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A TALE OF TWO SHIPS: THE MV *TAMPA* AND THE SS *AFGHAN*

ABSTRACT

This article tells the tale of two events of constitutional significance: the arrival in 1888 of steamer the SS *Afghan* into Sydney Harbour and the entry in 2001 of Norwegian containership the MV *Tampa* into Australian territorial waters. More than 100 years apart, these incidents raised parallel issues about the scope of the executive power to control entry into Australia and the role of courts in the formulation and implementation of migration policy.

I INTRODUCTION

The international movement of people has become in the second decade of the 21st century a source of increasing tension between nations and within groupings of nations. It has also become a source of increasing tension within nations between national institutions. Disagreement within and between politically accountable branches of government over the formulation of migration policy has been accompanied in a number of countries by conflict between politically accountable branches of government and judicial branches of government over the implementation of migration policy. Migration litigation has emerged as a battleground in which courts and executives have at times been the principal adversaries.

Although it is a distinction the merits of which remain controversial, the fact is that Australia has been at the forefront of the recent global move to tighten restrictions on the entry of foreign nationals. Here, as elsewhere, conflicts over the implementation of migration policy have manifested in institutional conflicts which have played out in the courts.

My intention in this article is to draw some parallels between some events of national constitutional significance in Australia in the early part of the 21st century and some events of colonial constitutional significance in New South Wales in the late part

* Justice of the High Court of Australia. This is an edited version of a speech, versions of which were given as the Sir James Martin Oration delivered at the Lysicrates Foundation Annual Dinner, at the premises of Gilbert + Tobin in Sydney on 27 August 2018, and as an Australian Academy of Law Public Lecture, delivered at the University of Adelaide Law School on 28 February 2019. My thanks to Hannah Canham for her research and assistance in preparing the speech for publication.

of the 19th century. The tale I want to tell is of two ships: the container ship, the MV *Tampa*, and the steamer, the SS *Afghan*.

II THE MV *TAMPA*

Without descending into the accompanying political controversy, let me revisit the basic facts of the *Tampa* crisis of 2001. On 26 August 2001, Captain Rinnan, Master of the Norwegian container ship the MV *Tampa*, received a request from the Australian Coast Guard to rescue a vessel in distress. Australian authorities guided Captain Rinnan to the wooden fishing boat sinking in international waters near Christmas Island. Licensed to carry no more than 50 people and with a crew of 27 already on board, the MV *Tampa* proceeded to rescue 433 people. On 29 August, Captain Rinnan was concerned that some of those rescued required urgent medical treatment. He took his ship into Australian territorial waters about four nautical miles off Christmas Island. The Administrator of Christmas Island, acting on instructions from the Cabinet Office, declined to permit the rescuees to land on Christmas Island and, within hours, 45 members of the Special Air Services Regiment of the Australian Defence Force left Christmas Island and boarded the MV *Tampa*.

In proceedings commenced on behalf of the rescuees in the Federal Court of Australia on 31 August 2001, the primary judge, North J, found that the rescuees were detained on board the MV *Tampa* by acts of the Australian Government for which there was no lawful authority and that an order in the nature of habeas corpus was justified.¹ Amongst the arguments put on behalf of the Australian Government by the Solicitor-General, David Bennett QC, which North J rejected, was an argument that the rescuees were not detained because they had boarded the MV *Tampa* voluntarily and were free to go anywhere except Australia. Another argument was that, as foreign nationals lacking any entitlement to enter Australia, their expulsion and incidental detention was a lawful exercise of the executive power of the Commonwealth without need of statutory support.

The judgment of North J was delivered in a camera-packed courtroom on 11 September 2001 — or, as we have become accustomed to referring to that day, ‘9/11’. An appeal by the Australian Government to the Full Court of the Federal Court was heard two days later.

On 18 September the Full Court, by majority, allowed the appeal and set aside the orders which had been made by North J.² The majority comprised French and Beaumont JJ. Chief Justice Black dissented. The difference between the judges who comprised the majority and the minority was that French and Beaumont JJ accepted, and Black CJ rejected, the primary arguments of the Australian Government — both

¹ *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

² *Ruddock v Vadarlis* (2001) 110 FCR 491 (*‘Tampa case’*).

that the rescuees were not detained, and that the executive power of the Commonwealth in any event permitted their detention for the purpose of expulsion.

