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The barrister class is alive and well

By Anna Katzmann SC



In his lecture at the conclusion of the rhetoric series last year Michael McHugh AC QC lamented what he described as the fall of 'the barrister class' and mourned the end of what he called the 'Golden Age' of the Bar. In an article soon to be published with the other lectures in that series, Justice Michael Kirby AC CMG takes issue with his former colleague.¹ Justice Kirby is right to do so. Much as some may yearn for a return to the past, things were not always better in the past. The so-called 'Golden Age' was not only elitist but, like other class or caste systems, it was exclusive. Women did not belong, and generally speaking (well known exceptions like Barwick and McHugh himself aside) neither did men from humble backgrounds. Those who did were often derided. Blackstone complained about the increasing numbers of barristers drawn from the middle classes in the middle of the eighteenth century, predicting that the practising Bar was in danger of being dominated by 'obscure or illiterate men'.² As late as the twentieth century Ada Evans (and many women before and after her) was blackballed, unable to practise, despite her literacy and capacity, for no other reason than her sex.

Yet, who would now argue that women should not be barristers or that the profession should be open only to those from privileged backgrounds? Who would not accept that the profession has been enhanced by diversity?

The methods of persuasion have also expanded. So too have the forums in which the barristers' skills are required. These facts do not herald the demise of the barrister 'class', merely its redeployment. Barristers now appear for clients, not only in courts, but also before tribunals and in arbitrations

and mediations. They also act as mediators. The art of persuasion, which is the art in which barristers are most practised, lies at the heart of the mediation process. The changing face of the Bar reflects not its passing, but its reinvigoration.

Most importantly, there remains a pressing need for a group of independent advocates, call it a class of persuaders if you like, free of the constraints of employment, partnership or corporate responsibility, upon whom both the client and the judiciary can depend – a class of persuaders for whom the duty to the court remains paramount, unconcerned about the interests of anyone but the client, and ready and able to act for anyone, no matter how unattractive his or her cause, and how unpalatable his or her conduct may be.

Michael McHugh asserted that there has been a decline in the status of the Bar in recent decades. He attributes that decline to two factors: the rise of film, television, radio, singing and sporting stars; and the decline in barristers' incomes relative to other occupations. It is quite true, as McHugh pointed out, that relative to sports' and movie stars (at least international sports' and movie stars), barristers enjoy inferior incomes. That disparity, however, does not bespeak the decline of the Bar. It merely reflects the rise of the mass media, the power of advertising and, in particular, the advertising dollar and the international appeal of the celebrity entertainers. Barristers with celebrated international practices also command high incomes. Jonathan Sumption QC is a notable example. There are just a few of them around and their fees are generally not advertised. It is true that increasing regulation of the profession has seen an increase in control over fees. But the same is true of the medical profession. In any case, even if it is true that barristers' fees have declined in real terms, if that is the price we must pay for improving access to justice, then it is a price worth paying.

In its Edinburgh declaration, the inaugural conference of the International Council of Advocates and Barristers, held in 2002, noted that 'the independence of courts is essential to the functioning of democracies, and that the independence of the legal profession in turn is essential to the independence of the

courts'. The conference also stressed that referral Bars, together with their professional organisations, 'have a particularly important role to play in defending the independence of the courts and in affording access by the public to them'. Recently, the president of the Victorian Bar was castigated by the attorney-general in his state for daring to criticise the preferment of a magistrate as an acting judge. Whatever the merits of that particular appointment, standing up for the principle of the independence of the judiciary is an important function of the independent Bar.

There is no doubt that Australia continues to enjoy a strong, vibrant and independent bench and Bar but we must always be vigilant.

Others are usurping the roles barristers traditionally fulfilled. Competition is all very well but the barrister's advocacy skills and experience, and the independence that a barrister enjoys, gives a barrister the edge in many areas into which solicitors are now expanding.

As the former chief justice of Zimbabwe, Hon Anthony Gubbay pointed out at the Edinburgh World Bar Conference, it is generally accepted that 'a society in which the rule of law is meticulously observed is one in which a climate of legitimacy and a strong, vibrant and independent judiciary and Bar, are evident'.³ He reminded us that an independent Bar acts as a bulwark against oppression. He went on to say that: 'a Bar which is loath to challenge before the courts enactments and actions viewed as in conflict with the rule of law, because of political pressure, an unwillingness to attract criticism from the government or the public, or from fear of an adverse impact upon livelihood, fails in its allied duty and function to ensure that the rights of the individual are respected and enforced.' Fortunately, there have been barristers in Zimbabwe⁴ prepared to take on the government, sometimes at great personal cost. The same is true of Pakistan where the Bar played a leading role in the opposition to General Musharraf's attacks on the independence of the judiciary and several prominent barristers were arrested and held in custody.

Closer to home Australian barristers travelled to South East Asia to argue against the death

penalty for Australian citizens. Others have spent their vacations in the poorest of countries like Bangladesh and Tonga teaching advocacy, or trying to establish or re-establish the rule of law in nations torn apart by war, like East Timor. Since 2006, the Regional Assistance Mission to the Solomon Islands (RAMSI) has engaged 10 barristers from jurisdictions around Australia to help rebuild the legal system in that country. Recently, Bar councillors Nye Perram SC and Rachel Pepper were engaged by the ousted prime minister of Fiji, Laisenia Qarase to appear in Fiji before its High Court to challenge his removal and his replacement by the coup leader and self-appointed interim prime minister, Frank Bainimarama. The case was broadcast on Fiji television. The assistance Perram SC and Pepper provided was acknowledged as 'yet another inspiring example of how the great engine of the law can be enlisted to give hope to victims of injustice in our region of the Pacific and of military oppression in Fiji in particular' – 'advocates prepared to devote [their] skills and learning to overcoming tyranny' – 'in the finest traditions of the profession'.

These experiences suggest that the barrister class is alive and well, doing what it does best.

Endnotes

1. The Hon Justice Michael Kirby, 'Rediscovering Rhetoric: Rhetoric in Law – A case for optimism?'
2. David Lemmings *Gentlemen and Barristers, The Inns of Court and the English Bar 1680-1730*, Oxford Historical Monographs, Clarendon Press, 1990, pp 71-2; Blackstone *Commentaries*, i, 33.
3. 'The Challenge of Independence', A paper delivered at the inaugural World Bar Conference, Edinburgh, 28 June 2002
4. There is a fused profession in Zimbabwe these days but a small de facto independent Bar continues to operate there.



This issue of *Bar News* highlights the diversity of issues and interests which engage the Bar.

An annual feature of *Bar News* is the publication of the Maurice Byers Address, this year delivered by the Right Hon Dame Sian Elias, chief justice of New Zealand, on the topic of 'Judicial Review Today'. The paper tracks the developments in judicial review over the last 50 years and, of particular interest, engages in an extended comparative law analysis and reflection.

Feature articles in this issue focus on environmental law and climate change with papers by Clifford Ireland, a new member of the Bar, and Dr Jane Macadam of the University of New South Wales whose paper was originally delivered as part of the continuing legal education programme. That programme has proved to be one of the great innovations in the corporate life of the NSW Bar in the last five years. The quality of the papers is invariably high, and the breadth of topics covered impressively diverse. The seminars also represent an excellent opportunity for members of the Bar to interact in a collegial atmosphere.

Richard Beasley follows up his interview with Stephen Kiem, featured in the last issue, with an interview with David McLeod, the lawyer for David Hicks. This makes for quite compelling reading, and McLeod does not hold back in his views as to the former government's consideration for the rule of law in the context of that case.

There is also a wide-ranging interview with the new Commonwealth attorney-general, the Hon Robert McClelland whose views as to the role of the attorney-general vis-à-vis the judiciary will be viewed by many as a welcome return to orthodoxy.

