

DICTATING TO ONE OF 'US': THE MIGRATION OF MRS FREER

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I INTRODUCTION

The 'White Australia Policy' and the dictation test under which it was infamously enforced provided central policy tools in the quest to control Australia's immigrant population from Federation in 1901 until well into the twentieth century. Based on similar legislation that had been enacted in Natal, and that had also been cloned in some of the Australian colonies, the test was widely recognised as 'merely a convenient and polite device ... for the purpose of enabling the Executive Government of Australia to prevent the immigration of persons deemed unsuitable because of their Asiatic or non-European race'.¹

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¹ *The King v Davey and Others; Ex parte Freer* (1936) 56 CLR 381 at 386, per Evatt J; hereafter, *Freer*. See, on the politics: Myra Willard, *History of the White Australia Policy to 1920* (2nd ed, 1967); A C Palfreeman, *The Administration of the White Australia Policy* (1967); Nancy Viviani (ed), *The Abolition of the White Australia Policy* (1992); Gwenda Tavan, *The Long, Slow Death of White Australia* (2005); *Wikipedia*, 'White Australia Policy', <http://en.wikipedia.org/wiki/White_Australia_policy> at 23 August 2006. And see, on the law: Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, 2006) ch 20.

The dictation test, a key element of the *Immigration Restriction Act* 1901 (Cth),² has always been associated with the question of race.³ It was administered to ‘coloureds’ and ‘Asians’ in order to have an apparently neutral reason to deport them. The last person to pass the test did so in 1909.⁴ It became ‘foolproof’, as it was designed to be: the applicant would be given the test in a language that their background firmly indicated they would not know and, upon failing, they would be told that the authorities could go on giving them tests in languages that they did not know, infinitely.⁵

However, despite government rhetoric that the test had never been intended, and would never be used, to exclude those of European ethnicity,⁶ the legislation was broad in its provisions and at times the government could not resist the lure of its own power. The still famous instance is the Kisch Case of 1934, in which a multilingual Czech visitor was set the test in Scots Gaelic.⁷ This article will examine another case, now rarely mentioned but in that time just as famous: when in 1936 a young British woman was twice given a dictation test in Italian under s 3(a) of the *Immigration Act* and, not passing it, was refused entry – which was the start of a long battle that ended in her disembarking at Sydney to a hero’s welcome. In tracing her story, we shall examine how a mode of exclusion through law that had been created for one purpose – acknowledged or, at least, barely denied - could be employed for a very different and hidden purpose.

² The statute’s original short title was the *Immigration Restriction Act* 1901 (Cth). In 1912 it was renamed the *Immigration Act* (without becoming, in its operation, any less restrictive).

³ Alexander T Yarwood, ‘The Dictation Test – Historical Survey’ (1958) 30(2) *Australian Quarterly* 19; Barry York, ‘White Australia and the Dictation Test’ (1996) 6(3) *Voices* (National Library of Australia) 27.

⁴ Yarwood, above n 3, 25; B York, *Immigration Restriction: Annual Returns as Required Under the Australian Immigration Act Between 1901 and 1957* (1992) 24. York finds a Japanese fisherman who had entered Australia illegally in 1915 and, 14 years later, was discovered and was set a dictation test in Greek: he failed, and was sentenced for being a prohibited immigrant and deported. The test was administered by a local Greek restaurateur. Likewise, in 1950 a Malay was tested in Rumanian. (York, above n 3, 27 and 34.)

⁵ Geoff Woodley, a former Deportations Officer, interviewed in Alec Morgan (dir), *Admission Impossible* (film, 1992). The same documentary records that by then the medical examination involved covert racial screening; that, in the urgent quest for migrant workers after World War II, Immigration Minister Arthur Calwell broke an undertaking of non-discrimination to the UN High Commission for Refugees by ensuring that as few Jews as possible were selected from the European displaced persons camps; and that, into the 1950s, applicants were required to state whether they were ‘Jewish’ or ‘Not-Jewish’ and whether they had any Jewish ancestry back to their great-grandparents.

⁶ ‘The Bill incidentally may exclude, in some few cases, white-skinned people, but it is not intended to exclude qualified European immigrants who come here to make their homes amongst us and who, whether they pass the test or not, we shall be glad to welcome’: Alfred Deakin, *CPD* vol 4, 4816.

⁷ For a comprehensive treatment of this affair, see Heidi Zogbaum, *Kisch in Australia: the Untold Story* (2004) and, in his own words, Egon Kisch, *Australian Landfall* (1969 ed of trans). Nicholas Hasluck’s essay on the Kisch Case in his *The Legal Labyrinth: the Kisch Case and Other Reflections on Law and Literature* (2003) 3-154 is mainly a response to criticisms of his novelisation of the case, *Our Man K* (1999).

II THE DICTATION TEST

The *Immigration Restriction Act* 1901 s 3(a) provided, in its original form, that the category 'prohibited immigrant' was to include

Any person who when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer

Anybody who failed the test would be a 'prohibited immigrant' and was to be prevented from landing.⁸ Contravention of this or any other restriction in s 3⁹ was an offence punishable with imprisonment for up to one month and then the offender would be deported.¹⁰

However, there was a class as well as a race element. Someone who could not pass the dictation test could nevertheless buy their way in, at least for a short visit, by depositing with an officer the then large sum of one hundred pounds; they then had 30 days to either obtain a certificate of exemption or leave the country, and in the latter case the deposit would be returned to them.¹¹ Even someone who contravened the Act could buy their way out of jail (or, no doubt, if they were organised enough, avoid jail) by finding two approved sureties for fifty pounds each that the offender would leave within one month.¹²

The purpose of the test was to install a racial bar without mentioning race. The British government had insisted on that, in order to avoid offending both non-white British subjects elsewhere in the Empire and the fastest-growing regional power, Japan.¹³ It was an 'education test' – albeit, said Leader of the House Alfred Deakin, 'a test for the purpose of excluding and not of admitting the educated or uneducated'.¹⁴ He did not, he assured, regard any 'civilisation' as superior to another.¹⁵ It was just that the races should not 'blend'.¹⁶ Hence: 'Unity of race is an

⁸ *Immigration Restriction Act* 1901 s 14.

⁹ Any person who is likely to require state or charitable financial support, is an idiot or insane, carries 'an infectious or contagious disease of a loathsome or dangerous character', has been convicted of a serious crime other than 'a mere political offence', is a prostitute or living off prostitution, or is to perform contracted or agreed manual work unless under an approved type of contract.

¹⁰ *Immigration Restriction Act* 1901 s 7.

¹¹ *Immigration Restriction Act* 1901 s 6.

¹² *Immigration Restriction Act* 1901 s 7.

¹³ Joseph Chamberlain (Secretary of State for the Colonies), quoted by Deakin at *CPD* vol 4, 4809 and 4811. Chamberlain also more loftily referred to a racial bar as 'contrary to the general conceptions of equality which have been the guiding principle of British rule throughout the Empire'. And he considered that such a bar would be the more offensive to the Japanese because it would place them 'in the general category of Asiatic races, without any consideration being paid to their state of civilisation' – as the Japanese government had already protested. Deakin's reaction was that this higher state just made the Japanese the more dangerous, so it was desirable to exclude them altogether: *CPD* vol 4, 4812.

¹⁴ *CPD* vol 5, 5820.

¹⁵ *Ibid* 5819.

absolute essential to the unity of Australia. It is more, actually more, in the last resort, than any other unity.’¹⁷ There had, indeed, to be ‘purity of race’.¹⁸ In that sense, he was comfortable in referring repeatedly to the need to preserve a ‘White Australia’.¹⁹ Though that did not protect him from accusations that the government was bowing to British interference in the affairs of this freshly unified and autonomous nation.²⁰

The Bill was proposed by Prime Minister Edmund Barton, doubling as Minister of External Affairs. The Bill as he quoted it referred not to ‘an European language’ but to ‘the English language’. In a deeply confusing way, Barton both insisted that a knowledge of English was indispensable and offered the Parliament the more racially loaded options of changing the wording to ‘any European language’ or ‘some European language’. These alternatives were already in force in two of the States, having been enacted when they were colonies and modelled on a Natal statute.²¹ Barton accepted that, if either of the alternatives were to be preferred, the officer could set a test in a language other than English and thus could set it in any European language irrespective of the applicant’s origin. These obvious possibilities did not seem to worry him; he seems to have assumed that in practice it would not matter. He declared that, since everyone would have an equal opportunity to pass a language test, the provision was ‘without distinction of race, colour, or origin’. He did not comment on the restriction to ‘European’ languages.

However, he went on to quote extensively and with unqualified approval from a book by a Professor Pearson,²² which referred to ‘[t]he fear of Chinese immigration which the Australian democracy cherishes’ and the Australian mission to guard ‘the last part of the world in which the higher races can live and increase freely for the higher civilization’. Pearson predicts with horror a day ‘when the European observer will look round to see the globe girdled with a continuous zone of the black and yellow races, no longer too weak for aggression or under tutelage, but

¹⁶ CPD vol 4, 4804.

¹⁷ CPD vol 4, 4807.

¹⁸ CPD vol 4, 4808.

¹⁹ Eg CPD vol 4, 4805.

²⁰ Eg CPD vol 5, 5801ff.

²¹ *Immigration Restriction Act 1897* (Natal) s 3. Cp *Immigration Restriction Act 1897* (WA) s 3(a): ‘a passage in English of fifty words in length’. However, New South Wales – which included the principal immigration port, Sydney – chose a different formula. Its *Immigration Restriction Act 1898* s 3 required the applicant to ‘write out in his own handwriting in some European language, and sign’ a ‘claim to be exempt’ from the operation of the ACT in a form set out in Schedule B to the Act or in such other form as might be enacted by proclamation. In both States, the main category of exemption would have been that of certain types of worker – as provided by law or by ‘a scheme approved by the Governor’: s 2(b) in both Acts.

²² This was almost certainly Karl Pearson, *National Life from the Standpoint of Science* (1900) – to which the authors have not had access. An extract from a later edition of the book is at <<http://www.fordham.edu/halsall/mod/1900pearsonl.html>> at 24 August 2006. In relying on Pearson, Barton chose not a typical racial evolutionist of the time but the most extreme then writing in English; Chamberlain was more typical: see Paul Crook, ‘Historical Monkey Business: the Myth of a Darwinized British Imperial Discourse’ (1999) 84 *History* 633.

independent' and 'represented by fleets in the European seas, invited to international conferences, and welcomed as allies in quarrels of the civilized world'. They will 'throng the English turf or the salons of Paris, and will be admitted to inter-marriage ... in a world which we thought of as destined to belong to the Aryan races and to the Christian faith'. Barton quotes this and more, and remarks: 'Is that not something to guard against?' He wishes to balance 'the prevention of certain Asiatic influxes' with a need to avoid legislating in a way that 'will complicate the foreign relations of the Empire'.²³ A few Members were to object that his argument was 'fiction' and that of a 'hypocrite'. They were right: those were his purposes and the House of Representatives adopted them. The Senate agreed: it also rejected by 22 votes to 3 an amendment providing that the officer administering the test should choose a language 'known to the immigrant'.²⁴

Barton also refers to the companion Bill which he was to introduce a few months later and which became the *Pacific Islands Labourers Act 1901* (Cth). That Bill can be read as a humanitarian attack on 'blackbirding', the seizure of Pacific Islanders for slave labour in the Queensland sugar industry; it can also be read as protection of the established Queensland labour force, which in that industry had become outnumbered by Pacific Islanders. It can also be read – as Barton was then to describe it – as a measure 'for the preservation of the purity of the race and the equality and reasonableness of its standard of living'.²⁵ Between 'the white man and the Pacific Islander' there is an ineradicable difference, 'of human mental stature – of character as well as of mind'; Professor Pearson is invoked once more.²⁶

After further protests from the Japanese government,²⁷ in 1905 the words 'an European language' were changed to 'any prescribed language'.²⁸ Although no regulations stating what languages were prescribed had been made, in practice the section was understood to refer solely to European languages.

The dictation test was to remain law until 1959.²⁹

III THE STORY OF MABEL FREER

Mrs Mabel Magdalene Freer (née Ward) was Indian-born, white and a British subject.³⁰ Travelling from India, on a valid British passport, she arrived in

²³ CPD vol 3, 3497-3503.

²⁴ CPD vol 6, 8302 and 8314.

²⁵ CPD vol 4, 5492.

²⁶ CPD vol 4, 5503-4.

²⁷ Yarwood, above n 3, 26.

²⁸ *Immigration Restriction Amendment Act 1905* s 4(a).