An application for special leave to appeal to the High Court was lodged, but by the time that application came to be heard the rescuees (or most of them) had been taken to Nauru where it appears to have been accepted that their detention, if any, in the purported exercise of the executive power of the Commonwealth had ceased. In legislation which had passed both Houses and received the Governor-General's assent on the same day — 27 September 2011 — the Commonwealth Parliament had also enacted the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), providing that all action taken by or on behalf of the Australian Government in relation to the MV *Tampa* was to be taken for all purposes to have been lawful when it occurred, and that proceedings, whether civil or criminal, were not to be instituted or continued in any court in respect of that action. Special leave to appeal was refused on 27 November 2001.³

In 2015, the High Court had occasion to revisit the question of the scope of the executive power of the Commonwealth which had divided the Full Court of the Federal Court in the *Tampa case* in the context of considering the lawfulness of actions taken by Australian maritime officers on the command of the National Security Committee of Cabinet to intercept an Indian-flagged vessel in the contiguous zone off Christmas Island and to transport its 156 passengers who claimed to be Tamil refugees to India.⁴ The High Court held by a majority of four to three that the actions were authorised by statute. The three members of the minority took the view that the actions were not authorised by statute and that the majority in the Full Court of the Federal Court had been wrong in the *Tampa case* to hold that the executive power of the Commonwealth extended to permit expulsion and incidental detention of foreign nationals having no entitlement to enter Australia. As one of the majority who held that the actions in issue were authorised by statute, I expressed no view then on the question of the scope of the executive power of the Commonwealth, and I am not about to do so now.

What I want to do is to tell how a similar question of the scope of the executive power capable of being exercised by the Colonial Government of New South Wales came up and was answered by the Supreme Court of New South Wales in May and June 1888.⁵

³ Transcript of Proceedings, *Vadarlis v Minister for Immigration and Multicultural Affairs* (High Court of Australia, M93/2001, Gaudron, Gummow and Hayne JJ, 27 November 2001).

⁴ *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.

⁵ See generally JM Bennett, *Colonial Law Lords: The Judiciary and the Beginning of Responsible Government in New South Wales* (Federation Press, 2006) 27–43; Eric C Rolls, *Sojourners: The Epic Story of China's Centuries-Old Relationship with Australia* (University of Sydney Press, 1992) 455–508.

III THE SS *AFGHAN*

A *The Colonial Setting*

To introduce some of the principal protagonists in the story, Sir James Martin, who had been the first Australian born Premier of New South Wales and who had gone on to hold the position of Chief Justice of New South Wales for 13 years, had died in office at the beginning of November 1886. Julian Salomons QC had been appointed as Martin's successor but had resigned before being sworn in.⁶ Salomons resigned after calling on Windeyer J who, according to the *Australian Dictionary of Biography*, 'taunted him with being unacceptable and accused him of "always breaking down mentally"'.⁷ Salomons decided that his 'temperament would not bear ... the strain and irritation that would be caused by unfriendly relations'.⁸

Following the resignation of Salomons, Sir Frederick Darley had been persuaded at the urging of the then Premier Sir Patrick Jennings that it was his public duty to take the position.⁹ Jennings had resigned in January 1887, immediately after which Martin's earlier great political rival, Sir Henry Parkes, had formed his fourth ministry and gone to an election at which he had won a resounding victory.

The geo-political setting for the story is well explained in a monograph by Benjamin Mountford entitled *Britain, China, & Colonial Australia*.¹⁰ For the purpose of my story, it is sufficient to note that, amid rising popular concern, an inter-colonial conference in 1880 and 1881 had resulted in agreement in principle by the Governments of the Australian colonies to the enactment of uniform laws restricting Chinese immigration.¹¹

The legislation which implemented that agreement in New South Wales was the *Influx of Chinese Restriction Act 1881* (NSW), the object of which was declared in its preamble to be to regulate and restrict the immigration of Chinese persons into New South Wales. The Act required the master of every vessel on arrival at a port in New South Wales to provide customs officers with a list of the names, ages and ordinary places of residence of all Chinese persons on board¹² and, with certain

⁶ JM Bennett, *Sir Frederick Darley: Sixth Chief Justice of New South Wales* (Federation Press, 2016) 113–41 ('*Sir Frederick Darley*').