A spotlight is also shone upon a small but dedicated band of barristers who have an active engagement as reservists with the armed services. Gregory Nell SC has contributed a piece in relation to the navy legal panel, whilst recent recruit, Kate Traill, recounts her personal experiences at Jervis Bay. These articles coincide with the establishment of a new Australian military court, the details of which are set forth in a piece by Cristy Symington. It is to be hoped that this new body debunks the view, variously attributed to Georges Clemenceau and Groucho Marx, that 'military justice is to justice as military music is to music'. As a counterpoint to Kate Traill's travails, and taking advantage of the lapse of copyright, I have also reproduced the account by that famous barrister, W S Gilbert, as to how Sir Joseph Porter KBE rose to the rank of First Lord of the Admiralty without ever going to sea.

Outstanding commitment to public service is exemplified in the careers of the recently retired Keith Mason and the late Kim Santow. The recording of the details of such careers in a journal such as *Bar News* is important not simply for the historical record but also because their contributions speak volumes for the great contributions which public spirited lawyers can and routinely do make to the wider community. As Chief Justice Spigelman observed, on the former's retirement, 'Today marks the culmination of 23 years of public-spirited service to the legal system of this state that has rarely been surpassed.' If his retirement address (partly reproduced) was anything to go by, the future observations of the former president on the development and course of Australian law will be eagerly awaited.



CHRISTIAN MEDITATION GROUPS

Four ecumenical Christian meditation groups meet each week at St James' Church at the top of King Street in the city. The groups are part of a worldwide network of over 1500 groups meeting in about 110 countries.

The ancient Christian tradition of meditating on a simple sacred phrase was revived by the English Benedictine monk John Main (1926-1982). Meditation involves coming to a stillness of spirit and a stillness of body. It is the aim given by the Psalmist ("Be still and know that I am God"). Despite all the distractions of our busy lives, this silence is possible. It requires commitment and practice. Joining a meditation group is a very good start.

Anyone who already meditates or who is interested in starting to meditate is welcome. You may quietly join the group and slip away afterwards or stay around to talk or ask questions.

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Women at the Bar: one alternative perspective

Dear Sir,

I take issue with Professor Ross Buckley's opinions concerning women at the Bar (Summer 2007/2008). Professor Buckley argues that the Bar must take steps to increase the proportion of women barristers to something in the order of 50 per cent, reflecting the proportion of law graduates who are women. Any person deciding whether to come to the Bar considers carefully whether the demands of practice as a barrister are compatible with the needs of their family, or perhaps a planned future family. Generally speaking, this consideration tends to weigh more heavily with women than with men because women are more likely to take the role of primary carer for children. This aspect of the decision whether to come to the Bar is a highly personal one. In my opinion, the Bar offers many benefits for women – satisfying work, independence and flexibility. However, those benefits do have a price, including outsourcing many aspects of motherhood. Whilst the Bar should ensure that there are no artificial barriers to women, it should not berate women into becoming barristers just for the sake of making up the numbers.

Whilst the demands of practice may be a barrier for some women who might otherwise pursue a career at the Bar, they are not an artificial barrier. Clients involved in litigation are engaged in a stressful, high risk and high cost exercise. They are entitled to expect nothing less than the highest standards of preparation and performance from their barristers and this will often involve long hours of work. The Bar cannot change this.

Professor Buckley labels the Bar as a 'blokey place that prefers blokes'. He claims to have a unique perspective about this because he is an 'outsider'. However, as an 'insider', I experienced first hand in my early years at the Bar the support of many of my male colleagues in introducing me to solicitors and recommending me for briefs. I also benefited from the New South Wales Bar Association's mentoring scheme for women barristers of 2-3 years' seniority. (There is no equivalent scheme for men.) My floor has supported me by allowing me to licence my chambers during two periods of maternity leave. In short, I do not feel myself to be the victim that Professor Buckley would cast me as. Of course, I can only speak about my own experience. I simply question Professor Buckley's authority to speak with no experience, either as a woman or as a barrister.

Kate Williams
Eleventh Floor Selborne Chambers

Fair trial guarantees in international humanitarian law

International humanitarian law enshrines a number of fundamental judicial guarantees, violation of which may amount to a war crime under national and international law, writes Emily Camins.*

Introduction

International humanitarian law (IHL) is the body of rules that in wartime protects people who are not, or are no longer, participating in the hostilities. Its central purpose is to limit and prevent human suffering in times of armed conflict. In recognition of the vulnerability of people detained by an opposing power during warfare, IHL has for over a century required that prisoners of war be treated humanely.¹ Legal protection of people detained in the course of war has steadily expanded in scope and detail, such that all persons in the power of a party to the conflict are now entitled to minimum standards of treatment and fundamental judicial guarantees.²

Changes in recent years in the nature of warfare and the classification of belligerents by parties to a conflict have resulted in much debate as to the rights and obligations of individuals and states involved in conflict. This article aims to clarify some of the issues that have been the subject of discussion. It first provides an overview of IHL and when it applies. It then proceeds to examine the obligation of detaining powers to provide fundamental judicial guarantees to people arrested or detained in the course of armed conflict.

What is international humanitarian law and when does it apply?

The rules of IHL are contained primarily in the four Geneva Conventions of 12 August 1949³ and their two Additional Protocols of 8 June 1977.⁴ International humanitarian law applies in situations of armed conflict, imposing obligations and conferring rights equally on all sides regardless of who started the fighting. Although the instruments of IHL do not expressly define 'armed conflict', the International Criminal Tribunal for the Former Yugoslavia has held that an armed conflict exists 'whenever there is a resort to armed force between states, or protracted armed violence between governmental authorities or organised armed groups or between such groups within a state.'⁵

Reflecting the traditional paradigm of war as conflict between nations, IHL draws a distinction between international armed conflict (hostilities between states) and non-international armed conflict (for example,



civil war), setting out different rules which apply in each context. Notwithstanding this distinction, provided a person is detained in the context of an armed conflict – be it international or non-international – he or she will be entitled, to certain fundamental judicial guarantees at a minimum, under IHL.⁶

Minimum fair trial guarantees in international humanitarian law

In 1948, the international community adopted the Universal Declaration of Human Rights, recognising the right of all people to a fair and public hearing by an independent and impartial tribunal.⁷ The following year, the Geneva Conventions were adopted to protect the rights of people in the context of armed conflict. All states have now ratified or acceded to the Geneva Conventions,⁸ and are therefore bound by their terms.

(a) Common Article 3

Article 3 common to the Geneva Conventions (often known as Common Article 3) specifies a number of minimum standards which must be met in the case of armed conflict 'not of an international character' occurring on the territory of a state party to the Geneva Conventions. Case law, however, has interpreted Common Article 3 as containing minimum standards of customary international law which protect people in armed conflict, whether classified as international or non-international.⁹

Broadly, the provision requires that persons who are taking no active part in hostilities, including those who have been removed from the fighting by detention, be treated humanely.¹⁰ More specifically, Common Article 3(1)(d) prohibits:

[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised people.

The International Committee of the Red Cross in its 2005 study on customary international humanitarian law¹¹ reviewed the international practice and jurisprudence in relation to Common Article 3. Following

Legal protection of people detained in the course of war has steadily expanded in scope and detail, such that all persons in the power of a party to the conflict are now entitled to minimum standards of treatment and fundamental judicial guarantees.

* Emily Camins, International Humanitarian Law Program, Australian Red Cross

the review, the authors of the study found that ‘regularly constituted court’ in Common Article 3(1)(d) means ‘established and organised in accordance with the laws and procedures already in force in a country.’¹² As discussed further below, this standard was accepted by the United States’ Supreme Court in *Hamdan v Rumsfeld, Secretary of Defense*.¹³

In the *Hamdan* case, the court considered whether the petitioner, Salim Ahmed Hamdan, was entitled to the protection of the Geneva Conventions. Hamdan, a Yemeni national, was captured in Afghanistan in 2001 by militia forces and turned over to the US military. In 2002 he was transported to an American prison in Guantanamo Bay, Cuba. Hamdan filed a petition challenging the authority of the military commission convened by the president of the United States to try him.