²⁹ The *Immigration Restriction Act* and all later migration statutes were wholly repealed by the *Migration Act 1958* s 4(1) and Schedule – now s 3(1) and Schedule. Most of the ACT including s 4, did not come into operation until June 1959. For the politics, see Tavan, above n 1, 103-8.

³⁰ She had been born in Lahore in October 1911 (*Freer*, above n 1, 382 – the court would have had evidence of this from her passport). According to her own account, her father was English

Fremantle on the *Maloja* on 20 October 1936. The Australian government had been given advance warning of her voyage and, seeking to exclude her, upon the ship's arrival had the immigration authorities give her a dictation test – in Italian.

Italian was not a language with which Mrs Freer was familiar and she was unable to complete the test.³¹ Consequently she was not permitted to land at Fremantle, nor at the eastern Australian ports that the ship then visited. She was given no reason at this time for the application of the test.³² (Nor was she ever.) However, she soon revealed that the exclusion could have been because she intended to marry her Australian travelling companion, a Lieutenant R E Dewar, who was still married to, but seeking divorce from, an Australian woman.³³ Dewar was an up-and-coming staff officer, returning after a year's secondment, within the Imperial Army, to India.³⁴ This was Mrs Freer's first visit to Australia,³⁵ although as a child she had visited England.³⁶

After remaining for several days on board the *Maloja* in Sydney – apart from the day when she was permitted to tour the city, under guard of a uniformed officer of the shipping line and a customs officer³⁷ – Mrs Freer was given permission by the Minister for the Interior, Thomas Paterson, to change ships to travel to New Zealand.³⁸ The difficulties she had experienced on arriving in Australia were not repeated in Auckland, even though New Zealand's Acting Minister for Customs had received information from the Australian government about the reason for the

and from a military family, 'William A. Ward, late of the Royal Horse Artillery' and 'well-known in India', and her mother Irish (some words then illegible in this copy), 'a really beautiful woman, with dark hair and grey Irish eyes, and fine transparent skin': Mabel M Freer, 'My Life Story' (part of first instalment – all that is on this file), *Woman*, 26 July 1937, 4 (NAA A2998 1951/696 10). She would have been a British subject through each parent. Her departmental file, which includes newspaper and magazine clippings, is available in the National Archives at A2998 1951/696. To see this and other officially archived material on Mrs Freer, go to <<http://naa12.naa.gov.au>> and search for 'Mabel Freer' and 'Mrs Freer'.

³¹ She later claimed: 'I could have passed that test. I can speak several languages, but I knew that my linguistic ability had nothing to do with my being allowed to land. I simply refused to sign any papers.' (*DT* 30 October 1936, 1). Since the stakes had been so high, this seems implausible. If she could speak Italian, she could have passed the test, entered Australia and then protested in the company of a husband-to-be.

³² *DT* 27 October 1936, 2.

³³ *DT* 30 October 1936, 1.

³⁴ It appears that he was admitted without difficulty – probably at Melbourne, since he later wrote to Paterson and Lyons from a drill hall in Richmond, Victoria. To have remained on board with Mrs Freer would presumably have been to disobey orders.

³⁵ She was to claim that, before leaving India, she had received a letter from some private person warning that, if she tried to come to Australia, her entry would be prevented under Australian immigration laws: *DT* 30 October 1936, 1. The leading candidate for authorship of that letter would be Lieutenant Freer's father.

³⁶ Freer, above n 30. She could have entered Britain, to live and work, without difficulty at any time.

³⁷ *DT* 2 November 1936, 2.

³⁸ *DT* 31 October 1936, 5 and *DT* 2 November 1936, 2.

ban in Australia.³⁹ Instead, a Departmental officer was sent to greet Mrs Freer and wish her a pleasant stay.⁴⁰

Paterson, a Country Party member of the United Australia Party/Country Party coalition government, emerged as a central figure in this drama.⁴¹ As the story continued to unfold in the newspapers, he gradually revealed that Mrs Freer had been given the test in order to exclude her because information from India indicated that she was of 'undesirable character'⁴² and that the information relied upon had not been provided by the government there.⁴³ He referred to Mrs Freer as an 'adventuress' with 'apparent total absence of ... compassion for a wife and child, whose domestic world is tumbling about their ears',⁴⁴ yet he refused to detail the substance and source of the information received about her.⁴⁵ He seemed to suggest that a sense of chivalry towards Mrs Freer prevented him from revealing the damning information which had prompted her exclusion.⁴⁶ This rationale for his reticence came to be as much criticised as his condemnation of Mrs Freer's character under the cloak of parliamentary privilege.⁴⁷ Cabinet members began leaking to the press that they had seen the Freer papers and that she was not being excluded on grounds of immorality.⁴⁸ The barrister who was to represent the Commonwealth when the case came to the High Court, J W Spender KC, told the press that 'the application of the dictation test to a white British subject is clearly a gross misuse of the powers of the Immigration Act' and foresaw that, if Mrs Freer were allowed into Australia, she might be subjected to a dictation test any time that she were to leave and return⁴⁹ – a prospect to frighten every immigrant in Australia.

³⁹ *SMH* 5 November 1936, 5 and *DT* 5 November 1936, 7. Even the passing of information to the New Zealand government became the subject of controversy. As was pointed out in the House of Representatives, Paterson appeared to think it reasonable to provide information to the New Zealand government which he would not provide to the House (*CPD* vol 152, 1525). Paterson denied providing any information to New Zealand, contrary to statements by his New Zealand counterpart: *CPD* vol 152, 1525 and 1590. It was later revealed that the information was provided to the New Zealand Trade Commissioner in Sydney by Australian customs officials: *SMH* 9 November 1936, 9; *DT* 10 November 1936, 1 and *CPD* vol 152, 1658-9.

⁴⁰ *DT* 5 November 1936, 7.

⁴¹ Thomas Paterson had been born in England, of Scots parents, and was a Presbyterian. With his wife, mother, youngest brother and a cousin, he had sailed into Melbourne on 31 December 1908. Two of his brothers had preceded him. See B J Costar, 'Paterson, Thomas (1882-1952)', *Australian Dictionary of Biography* vol 11 (1998), 157-8: <<http://www.adb.online.anu.edu.au/biogs/A110160b.htm>> at 18 August 2006.

⁴² *CPD* vol 152, 1658.

⁴³ *CPD* vol 152, 1769.

⁴⁴ *CPD* vol 152, 1768.

⁴⁵ *CPD* vol 152, 1768.

⁴⁶ *CPD* vol 152, 1767. See also *SMH* 11 November 1936, 15 and *DT* 6 November 1936, 6.

⁴⁷ *CPD* vol 152, 1773.

⁴⁸ *DT* 7 November 1936, 5.

⁴⁹ *DT* 9 November 1936, 2.

Lieutenant Dewar wrote letters to Paterson⁵⁰ and to Prime Minister Joseph Lyons⁵¹ in November and made comments to the newspapers speculating on the source of the information provided to the Minister. Dewar cast doubts on the reliability of the information and revealed that it was members of his own family who had threatened to organise such a ban.⁵² Other individuals involved in the drama – including Mrs Freer’s mother-in-law, Dewar’s father, Dewar’s wife and his father-in-law – as well as Mrs Freer herself,⁵³ provided information to newspapers on the events, thereby adding a soap-operatic dimension to the unfolding narrative.

Further spice landed in the affair when it emerged that Mrs Freer was a niece of Countess Cave, widow of prominent British politician and lawyer George, Viscount Cave. He had been Home Secretary, Lord Chancellor, legal adviser to the Prince of Wales and Chancellor of the University of Oxford.⁵⁴ Mrs Freer said that she had asked Lady Cave to intercede on her behalf with the Governor-General.⁵⁵ ‘I wouldn’t if I could’, the countess told the press in London, opining that it would be better if Mrs Freer returned to her parents in India.⁵⁶

Meanwhile, Paterson despatched urgent cables to India, Ceylon and London, in search of information, including intelligence about a Eurasian woman - impliedly a prostitute – called Vera Freer.⁵⁷ The London *Daily Telegraph* got wind of these inquiries, which shook the Prime Minister,⁵⁸ but their precise nature was not known at the time and seems to have ignored clear photographic evidence that Mrs Freer was white.⁵⁹ The secret cables failed to produce any credible information to the

⁵⁰ *SMH* 18 November 1936, 15.

⁵¹ Letter from Lieutenant Dewar to Prime Minister Lyons, 25 November 1936 (NAA CP290/1 BUNDLE 1/16 25). Lyons was Prime Minister, leading a United Australia Party government, from 1931 to 1934 and, leading a conservative coalition government, together with the Country Party, from 1934 to 1939.

⁵² *DT* 25 November 1936, 1.

⁵³ *DT* 17 November 1936, 2; 19 November 1936, 2; 20 November 1936, 2; 21 November 1936, 2 and 16 November 1936, 1. Also *SMH* 14 November 1936, 17 and 18 November 1936, 15.

Wikipedia, ‘George Cave, 1st Viscount Cave’, <http://en.wikipedia.org/wiki/George_Cave,_1st_Viscount_Cave> at 23 August 2006. Viscount Cave died just before he was to be made an earl, but his widow was nevertheless elevated from viscountess to countess.

⁵⁵ *DT* 30 October 1936, 1; noted in Department of the Interior Memorandum, 30 October 1936 (NAA A6980 S203497 23).

⁵⁶ *DT* 30 October 1936 (NAA BP234/1 SB1936/2454 16) and 9 November 1936 (ibid 15) (though the dates on these clippings do not match the microfilmed copy of the newspaper). Lady Cave stated that Mrs Freer’s mother was her sister-in-law. That would be strong evidence that Mrs Freer senior was white. Captain Freer, a former Army officer, must have been white. More information might be in the Cave correspondence and papers, including some letters by the countess, in the British Library Manuscripts Collection at Add MSS 62455-516.

⁵⁷ See Paterson’s handwritten drafts and copies of Secret cablegrams dated 16, 17, 18 and 27 November 1936, with slow and patchy replies from the Indian government (NAA CP290/1 BUNDLE1/16).

⁵⁸ Cablegram, High Commissioner in London to Prime Minister, 19 November 1936, and reply same day (NAA CP290/1 BUNDLE 1/16 26-7).

⁵⁹ *DT* 30 October 1936, 1; *SMH* 31 October 1936, 20 and *DT* 2 November 1936, 2. A face photograph of Mrs Freer can be seen at NAA A6980 S203497 1. Three other pictures of her

detriment of Mrs Freer⁶⁰ and by the end of November there were calls for Paterson to resign.⁶¹

A summary, undated but necessarily of late November 1936 and headed 'Information in Possession of Department [of the Interior]',⁶² reads:

- (1) *NAME* – Mabel Magdalene Freer – said to be identical with *Vera* Freer.
- (2) Said to be divorced – came to Lahore in May, 1936.
- (3) Lived by her wits and gave herself to the biggest bidder.
- (4) Her one idea is to find someone to pay her expenses.
- (5) Enquiries should be made into her parentage and mode of living.
- (6) She only married her first husband to get a father for her child. That was when she was in Whiteway, Laidlaw, Bombay.
- (7) Don't think she and her parents have seen any country other than India.
- (8) Said to be known in Bangalore as Vera Freer, where she lived in Infantry Road in 1931-1932.
- (9) At this time (1931-1932) had a small son of 2½ to three years of age who showed undoubted indications of black blood.
- (10) She is said to be half Sinhalese.
- (11) She stated at the time (1931-32) that she was divorced from Freer, but was married at the time to an Armenian who was in Iraq and who was the father of her child. She did not use the name of the Armenian.
- (12) Was constantly in the company of an Indian named Banerjee, said to be a Civil Servant of State of Hyderabad, spending his leave in Bangalore.
- (13) Said to have been the cause of the disgrace and expulsion from India of a young English member of a Calcutta mercantile firm.
- (14) Although an Eurasian she always said she was pure English.
- (15) She is a cunning and utterly immoral woman. She is little better, if at all, than a common prostitute.

are in the State Libraries of New South Wales and Victoria: <<http://www.pictureaustralia.org/index.html>> (at 22 August 2006) and search for 'Mrs Freer'. The Victorian photograph, which is whole-length, is dated at 1936 and appears to have been taken on board a vessel, but Mrs Freer looks much older than in the Archives photograph and the setting looks like it may be a studio mock-up.