⁷ Suzanne Edgar and Bede Nairn, 'Salomons, Sir Julian Emanuel (1835-1909)' in Douglas Pike, Geoffrey Serle, Russel Ward (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1976) vol 6, 81–2.

⁸ *Ibid.*

⁹ Bennett, *Sir Frederick Darley* (n 6) 144–5.

¹⁰ Benjamin Mountford, *Britain, China, & Colonial Australia* (Oxford University Press, 2016).

¹¹ AW Martin, *Henry Parkes: A Biography* (Melbourne University Press, 1980) 315–6; Intercolonial Conference, *Minutes of Proceedings of the Intercolonial Conference Held at Sydney, January, 1881* (Thomas Richards, Government Printer, 1881) 9.

¹² *Influx of Chinese Restriction Act 1881* (NSW) s 2.

exceptions, made it an offence for the master to have on the vessel more than one Chinese passenger for every hundred tons of the tonnage of the vessel.¹³ The Act also required the master of every vessel arriving at every port in New South Wales to pay a poll tax of £10 for every Chinese person carried on the vessel before that person would be permitted to land.¹⁴ There was an exemption from the poll tax for those Chinese persons who were British subjects.¹⁵ And there was another exemption for those Chinese persons who had been living in the Colony and who had obtained a certificate from the Colonial Treasurer authorising their temporary departure.¹⁶

Despite the *Influx of Chinese Restriction Act 1881* (NSW) and similar legislation in South Australia, Victoria and Queensland¹⁷ a stream of Chinese immigration continued into the colonies and, with it, popular concern continued to rise. By 1888, the centenary of the arrival of the First Fleet, the vast majority of the European population in those colonies was concerned about the prospect of being swamped by Chinese immigration and suspicion was growing that the Chinese empire of the Qing Dynasty had territorial designs on Australia itself. This was leading to tension between the nascent governments of the colonies, whose anti-immigration attitudes reflected the sentiments of their local constituencies, and the Colonial Office in London, which sought to keep open the free movement of people and goods between Australia and Hong Kong and to maintain a policy of greater engagement with Asia.

At a raucous meeting at Sydney Town Hall at the end of March 1888, the future Prime Minister, Edmond Barton, ‘moved a unanimous motion that “the almost unrestricted influx of Chinese persons into Australia” was a threat to political and social welfare’.¹⁸ Three days later, Parkes dispatched a telegram to the Colonial Secretary, Lord Carrington, stating that ‘Australian feeling [was] much exercised in reference to Chinese immigration’ and that the ‘difficulty’ was threatening to become a ‘calamity’.¹⁹

B *Arrival of the SS Afghan in Sydney Harbour*

So it was that in May 1888, four ships carrying Chinese passengers arrived in Sydney Harbour at more or less the same time. One of those ships was the *SS Afghan* measuring 1,438 tons under the command of Captain Roy. On the *SS Afghan* were 268 Chinese passengers who had boarded in Hong Kong.²⁰ One of them was Lo Pak, also known as Ah Buck. Lo Pak had been living in New South Wales. He had obtained

¹³ Ibid s 3.

¹⁴ Ibid s 4.

¹⁵ Ibid s 10.

¹⁶ Ibid s 9.

¹⁷ *Chinese Immigrants Regulation Act 1877* (Qld); *Chinese Immigrants Regulation Act 1881* (SA); *Chinese Act 1881* (Vic).

¹⁸ Mountford (n 10) 101.

¹⁹ Ibid 102.

²⁰ ‘Arrival of a Shipload of Chinese’, *The Argus* (Melbourne, 28 April 1888) 13.

a certificate from the Colonial Treasurer authorising his temporary departure, and he was now returning.