The court, upholding Hamdan’s petition, found that Common Article 3 applied ‘even if the relevant conflict (that is, the conflict in Afghanistan) is not one between signatories’.¹⁴ The court refrained from characterising the nature of the conflict in Afghanistan as either international or non-international, instead taking the view that the standards in Common Article 3 formed a minimum standard of protection applicable to those detained in the conflict.¹⁵

The court then examined whether the military commission process met the minimum standards set out in Common Article 3. After reviewing the jurisprudence and commentary on the matter, the court found that the military commission process fell foul of the Common Article 3(1)(d) requirement of a ‘regularly constituted court’, as no practical need to deviate from the regular military justice system and establish a special tribunal had been demonstrated.¹⁶ The court went on to find that the military commission process also failed to afford ‘all the judicial guarantees which are recognised as indispensable by civilised people’ because, as well as deviating from the procedures governing courts-martial for no ‘evident practical need’, it also dispensed with principles articulated in Article 75 of Protocol I.¹⁷

Having held that the military commission violated basic principles enshrined in Common Article 3, the court did not consider it necessary to decide whether the more extensive protections of the Geneva Conventions, including those afforded to a prisoner of war, applied.

(b) Article 75 of Protocol I

In interpreting the Common Article 3 phrase ‘all the judicial guarantees which are recognised as indispensable by civilised people’, the court drew on Article 75 of Protocol I. Article 75 not only extends the fundamental fair trial guarantees to international armed conflicts, it also elaborates on and clarifies Common Article 3, including in respect of the right to a fair trial.¹⁸

Article 75 prescribes a number of fundamental rights to which a person is entitled if he or she is:¹⁹

- ◆ in the power of a party to an armed conflict;
- ◆ affected by (meaning touched by or concerned with)²⁰ an international armed conflict or occupation; and
- ◆ does not benefit from more favourable treatment under the Geneva Conventions or Protocol I.



Many argue, and it appears from the decision in the *Hamdan* case, that the judicial guarantees contained in Article 75 reflect customary international law applicable in not only international, but also internal, armed conflicts.²¹

In addition to prohibiting absolutely certain acts against the person, such as torture and outrages upon personal dignity,²² Article 75 specifies several fundamental fair trial rights to which a detained person is entitled. Reflecting Common Article 3, Article 75(4) provides that no sentence may be passed nor penalty executed ‘except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure’. Article 75(4) enumerates several such principles.

The first principle ‘[provides] for an accused to be informed without delay of the particulars of the offence alleged against him or her’.²³ This principle is reflected in international treaties (including Article 14(3)(a) of the International Covenant on Civil and Political Rights²⁴), and in national legislation and military manuals.²⁵ While neither Protocol I nor the commentary to it expands on the meaning of ‘without delay’, the Human Rights Committee has commented in relation to Article 14(3)(a) of the ICCPR that the relevant information must be:

given ... as soon as the charge is first made by a competent authority. ... [T]his right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such.²⁶

In addition, while not specified in Article 75(4), it is widely considered that the right to trial without undue delay, provided for in the Geneva Conventions²⁷ and numerous human rights conventions,²⁸ is another essential principle of judicial procedure.²⁹ This principle applies from the time of the charge to the final trial on the merits, including appeal.³⁰

How long a delay is too long? Jurisprudence suggests it is necessary to assess the legality of a delay on a case-by-case basis, having regard to such factors as the complexities of the case, the behaviour of the



Detainees in orange jumpsuits sit in a holding area at Camp X-Ray at Naval Base Guantanamo Bay, Cuba. Photo: US Navy file photo / Newspix

accused, and the diligence of the competent authorities in their conduct of the proceedings.³¹ Cases decided on the basis of Articles 9 and 14 of the ICCPR, which enshrine the right to liberty and the right to a fair trial without delay respectively, have found that periods of pre-trial detention of 22 months and 23 months breached the ICCPR.³²

Other standards set out in Article 75(4) of Protocol I include the principles that an accused must be provided with all necessary rights and means of defence and may only be convicted on the basis of individual criminal responsibility, the principle of legality (that is, that a person must not be convicted of a crime on account of an act which was not criminal at the time it was committed), the presumption of innocence, the right to be present at one's trial, and the right to cross-examine witnesses.³³

Almost all the judicial guarantees in Article 75(4) of Protocol I are reflected in corresponding provisions of international human rights conventions, such as Article 14 of the ICCPR. While human rights conventions apply alongside rules of IHL in times of armed conflict,³⁴ some of their provisions, including Article 14 of the ICCPR, may be derogated from in time of proclaimed public emergency.³⁵ Conversely, the guarantees enshrined in Common Article 3 and elucidated in Article 75 reflect minimum standards applicable in armed conflict which do not allow for any exceptions.³⁶

Conclusion

The right to a fair trial without undue delay is recognised as a minimum standard of humane treatment that applies during both wartime and peacetime. The judicial guarantees protected by Common Article 3 of the Geneva Conventions and clarified in Article 75 of Protocol I apply to persons detained in the course of armed conflict without distinction as to religion, race or political leaning. The judicial guarantees enshrine the right of a detainee to basic procedural safeguards such as the

presumption of innocence, the right to be present at one's own trial and be privy to the evidence, and the right to be informed of the charges against one without undue delay. Moreover, customary international law requires 'swift justice' in the determination of a case. Failure to afford fundamental judicial guarantees might amount to a war crime under national or international laws.³⁷

Except insofar as IHL proscribes prosecutions for acts which were not criminal at the time they were committed,³⁸ it does not prevent war detainees from being tried under international or national criminal laws. It does not shield those detained from justice; rather, it seeks to ensure that the justice process meets fundamental standards of fairness.

Endnotes

1. Emily Camins is admitted to practise as a barrister and solicitor of the Supreme Court of Western Australia. She is currently undertaking a Master's degree in Public and International Law at the University of Melbourne. The author acknowledges the input of Pia Riley of the Australian Red Cross in the preparation of this paper. See: the Hague Convention with Respect to the Laws and Customs of War on Land (1899) 32 Stat. 1803, Annex Article 4. For an earlier national example of laws protecting prisoners of war, see Section III of the Instructions for the Government of Armies of the United States in the Field (also known as the Lieber Code), 24 April 1863.
2. See: *Prosecutor v Tadi* Case No. IT-94-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (ICTY App. Chamber, 2 Oct 1995) ('Prosecutor v Tadi'), ¶102.
3. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) 75 UNTS 31 ('First Geneva Convention'); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked members of Armed Forces at Sea (1949) 75 UNTS 85 ('Second Geneva Convention'); Geneva Convention Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135 ('Third Geneva Convention'); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287 ('Fourth Geneva Convention').
4. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977) 1125 UNTS 3 ('Protocol I') and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977) 1125 UNTS 609 ('Protocol II').
5. *Prosecutor v Tadi*, ¶70.
6. See: *Prosecutor v Tadi*, ¶102; Geneva Conventions, Common Article 3.
7. Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, Article 11.
8. See: www.icrc.org/ihl. Australia signed the four Geneva Conventions on 4 January 1950, ratified them on 14 October 1958, and implemented them with the *Geneva Conventions Act 1957* (Cth).
9. See: *Prosecutor v Tadi*, ¶102 (stating that the character of the conflict is irrelevant in deciding whether Common Article 3 applies); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Judgment of 27 June 1986), 114.