⁶⁰ The only substantial information provided by the government of India was received on 28 November 1936. Key points were: that a 'Mohammedan gentleman' had 'hired furniture on her behalf and paid for some time' and later she hired furniture herself but failed to pay and '[s]uddenly disappeared'; that she was '[s]aid to look like Anglo-Indian'; that in 1935 her husband 'Captain Freer' had refused to support her and commenced divorce proceedings; that she had stayed in a room next to Lieutenant Dewar's at the Grand Hotel in Bombay; and that Dewar had attempted to book a passage to Australia for the two of them as husband and wife. (Secret cable received 28 November 1936. See other responses dated 17 November 1936, 25 November 1936 and 8 December 1936: NAA CP290/1 BUNDLE 1/16.) The last of these states that Mrs Freer was 'not, so far as is known, Anglo-Indian' and that the house where she had lived in Bangalore was of good repute.

⁶¹ *DT* 26 November 1936, 1 and 6; *CPD* vol 152, 2393.

⁶² NAA A6980 S203497 207. The summary must be later than 14 November 1936, since items (8), (9) and (15) come from a letter of that date to Paterson from Walter Hunt (*ibid* 102-8). And it is probably later than the record, dated 18 November 1936, of an official's interview with Hunt (*ibid* 87-9).

Mrs Freer, living in Auckland and working in odd jobs,⁶³ responded to Paterson's early statements by challenging him to detail the accusations against her. She repeatedly expressed her determination to have her name cleared.⁶⁴ Although clearly frustrated by her circumstances,⁶⁵ she was an articulate critic of Paterson's decision and displayed a sense of humour that could only have persuaded observers of her fortitude in difficult circumstances.⁶⁶

Her legal representative in Auckland, Mr G P Finlay, appealed to the Commonwealth government, through Attorney-General Robert Menzies, for an impartial investigation of the case.⁶⁷ Members of Parliament also repeatedly demanded an inquiry. But Menzies advised the Prime Minister that a 'purely individual case' did not merit an inquiry and the best course was to 'sit tight and let [the] controversy die away'.⁶⁸

Mrs Freer remained in New Zealand until 30 November 1936.⁶⁹ During this time, Paterson was under increasing pressure from Australian newspapers and from federal MPs (including those within his own party) to admit her.

In early December 1936, Mrs Freer made a second attempt to gain admission to Australia, arriving in Sydney on the *Awatea*. In transit she had been told that Cabinet, which had been widely tipped to permit her admission, had decided not to do so.⁷⁰ This journey would seem to have been orchestrated by her legal advisers

⁶³ Initially in a drapery firm (*SMH* 18 December 1936 = NAA A2998 1951/696 111); eventually as a typist in her lawyer's office (*Sydney Sun*, 5 June 1937 = NAA A2998 1951/696 30).

⁶⁴ *DT* 12 November 1936, 1; *DT* 14 November 1936, 2; *SMH* 18 November 1936, 15; *DT* 20 November 1936, 2 and *DT* 1 December 1936, 1.

⁶⁵ See interview in *DT* 26 November 1936, 2. See also the letter from Lieutenant Dewar to Prime Minister Lyons, 25 November 1936, in which he quotes a suicidal statement allegedly made in correspondence received from Mrs Freer (NAA CP290/1 BUNDLE 1/16 25).

⁶⁶ Eg "Mr. Paterson," Mrs. Freer added, 'seems to have got himself into a tangle.'" (*SMH* 14 November 1936, 17). Perhaps her best put-down of Paterson was to play the role, in a film made in New Zealand to promote travel to New Zealand and Australia, of 'a traveller boarding the *Awatea*, Sydney-bound, ticket in hand' (*SMH* 10 February 1937, 16). See also her remarks on the necessity for an 'around the world' ticket when offered a return fare by Lieutenant Dewar's father (*SMH* 20 November 1936, 13).

⁶⁷ Letter dated 11 November 1936 to the Attorney-General for the Commonwealth of Australia from G P Finlay, Barrister and Solicitor of Auckland (NAA A432/85 36/1360). See copies of telegrams dated 27 November 1936 and 28 November 1936 from Finlay to Attorney-General Menzies (NAA A432/85 36/1360).

⁶⁸ Memorandum, NAA CP290/1 BUNDLE 1/16 20.

⁶⁹ *DT* 1 December 1936, 1.

⁷⁰ *DT* 3 December 1936, 1. Paterson had informed a meeting of Cabinet on 4 November that he had refused Mrs Freer a permit to land. He told Cabinet that he had done this on the basis of information received from India, London and Australia (an assertion that would not seem to have been true). At subsequent meetings Cabinet considered the case but no decision in support of Paterson was recorded in the minutes. It was thus surprising that the minutes of the 2 December 1936 Cabinet meeting state that 'After discussion, it was agreed that Cabinet adhere to its previous decision.' (NAA Minutes of Cabinet Meetings, vol 16, part 2). It is worth noting that Paterson stated in the House on 4 November 1936 that he had 'received the endorsement of Cabinet' (*CPD* vol 152, 1470). Even if Paterson had thereby overstated the

and financed by a Sydney newspaper, the *Daily Telegraph*.⁷¹ The timing of the trip was evidently designed to take advantage of the public pressure being placed on Paterson to resign.⁷² However, it proved to be disastrous, as the abdication crisis in England was to divert the attention of the public and the press away from Mrs Freer's second exclusion and thereby reduce pressure on Cabinet to admit her. Cabinet itself had otherwise attempted to reduce the attention which her arrival might have attracted by determining that she would not be permitted to broadcast as she arrived in Sydney.⁷³

When the *Awatea* docked in Sydney, Mrs Freer was again given a dictation test in Italian. She placed her fingers in her ears as Dr C A Monticone, the Chief Government Interpreter for New South Wales,⁷⁴ read her a weather report translated into Italian for the purpose of the test:

La pioggia di ieri, che a stata discretamente generale in tutto lo statto, rappresenta un cambiamento piu che benvenuto, dal periodo di bel tempo che era divenuto una grave siccita in qualche area. Sebbene li piogge siano statte piuttosto leggiere, le previsions promettono precipitazione piu importante, e si deve sperare un miglioramento.⁷⁵

position of Cabinet, once the statement was made and not corrected it would have been difficult to refute.

⁷¹ Prior to her departure from New Zealand, Mrs Freer admitted to being in straitened financial circumstances. It would seem that the *Daily Telegraph* paid for her return ticket to Australia. The paper would also seem to have paid the deposit required by the shipping line as a guarantee against any unlawful departure by Mrs Freer from the ship in Sydney (in the event that she was once again found to be a prohibited immigrant). See Deposition by Customs Officer Herbert Bede Cody (NAA A432/85 36/1360). It is not clear who paid Mrs Freer's legal bills, which almost certainly exceeded her means, although evidently the *Daily Telegraph* is a possibility.

⁷² The timing also coincided with the scheduled end of the parliamentary session (in the knowledge that it would be difficult to convene a meeting of Cabinet for some time thereafter). See also the telegram from Finlay to Attorney-General Robert Menzies dated 27 November 1936, stating: 'Australian legal authorities urging Mrs Freer sail Australia immediately' (NAA A432/85 36/1360). These 'authorities' may have been Sydney solicitors Allen, Allen & Hemsley, who were to handle the application to the High Court.

⁷³ Minutes of Cabinet Meeting of Thursday 3 December 1936 (NAA, vol 16, part 2).

⁷⁴ The reason for using a senior skilled interpreter who was, perhaps, a native speaker of Italian, was to preclude the raising of issues around the competence of the dictating person like those raised in the High Court challenge to the Scottish Gaelic dictation test imposed on Egon Kisch. See Kisch, above n 7, 98-101. Italian was chosen by Paterson because Mrs Freer had already failed once in Italian and Monticone was chosen because no customs officer in Sydney could speak Italian. (See Department of the Interior memorandum by R A Peters, 16 November 1936: NAA A6980 S203497 175.)

⁷⁵ NAA A2998 1951/696 66. It would not have been the same passage as on the first occasion. 'Passages used in the Test were selected by the Secretary of the Department of External Affairs, distributed to the State Collectors of Customs, and changed every fortnight to prevent evasion by means of rote knowledge': Yarwood, above n 3, 24.

The language is very simple – the passage seems to have been the standard text of the moment, or at least of a standard type.⁷⁶

At the conclusion of Monticone's second and slower reading of the passage, when she should have written the passage down, Mrs Freer was informed by customs officer Herbert Cody that she had failed the test, that she was therefore a prohibited immigrant and that she would not be allowed to land. She was also informed by Cody that he had, regardless of the dictation test outcome, instructions from the Minister for the Interior to prevent her from landing.⁷⁷ The test, then, was a façade.

Later that morning, application was made to the High Court for a writ of *habeas corpus*.⁷⁸ The application was heard by Justice H V Evatt, who had decided in the applicant's favour an earlier immigration *habeas corpus* case involving a controversial applicant, Mr Egon Kisch – another white European whom the government nonetheless felt an irresistible compulsion to exclude using the dictation test.⁷⁹ However, this was not the only reason why it was an advantage to have Justice Evatt to hear the application: he had evinced a strong personal interest in immigration matters,⁸⁰ even before assisting in an unsuccessful challenge to the deportation of Irish Republican Representatives before the High Court in 1923⁸¹ and two years later successfully arguing before the High Court against the deportation of the leaders of the Seamen's Union, Walsh and Johnson.⁸²

⁷⁶ But simple language might contain pronunciation and spelling traps for the less than fluent. York, above n 3, 27 quotes a test in English from 1927: 'The tiger is sleeker, and so lithe and graceful that he does not show to the same appalling advantage as his cousin, the lion, with the roar that shakes the earth. Both are cats, cousins of our amiable purring friend of the hearth rug, but the tiger is king of the family.'

⁷⁷ *The Herald*, 4 December 1936, 8. See also Deposition by Herbert Bede Cody, Customs Officer, 4 December 1936, fifth sheet (NAA A432/85 36/1360). The deposition is also in Mrs Freer's file at A2998 1951/696 50-63. Paterson's instruction is annexed to that copy: addressed to Cody by name and dated 4 December 1936 (hence implemented that day), it merely cites statutory Ministerial discretion and gives no reason for the ban (A2998 1951/696 64). The provision cited is *Immigration Act* 1912 s 3J: 'The Minister may, if he thinks fit, prevent an intending immigrant from entering the Commonwealth, notwithstanding that a certificate of health has been issued to the intending immigrant.'

⁷⁸ Sworn statement by Norman Cowper and request for an Order that a Writ of *Habeas Corpus* issue (NAA A432/85 36/1360).

⁷⁹ *R v Carter; Ex parte Kisch* (1934) 52 CLR 221.

⁸⁰ G C Bolton, 'Evatt, Herbert Vere' in *Australian Dictionary of Biography* (1996) vol 14, 109: <<http://www.adb.online.anu.edu.au/biogs/A140124b.htm>> at 18 August 2006. Also, as one of just two Labor-appointed judges on the High Court in 1936, Evatt J was a part of the majority which granted Kisch's appeal against his conviction as a prohibited immigrant after the infamous dictation test in Scottish Gaelic (see Kisch, above n 7).

⁸¹ *R v MacFarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518. For an excellent account of the events preceding and following this case, see B Fitzpatrick, *The Australian Commonwealth: a Picture of the Community 1901-1955* (1956) 295-8.

⁸² *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36. See also Ken Buckley, Barbara Dale and Wayne Reynolds, *Doc Evatt: Patriot, Internationalist, Fighter and Scholar* (1994) 46-9.

Evatt J granted an order *nisi* for *habeas corpus*, returnable the same afternoon.⁸³ In his decision at the end of the brief proceedings later in the day he concluded that none of the arguments supporting Mrs Freer were valid. Accordingly, she remained a prohibited immigrant and returned to New Zealand. She had been in Australia for nine hours and had not been permitted to leave the *Awatea*.⁸⁴

After her return to Auckland, Mrs Freer condemned the test and stated that she would continue to fight for admission to Australia.⁸⁵ She also stated that she was prepared to appear before any tribunal or before Cabinet to put her case for admission and, further, that she would abide by any decision reached by a tribunal.⁸⁶ In Wellington, to where she then moved, she was apparently counselled by her new legal adviser, Matthew Barnett, to refrain from comment on her circumstances.⁸⁷

In the following months, Barnett lobbied for a lifting of the ban,⁸⁸ receiving various confidential messages from Menzies.⁸⁹ Barnett played hard ball. In May 1936 he informed Paterson that, while Mrs Freer had never been given any reason for her exclusion, he assumed that the issue was the preservation of the Dewar family, that Mrs Dewar had commenced legal proceedings against her husband (ie was suing for divorce) and there was now no prospect of reviving the marriage. He added that, if a decision to admit Mrs Freer – at least for six months, it was conceded – were not taken before Parliament reassembled on 10 June, there would be no alternative but to cease avoiding publicity and give to the avid press all of her correspondence on the matter, including that between Lieutenant Dewar and his father.⁹⁰

No doubt not all of the public took Mrs Freer's side. By November, her Auckland lawyer Finlay was writing to Menzies about 'wild' public speculation that Mrs Freer was 'an International spy', was engaged in the white slave trade and was 'a dope fiend': the public was imagining 'that she is anything and everything that in its view would be alone sufficient justification for the peremptory harshness of the treatment she received'.⁹¹ Yet here he may have been pushing a line, for the origin

⁸³ Copy of Order Nisi for Habeas Corpus signed by Justice H V Evatt and dated 4 December 1936 (NAA A432/85 36/1360).