The arrival of the ships in Sydney Harbour was met with alarm amongst the local population. People turned out in the streets and on the wharves of Sydney to protest against the arrival and an estimated 5,000 protesters marched on Parliament House. Parkes formed the view that there would be violence and possibly bloodshed if any of the Chinese passengers were to land. Parkes guaranteed to the assembled crowd that none of them would land and instructed the New South Wales Police to prevent them from doing so. Police under the command of Inspector Hyem were placed on board the vessels and on the wharf where they formed a cordon.²¹

C *The Case of Lo Pak*

Lo Pak, unable to disembark, sought a writ of habeas corpus from the Supreme Court.²² Chief Justice Darley, thinking Lo Pak had an arguable case, on 14 May 1888 made a rule nisi the procedural effect of which was to oblige Inspector Hyem to show cause before the Full Court why his action was lawful in order for the rule not to be made absolute. Inspector Hyem sought to meet that obligation by filing an affidavit which relevantly said no more than that he was acting through the Inspector-General of Police under the authority and by orders of the Government of the Colony. Before the Full Court comprised of Darley CJ and Windeyer and Foster JJ, on 17 May, Inspector Hyem was represented by Salomons.

Salomons presented what were in effect three arguments as to why the rule nisi for habeas corpus should not be made absolute but instead should be discharged. The argument which received the shortest of shrift from the Full Court was that an alien had no right at all to approach the Supreme Court for a writ of habeas to prevent him from being dealt with in what Salomons sought to characterise as an exercise of sovereign power. The other two arguments might have come from the script in the *Tampa case*. One was that Lo Pak was not detained on board the SS *Afghan* because he had embarked on the vessel of his own volition and because he remained free to disembark anywhere in the world except in New South Wales. The other was that the Government of New South Wales had executive power to expel or repel an alien at will.

The Supreme Court gave judgment on the spot. Whether the Queen of England might have power by proclamation to prevent aliens from entering the kingdom, the Supreme Court held, was unnecessary to answer. What was abundantly clear was that the Colonial Government had no such power. Inspector Hyem's affidavit, deposing simply to him acting on the authority of the Government of the Colony, was not a sufficient return to a rule nisi for habeas corpus, and 'no man's liberty', to quote the words of Darley CJ, 'whether he be a subject of the Queen, or the subject of any other

²¹ Henry Parkes, *Fifty Years in the Making of Australian History* (Books for Libraries Press, 1892) vol 2, 205.

²² *Ex parte Lo Pak* (1888) 9 LR (NSW) 221, 221 ('*Lo Pak*').

nation at peace with England ... would be safe for one moment were it held that this was a sufficient return'.²³ 'This might be a good return in an autocratic State like Russia', Foster J said, 'but in a country governed by free institutions it cannot be for a moment listened to, since nothing is more inconsistent with freedom than that a people should be arbitrarily subjected to the will of the executive'.²⁴

Parkes was furious at the decision in *Lo Pak* and was determined to maintain the Government line. The morning after the decision, Chinese passengers on the SS *Afghan* and on another ship who, like *Lo Pak*, held certificates of exemption, were allowed to disembark. But no one else. '[T]here is one law which overrides all others', Parkes declared in the Legislative Assembly, 'and that is the law of preserving the peace and welfare of civil society'.²⁵

D *A Victorian Interlude: The Case of Chung Teong Toy*

Before it had arrived in Sydney, the SS *Afghan* had in April steamed to Melbourne. There an attempt by Chung Teong Toy to disembark had been thwarted when the Victorian Collector of Customs, Alexander Musgrove, acting on the instructions of the Minister within the Government of Victoria responsible for customs and trade, refused to receive the poll tax of £10 which Captain Roy had tendered in order for him to be permitted to land under the *Chinese Act 1881* (Vic). The refusal eventually resulted in a case framed as an action for damages which came to be heard before the Full Court of the Supreme Court of Victoria at a more leisurely pace. *Toy v Musgrove* was to be argued over a period of four days in July and was to result in judgment given in September.²⁶ The Supreme Court of Victoria would in its judgment in September reach by majority the same conclusion: that the Colonial Government lacked executive power to expel or repel an alien at will. The Victorian Government would then appeal the decision to the Privy Council which, in London in 1891, after a heavy argument which extended over three days and reserving its decision for four months, would manage to dispose of the appeal on technical grounds without reaching the issue of constitutional principle.²⁷ Because he had carried 268 Chinese passengers on a vessel measuring 1,439 tons, Captain Roy had been guilty of the offence of bringing a greater number of Chinese persons into port than was allowed. Because Captain Roy had been guilty of that offence, the Privy Council held Musgrove was under no obligation to accept a payment tendered by Captain Roy on behalf of any one of those passengers. Moreover, intimated the Privy Council, in circumstances where Chung Teong Toy made no claim to have been wrongfully imprisoned, his action for damages could only be maintained if he could establish that he had a legally enforceable right to enter Victoria. There was no authority for the proposition that an alien had such a right at common law. Their Lordships therefore did not