10. Geneva Conventions, Common Article 3(1).
11. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Volume 1) (2005).
12. Henckaerts and Doswald-Beck above n 11, 355.
13. *Hamdan v Rumsfeld, Secretary of Defense* 548 US (2006) ('Hamdan case').
14. *Hamdan* case, 66.
15. *Hamdan* case, 65-67.
16. *Hamdan* case, 70.
17. The specific principles to which the court referred are that an accused must, absent disruptive conduct or consent, be present for his or her trial and must be privy to the evidence against him or her: per Stevens J at 71, delivering the opinion of the court.
18. See: International Committee of the Red Cross ('ICRC') Commentary on Protocol I, ¶3084; Derek Jinks 'The Declining Significance of POW Status' (2004) 45 *Harvard International Law Journal* 367, 429.
19. Protocol I, Article 75(1).
20. See ICRC Commentary to Protocol I, ¶3011.
21. See *Hamdan* case, 70-71; Henckaerts and Doswald-Beck above n 11, rule 100.
22. Protocol I, Article 75(2)(a)(ii) and (b) respectively.
23. Protocol I, Article 75(4)(a).
24. International Covenant on Civil and Political Rights (1966) 999 UNTS 171 ('ICCPR').
25. For examples see Henckaerts and Doswald-Beck above n 11, rule 100.
26. Human Rights Committee, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, ¶8.
27. See: eg Third Geneva Convention, Article 103 and Fourth Geneva Convention, Article 71.
28. See: ICCPR, Articles 9(3) and 14(3)(c).
29. See: Henckaerts and Doswald-Beck above n 11, 364 and the state practice referred to therein.
30. Henckaerts and Doswald-Beck above n 11, 364.
31. See: *Giménez v Argentina*, Case 11.245, Report No. 12/96, Inter-Am. CHR, OEA/Ser.L/V/II.91 Doc. 7 at 33 (1 March 1996), ¶111.
32. *Sextus v Trinidad and Tobago* HRC Communication No. 818/1998 UN Doc CCPR/C/72/D/818/1998 (16 July 2001); *Brown v Jamaica* HRC Communication No 775/1997, UN Doc. CCPR/C/65/D/775/1997 (Mar 1999), ¶6.11.
33. Protocol I, Article 75(4).
34. See: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, ICJ Reports 2004 (9 July 2004), ¶106; Human Rights Committee General Comment No. 31 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, ¶11.
35. See: ICCPR, Article 4. See further Human Rights Committee, General Comment No. 29 'States of Emergency (Article 4)' (2001) UN Doc. CCPR/C/21/Rev.1/Add.11.
36. See: ICRC Commentary to Protocol I, ¶3032.
37. See: Rome Statute of the International Criminal Court (1998) 2187 UNTS 90, Article 8(2)(a)(vi) and 8(2)(c)(iv). For an Australian example, see: Commonwealth Criminal Code (being the Schedule to the *Criminal Code Act 1995* (Cth)), s268.76.
38. See Protocol I, Article 75(4)(d).



Specialisation at the Bar

By Duncan Graham

Greater public confidence in the quality, efficiency and cost of the services provided by the Bar could be achieved through a system of specialist accreditation. The potential for specialist accreditation of barristers is already recognised by virtue of section 86 of the *Legal Profession Act 2004* (NSW). No system has yet been devised. It is time for a system to be implemented.

Such a system should be introduced if only for the reason that a barrister's practice has changed. It is no longer enough to think of oneself as a specialist advocate. In many areas of practice, little time is spent in court. A barrister's practice involves a diverse range of out-of-court work. Solicitors and clients increasingly wish to engage independent specialist lawyers and not just advocates.

In order to move to a system of specialisation, it is first necessary to debunk the myth of the generalist. In the 'good old days', barristers could be generalists. The history of the Bar is replete with tales of the great generalists, able to practise in multiple jurisdictions with equal skill and success. Those days are gone. They will not return. The sheer weight of information to be read and understood in each particular area of law makes it impractical if not dangerous to be a generalist. This does not mean that it is inappropriate to practise in more than one area. But it is inappropriate to be a true generalist. Today, a barrister hoping to be a generalist will not end up being a champion of the Bar, but will instead become a 'jack of all trades'.

Lessons on the importance of specialisation can be learned from other professions. In medicine, for example, medical practitioners engage in a course of study and practical experience in order to be accredited as specialists in a particular area. It is only after this rigorous process has been completed that a doctor is entitled to hold himself or herself out as a specialist cardiologist or orthopaedic surgeon. Once accredited, the doctor becomes a member of a specialist association. The public, and referring general practitioners, are reassured by this process. They can be confident that patients will be managed by medical practitioners with the requisite expertise.

The situation for barristers is in stark contrast. At present, barristers may end up being 'specialists' in particular areas for a number of reasons, most of them unsatisfactory. Expertise may be illusory. A barrister could 'fall' into an area by accident. Barristers may hold themselves out as experts in various areas, even though they have had no relevant training or experience. A barrister may obtain briefs because he is a good 'long luncher' or a 'mate' of a particular solicitor. He or she may have written an article on drains, and then is forever typecast as a draining law expert.¹ A lot depends on luck. While frequently, through word of mouth, a client may end up in the hands of a barrister with acknowledged expertise in a particular area, it is not always the case. A client has no way of knowing that the barrister met in chambers has any relevant study or experience in the particular area. He or she blindly accepts the word of the solicitor that the barrister is such an expert. And if he or she sounds authoritative, the client will be none the wiser.

The point to all this is that it should not be a matter of luck or paying for expensive lunches or talking on the seminar circuit. A young lawyer should not have to write an article on drains in a Law Society publication. None of these problems would arise if there were a transparent system

of specialist accreditation. There would be no doubt about a barrister's expertise if he or she were an accredited specialist.

Specialisation promotes greater judicial confidence in a barrister. If matters involving a particular area of law are litigated in a specialist tribunal (e.g. Dust Diseases Tribunal, Land & Environment Court), then proceedings will be dealt with more efficiently and the bench will be reassured by hearing from counsel who are acknowledged specialists in the field. There can be no doubt that, for example, in the area of crime, it is not only imprudent for a barrister to 'dabble' in crime, but it is frowned upon by judges hearing criminal cases.

There may be teething problems with specialisation. Some areas of practice are easily compartmentalised: for example, crime, tax, insolvency, medical negligence, building and construction law. In other fields, the lines may be hard to draw. There may be some crossover between disciplines. A practical solution could be devised. Just because it may be difficult is not a good reason for dismissing the concept.

The broad areas of specialisation established by the Law Society do not go far enough. It is inappropriate to suggest that a general personal injury specialist will have expertise in medical negligence law. Medical negligence law requires some familiarity with, or study of, medical and scientific principles.

Specialisation would provide greater certainty for a young barrister's career progression. Junior barristers could follow a clear career path to become a specialist in a particular area of law. Specialisation would also make it easier to change direction in one's career. Unfortunately, the recent mentoring programme was unsuccessful. Specialisation would overcome many of the problems encountered in that programme. While studying to become an expert in taxation, for example, a young barrister (or a barrister wishing to change direction) could practise as a general advocate (or continue to practise in his or her old area). The absence of specialist qualifications would not prohibit practice in a particular area; it would simply indicate that the barrister had not yet undergone specialist training and experience. Whether a client or solicitor is content with a general practitioner providing a service (perhaps, at a lower cost) would then be a matter of informed choice.

In any system of specialisation, there would need to be a grandfathering period. Practitioners who have practised in a particular area for a number of years would need to be acknowledged as specialists in that field. Thereafter, specific training and study would need to be performed before accreditation could be given.

A note on change: The mere fact that some parts of practice at the Bar have been present for centuries is no excuse for avoiding change. The demands of practice have changed. The Bar should adapt to the changing environment. The current system runs the risk of entrenching laziness, inefficiency, unsafe practices and expertise by claptrap. A system of specialist accreditation should be conducted and approved by the Bar Council under section 86 of the *Legal Profession Act 2004*.

Endnotes

1. See: Lee Aitken 'Analysing a judgment or how to develop a practice' (2007) 30 ABR 114.



Animal law

By John Mancy

The Australian Law Reform Commission journal *Reform* devoted its summer issue (91 2008) to animal welfare and animal rights – perhaps ‘the next great social justice movement’.¹

‘As with other social justice issues,’ ALRC President Professor David Weisbrot wrote, ‘activists are seeking to push the existing boundaries and achieve law reform through a range of strategies, including:

- ◆ lobbying for legislative change;
- ◆ utilising targeted and test case litigation;
- ◆ undertaking community and professional education campaigns; and
- ◆ harnessing the power of consumers in the marketplace’.