⁸⁴ *DT* 5 December 1936, 9.

⁸⁵ *The Herald* (Melbourne), 7 December 1936, 2 and *The Age* (Melbourne), 8 December 1936, 10.

⁸⁶ *DT* 17 December 1936, 2 and *SMH* 17 December 1936, 11.

⁸⁷ Letter from Matthew Barnett to Attorney-General Menzies, 18 February 1937 (NAA A432/85 36/1360). This is the more formal of two letters written to Menzies on this day and was a request, though Menzies, for a Cabinet reconsideration of Mrs Freer's case.

⁸⁸ See the two letters to Attorney-General Menzies, 18 February 1937: NAA A432 1936/1360 34-5 and 39-44.

⁸⁹ See letter from R G Menzies to Mr O Barnett, 26 February 1937, NAA A432/85 43/1139 Folio 6; *ibid* March 26 Folio 8, April 13 Folio 17, April 29 Folio 18 and May 24 Folio 22.

⁹⁰ See letter from Matthew Oliver Barnett to The Honourable T Paterson, 4 May 1937 with copy to Attorney-General Menzies (NAA A6980 S203497 6-9).

⁹¹ All of this, of course, he denied: letter from G P Finlay (barrister and solicitor) to The Hon The Attorney-General for the Commonwealth of Australia, 11 November 1936 (NAA A6980

of these accusations appears to have been Mrs Freer herself. Two weeks earlier, she had speculated on what people might read into the fact that she was being so resolutely excluded: 'People will think that I am engaged in espionage, white slavery, or drug running.'⁹² Was she trying to deflect rumours that had reached her ears? Or was Barnett reckoning that all's fair in love and law?

Finally, however, when commentators persisted in holding up the case as an illustration of the government's shortcomings and when the affair was held to have been an important ingredient in both Labor's victory in the Gwydir by-election⁹³ and the failure of the constitutional referenda,⁹⁴ Federal Cabinet relented. The admission decision was made on 2 June 1937 and announced immediately.⁹⁵ Mrs Freer was delighted. Lieutenant Dewar stated that he was pleased by Cabinet's decision but that he had expected it, having just received orders posting him to Western Australia.⁹⁶

Mrs Freer's arrival in Sydney by the *Wanganella* on 12 July was a major public event. The *Sydney Morning Herald* reported that she 'was given a reception equal to that of an international celebrity'. Before landing, she was presented with 'a shoal of congratulatory letters and telegrams'. 'When the *Wanganella* berthed, the wharf was black with people, with an overflow to the street. A line of cars and taxis almost two miles long stretched down the pavements outside. Her walk from the gangway to a waiting car had the elements of a procession of triumph.' 'I hold no grudge against Mr. Paterson', she said, adding 'I do not intend to seek any redress at Canberra.'⁹⁷ The *Daily Telegraph*, ever an ally, described her as '[t]all, slight and charming' and reported: 'She expressed satisfaction "that a mere woman" had been able to win out in face of the government, and said that she had no ill feeling against Mr. Paterson. She was only sorry for him.'⁹⁸ Game, set and match.

S203497 63-7). The word 'International' appears to refer to the Communist International, meaning that Mrs Freer was reckoned to be a Soviet agent. Barnett and Finlay were co-operating closely.

⁹² *DT* 30 October 1936, 1.

⁹³ See Editorial, 'First Fruits of Gwydir', *CT* 3 June 1937, 4.

⁹⁴ See Editorial, 'Chickens Home to Roost', *CT* 8 March 1937, 2.

⁹⁵ Minutes of Cabinet Meeting 2 June 1937 (NAA vol 17, part 2). The decision appears to have been made immediately after receiving advice that day from Defence, after prompting from Paterson, that they 'will raise no objection' to admitting Mrs Freer (NAA A6980 S203497 2). One of the reasons for reversing the ban was that, by this time, Mrs Freer had lived peaceably in New Zealand for six months: press release by Acting Prime Minister Dr Earle Page, 2 June 1937 (NAA CP290/1 BUNDLE 1/16 5).

⁹⁶ *CT* 3 June 1937, 1.

⁹⁷ *SMH* 12 July 1937 (NAA A2998 1951/696 17).

⁹⁸ *CT* 13 July 1937, 1. There was considerable press and parliamentary scepticism that the transfer – as far away as possible from Sydney – had been arranged as a precursor to the decision to admit Mrs Freer. Allowing them to appear together in front of a crowd, with photographers clicking away at *The Kiss*, would have been too much of a bad thing.

However, not all was rosy. It would appear that Mrs Freer's relationship with Lieutenant Dewar had ended.⁹⁹ In addition, she was in straitened financial circumstances. After arriving in Sydney she lived with an aunt and commenced work as retail manageress of a Sydney beauty parlour in order to support herself.¹⁰⁰ She shunned further publicity.

If the government hoped in permitting Mrs Freer's entry to escape further parliamentary criticism over the case, it was to be disappointed. In the new session of Parliament it was frequently reminded that it had never provided any evidence for the accusations made by Paterson and that it had financially ruined Mrs Freer.¹⁰¹

Two months later, Mrs Freer wrote to Menzies seeking compensation from the government for her exclusion. She made mention of the anguish she had endured, the expenses associated with her stay in New Zealand, the debts incurred in fighting her case and the paid publicity opportunities she had not pursued since being admitted to Australia.¹⁰² Menzies reminded Mrs Freer of her lawyer's undertaking that she would not seek compensation,¹⁰³ but nonetheless offered to meet with her.¹⁰⁴ That meeting did not take place. However, Menzies promised to put a request for compensation to Cabinet, Mrs Freer became distressed by the delays and Menzies counselled patience.¹⁰⁵ Menzies sympathetically framed proposal for a committee to make an act of grace payment to Mrs Freer was finally considered by the post-election, differently constituted Cabinet on 16 December 1937. The proposal was not approved.¹⁰⁶

So far, it seems that Paterson approved the administration of the dictation test on the advice of public servants, without any substantial evidence to the effect that Mrs Freer was an undesirable person. In doing so, he dug for himself a pit in which he was to be buried. However, archive documents reveal that, all along, Paterson was in possession of evidence that he was not prepared and perhaps simply not able to use.

⁹⁹ *CT* 9 June 1937, 1

¹⁰⁰ *SMH* 26 June 1937, 17 and *DT* 26 June 1937, 2.

¹⁰¹ *DT* 18 June 1937, 2 and *CPD* vol 153, 27, 29, 87, 227, 272, 274, 535, 580, 586-8 and 691.

¹⁰² Handwritten note to Attorney-General Menzies from Mrs Mabel Freer dated 14 August 1937 (NAA A432/85 43/1139).

¹⁰³ Letter from Matthew Barnett to Menzies, 18 February 1937: NAA A432 1936/1360 39-44 at 44.

¹⁰⁴ Letter from Mrs Mabel Freer to Attorney-General Menzies, 24 August 1937 and 'Personal' letter from Menzies to Mrs Freer, 1 September 1937 (NAA A432/85 43/1139).

¹⁰⁵ Telegrams dated 1 October, 15 November and 16 November 1937 (NAA A432/85 43/1139).

¹⁰⁶ Minutes of Cabinet Meeting of 16 December 1937 (NAA vol 17, part 3). Menzies had written to Cabinet: 'I think there is no doubt that Mrs. Freer suffered severely as a result not only of certain statements made in relation to her exclusion but also as the result of the non-disclosure in detail of the reasons for her exclusion' (NAA A432/72470; CP290/1 BUNDLE 1/16 2).

Firstly, there was slow and patchy evidence from the government of India. The correspondence indicates that Paterson was never satisfied that it was sufficiently solid.¹⁰⁷

Secondly, he had copies or reports of correspondence between Lieutenant Dewar's father, Mr R Dewar, and a senior Army officer, Major P S Myburg, apparently commanding the regiment to which Lieutenant Dewar was temporarily attached. Myburg had written to Dewar senior that Mrs Freer, supposedly divorced, had come to Lahore and 'from all we heard we gathered that she just lived by her wits and gave herself to the biggest bidder [sic] her one idea being to find someone whose would pay her expenses'.¹⁰⁸ Myburg had also written to the military officer who was also the Secretary of the Department of External Affairs and indicated that the interests of the Army and Lieutenant Dewar would be best served by the exclusion of Mrs Freer. The Secretary of the Department of External Affairs passed that on to the officials of Paterson's Department, where it was apparently considered to be a formal request from the Defence Department.¹⁰⁹ On 16 October 1936, exclusion by customs officers was agreed by Ministry officials, anticipating Paterson's approval, which was given three days later.¹¹⁰ The same document records that the Chief of General Staff 'urges that the woman be prevented from landing as if a scandal arises, it will finish Dewar's career, + will be detrimental to the interests of the staff + the service generally'.¹¹¹ This evidence supports the *Daily Telegraph's* conclusion in its report on the heated 2 December 1936 Cabinet meeting:

It was freely stated that Paterson had taken his original action on the advice of officers without closely studying the documents, and that although in the House he indicated that he was protecting Mrs Freer, actually he was protecting departmental officers.¹¹²

The summary quoted above, of 'Information in Possession of Department', indicates the standard of evidence that those officers had been prepared to accept.

¹⁰⁷ NAA CP290/1 BUNDLE1/16.

¹⁰⁸ NAA A6980 S203497 228.

¹⁰⁹ Copy of Minute to Chief of General Staff dated 17 November 1936 from Major B Combes, Staff Corps; copy of Minute to Secretary dated 17 November 1936 from C B Laffan, Secretary to the Military Board; and 'Confidential' Minute by Minister dated 20 November 1936 (NAA A5954/1 973/13). See also letter from Lieutenant Dewar to Prime Minister Lyons, 25 November 1936, referring to 'a forced marriage' (NAA CP290/1 BUNDLE 1/16 25), and letter from Lieutenant Dewar to Paterson the previous day (NAA A6980 S203496 54-5), in which Dewar confesses: 'Throughout my married life, my wife has never been as a wife to me so I found the necessity of deceiving her and seeking unlawful relationships'. He does not state where these adulteries took place. All the same, the reference to 'necessity' is not easy to reconcile with there being young offspring of the marriage. In the same letter, Dewar claims that Army officers and a chaplain had recommended against action either by the military or 'under the Immigration Laws', and that therefore he had been deceived.

¹¹⁰ Memorandum by J Horgan, 16 October 1936, initialed 'Approved' by Paterson on 19 October (NAA A6980 S203497 235).

¹¹¹ Ibid, annotation by J Horgan.

¹¹² DT 3 December 1936, 1. Paterson had regularly denied in Parliament that he had taken the decision without close examination of the documents.

Thirdly, late in the day and in response to the publicity of the Freer affair came a rambling handwritten letter to Paterson from a Mrs Irene MacArthur in Moradabad, Uttar Pradesh. She accuses Mrs Freer's sister Emily Ward of running off with her husband, Captain MacArthur. The very scandal, she says, had lost Mr Ward his job. She goes on to claim that her former husband, now living with Emily, does not need to work since Emily earns enough to support them both. She does not specify Emily's source of income – implying that it is prostitution. Mrs MacArthur also states that she had found Mrs Freer completely drunk in a hotel in Lahore, yet drinking again the following evening. At one time Mrs Freer had gone off with an unnamed major, who had paid for their accommodation. This sort of affair, she says, is common. The police turn a blind eye to and even encourage them, and will not provide evidence – for to implicate a British officer was more than any policeman's job was worth. Of course, Mrs MacArthur does not wish to be 'vindictive', and she notes that 'the 5 Ward children are fair', but 'I know they have dark relations on the Mothers [sic] side.'¹¹³ There is no annotation as to the date of receipt, but none of its content appears in the summary quoted above, so it probably came later and indeed might have arrived after the ban on Mrs Freer had been rescinded. But it is at least one more piece of evidence that the Freer affair threatened to expose the British officer class in India.