²³ Ibid 235.

²⁴ Ibid 248.

²⁵ Parkes (n 21) 212.

²⁶ *Toy v Musgrove* (1888) 14 VLR 349.

²⁷ *Musgrove v Toy* [1891] AC 272.

think it appropriate to express any opinion on the question of the scope of colonial executive power on which the Supreme Court of Victoria had divided.

Our story, however, continues in Sydney in May 1888.

E *The Case of Leong Kum*

Five days after the Full Court of the Supreme Court of New South Wales decided the case of *Lo Pak*, Darley CJ made another rule nisi for habeas corpus this time in the case of *Leong Kum*.²⁸ Like *Lo Pak*, Leong Kum was a Chinese subject, but unlike *Lo Pak*, he had never before lived in New South Wales. When he arrived in Sydney Harbour on the *SS Menmuir*, the captain of that ship tendered the poll tax for Leong Kum, which James Powell, the New South Wales Collector of Customs, refused to receive. Meanwhile Inspector Hyem and his men, acting under the continuing instruction of Parkes, continued to form the cordon which prevented Leong Kum from leaving the ship.

Being obliged to show cause why Leong Kum should not be released from the *SS Menmuir*, Powell filed an affidavit in which he deposed that Leong Kum was free to leave the Colony and was in no way restricted in his liberty except insofar as he was by order and under the authority of the Government of the Colony prevented from disembarking from the vessel and so becoming a resident of the Colony. Before the Full Court constituted by Darley CJ and Windeyer and Innes JJ, Powell was on 23 May 1888 represented by Salomons.

Salomons might or might not have been able to take the same technical point that was ultimately to prevail in the Privy Council in *Musgrove v Toy* three years later. The tonnage of the *SS Menmuir* and the number of Chinese passengers on board does not appear from the report of the case of *Leong Kum*. If it had been open to Salomons to argue that Powell was under no obligation to accept a payment tendered because the captain of the *SS Menmuir* was guilty of the offence of bringing a greater number of Chinese persons into port than was allowed, the argument evidently did not occur to him or to anyone else involved in defending the case. It was a very technical argument, and the Supreme Court of New South Wales was no place for a faint-hearted barrister to take a very technical point.

What Salomons did in the case of *Leong Kum* was bravely present the same argument he had presented the week before in the case of *Lo Pak*. Unsurprisingly, he got a hostile reception. Bernhard Wise, who appeared for Leong Kum, was stopped in argument. The Supreme Court again gave judgment on the spot. The case raised no issue that had not been decided the week before, Darley CJ opined, and the views he had then expressed he now held with even greater conviction.²⁹ The Chinese persons who were on ships in Sydney Harbour, said Innes J — who had not participated in the previous case — were as much within New South Wales as if they were in George

²⁸ *Ex parte Leong Kum* (1888) 9 LR (NSW) 250 ('*Leong Kum*').

²⁹ *Ibid* 255.

Street. Being within New South Wales, they were entitled to the protection of its laws, not least of which was the right to personal liberty. They were deprived of that right for so long as they were forcibly imprisoned on a ship.³⁰

F *The Case of Woo Tin*

After the case of *Leong Kum* finally came the factually identical case of *Woo Tin*.³¹ It was heard by an identically constituted Full Court on 5 June 1888. The government party was again represented by Salomons, who this time submitted to the judgment of the Court. In layman's terms, Salomons 'skied the towel'.