Professor Weisbrot suggested some legal strategies that might ‘offer people of good will the ability to act on their consciences’:

- ◆ development of good food labelling laws that address and reward the ethical and humane treatment of animals: ‘A task for law reformers would be to determine how to integrate and balance animal welfare issues with public health concerns and industry economics in the setting and enforcing of food standards’, he wrote.
- ◆ reform to provide greater clarity and protection to consumers seeking to exercise an informed choice’ when, for example, confronted with shelves of ‘factory-produced eggs misleadingly stamped ‘farm fresh’, ‘all natural’, ‘barn raised’ and so on’.
- ◆ ‘Another useful law reform exercise would be to examine the effectiveness of the legislation covering animal welfare and anti-cruelty (which in Australia is a matter for the states and territories) – both in terms of policy and practice,’ Prof. Weisbrot wrote.

For example, s530(1) of the Crimes Act 1900 (NSW) is fairly typical of such laws insofar as it prohibits ‘serious animal cruelty’, an offence committed where a person, ‘with the intention of inflicting severe pain:

- (a) tortures, beats or commits any other serious act of cruelty on an animal, and
- (b) kills or seriously injures or causes prolonged suffering to the animal’.

On its face, this would appear to provide more than adequate protection, especially since the maximum penalty for breach is imprisonment for up to five years. However a major loophole is provided in subsection (2), according to which persons are not criminally responsible if they have acted in accordance with ‘routine agricultural or animal husbandry activities, recognised religious practices, the extermination of pest animals or veterinary practice’, or with legal authority under the Animal Research Act 1985 (NSW).

And, ‘perhaps not surprisingly,’ Professor Weisbrot added, ‘given the size, influence and economic importance of the agriculture and livestock industry in Australia, such practices as factory farming and battery egg production are regarded as ‘routine activities’ for the purposes of the law’.



Following a relatively unheralded amendment late last year, the right to bring a private prosecution under the *Prevention of Cruelty to Animals Act 1979* (NSW) (POCTAA) and its associated Regulations was effectively removed. Prior to the amendment, neither the Act nor the Regulations specified who had the authority to prosecute. So that, by virtue of s14 of the *Criminal Procedure Act 1986* (NSW), a private prosecution was an available avenue for any animal protection law organisations or individuals.

The right to institute proceedings for an offence under s34AA of the amended POCTAA, or the regulations, is now restricted to two charitable organisations, the RSPCA and the NSW Animal Welfare League; the police; the responsible minister; the director-general of the Department of Primary Industries; or a person who has the written consent of the minister or the director-general. The privately funded Animal Liberation (founded in 1976) and Voiceless, the fund for animals, are no longer able to initiate proceedings under POCTAA.

In the United States the discipline of animal law is well established and taught in almost 100 law schools. Three specialist law journals are published. Since 1979, the Animal Legal Defense Fund has fostered the field of animal law among legal professionals and in law schools; worked with law enforcement and prosecutors to seek maximum penalties for animal abusers and continually filed ‘cutting-edge lawsuits to stop the abuse of companion animals, and animals abused in industries including factory farming and the entertainment business’. There about 25 state and national professional bar association sections and committees in the US.

In Australia, the teaching of animal law courses is a far more recent phenomenon. The first course was offered by the University of NSW in 2005. Since then, courses have been offered also at Southern Cross in northern NSW, Griffith University in Brisbane and (this year) at Wollongong University. Courses are scheduled in 2009 for Sydney University, Monash University, Bond University and Flinders University.



The inaugural issue of Australia's first animal law journal, *The Australian Animal Protection Law Journal*, a peer-reviewed biannual, is due out in June.²

The only professional animal law group in NSW is the Young Lawyers Animal Law Committee which last year staged Australia's first Animal Law Conference.

Victoria has a Barristers Animal Welfare Panel. Melbourne-based Lawyers For Animals Inc. is a volunteer-based organisation which 'seeks to strengthen Australia's protection of animals through education and law'. And, in Queensland, there is BLEATS – Brisbane Lawyers Educating and Advocating for Tougher Sentences in animal cruelty cases.

Professor Weisbrot, in the 'Animals' issue of Reform concludes:

Just as we now look back on the past 40 years with some bewilderment – and embarrassment – that we were so slow to recognise the human rights of indigenous people, children, people with a disability, older people and others, it is intriguing to wonder whether our children will look back in 40 years and wonder how we possibly failed for so long to take animal rights seriously.

Endnotes

1. In the view of speakers at the 2006 Australasian Law Reform Agencies Conference who were trying to identify the 'over the horizon issues' that would occupy them in the coming decades.

2. The author of this article is the editor.

Betfair Pty Limited v Western Australia (2008) 82 ALJR 600; [2008] HCA 11

In this case the High Court had occasion to consider the operation of s92 of the Constitution.

The first plaintiff, Betfair, held a licence under Tasmanian law to operate a betting exchange. A betting exchange is a means by which gamblers stake money on opposing outcomes of a sporting event, such as a horse race or football game. The possibility of 'backing to lose' distinguishes betting exchanges from traditional forms of wagering in Australia – with bookmakers or totalisators. The operator of the betting exchange only accepts a bet when it can match the bet with an opposing bet from another customer. Unlike a bookmaker, the operator does not 'hold a book' and does not carry any risk on the outcome of the event.

Betfair uploads onto a computer server at its Hobart premises information about each sporting event on which wagers may be placed, including, with respect to racing, the 'race field'. The race field is simply a list of the entrants in a race. Registered players place bets by means of telephone or Internet communications to Betfair's premises. The second plaintiff, a resident of Western Australia, is a registered player.

By amendments made to the *Betting Control Act 1954* (WA) commencing on 29 January 2007, it became an offence for a person in Western Australia to bet through the use of a betting exchange, wherever situated (s24(1aa)). In addition, a provision was introduced (s27D) prohibiting a person in Western Australia, or elsewhere, from publishing a WA race field, without Western Australian Executive approval. Betfair in Tasmania was refused permission to make available a WA race field for facilitating the making or receiving of offers by Internet.

The plaintiffs challenged the validity of the relevant provisions of the law of Western Australia, principally by reliance upon s92 of the Constitution.

The relevant terms of s92 are as follows:

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The High Court unanimously upheld the plaintiffs' challenge. Heydon J delivered a separate judgment.

The nature of a s92 case post *Cole v Whitfield* (1988) 165 CLR 360 is one that involves the characterisation of the legislation as protectionist. As noted in the joint judgment, the term 'protection' is concerned with 'the preclusion of competition, an activity which occurs in a market for goods or services'. While the source of present doctrine in respect of s92 is *Cole v Whitfield* and the relevant cases decided shortly thereafter, the joint judgment states that 'it would be an error to read what was decided in *Cole v Whitfield* as a complete break with all that had been said by the court respecting the place of s92 in the scheme of the Constitution'. For example, Barwick CJ had rejected the proposition that the economic consequences of the operation of a law could not come within the purview of s92.

The joint judgment notes that there have been significant developments in the last 20 years in the Australian economic milieu in which s92 operates, including developments in the interpretation given to Ch IV of the Constitution in which s92 appears (cf *Ha v New South Wales* (1997) 189 CLR 465), the emergence of the 'new economy' in which Internet-dependent businesses like that of Betfair operate without regard to geographic boundaries and, finally, the development of a National Competition Policy and consequent legislative reforms.

The joint judgment considers the role of s92 in the creation and maintenance of a national economy expressive of political unity, and the relevance of pre-1900 United States decisions regarding the 'Commerce Clause' to construing, and understanding the provenance of, s92. That US line of authority stood at the time s92 was formulated. Those decisions were considered important for elucidating several propositions, including that a law, the practical effect of which is to discriminate against interstate trade in a protectionist sense, is not saved by the presence of other objectives, such as public health, which are not protectionist in character.

The joint judgment did not accept that the proposition, drawn from *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, that each state legislature has power 'to enact legislation for the well-being of the people of that state' would save legislation from the full operation of s92.