A further threat came from Indian law. Captain Freer had instituted divorce proceedings, citing Dewar.¹¹⁴ Under the *Indian Penal Code* 1860 ss 497-8, Dewar was then liable to be imprisoned for up to five years or fined, or both.¹¹⁵ The

¹¹³ Letter from Mrs Irene MacArthur to The Right Hon Minister Patterson [sic], 19 November 1936: NAA A6980 S203497 27-31. Mrs MacArthur's own reason for being in the hotel two nights running was, naturally, respectable; she was accompanying her son, a jockey. Mrs Freer's autobiographical article (above n 30, records that there were three Ward boys and two girls (who would be herself and Emily) and that not long (she is not sure exactly when) after she was born her father 'resigned his military career and took up the position of Superintendent of the Medical Hostel at Lahore'. That Mrs Freer's father, Major Myburg and Lieutenant Dewar were all of the Royal Artillery does not mean much; it was and is a whole army corps, composed of several regiments. Lieutenant Dewar retaliated against Myburg in a letter to Prime Minister Lyons on 25 November 1936 (NAA CP290/1 BUNDLE 1/16 25), describing Myburg as a man 'whose own lack of reputation where ladies are concerned is well known in India' (A6980 S203496 54-5). Writing to Paterson the previous day, Dewar said that on his leaving India Myburg had given him a sealed letter to deliver to 'Mrs. McIlwraith of South Yarra, so that the letter would not bear an Indian postage stamp or postmark. This letter was destroyed for safety in Bombay, but I am not the only one who knows that it existed.' (NAA A6980 S203496 55). It appears that Myburg may have persuaded Dewar to act as a go-between and that Dewar got cold feet.

¹¹⁴ Cablegram from Secretary of State for India (to Ministry of the Interior), 27 November 1936 (NAA A6980 S203496 112).

¹¹⁵ Five years imprisonment or a fine or both, s 497 'Adultery' (the wife could also be punished as an abettor); two years imprisonment or a fine or both, s 498 'Enticing or taking away or detaining with criminal intent a married woman', <<http://www.indialawinfo.com/bareacts/ipc.html>> at 27 August 2006. Walter Hunt advised of this in his letter to Paterson of 14 November 1936 (NAA A6980 S203497 102-8 at 106). He added that husband and wife might collude to blackmail the co-respondent – 'a favourite method in these cases'. Citing

prospect of him and other British officers being jailed in India for immorality was appalling, but could have been difficult to avoid.

Hunt, Rowland James confronted Paterson with s 498 in the House on 26 November 1936 (*CPD* vol 152, 2331).

IV THE CASE BEFORE JUSTICE EVATT

While Mrs Freer did not legally challenge her first exclusion from Australia, she was evidently fully prepared for such a challenge on her second.

Although often overlooked in a catalogue of 'White Australia' migration decisions, the decision of Evatt J in the *habeas corpus* proceedings of 4 December 1936 cleared up a surprising number of issues in relation to the operation of the test and its consequences. This article analyses the transcript of proceedings before Evatt J, as well as the reported decision. The reasoning as such could be the subject of another article, in which Evatt's reasoning in the Freer Case would be compared with his reasoning in the Kisch Case and with the High Court's reasoning in the other cases that will be mentioned. The interest now, rather, will be in Evatt's attitude.

The Freer action was for a writ of *habeas corpus*, brought under Constitution s 75(iii), which provides the High Court with original jurisdiction in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party. The action was in the King's name against the Commonwealth and two officers thereof, including customs officer Cody. The argument was that Mrs Freer was being unlawfully detained by Arthur Davey (master of the *Awatea*) and Cody.

The transcript¹¹⁶ demonstrates Evatt's keen interest in the arguments put to him. He is no passive observer: at times he takes upon himself the role of counsel, developing and countering the arguments put to him and engaging in cross-examination of witnesses. From beginning to end, his intimate knowledge of the exclusion provisions of the *Immigration Act* and his analytical intelligence are on prominent display.

Evatt makes clear that it is the task of Mr J W Spender KC (appearing on behalf of the Commonwealth and Cody) to provide 'answers to the *habeas*',¹¹⁷ yet afterwards Spender is not much heard from as Evatt J deals with the various arguments put by Mr J W Bavin (appearing for Mrs Freer).¹¹⁸

As these arguments unfold and witnesses are examined, a number of peculiar things become clear. It was revealed that Davey was not restraining Mrs Freer and that (contrary to normal practice) he had received no notice requiring him to detain her.¹¹⁹ It is also revealed that Dr Monticone had refused to certify that Mrs Freer

¹¹⁶ Transcript of Proceedings Before His Honour Mr Justice Evatt, Sydney, Friday, 4th December 1936 At 1.30 PM (NAA A432/85 36/1360 = A2998 1951/696 68-101); hereafter, 'Transcript' (page numbers are those of the document itself).

¹¹⁷ Transcript, 1.

¹¹⁸ Bavin had been briefed by Sydney solicitors Allen, Allen & Hemsley.

¹¹⁹ Transcript, 6. A printed Deportation Order on which Mrs Freer's name has been typed was signed by Paterson but not dated and the vessel is not yet named: the order remained on file

had failed the test at its conclusion, because he had been of the view that she had not attempted to pass it.¹²⁰ It is further revealed that Cody, the customs officer with formal custody of Mrs Freer, possessed a 'dual authority' for preventing her from landing; he had stopped her from disembarking because she had (allegedly) failed the test provided for by s 3(a) of the *Immigration Act* and because he had an authority from Paterson under s 3J to exclude her.¹²¹

In his decision Evatt properly rejected the argument (which Spender had abandoned during the hearing) that s 3J conferred on the Minister a general power of exclusion.¹²² Rather, the argument to which Evatt paid the greatest attention was one that clearly excited him at the hearing. Put in its simplest form: Bavin was arguing that the effect of amending the Act by removing the words that had made it clear that the test language in s 3(a) was to be chosen by the dictating officer could be that not the officer but the immigrant could now select the language in which the test would be given. Bavin further submitted that there was thus *no* provision authorising an officer of the Commonwealth to direct in which language the test was to be administered.¹²³ Should this argument be accepted, Bavin contended, 'it is not necessary that I should put my case as far as to say that the immigrant is entitled to choose the language, but I submit that is the problem'.¹²⁴ Bavin further submitted that it had been held that it was 'the very words "directed by the Officer" which empowered the Officer to make an unrestricted choice from European languages'. Further 'the Legislature knew the old law, and the interpretation the Court had placed upon it' and had nonetheless amended the section and removed the crucial words.¹²⁵

Evatt agreed that this was a novel argument, stating: 'it is quite true [the Act] does not in terms say the officer is to select the language'.¹²⁶ And, while Evatt appeared intensely interested in this argument, it was on making the provision mesh with the underlying intention of the Act that Bavin failed.

(NAA A432 1936/1360 56). It is addressed 'To the MASTER, s.s.' (vessel name to be filled in) and relates to a person who has been 'found within the Commonwealth in contravention or evasion of the *Immigration Act*'. The person is to be deported and for that purpose is to 'be kept in the custody of the bearer of this Order'. This seems to be an order in readiness for the possibility (which was feared) that Mrs Freer might slip through.

¹²⁰ Transcript, 17-18.

¹²¹ This provision permitted the Minister to decide that someone could be a prohibited immigrant even if he or she possessed a health certificate. See especially Transcript, 9-10, but discussion of this matter is scattered throughout the record.

¹²² *Freer* at 385.

¹²³ Transcript, 25.

¹²⁴ Transcript, 25-6.

¹²⁵ Transcript, 28.

¹²⁶ Transcript, 27.

Being pushed by Evatt to support his argument by providing an alternative purpose for the provision, Bavin submitted that s 3(a) had really been intended to exclude illiterates as undesirable persons.¹²⁷ Evatt did not agree.¹²⁸

It was on the underlying purpose of the *Immigration Act* that Evatt focused in the short judgment, handed down later that day. He dismissed out of hand the argument raised by Spender that s 3J of the Act conferred 'an absolute and unqualified power' on the Minister to exclude a potential immigrant. The power was, rather, to exclude an immigrant on grounds of health even though they possessed a health certificate.¹²⁹

Referring to the history of s 3(a) as 'one of extraordinary interest', Evatt noted: 'It is quite clear that, by executive action, there has been a remarkable turning or twisting of the original scheme of the Commonwealth Parliament in prescribing a failure to pass the dictation test as itself making the person failing a prohibited immigrant'.¹³⁰ Originally, the Act had clearly been intended as a device to exclude 'persons deemed unsuitable because of their Asiatic or non-European race'.¹³¹ However, Evatt noted, the 'blanket words' of the section had 'in modern times ... been found sufficiently wide to cover not only any person of European race, but British subjects of European race'.¹³²

Considering the history of the section, Evatt was unable to find, as a matter of statutory construction, that the officer of the Commonwealth was not able to select the language from just 'any European language'. However, he acknowledged that '[w]hile the Act does not specifically state that the European language is to be selected by the person administering the dictation test, this is the necessary result of the fact that the first of the two events is controlled by the person who dictates; and that it is nowhere suggested that the person arriving has the right of selecting the European language, a right which would entirely contradict and defeat the object of the legislation'.¹³³ Thus, Evatt recognised the unavoidable conclusion that the overwhelming purpose of the *Immigration Act* was exclusion.

In conclusion, Evatt noted that the test operated objectively: the immigrant automatically became a prohibited immigrant upon the occurrence of the events

¹²⁷ Transcript, 29. This argument had been discussed in the press, with an article in the *Daily Telegraph* arguing that the test might have been unconstitutional. It was suggested that it was actually a test of 'education' – as was the Natal test upon which it was modeled – and the Commonwealth Constitution granted the federal parliament no power over education: *DT* 27 November 1936, 1; cp Yarwood, above n 3, 21.

¹²⁸ Transcript, 31.

¹²⁹ *Freer* at 385. The rationale was presumably that the immigrant might have manifested or picked up an illness in transit. It is interesting to contrast Evatt J's statement with recent judicial pronouncements on the executive power to exclude immigrants and aliens under the current *Migration Act* 1958 (Cth) and/or by use of the royal prerogative. See, for example, *Ruddock v Vadarlis* (2001) 183 ALR 1.

¹³⁰ *Freer* at 386.

¹³¹ *Freer* at 386.

¹³² *Freer* at 387.

¹³³ *Freer* at 387-8.

specified in s 3(a). Thus, he stated, it was not for the court to enquire into the suitability of the immigrant.¹³⁴ With this statement, it appears that Evatt legitimated the ‘twisting and turning’ of the original scheme of the Act. At the same time – and this is ‘Doc’ Evatt, one of Australia’s greatest champions of human rights¹³⁵ – in applying the law with care, he explored the role of judicial review of administrative action, at that time an area of the law in a state of retarded development. In holding that the decision was unreviewable because Parliament had not provided for review,¹³⁶ he raised the issue of whether the courts might be more adventurous in the face of an ‘abuse of the power’.¹³⁷ In holding that the court could not interfere even though the decision might have been ‘based upon inaccurate or misleading information’,¹³⁸ he raised the question of whether that was an appropriate state of the law.¹³⁹ Referring to *Bavin* and citing a famous Lord Chancellor, he declares that ‘the ingenuity and zeal of counsel are never misplaced when exercised for the defence of the personal liberty of the subject’.¹⁴⁰ And he completes this with the other side of the coin:

I entirely agree with Mr. *Bavin* that it must not be thought for an instant that, in refusing the present application, the court is in any way indorsing or confirming the justice of any executive decision to exclude. Further[,] no question whatever has been or could be raised before me as to the personal character or reputation of the applicant. They remain quite unaffected by the decision of the court.¹⁴¹

Not for an instant, indeed. Yet cold comfort to Mrs Freer as the ship bore her towards New Zealand once more.

In 1939, Mrs Freer remarried in Australia.¹⁴² Her name had been dragged through the mud and the Parliament. She had lost her financial security and the relationship that had originally brought her half way around the world. The story appears tragic, though perhaps it did have a happy ending with her new marriage. By this point, though, the drama had ceased to captivate the public imagination and Mrs Freer had faded from public view.

V IMPLICATIONS OF THE CASE

¹³⁴ *Freer* at 389.

¹³⁵ See Buckley, Dale and Reynolds, above n 82.

¹³⁶ *Freer* at 389.

¹³⁷ Today’s law, judicially created, is that a decision is reviewable unless review is excluded by clear words of the authorising statute: *Annetts v McCann* (1990) 170 CLR 569.