The judgment of the Supreme Court which Darley CJ delivered that day in the case of *Woo Tin* has been fairly described by Keith Mason QC (the former Solicitor-General of New South Wales and former President of the Court of Appeal of the Supreme Court of New South Wales) as 'a very fine piece of sustained judicial rhetoric';³² perhaps it was the strongest in Australian history. To borrow the words of Darley's biographer, Dr John Michael Bennett, this last of the 'Chinese Cases' saw Darley's 'fearlessness' as a jurist at its 'zenith'.³³

The body of Darley CJ's judgment for the Supreme Court in *Woo Tin* consists of a series of lengthy quotes from judgments of Martin CJ. Worthy of being set out in full is Darley CJ's introduction, one of his quotes from then Martin CJ and then his conclusion.

Chief Justice Darley started as follows:

This is now the third time that the power of this Court has been invoked to grant writs of *habeas corpus* to release persons who, coming within the provisions of the *Chinese Influx Restriction Act*, have had tendered for them the poll-tax which is required by that Act. Upon the second application we pointed out that we had already declared what the law of the colony upon this subject is, and further, that everyone in this colony, no matter how high his position, or how low, was bound by that declaration, and bound to scrupulously obey the law as declared. Now, we find that the law so enunciated by us, is for the second time knowingly and of purpose disregarded and set at nought, and this too by those who, above all others in this community, are by their prominent position, by the duty they owe their country, and by their oath of allegiance to their Sovereign, bound to see that the law of their country as pronounced by the properly constituted authorities (the Judges of the land), is duly and faithfully carried into execution. The constitution of our country does not provide the Judges with a separate staff of officers for the

³⁰ Ibid 268–9.

³¹ *Ex parte Woo Tin* (1888) 9 LR (NSW) 493 ('*Woo Tin*').

³² Keith Mason, *Lawyers Then and Now: An Australian Legal Miscellany* (Federation Press, 2012) 187. See also Keith Mason, *Old Law, New Law: A Second Australian Legal Miscellany* (Federation Press, 2014) 133–6.

³³ Bennett, *Sir Frederick Darley* (n 6) 267.

purpose of enforcing obedience to the decrees and judgments of the Court. The constitution casts this duty upon the executive, and never before in the history of any British community, so far as our knowledge extends, has this sacred duty been disregarded.³⁴

Turning to precedent, Darley CJ then quoted the following from a judgment of Martin CJ given in a contempt case:

What are such Courts (that is the Supreme Courts) but the embodied force of the community whose rights they are appointed to protect? They are not associations of a few individuals, claiming on their own personal account special privileges and peculiar dignity by reason of their position. A Supreme Court like this, whatever may be thought of the separate members composing it, is the appointed and recognised tribunal for the maintenance of the collective authority of the entire community. The enforcement of all those rules which immemorial usage has sanctioned for the preservation of peace and order, and for the definition of rights between man and man, is entrusted to its keeping. Every new law made by the Legislature comes under its care, and relies upon it for its application. Without armed guards, or any ostentatious display — with nothing but its common law attendant, the sheriff, and its humble officials, the court-keepers and tipstiffs — it derives its force from the knowledge that it has the whole power of the community at its back. This is a power unseen, but efficacious and irresistible, and on its maintenance depends the security of the public.³⁵

After references to a further judgment of Martin CJ³⁶ and an opinion of Wilmot J of the Court of King's Bench in 1758,³⁷ Darley CJ concluded as follows:

We did not, though this law was present to the minds of each and all of us, deem it expedient to bring it forward upon the second occasion when these matters were before us. Now, we are of opinion, in view of the exasperation which may be produced in the minds of those illegally imprisoned, that it is incumbent upon us to do so, in order to point out to those who take upon themselves the responsibility of acting illegally the great risk they run, for by doing so they place valuable lives in jeopardy in order that their illegal mandates may be carried out. The law is clear that a man illegally deprived of his liberty is justified in taking life if it is only by that means that he can obtain his liberty. Killing, under such circumstances, is not murder, but is justifiable homicide. In saying what we have said, we believe we are discharging our duty to the community. Were we to fail in this, or in pointing out the danger of pursuing such a course of illegality, we would be no longer worthy of the high position we have been appointed to fill;

³⁴ *Woo Tin* (n 31) 493–4.