The High Court concluded that the prohibition on the publication of a WA race field burdened interstate trade and commerce both directly and indirectly. It did so directly because it denied to Betfair use of an element in its trading operations. It did so indirectly by depriving registered players of information about WA race fields through Betfair's website or telephone operators. Section 27D operated to the competitive disadvantage of Betfair and to the advantage of RWWA (being the controlling authority in WA for the conduct of racing and TAB wagering) and other in-state wagering operators. The court took into account that the prohibition upon publication of WA race fields did not apply to RWWA.

In relation to s24(1aa), the High Court concluded that the prohibition on persons in Western Australia betting through the use of a betting exchange also constituted a discriminatory burden on interstate trade of a protectionist kind. The evidence indicated cross-elasticity of demand and close substitutability between the various methods of wagering. Section 24(1aa) operated to protect the established wagering operators in WA, including RWWA, from the competition Betfair otherwise would present. It was therefore irrelevant that s24(1aa) also denied the particular form of betting to in-state wagering operators and their customers.

Western Australia contended that the principal justification for prohibiting betting exchanges was the protection of the integrity of the racing industry in Western Australia. The court concluded that, even if that legislative object was legitimate, prohibition was not an 'appropriate and adapted' method to achieve it, given the avenue of regulation in a non-discriminatory manner (which, notably, Tasmania had adopted).



In the final analysis, in the words of the joint judgment, '[t]he effect of the legislation of Western Australia was to restrict what otherwise is the operation of competition in the stated national market by means dependent upon the geographical reach of its legislative power within and beyond the state borders. This engages s92 of the Constitution'.

By reason of the operation of s92, the High Court did not rule on the plaintiffs' grounds of further challenge to the validity or operation of s27D, which included a challenge on the basis of the 'full faith and credit' provision of s118 of the Constitution.

By Georgina Wright

Mahmood v Western Australia (2008) ALJR 372 and Carr v Western Australia (2007) 82 ALJR 1

Western Australia and videotape evidence have occupied the High Court in two recent decisions.

In *Mahmood v Western Australia* (2008) ALJR 372 part of the evidence against the appellant accused of murdering his wife at their restaurant was an interview with the police on the day of the murder. At that time the appellant had blood on his clothes.

Further evidence was a videotape 'walk through' of the restaurant involving the accused made by the investigating police a week after the killing. In the taped 're-enactment' of some of the events on the day of the murder, the appellant sought to explain things he had recounted to the police in the earlier interview. These included a description by the appellant of his physical actions when he discovered and cradled his wife's body. This could have provided an innocent reason for the blood on his clothes.

During cross-examination of a police witness about the re-enactment video, defence counsel tendered a few minutes of the two hour plus tape.

In his final address the prosecutor drew the jury's attention to what was described as 'cold-bloodedness' and apparent lack of distress by the appellant as he described events in the tendered portion and the

prosecutor invited the jury to draw an inference of guilt from this. In fact at other times on the full tape the appellant became quite emotional. The defence unsuccessfully applied to re-open and tender some further parts of the tape where the appellant portrayed this emotion.

The High Court unanimously allowed the appeal deciding that although the appellant's actions on the video did not originally form part of the Crown case, once comments were made about a few minutes of the tape by the prosecutor it was incumbent on the court to deal with the whole. In a joint judgment Gleeson CJ, Gummow, Kirby and Kiefel JJ drew a distinction between a direction and a comment by a trial judge (referred to in *Azzopardi v The Queen* (2001) 205 CLR at [49]-[52]) and said at [18]:

It was necessary for the jury to be directed, in unequivocal terms, that they knew so little of the context in which the segment of the video recording appeared that they could not safely draw the inference that the prosecutor had invited them to draw, that is to say, that they should ignore the prosecutor's invitation and remarks.

Carr v Western Australia (2007) 82 ALJR 1 involved a tape made in different circumstances which resulted in an unsuccessful appeal by the offender.

The appellant stood trial on a charge of aggravated armed robbery of a Commonwealth Bank. Part of the evidence included admissions made by him at a police station following his arrest.

The appellant was aware that questioning in an interview room at the police station was being videotaped and he had been cautioned in the usual manner. No substantial admissions were made at that time.

Later, in the lock-up area of the station during routine activities relating to photographing and recording of personal details the appellant made substantial admissions which strongly suggested he was involved in the bank robbery. No further caution had been administered in the lock-up. The police involved in the conversations were aware of video recording facilities in that area, the appellant was not.

In the High Court the appellant submitted that he did not consent to and had no knowledge of the videotape being made and accordingly it was not admissible. This was said to follow from a provision in the Criminal Code of Western Australia requiring the need for videotaping of interviews. He also argued that the same provisions regarding the need for videotaping of interviews required a 'degree or element of formality' lacking in the lock-up conversation. In short, a mere conversation could not be described as an 'interview'.

Gleeson CJ dismissed the appeal. In a joint judgment Gummow, Hayden and Crennan JJ also dismissed the appeal ruling that the appellant's admissions were properly admitted and common law exclusionary rules had also not been infringed.

The whole circumstances of the case are a cautionary tale for any counsel offering advice to a suspect who is 'assisting with enquiries.' If a client is exercising a right to silence it should be constant when in the company of the police.

By Keith Chapple SC

The introduction of the UNCITRAL Model Law on Cross-Border Insolvency: the Cross Border Insolvency Act (Cth) 2008

The international background to the UNCITRAL Model Law on Cross-Border Insolvency

The United Nations Commission on International Trade Law¹ ('UNCITRAL') was formed in 1966 with the express mandate to further the progressive harmonisation and unification of international trade law. Increasingly, model laws developed by UNCITRAL working groups have been adopted by different states leading to a harmonisation of laws in specific subject areas. The success of this harmonisation has been quite remarkable, given that the model laws are often adopted by countries from both a common law and civil law tradition. Recent examples of UNCITRAL model laws that have been adopted and enacted into Australian law include the 1985 UNCITRAL Model Law on International Commercial Arbitration (now a schedule to the *International Arbitration Act 1974* (Cth)) and the 1996 UNCITRAL Model Law on Electronic Commerce (enacted into both Commonwealth and state legislation, relevantly, the *Electronic Transactions Act 2000* (NSW) and the *Electronic Transactions Act 1999* (Cth)).

In May 1997 UNCITRAL adopted the Model Law on Cross-Border Insolvency² ('Model Law') and in 2004 published a legislative guide to its enactment³. The Model Law applies to both corporate and individual debtors. The Model Law takes into account other international efforts⁴. The preamble to the Model Law states its purpose is to provide effective and efficient mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of cooperation between courts, greater certainty for trade and investment, fair and efficient administration of cross border insolvencies that protect the interests of creditors and other interested persons, protection and maximisation of the value of assets and facilitation of the rescue of financially troubled businesses.

The Model Law is said to be an example of another 'Model soft law' – where a country may adopt a standard law drafted by international experts but may also incorporate minor differences to address unique domestic concerns⁵. The Model Soft Law approach to harmonisation is increasingly being used where domestic policy concerns make hard law (such as that created by binding conventions) uniformity difficult and in countries that lack modern legislation covering the substantive topics.⁶

The Model Law takes a 'universal' approach which assumes that one insolvency proceeding will be universally recognised by the jurisdictions in which the entity has assets or carries on business (to be compared with a territorial approach which assumes that each country will have exclusive jurisdiction over the insolvency of a particular debtor and that separate proceedings for each country under that country's laws will be undertaken).⁷

UNCITRAL describes⁸ the Model Law as respecting differences among national procedural laws and concedes that it does not attempt a substantive unification of insolvency law. Rather it is said to offer 'solutions' in a 'significant way'.

Some criticise the Model Law as being part of a push by the 'Washington Consensus' (the World Bank and USAid) which assumes neo-liberal economic globalisation policies⁹. Others speak of the Asian Financial Crisis of 1997 as being a major jolt to the adoption of new insolvency laws in East Asia¹⁰.