¹³⁸ *Freer* at 389.

¹³⁹ Today, a decision may be overturned if it could well have been different had the decision-maker not taken irrelevant information into account or not omitted to take relevant information into account: eg *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5, which also contains related grounds and more or less codifies developed case law.

¹⁴⁰ *Freer* at 386.

¹⁴¹ *Freer* at 389.

¹⁴² Gavin Souter, *Acts of Parliament: a Narrative History of Australia’s Federal Legislature* (1988) 305.

Several cases remain as well remembered exercises – perhaps abuses – of the *Immigration Act* to exclude those who did not fit well with the government's ideals. But Mrs Freer's case is not one of them. However, her case deserves to be remembered, because it illustrates important points in the history of Australia's migration scheme which still hold relevance. These points include the question of Australian governments' motivations to exclude potential immigrants, the vexed issue of how to deal with British subjects, the politically charged nature of migration decisions, and Australian moral attitudes under threat.

A Motivations to Exclude

The Freer affair is of significance because it demonstrates that the contentious immigration and deportation decisions made by the Lyons government and by conservative Australian governments between the two world wars¹⁴³ were not confined to a fear of working-class radicalism. Motivations to exclude were in fact far wider.

Several cases are generally cited for the now widely accepted proposition that the White Australia Policy served two useful governmental goals: excluding Asian and other non-white immigrants; and preventing the entry or providing for the deportation of persons associated with communism or socialism, of radical union leaders and of Irish nationalists. These are the Kisch Case, the case of Walsh and Johnson and the Irish Envoys case.¹⁴⁴

The case – already mentioned – of prominent Czech journalist Egon Kisch is most closely in point since it involved a dictation test. The case has been so well reported and analysed that it suffices here to set out very briefly the facts surrounding his exclusion from Australia. Kisch came to Australia to speak against fascism. He was supported by the International Labour Defence and was a communist. The government's attempts to exclude him included twice declaring him a prohibited immigrant, prosecuting him twice for so being, and (most famously) applying a dictation test to him in Scots Gaelic – a choice forced upon them by his extraordinary facility with European languages.¹⁴⁵ Kisch also had strong personal flair, taking such memorable actions as leaping from the ship on which he was

¹⁴³ Others, apart from those about to be mentioned, were the decisions to deport Father Charles Jerger in 1920, to admit the German propagandist Count von Luckner in 1937 and to deport a large number of Victorian Chinese.

¹⁴⁴ Mary Crock, *Immigration and Refugee Law in Australia* (1998) 65. See further Blackshield and Williams, above n 1, 930-47. For more on the nexus between trade unionism and restrictive immigration policies, see Kenneth Rivett (ed), *Immigration: Control of Colour Bar* (1962) 13 and H I London, *Non-White Immigration and the 'White Australia' Policy* (1970) 158-9.

¹⁴⁵ York, above n 3, 28, credits him with fluency in ten European languages. He had even picked up a little Gaelic (but not enough) from a Scotsman he had met on the *Strathaird*, Kisch, above n 7, 73.

detained – breaking a leg in the process, which guaranteed him attention both at the time and subsequently.¹⁴⁶

Walsh and Johnson, the leaders of the Australian Seamen's Union, had mounted a campaign of militancy culminating in a labour strike. Both were subsequently detained in custody pending deportation in pursuance of an order made under s 8AA of the *Immigration Act*. This provision had been enacted specifically to enable their removal from Australia.¹⁴⁷ Both Walsh and Johnson had been long-term residents of Australia; they had made their homes here. Tom Walsh, born in Ireland, had arrived in New South Wales before Federation, and had since that time remained in Australia. Jacob Johnson, born in The Netherlands, had come to Australia in 1910 and had been naturalised here three years later. The High Court rebuffed the government's intention to expel the men in *Ex parte Walsh and Johnson; In re Yates*,¹⁴⁸ holding that the Act could not apply to the men as they were not immigrants; rather, they were members of the Australian community.

The Reverend Father Michael O'Flanagan and Mr John O'Kelly visited Australia in 1923, under the auspices of catholic archbishop Daniel Mannix, to enlighten Australians against the agreement to split Ireland into a catholic Irish Free State and a predominantly protestant Northern Ireland. Their visit was opposed by militant Australian protestants and by some Australian catholics, who were worried that it might exacerbate sectarian tension. The two envoys were prosecuted for sedition, but the government may have realised that it would be difficult to make that charge stick when all that the envoys had in mind was to engage in peaceful political argument. Before the case could be heard, the two were required to appear before a Board constituted under the *Immigration Act* s 8A, to show cause why they should not be deported. They failed in a challenge to the constitutionality of the hearing. The High Court rejected their arguments that legislation under the constitutional power to make laws with respect to immigration and emigration could not apply to British subjects and that, even if it could, it did not apply to mere visitors.¹⁴⁹ The

¹⁴⁶ Kisch, above n 7. Kisch records (ibid 42) that another anti-war activist invited to speak in Australia, Irishman (and therefore British subject) Gerald Griffin, had been given a dictation test in Dutch, which he had failed as he was meant to do. Kisch goes on to tell with gusto how Griffin then entered Australia under a false name and led the authorities a merry dance as he popped up unannounced to speak at meeting after meeting.

¹⁴⁷ Section 8AA provided (in effect) that any person not born in Australia, who interfered with trade or commerce between or among the states such as constituted a threat to the peace, order or good government of the Commonwealth, could be summoned to show cause as to why he should not be deported. The provision operated in times when a proclamation had been issued, stating that a 'serious industrial disturbance prejudicing or threatening the peace, order or good government of the Commonwealth' existed at that time.

¹⁴⁸ (1925) 37 CLR 3.

¹⁴⁹ One judge dissented, but only to the extent that in his view intervention by the High Court would be premature. The Australian federal constitution, which came into force in 1901, contains separate heads of legislative power with respect to 'Immigration and Emigration' s 51(xxvii), and to 'Naturalization and Aliens' s 51(xix). The effect of this separation was to make it possible to handle as immigrants persons born overseas who were British subjects and therefore were not aliens.

case almost ludicrously involved two visiting British subjects who did not want to be British defending what they believed to be their rights as British subjects.

Why is it that the events surrounding these personalities have so comprehensively overshadowed those involving Mrs Freer? Two reasons exist. The first involves the legal and political significance of the cases, the second their human element.

B *Legal and Political Significance of the Cases*

The lengths to which the respective governments went in order to rid Australia of Kisch, of Walsh and Johnson, and of the Irish envoys were extraordinary. The sheer volume of the legal proceedings initiated by the Lyons government in the four months between Kisch's arrival in Fremantle and his final departure, along with the surveillance and public order measures taken by the government during Kisch's trip, attests to the government's determination to see him off.¹⁵⁰ In the case of Walsh and Johnson, the legislative change illustrates an almost hysterical response to their union activities. In that of the Irish envoys, the over-reacting with a prosecution for sedition and then the hasty summoning to a tribunal that could order deportation smacked of desperation. These cumulative efforts better illustrate the artillery at the disposal of a vindictive government and make the two dictation tests imposed on Mrs Freer, and a solitary *habeas corpus* action, seem like very modest troubles.

A further fact that may account for the greater prominence accorded those other affairs is that they better demonstrate the conservatism of the governments involved. For example, the UAP and the forces of conservatism in Australian public life seem to have been united in their opposition to the presence of Kisch. A united front of liberals, socialists and communists opposed them. Likewise, the Walsh and Johnson situation polarised union supporters against conservative interests. In the Freer Case, however, the battle lines were not so clearly drawn. In the major parliamentary skirmishes in early November, the Labor Party played a minor role. Most of Paterson's attackers on each occasion were members of the UAP and the most unrelenting of them was without doubt William McCall, the Member for Martin.¹⁵¹ UAP Ministers too were not supportive of Paterson. Opposition leader John Curtin curiously explained the Labor Party's comparative silence by stating that, in the absence of evidence of Mrs Freer's undesirability, the party was 'in no position to decide whether she is an undesirable immigrant'.¹⁵² In fact, some of the conservative forces that were prominent in the campaign against Kisch, like the *Sydney Morning Herald*, pressured the government to admit Mrs Freer.¹⁵³

¹⁵⁰ See Kisch and Zogbaum, both above n 7.

¹⁵¹ *CPD* vol 152, 1469-70 and 1765-78.

¹⁵² *DT* 21 November 1936, 2.

¹⁵³ See *SMH* 2 December 1936, 14; 4 December 1936, 12; 1 June 1937, 10. See also letter dated 5 April 1937 to R G Menzies, Attorney-General, from W Fairfax, Managing Director, John Fairfax & Sons: NAA A432/85 43/1139 Folio 24. The Fairfax company, then as now, published the *Sydney Morning Herald*.

This last point raises a further reason for historians' greater interest in the Kisch affair. That affair cast a bad light on Menzies (who was to dominate the middle decades of the century, as Australia's longest-serving Prime Minister), while his role in the Freer affair was not an egregiously wicked one. The Kisch Case also seemed to be a precursor to his later attempts to ban the Communist Party of Australia. Conversely, the role of the ALP in the Kisch affair was laudable but, in the Freer affair, was unremarkable.

For legal historians, the Kisch affair is of significance because the litigation actually brought about changes to the existing law: the legislature added to s 5 of the *Immigration Act* a sub-section empowering deportation by Ministerial order of a prohibited immigrant who had 'evaded an officer'.¹⁵⁴ The legislation introduced to expel Walsh and Johnson is of similar import in elucidating the development of Australia's migration regime.¹⁵⁵ Moreover, more than one of the judgments handed down by the courts regarding Kisch have remained important statements of the law in the fields beyond immigration.¹⁵⁶ Likewise, the litigation in Walsh and Johnson's case continues to inform High Court judgments in the migration area.¹⁵⁷ The Freer litigation is remembered (if at all) as largely unremarkable, despite the interesting issues raised both in argument and in Evatt J's judgment.

C Human Interest

The human element to each of the stories should not be discounted as playing a part in their allure – both at the time and subsequently. The picture of a genteel English woman separated from the man she loved, subjected to the accusations of a powerful politician made under the cloak of parliamentary privilege and waiting in a foreign land for events to turn in her favour was doubtless a touching one. Walsh and Johnson's case would have elicited similar sympathy because the action was to expel them from their homes, rather than to prevent their entry. Both of them had lived in Australia for some time and, even on a strict and legalistic view, were regarded as members of the community who had made their homes here and

¹⁵⁴ B Fitzpatrick, *The Australian Commonwealth: a Picture of the Community 1901-1955* (1956) 295.

¹⁵⁵ See Crock, above n 144, 65.

¹⁵⁶ For example, Enid Campbell and Harry Whitmore see as noteworthy the views of the judges in *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434 to the effect that the courts' role in preserving the federal system requires greater protection of the courts' dignity and authority: *Freedom in Australia* (1973) 312. *R v Fletcher; Ex parte Kisch* (1935) 52 CLR 248 – the second of the Scottish Gaelic contempt cases – is cited by the same commentators as authority for the principle that a plea of fair comment will not be accepted in contempt proceedings when the publication fails to give its readers 'a fair and adequate account of the reasons which the Court had advanced in support of its conclusion': *ibid* 311. The same case is also cited as authority for the proposition that publication that may have a prejudicial effect on pending litigation is criminal contempt and that, accordingly, guilt must be proved beyond a reasonable doubt: *ibid* 301.

¹⁵⁷ See, for example: *Koon Wing Lau v Calwell* (1949) 80 CLR 533, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 and *Plaintiff S157/2002 v Commonwealth* (2003) 201 ALR 1.

become part of the Australian polity.¹⁵⁸ Kisch, while an outsider, was in Australia (in a way) and was an active participant in the various proceedings which decided his future. He enlisted support for the anti-fascist cause through a ready-made organisation, in the form of the International Labour Defence. He was also personally well placed – as a writer – to record his own story for the public of his time and thereafter.¹⁵⁹

Kisch, Walsh and Johnson, and the Irish envoys, also had the tactical advantages that they were in the country and in addition were members or had the backing of powerful organisations, skilled at disseminating and manipulating the stories to their own greatest advantage. In contrast, Mrs Freer was hampered by the fact that she had to pursue her particular cause – the rehabilitation of her reputation along with admission to Australia – from afar. Even during her *habeas corpus* proceedings, Mrs Freer was not present. While it is true that the Council for Civil Liberties organised a letter writing scheme¹⁶⁰ on behalf of Mrs Freer, it would not seem that she otherwise had any organised popular support.¹⁶¹ Although precisely this isolation attracted the support of newspapers and of members of the federal parliament, who (though doubtless also with a second agenda) harried Paterson, in particular, in the House.