³⁵ *Ibid*, quoting *Re 'The Evening News' Newspaper* (1880) 1 LR (NSW) 211, 237.

³⁶ *Re the Echo and Sydney Morning Herald Newspapers* (1883) 4 LR (NSW) 237.

³⁷ *Opinion on the Writ of Habeas Corpus* (1758) Wilmot 77; 97 ER 29.

we would be regardless of the high trusts reposed in our hands. There must be a rule absolute made in each of these cases.³⁸

‘Never before in the history of this colony has the executive government received such a rebuke’, exclaimed the *Herald* the following day, ‘[n]ever was a grave rebuke more thoroughly deserved’ and ‘[n]ever was judicial remark more fully justified’.³⁹ *The Bulletin*, which had earlier published a cartoon depicting Parkes in a tug-of-war with the Supreme Court, published another cartoon in which the judges were triumphant and Parkes was flat on his bottom.⁴⁰

G *The Aftermath*

Parkes had finally got the hint from the Supreme Court. But Parkes had also got the numbers in the Parliament.

Importantly, given that Parkes was also facing rising concern about his actions from within the Colonial Office in London, Parkes had got the backing of the South Australian Premier, Sir Thomas Playford. I mentioned that the arrival of the SS *Afghan* in Sydney Harbour was met with large protests. Similar protests had taken place in South Australia on 7 May 1888 when the SS *Menmuir* arrived in Port Adelaide on route to Sydney, where it would go on to feature in the case of *Lo Pak*. None of the Chinese passengers on board the SS *Menmuir* attempted to land in South Australia, and Playford made clear to a crowded public meeting at the town hall in Port Adelaide that none would ever be permitted to land.⁴¹

Two days later, Playford sent telegrams to Parkes and other colonial Premiers proposing an urgent inter-colonial conference to address what he referred to as ‘the Chinese question’. The conference proposed by Playford went ahead in Sydney between 12 and 14 June 1888. The result was a resolution, sponsored by Playford, expressing the opinion that the further restriction of Chinese immigration was ‘essential to the welfare of the people of Australia’ and that ‘the necessary restriction can best be secured through the diplomatic action of the mother country, and by uniform Australasian legislation’.⁴² The conference worked its way through draft legislation which the governments of the colonies, with the exception of the governments of New South Wales and Western Australia, undertook to introduce into their respective Parliaments. New South Wales already had legislation before its Parliament which had temporarily stalled in the Legislative Council but which was about to be enacted.

³⁸ *Woo Tin* (n 31) 496.

³⁹ *Sydney Morning Herald* (New South Wales, 6 June 1888) 9.

⁴⁰ Phil May, Illustration, *The Bulletin* 9(435) (Sydney, 2 June 1888) 10–11.

⁴¹ ‘Arrival of the Menmuir at Adelaide’, *Daily Telegraph* (Sydney, 8 May 1888) 5.

⁴² Legislative Assembly, Parliament of Victoria, *Chinese Immigration* (Parliamentary Paper No 20, July 1888).

On 11 July 1888, the New South Wales Governor assented to the *Chinese Restriction and Regulation Act 1888* (NSW). The Act, amongst other things, reduced the number of Chinese passengers able to be brought into a port from one for every hundred tons of the tonnage of a vessel to one for every three hundred tons, and it increased the poll tax from £10 to £100.⁴³ The Act was also expressed to ‘fully [indemnify]’ ‘[a]ll members of the Executive Government’ and all persons acting on their behalf who may have committed any act in preventing the landing of Chinese persons, or otherwise in relation to Chinese immigrants, or to vessels carrying such immigrants, since 1 May 1888.⁴⁴

Just as the courtroom drama which would begin with the arrival of the MV *Tampa* off Christmas Island would end more than a century later, so ended the series of courtroom dramas which had begun with the arrival of the SS *Afghan* in Sydney Harbour in 1888 — with legislation.

⁴³ *Chinese Restriction and Regulation Act 1888* (NSW) ss 5–6.

⁴⁴ *Ibid* s 2.