An updated list of countries that have adopted the Model Law is available on the UNCITRAL website and includes a number of other Western nations and trading partners of Australia, notably Great Britain (excluding Northern Ireland), the United States of America, Japan and New Zealand.¹¹

Due to the fact that the Model Law is not binding on state signatories (compared to the binding nature of international conventions or treaties) and that states can change its terms on implementation, there is some controversy as to whether some states, notably Japan, have fully implemented the Model Law, or whether they have changed it unrecognisably.¹² Likewise, although Canada has implemented changes to its insolvency law based on the draft Model Law by adopting 'elements' of that law, it is not listed on the UNCITRAL website as a country which has adopted the Model Law.¹³

The European Union ('EU') has for sometime had in place Regulation 1346/2000 (in force from 31 May 2002) (the 'EU Regulation') which is said to be largely based on the Model Law. It applies only in relation to matters arising between EU member states, i.e. intra EU. The EU Regulation has been a source of case law which is likely to influence how the Model Law is interpreted. With Great Britain adopting the Model Law, it is expected that other EU member states will follow suit, although Great Britain will continue to apply the EU Regulation to cross-border insolvency issues relating to other EU states (other than Denmark which is not a party to the EU Regulation and so in relation to proceedings involving Denmark in Great Britain the Model Law will apply).

While Australia has been somewhat inexplicably slower to implement the Model Law than a number of its trading partners, the Australian Labor Government under the leadership of Prime Minister Kevin Rudd has continued a process started by the Howard Coalition government¹⁴ to implement the Model Law into Australian law.

A bill to implement the Model Law was introduced by the Howard Coalition government into the House of Representatives on 20 September 2007 but was not passed before the election was called and therefore lapsed.

The *Cross-Border Insolvency Bill 2008* (Cth) (the 'Act') was introduced into the Senate by the Rudd Labor government on 13 February 2008 and was passed by parliament on 15 May 2008 (hereafter 'the Act'). The Act commences on royal assent, except for Parts 2, 3, 4, and Schedule 1, which will commence on a day fixed by Proclamation, or six months after royal assent, whichever is the earlier (see s2 of the Act).

Once enacted, the Model Law will apply generally and its application does not depend on reciprocity¹⁵ or that the state of origin of the

foreign representative or party seeking to rely on the Model Law has itself enacted the Model Law (cf for example the 1958 UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York' convention) which applies where there is reciprocity between signatory states).

The application and scope of the Model Law and an outline of the important provisions of the Model Law

Cross-border insolvency is a term used to describe circumstances in which an insolvent debtor has assets and/or creditors in more than one country¹⁶.

A number of complex issues may arise in the context of cross-border insolvency.¹⁷ An insolvency administrator may have limited access to assets of the company that are located in another country. There may be special rules providing local creditors with access to local assets before funds go to a foreign administration. There may be limited or no recognition of foreign creditors. There may be inconsistency in the priority of creditors (particularly in relation to employee claims) across jurisdictions. There may be difficulties for foreign creditors seeking to enforce securities over local assets.¹⁸

The Act proposes that the Model Law will be enacted as a stand alone schedule to the Act (s6 provides that the Model Law has force of law in Australia). By comparison, the implementation in other countries, for example the US, has involved the incorporation of the Model Law into existing legislation.

The Model Law will apply to both corporate and personal debtors, with the only exclusions from its application being deposit taking institutions and insurance companies (s9 of the Act and proposed regulations to the Act as identified in the explanatory memorandum¹⁹). The courts nominated under the Model Law are, in respect of individual debtors, the Federal Court; and in respect of non-individual debtors,

the Supreme and Federal courts (s10 of the Act). The Model Law will extend to liquidations arising from insolvency, reconstructions and reorganisations under Part 5.1, and voluntary administrations under Part 5.3A of the Corporations Act. It does not extend to receiverships involving the private appointment of a controller or a member's voluntary winding up or a winding up by a court on just and equitable grounds, as such proceedings may not be insolvency related.²⁰

Any inconsistencies between the Model Law and the existing *Corporations Act 2001* (Cth) ('Corporations Act') and *Bankruptcy Act 1966* (Cth) ('Bankruptcy Act') are dealt with by sections 21 and 22 of the Act which in general terms provide that the Model Law will prevail over both the Corporations Act and the Bankruptcy Act in the event of inconsistency.

Essentially the changes to be made by the Model Law will be procedural in nature. The Model Law contains 32 articles which in summary²¹ deal with the following:

- ◆ Chapter II – sets out the conditions under which the person administering a foreign insolvency proceeding, and foreign creditors, will have access to the Courts of a Model Law state;
- ◆ Articles 13-14 – allow foreign creditors to participate in proceedings in the local jurisdiction;
- ◆ Chapter III – sets out the conditions for recognition of a foreign insolvency proceeding and for granting relief to the representative of such foreign proceeding;
- ◆ Chapter IV – permits courts and insolvency administrators from different countries to cooperate more effectively; and
- ◆ Chapter V – makes provision for the coordination of insolvency proceedings that are taking place concurrently in different states.

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A 'foreign proceeding' is defined in article 2 of the Model Law as a collective judicial or administrative proceeding (including an interim proceeding) pursuant to a law relating to insolvency which must entail control or supervision of the assets and affairs of the debtor by a foreign court; it must be for a purpose of reorganisation or liquidation. A foreign proceeding will be classified by the Model Law as either a foreign main proceeding (where the proceeding is taking place in a state in which the debtor has its centre of main interests ('COMI')) or a foreign non-main proceeding. The term COMI is not defined in the Model Law²², however, article 16(3) of the Model Law contains a presumption that in the absence of proof to the contrary, the debtor's place of registration, or where the debtor is an individual – his or her habitual residence – is the COMI. A foreign non-main proceeding is defined as a foreign proceeding which is not a foreign main proceeding where the debtor has an establishment in the foreign state. A number of the European cases to date under the EU Regulation have related to disputes concerning the COMI of the debtor and the consequential classification of proceedings as foreign main proceedings.²³

If recognised as a foreign main proceeding then commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities in the state in which the application is made will be stayed, and any execution against the debtor or its assets and the right to transfer, encumber or otherwise dispose of the debtor's assets will also be stayed (articles 20 and 21 of the Model Law). Proceedings by the foreign representative to seek to 'clawback' antecedent transactions may be commenced (article 23 and s17 of the Act).

The Commonwealth Department of Treasury's *Corporate Law and Economic Reform Program Proposals for Reform: Paper No. 8 Cross-border Insolvency: Promoting International Cooperation and Coordination* ('CLERP 8') describes the Model Law as covering the following 'procedural' issues:²⁴

- ◆ inbound requests for recognition of foreign insolvency proceedings;
- ◆ outbound requests for assistance from a foreign state in connection with a proceeding in Australia under its laws relating to insolvency;
- ◆ requests for the coordination of insolvency proceedings taking place concurrently in a foreign state and in Australia in respect of the same debtor; and
- ◆ participation by foreign creditors or other interested parties in proceedings occurring in Australia.

The important changes that the Model Law is likely to bring about

Important changes that the Model Law will bring about are:

- ◆ automatic access by foreign representatives to Australian courts (articles 9 and 11) and the right to participate in a proceeding regarding the debtor (article 12);
- ◆ a streamlined procedure for the recognition of foreign proceedings – as either a foreign main proceeding or foreign non-main proceeding (articles 15-17);

- ◆ the automatic imposition of a moratorium or stay following recognition and increased ease of obtaining interim relief similar to the appointment of a provisional liquidator under the Corporations Act or interim trustee under the Bankruptcy Act in cross-border insolvency situations (article 19); and
- ◆ increased cooperation between Australian and foreign courts (the obligation on the Australian court to cooperate in article 25 is now mandatory and the form of cooperation is specified in article 27 – although states can identify additional forms of cooperation, Australia has not done so).

Justice Barrett of the New South Wales Supreme Court in an interesting conference paper delivered in early August 2005²⁵ reviewed cases that had arisen in 2005 involving cross-border insolvency issues and commented on how they may have been impacted upon if the Model Law had formed part of the law of Australia at that time. This paper gives a number of practical examples of the potential impact of the Model Law on proceedings.