Why, then, have the other cases remained in the public and legal memories while that of Mrs Freer has dropped out? The matter of the legal memory is the easier to explain: the other cases got up to a full court of the High Court and continue to serve as precedents.¹⁶² As to the public memory: those other cases have been consistently used to illustrate, even as conclusive proof, that the fear of working-class radicalism would drive Australian governments to extreme tactics. By contrast, on the political level the Freer affair was merely a blunder which exposed the preparedness of a Minister to use his statutory powers to impose his own (or his Department's) values on strangers. It otherwise made clear the preparedness of UAP Ministers to place the retention of power above the fair treatment of a foreign woman. It did not conclusively prove any governmental agenda, nor did it mobilise or politicise a clear segment of the Australian community. Beyond the publicity of 1936 and 1937, Mrs Freer as victim has appeared to symbolise a Britishness and a white identity that Australians have been keen to put behind them. Only in the light of the documentary evidence presented here does it emerge that her being a woman was a major factor in her treatment.

¹⁵⁸ *Ex parte Walsh v Johnson; In re Yates* (1925) 37 CLR 3 at 62-5, per Knox CJ.

¹⁵⁹ See Kisch, above n 7.

¹⁶⁰ *DT* 24 November 1936, 1.

¹⁶¹ There was also something both ironic and just about Kisch being given so much attention as a result of government efforts to remove him and about him being free to address meetings across the country while the government made every effort to detain him. There was no equivalent justice in Mrs Freer's story.

¹⁶² Had Mrs Freer been better resourced, she might have appealed to a full court of the High Court. Evatt J's judgment can be read as inviting an appeal so that the law might develop.

There was also, however, a question of privacy. While all of those involved in the other cases courted maximum publicity, Mrs Freer always sought privacy and eventually she was willingly allowed it. The *Daily Telegraph* editorialised, while reporting her arrival in Sydney, that the publicity about her had not been of her seeking and she should now be permitted to forget it.¹⁶³ One can, however, wonder whether the press would ever have been given such publicity had she not been (by accounts of both friend and foe) good-looking.

The Freer Case, by its very contrast with the more famous and well-remembered cases, illustrates both history's selective memory regarding the uses of the White Australia Policy and its dictation test; and the manipulability of those policy tools.

D Excluding British Subjects

The fact that the Freer Case involved banning a British subject from entry into Australia might be thought to be the most significant aspect of the case. However, returns detailing the persons refused admission to Australia each year reveal that persons of British nationality were usually amongst those excluded in each of the years between 1902 and 1936.¹⁶⁴ The first British passport holder to be excluded by use of the test, an Irish woman, had been excluded in 1914 after a dictation test in Swedish.¹⁶⁵ So Mrs Freer was neither the first nor the only British subject to be given the test in an alien tongue.

The reasons for exclusion of persons of British nationality in the years until 1935 would seem to cover the prescribed spectrum, with the possession of criminal records and the harbouring of disease being of roughly equal importance as excluding factors. However, individuals listed as being of British nationality were sometimes excluded by means of the dictation test: three in 1923, four in 1926, two in 1930, two in 1933 and two more in 1934.¹⁶⁶ Albeit that the returns do not specify the racial origins of persons of British nationality and, as a consequence, do not indicate how many of these individuals were *white* Britons like Mrs Freer.

Despite these figures, public discussion about the Freer affair was notable for the surprise that greeted the application of the dictation test to Mrs Freer, being a British subject.¹⁶⁷ This surprise was doubtless fuelled by a view that Mrs Freer was correct when she claimed: 'I have a British passport, which enables me to land in

¹⁶³ *DT* 13 July 1937, 6. See also 'Mrs. Freer Wants Quiet', *ibid* 7 (describing her as 'a radiant figure').

¹⁶⁴ See the annual returns contained in York, above n 4. The largest numbers of persons of British nationality were refused admission in 1911 (26), 1912 (41), 1913 (35) and 1914 (27). It should be noted that the returns do not specify the racial origins of persons of British nationality and, as a consequence, do not indicate how many of these individuals were white Britons.

¹⁶⁵ Yarwood, above n 3, 27-8; citing *Adelaide Advertiser*, 17 November 1914.

¹⁶⁶ See the annual returns contained in York, above n 4.

¹⁶⁷ This surprise was the subjeCT in part, of an editorial in the *Sydney Morning Herald* on 5 November 1936. The editorial repeated the view of Departmental officials that a passport holder was still subject to local regulations, even within the British Empire: *SMH* 5 November 1936, 10. See also *DT* 4 November 1936 2; 10 November 1936, 2; and 25 November 1936, 2.

any British Dominion'.¹⁶⁸ A statement on the part of the government that the possession of a British passport did not exempt the holder from compliance with any local regulations¹⁶⁹ probably increased apprehensions, as most of the passport holders in Australia in 1936 would have possessed British passports, there being no separate Australian citizenship at that time.¹⁷⁰ Apprehension among Australians that they might be subjected to the test on their return from overseas travel may have been created, or exacerbated, by a suggestion on the part of an anonymous constitutional authority that the test could be employed against a British passport holder – although (the author supposed) it had not been the intention of the framers of the Act that it would be so used.¹⁷¹ The commonly held view that white British subjects had unimpeded access to the various Dominions constituting the British Empire is significant in that it demonstrates a widespread misunderstanding of the benefits attached to the status of British subject. That this was not an outlandish view to have held is demonstrated by the reasons of Higgins J in the *Irish Envoys Case*.¹⁷²

The dismay about the application of the test to a white British subject may also indicate, despite suggestions that a cultural nationalism was rampant in this period, that more importance was attached by Australians to the status of British subject and to 'citizenship' of the British Empire than to Australian national citizenship. This preference for the status of British subject (although based on a misunderstanding as to the privileges attached to the status of the subject) arguably casts doubt on the idea of an 'Australian community', on which a number of important early immigration cases were conceptually dependent.¹⁷³ An apparent preference for the status of British subject (regardless of the fact that it may have been founded in part on a misunderstanding as to the attached rights) over that of Australian citizen would also explain the lack of any legislation to define Australian citizenship, at the time when other nations, such as Canada and South Africa, were so legislating.¹⁷⁴

¹⁶⁸ *DT* 30 October 1936, 1.

¹⁶⁹ *SMH* 3 November 1936, 11.

¹⁷⁰ An Australian citizenship was created from 1949 by the *Nationality and Citizenship Act 1948* (Cth), retitled in 1969 as the *Australian Citizenship Act 1948*. See further: Kim Rubenstein, 'Citizenship and the Centenary – Inclusion and Exclusion in 20th Century Australia' (2000) 24 *Melbourne University Law Review* 576.

¹⁷¹ The anonymous authority was probably Robert Garran, who in this period wrote a number of articles about legal matters for *Sydney Morning Herald* – such as the commentary on immigration law and the Freer case at *SMH* 6 November 1936, 12. The anonymous authority in the 3 November article states that, even though it was not intended that the test be applied to British subjects, 'a way was left open for a test in a European language to be applied to a British subject' (*SMH* 3 November 1936, 11).

¹⁷² *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 565-77.

¹⁷³ These also included *Potter v Minahan* (1908) 7 CLR 308 and *Donohoe v Wong Sau* (1925) 36 CLR 404. This idea remains current in the judicially generated test that an immigrant may be free from restriction by migration law if they have become 'absorbed' into the Australian community or 'body politic': eg *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

¹⁷⁴ *SMH* 12 June 1937, 17.

This confusion over belonging, as a British subject, to the ‘Australian community’ has – perhaps surprisingly – continued as a current issue in migration law. The disjuncture between legal membership of the Australian community, which appears to have been settled somewhere in the 1980s with the passage of the *Australia Acts*,¹⁷⁵ and the idea of a special status of British subjects within Australian law continues to haunt the High Court’s decisions on the exclusion of prohibited immigrants. In fact, until very recently, the decisions of the High Court on the scope of the constitutional ‘aliens power’ exhibited a peculiar tendency to raise arguments regarding the fundamental question of the status of many ‘members of the Australian community’ – especially white British subjects – who had made their homes in Australia and were for all intents and purposes Australian, save a crucial piece of documentation: the passport. The line of cases beginning with *Nolan* and culminating (so far) in late 2004 with *Singh*¹⁷⁶ held, after much wrangling and semantic gymnastics, that those who are not citizens are therefore aliens, regardless of their ‘membership’ of the Australian community. These cases are important for many reasons, not least because they illustrate a continued belief among Australians (including Australians on the High Court) that our history and culture include special preferences for those like Mrs Freer: British subjects.¹⁷⁷

If there are significant aspects of the public discussion of the Freer Case, they must include the ease with which critics of Paterson’s actions were able to translate deficiencies in the government’s handling of the case into breaches of important principles of British justice or of common law rights. Commentators in the newspapers, representatives of community groups and speakers in local legislatures referred repeatedly to ‘the liberty of the subject’. As early as July 1936 it was declared: ‘It is unthinkable in a democracy for a man or woman to be condemned without trial, by a secret tribunal.’¹⁷⁸ By November, the commentators had warmed to the task. The treatment of Mrs Freer breached, it was alleged, ‘the vital principle of individual liberty’.¹⁷⁹ It was suggested that ‘no one should be tried in the dark’¹⁸⁰

¹⁷⁵ *Australia Act 1986 (Cth)* and *Australia Act 1986 (UK)*. On the relevant timing of Australia’s independence for matters of immigration and alien status see *Sue v Hill* (1999) 199 CLR 462, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 and *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 143.

¹⁷⁶ *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 143, *Singh v Commonwealth* (2004) 209 ALR 355. In *Singh*, the parents were Indians and had entered Australia without visas; the issue was the status of their daughter, born in Australia in 1998.

¹⁷⁷ A remaining preference (the only one known to the authors) is that British subjects who have not become Australian citizens and who were on the electoral roll before 26 January 1984 are able to vote in elections: *Commonwealth Electoral Act 1918 (Cth)* s 93(1)(b)(ii). This is a preference in that for this group voting is voluntary whereas for all Australian citizens it is compulsory. British nationals can be naturalised as Australians with no effect on their British nationality.

¹⁷⁸ *DT* 13 July 1936, 6.

¹⁷⁹ Editorial, ‘Paterson and a Principle’, *DT* 12 November 1936, 6.

and that 'Star Chamber methods have never been acceptable to Australians'.¹⁸¹ Reference was made to the 'right of a British subject to know the offence for which he or she has been cruelly punished'¹⁸² and to 'the basic principle of British law that justice shall be denied to none, and that all shall be heard before they are condemned'.¹⁸³ Reference was also made to 'the right of individual freedom for all citizens who have committed no crime against British law'.¹⁸⁴ It was suggested that 'the accused should have an opportunity to prove innocence to courts of the land',¹⁸⁵ and that there should not be 'reliance on hearsay evidence'.¹⁸⁶ Reference was also made to Magna Carta¹⁸⁷ and to natural justice.¹⁸⁸ These are typical of the many references – some direct, others oblique – to British legal principles and rights throughout the course of the affair. Such widespread recourse to these terms says a great deal about the importance of the British legal heritage to the culture of white Australians in the period.

Equally prominent in the public discourse about the Freer affair were expressions indicating a heightened antipathy to bureaucratic decision-making (which, so it was reasoned, was not subject to public scrutiny, as was the making of statutes) and the intrusions of the executive on individual freedoms. A number of writers, including leading English judge Lord Hewart, gave credence to these notions from the late 1920s.¹⁸⁹ There was widespread dissatisfaction with the secrecy surrounding the decision to ban Mrs Freer and the curtailment of freedoms by executive action that the ban exemplified.¹⁹⁰ There was even greater dissatisfaction with the intrusion of the executive into a domestic matter or one appropriately left for the courts to resolve.¹⁹¹

E Political Implications and the Coalition Government

The case is of direct political significance, because it nearly brought an end to the coalition arrangement between the United Australia Party and the Country Party in

¹⁸⁰ DT 6 November 1936, 6. For her plight raised a core issue of civil liberties: 'It is unthinkable in a democracy', declared the *Daily Telegraph*, 'for a man or woman to be condemned without trial, by a secret tribunal. This is what happened to Mrs Freer.' (DT 13 July 1936, 6).

¹⁸¹ Motion before the 1937 Convention of the Women's Coordinating Council of the United Australia Party: SMH 26 November 1936, 11.

¹⁸² DT 6 November 1936, 6.

¹⁸³ SMH 5 November 1936, 5.

¹⁸⁴ DT 12 November 1936, 6.

¹⁸⁵ CPD vol 152, 1773.

¹⁸⁶ DT 3 December 1936, 2.

¹⁸⁷ DT 5 December 1936, 9.

¹⁸⁸ DT 27 November 1936, 6.

¹⁸⁹ See D C Pearce, *Delegated Legislation in Australia and New Zealand* (1977) 4; referring to Lord Hewart, *The New Despotism* (1929).

¹⁹⁰ For example, see the statement by Mrs P Cameron, President of the Feminist Club (DT 4 November 1936, 2). See also DT 3 November 1936, 6; SMH 3 December 1936, 9 and DT 8 December 1936, 5.

¹⁹¹ For an example, see the speech by UAP member Harold Holt (CPD vol 152, 1773). See also editorial, SMH 5 November 1936, 10.

the first days of December 1936. Country Party Ministers constituted the majority at the first meeting of Cabinet to be informed of the decision by the Country Party's Minister for the Interior, Paterson, to exclude Mrs Freer.¹⁹² Neither Lyons nor Menzies was at this Cabinet meeting, at which a reversal decision could, presumably, still have been made without disastrous consequences. Thereafter, United Australia Party members of Cabinet were notable for their (at best) lukewarm support for Paterson; it was noted in both the Parliament and the press that, in the crucial debate about the Freer affair in the House of Representatives on 12 November 1936, not one UAP Minister spoke in support of Paterson.¹⁹³ Newspaper reports throughout November indicated that a group of UAP Ministers within Cabinet was dissatisfied with the exclusion decision,¹⁹⁴ while UAP backbenchers were openly critical of Paterson and were more to the fore in attacks on Paterson than were members of the ALP Opposition. In late November, after Paterson's reliance on the evidence of a convicted perjurer was revealed,¹⁹⁵ calls for the Minister's resignation increased.

Prior to the Cabinet meeting scheduled for 2 December, a meeting between Lyons and Menzies allegedly resolved that a lifting of the ban should be recommended; commentators suggested that this would give Paterson no option but to resign.¹⁹⁶ It was at this point that Country Party members signalled that they would withdraw their support from the Ministry if Paterson was placed in a situation in which he would have to resign. Cabinet decided to continue the ban at its meeting on 2 December 1936¹⁹⁷; Paterson's position was temporarily secured and a split was averted.

¹⁹² Minutes of Cabinet Meeting of 4 November 1936 (NAA vol 16, part 2).

¹⁹³ *SMH* 13 November 1936, 12; *DT* 13 November 1936, 1.

¹⁹⁴ *DT* 7 November 1936, 5; 9 November 1936, 1; 11 November 1936, 1 and 6, and *SMH* 16 November 1936, 9.

¹⁹⁵ *CPD* vol 152, 2672-4. One of Paterson's pursuers was Rowland James, Member for Hunter. The informant was Walter Hunt, then living in Sydney, who had claimed that Mrs Freer was the same person as a 'Vera' Freer of whose adventurism he had been a victim in Bangalore. His motive seems to have been to gain employment through Paterson. The eventually acrimonious correspondence with Hunt appears to be comprehensively preserved in Mrs Freer's file, NAA A2998 1951/696. See also the record, dated 18 November 1936, of an official's interview with Hunt as directed by Paterson (NAA A6980 S203497 87-9). James quoted Hunt's correspondence extensively when attacking Paterson in the House on 26 November 1936 (*CPD* vol 152, 2331), but did not say how he came by it.

¹⁹⁶ See especially *DT* 1 December 1936, 1. The newspaper correctly predicted in its front-page headline that Mrs Freer would be admitted and that Paterson would resign.

¹⁹⁷ Minutes of Cabinet Meeting of 2 December 1936 (NAA vol 16, part 2).

It is true that, even if the Abdication crisis¹⁹⁸ had not then distracted public attention away from Mrs Freer's arrival from New Zealand and from the decision of Evatt J in the High Court, the end of the Parliamentary session would have reduced the pressure on the Cabinet to admit Mrs Freer. The possibility that the Coalition could be brought to an end by the Freer Case is nonetheless indicative of the extent to which it embarrassed UAP members and brought pressure to bear on them to reverse the decision.

It should be said that relations between the United Australia Party and the Country Party were tense well before the Coalition was formed and were not improved by a feeling amongst UAP members that the Country Party had excessive control of government policy; it cannot be claimed that the Freer affair had soured a previously harmonious relationship between members of the two parties.¹⁹⁹ The constant reminders in the press and on the floor of the Parliament of the full range of the government's failures fuelled antagonisms between the Coalition partners which had existed since the days of the first Lyons government. The existence of these antagonisms was hardly surprising, given the backgrounds of those in the combined Ministry. Ellis notes that this conservative Ministry consisted of individuals from what had been three parties, under a Prime Minister with a long Labor past. He suggests that, thanks to Lyons, at the beginning the Ministry was reasonably united. However, it was so despite an extraordinary array of enmities and antipathies, some of many years' standing.²⁰⁰ It also needs to be said that, if the Country Party had withdrawn from the Coalition, the UAP would probably have formed a minority government until the end of 1937, when an election was due. It would probably have done so notwithstanding the fact that Lyons' experience of minority government in the wake of the September 1934 election had been unhappy. The key policies of the Coalition would in all likelihood have remained in place.

The affair is also of significance because it was arguably the most damaging of the sequence of Ministerial blunders that, by mid-1937, saw the government under considerable pressure. These blunders included the unlawful associations proceedings under the *Crimes Act* against the Friends of the Soviet Union and the

¹⁹⁸ Key events in the Freer Case coincided, with an eerie frequency, with the reporting of key events in the relationship between Edward VIII and Mrs Simpson. The ban in British and Australian newspapers on reporting about of the relationship was lifted on the occasion of Mrs Simpson being granted a divorce from Mr Ernest Simpson on 27 October 1936, the day when news of Mrs Freer's exclusion from Australia first appeared in Australian newspapers. The standoff between the Baldwin Cabinet and the King (as a result of the Cabinet's decision to resign if Edward proceeded, as King, to marry Mrs Simpson) coincided with Mrs Freer's return to Australia in early December 1936. Having dominated the news, Mrs Freer all but disappeared from it. The announcement of her admission to Australia in early June 1937 coincided with the wedding of Edward and Mrs Simpson.

¹⁹⁹ Frank C Green, *Servant of the House* (1969) 103 and 110-11.

²⁰⁰ Ulrich Ellis, *A History of the Australian Country Party* (1963) 212.

Communist Party of Australia,²⁰¹ and the banning (without useful effect) of Kisch and of Irish radical Gerald Griffin.²⁰²

Martin writes, as a prelude to comment on the government's severe defeats in the March 1937 constitutional referenda²⁰³ and in the May 1937 Gwydir by-election: 'the extent of the damage which the Freer case caused the government can scarcely be exaggerated'.²⁰⁴ There were sound reasons, not connected to Mrs Freer, for the by-election and referenda defeats.²⁰⁵ However, contemporary commentators saw the government's conduct towards her as an important ingredient in these failures.²⁰⁶

The delayed admission of Mrs Freer added to other setbacks or embarrassments with reverberations in the Parliament when it met for the first 1937 session in mid-June of that year.²⁰⁷ Paterson and the government were reminded of the Freer Case on each day of the June 1937 parliamentary session, even though the overturning of the ban on Mrs Freer's entry had by then been publicly announced. The most sustained of the attacks occurred during savage debate on the Supply Bill during the overnight sitting of 28-29 June 1937.²⁰⁸ This debate immediately preceded the despatch to the Government Printer of the first 1937 draft of an ordinance that, when made in July, marked the democratic nadir of the Lyons government: the draconian *Unlawful Assemblies Ordinance*.²⁰⁹ The debate illustrates how the Freer

²⁰¹ In May 1935 the organization Friends of the Soviet Union indicated that it would challenge the ban on transmission of its publications by an action in the High Court. In a counter to this initiative, the Acting Attorney-General, Senator Thomas Brennan, invoked the unlawful associations provisions of the *Crimes Act* against the FOSC and the Communist Party of Australia. These organisations were consequently required to show cause why they should not be declared unlawful associations, and thereby banned. A flood of protest from across the community followed and eventually Menzies, who was uncomfortable about the reversed onus of proof, was required to negotiate a withdrawal of the actions. See Frank Cain, *The Origins of Political Surveillance in Australia* (1983) 251-2. See also Robert Menzies, *CPD* vol 153, 71-2. See further NAA A430 35/779 part 2, passim.

²⁰² A W Martin *Robert Menzies: a Life, vol 1 1894-1943* (1993) 133-7.

²⁰³ See Blackshield and Williams, above n 1, 1449.

²⁰⁴ Martin, above n 202, 206.

²⁰⁵ Gwydir had changed hands in the past and was lost on this occasion for reasons more to do with Country Party factionalism than with the electorate's response to the policies of the candidates. The referenda losses were able to be explained, in part, but the fact that support for and opposition to the proposals did not follow party lines. See Joan Rydon, *A Federal Legislature: the Australian Commonwealth Parliament 1901-1980* (1986) 210. See also Ellis, above n 200, 218-19 and Martin, above n 202, 208.

²⁰⁶ *The Round Table* vol XXVII, no 107, June 1937, 655-6 and *CPD* vol 153, 87 (William Scully, Member for Gwydir). See also, *CT* 8 March 1937, 2; 17 May 1937, 2; 3 June 1937, 4 and *SMH* 10 May 1937, 8.

²⁰⁷ These embarrassments included the failure to convene the Parliament earlier in the year (see *CPD* vol 153, 25, 61, 90, 524 and 531. There was also the problem of the ambiguous position of the government on the 40 hour work week (see *CPD* vol 153, 308-9 (Senator Sir George Pearce), 511-16 (Maurice Blackburn, Member for Bourke). There were also various other matters including issues of international trade (eg *Annual Register* 1937, 133).

²⁰⁸ *CPD* vol 153, 535, 580, 586-8 (Rowland James, Member for Hunter). Francis Baker, Member for Griffith, asked why Mrs Freer had been subjected to a dictation test while in 1936 '2,000 coloured people were admitted without difficulty': *CPD* vol 153, 535.

²⁰⁹ *Unlawful Assemblies Ordinance* 1937 (Cth).

affair had contributed both a general and an immediate sense of the pressured decision making which instigated this measure. It thus both exemplified and encouraged bad decision making by Coalition Ministers.

VI CONCLUSIONS

But of what longer term significance is the Freer Case?

Of the litigation, it might be said that it confirmed that the Minister responsible for immigration did not have unconditional exclusion powers. It might also be said to be an illustration of the point that Justice Evatt 'stood out against the distortion of immigration rules'.²¹⁰ But such a characterisation ignores the fact that the decision was one essentially in support of the status quo. The judgment did not prompt any amendments to the Act, enunciate any new and remarkable legal principles, or result in any changes to the operation of the dictation test. All that Evatt did, and perhaps all that he could achieve without abusing the constitutional separation of powers, was to push the envelope in the then rudimentary area of judicial review of administrative action. Then, as now, the reviewing judge's business is to consider only whether the action taken is authorised by a relevant law and not whether different action under such authorisation would have been preferable on moral or other grounds. The main reason for this limit is that, as to preferability, a Minister is responsible to the Parliament while a judge is answerable to no-one except any higher court. If Evatt had any immediate political preference, it may have been for the outcome that – by adhering strictly to his role and upholding the decision as a matter of law – he left Paterson twisting before the people.

But the case does stand out as an illustration of the tendency of Australian governments of various political stripes to manipulate immigration laws for ends unrelated to their original aims. Yet the Coalition Government's handling of the situation need not be seen as malicious. The Government was in a difficult situation. Once Cabinet, with important United Australia Party Ministers absent, had made the decision to support Paterson, it could not reverse that decision without ending the Coalition. Paterson, having made the ill-advised decision to ban Mrs Freer on alleged moral or family-protective grounds, was unable to obtain timely and reliable advice as to her alleged immorality. Even if such advice had been to hand, his freedom to use it would have been limited because of prevalent notions of 'gentlemanly' public behaviour towards women and because, more importantly, it would have lifted the lid on immoral behaviour, criminal under the law of India, within the Imperial Army.

The lasting significance of the Freer Case is that it not only illustrates a past tendency but also serves as a point of access to discuss questions of belonging, exclusion and identity that remain relevant to the Australian community today.

²¹⁰ Buckley, Dale and Reynolds, above n 82, 103.