Section 581 of the Corporations Act makes provision for an Australian court to act in aid of a foreign court that has jurisdiction in external administration matters, with a distinction being made between the degree of cooperation which will be extended to countries prescribed by the regulations (the court must act) and other countries (the court may act). This section will remain in force, although in the event of any inconsistencies between it and the Model Law, the Model Law prevails. Section 581 is likely to continue to be utilised, especially in relation to entities excluded from the application of the Model Law, such as insurance companies.²⁶

Section 29(5) of the Bankruptcy Act is in similar terms to s581 of the Corporations Act and will remain in force following the Model Law coming into effect.

Article 10 of the Model Law provides that a foreign representative is (or the foreign assets and affairs of the debtor are) not subject to the jurisdiction of the Australian Courts solely due to the fact of making an application under the Model Law.

Australian cases which concern the Model Law are likely to involve reference to overseas authority concerning the relevant Model Law provisions at issue in the dispute, consistent with the interpretation provision in article 8 of the Model Law which expressly provides that in the interpretation of the Model Law regard is to be had of its international origin and the need to promote uniformity in its application. UNCITRAL maintains a website database of case law relating to the Model Law (called CLOUT – case law on UNCITRAL texts) which may assist in locating these case authorities.²⁷

General comments/criticism of the Model Law

The Model Law will not do away with the potential for parties to engage in forum shopping in cross-border insolvency matters, particularly in relation to COMI disputes concerning the location of the foreign main proceeding.

One criticism of the Model Law is that it only applies to single entities as opposed to corporate groups²⁸ (although article 11 of the Model

Law provides that a foreign administrator of a group can bring proceedings).

One commentator has suggested that there will be less likelihood of anti-suit injunctions being granted in states in which the Model Law applies given the express mandatory cooperation obligations imposed on courts by the Model Law.²⁹ The precise way that cooperation between the Australian courts and foreign courts will operate in practice remains to be determined.³⁰

By Julie Soars

Endnotes

1. Composed of 60 member states of the UN General Assembly who are elected for terms of 6 years. Australia is currently a member with its membership expiring in 2010.
2. http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html
3. http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html
4. Explanatory Memorandum ('Explanatory Memorandum') to the Cross-border Insolvency Bill 2008 at 3.
5. Kent Anderson 'Testing the Model Soft Law Approach to International Harmonisation: A Case-Study Examining the UNCITRAL Model Law on Cross-Border Insolvency' (2004) 23 *Yearbook of International Law* 1 at 2.
6. *ibid*.
7. The Commonwealth Department of Treasury's Corporate Law and Economic Reform Program Proposals for Reform: Paper No. 8 Cross-border Insolvency: Promoting International Cooperation and Coordination ('CLERP 8') at 17 and 21.
8. http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html – these 'solutions' include foreign assistance for an insolvency proceeding taking place in the enacting state; foreign representatives' access to courts of the enacting state; recognition of foreign proceedings; cross border cooperation; and coordination of concurrent proceedings.
9. Professor Roman Tomasic 'Insolvency law reform in Asia and emerging global insolvency norms' (2007) 15 *Insolv LJ* 229 at 234 and see the sources at footnote 29.
10. *Id* 241.
11. An updated status list can be found on the UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html. According to that website, the following states have implemented legislation based on the Model Law on Cross-Border Insolvency: British Virgin Islands; overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005), Colombia (2006), Eritrea, Great Britain (2006), Japan (2000), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), South Africa (2000), and the United States of America (2005).
12. Anderson, *supra* 11-14.
13. *Id* 15.
14. On 12 October 2005 it was announced by the Australian Government that the reforms proposed by CLERP 8, one of which included the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, would be implemented.
15. CLERP 8 *supra* 21.
16. Explanatory Memorandum *supra* 3.
17. The following list of issues summarises the Explanatory Memorandum *supra* 3.
18. *ibid*.
19. Explanatory Memorandum at Chapter 1 para [14].
20. CLERP 8 *supra* at 23.
21. Taken from CLERP 8 *supra* 22.
22. Explanatory Memorandum *supra* Chapter 1 para [7] which provides that: 'The Bill does not seek to define COMI as a considerable body of common law that exists in overseas jurisdictions in relation to that concept. It is expected that Australian courts will be guided by that body of law in considering the definition of COMI in the context of this Bill. Such an approach will ensure that Australian law is in harmony with other jurisdictions.'
23. Some cases under the EU Regulation are helpfully summarised by John Baird in 'Cross-Border Insolvency and the UNCITRAL Model Law' (2006) 18(1) *Australian Insolvency Journal* 4 at 8-10.
24. CLERP 8 *supra* 23.
25. RI Barrett 'Cross border insolvency – aspects of the UNCITRAL Model Law' available at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_barrett060805.
26. It is noted that in a recent case of *McGrath v Riddell* [2008] UKHL 21 delivered on 9 April 2008 arising out of the collapse of HIH, an application was made by the liquidator of HIH to the English Court under a similar provision found in s426 of the UK *Insolvency Act 1986* (which was unsuccessful at first instance but successful on appeal to the House of Lords). While this application was prior to the Model Law coming into force in Great Britain, the Model Law would not have applied in any event as in Great Britain, as is proposed in Australia, insurance companies are excluded from the application of the Model Law. This case, however, shows the UK court taking a 'universal' approach to the issue, consistent with the approach under the Model Law.
27. <http://www.uncitral.org/clout/searchDocument.do;jsessionid=75F637934AA6785F7E13361EF7AC508F.WEB01>
28. Raised as an issue by Richard Fisher in a paper entitled 'Current issues and developments corporate insolvency law & practice' delivered at a seminar organised by the Federal Court of Australia in Sydney on 2 April 2008.
29. Look Chan Ho 'Anti-Suit Injunctions in Cross-Border Insolvency: A Restatement' 52 *ICLQ* 697 at 732-734.
30. It seems that 'cooperation' is unlikely to involve a judge in Australia phoning a judge in, for example, the US for a chat.



Climate change and environmental planning law

By Clifford Ireland¹

Introduction: The scientific and policy context of contemporary climate change litigation

In his well known book *We are the Weather Makers – The Story of Global Warming*², Dr Tim Flannery observed that:

Prior to 1800 and the start of the industrial revolution, there were about 280 parts per million of CO₂ in the atmosphere, which equates to around 586 gigatonnes of carbon...

Today the figures are 380 parts per million or around 790 gigatonnes in total. If we wish to stabilise CO₂ emissions below that threshold of dangerous change [450 to 550 parts per million of CO₂], we will have to limit all future human emissions to around 600 gigatonnes. Just over half of this will stay in the atmosphere, raising levels to around 1,100 gigatonnes, or 550 parts per million by 2100. This will be a tough budget for humanity to abide by. Over a century, it equates to around 6 gigatonnes per year. Compare that with the average of 13.3 gigatonnes that accumulated each year throughout the 1990s (half of this from burning fossil fuel). And remember that the human population is said to rise from six billion now to nine billion in 2050.

Flannery wrote of predictions (at page 160) that if global CO₂ were stabilised at 550 parts per million, this would probably result in an increase in global temperature of around 3°C. Such a global temperature increase is predicted to cause much – some use the term ‘catastrophic’ (and it may well be quite apt, though emotive) – environmental change and damage.

It can be freely acknowledged, without challenging any of these predictions, that there remains some residual uncertainty as to the precise extent which global increases in CO₂ will cause the global average temperature to rise. As Flannery noted at 151:

We must now turn to the key uncertainty that remains in all models: would doubling of CO₂, from pre-industrial levels of 280 to 560 parts per million, lead to a 2° Celsius or 5° Celsius increase in warming? After almost 30 years of hard work and profound technological advances we are still not sure about the answer to this question.

Some eminent scientists (often earth scientists³ familiar with the dramatic natural fluctuations of the planet’s climate over the millennia) have gone quite a bit further than such acknowledgement that there is uncertainty in predicting the precise extent of greenhouse induced temperature rise, and queried whether the greenhouse effect has in fact caused the surface warming already observed in measurements to date at all. Typical of these more robust critiques is perhaps that of Ian Plimer, professor of geology at the University of Melbourne who, in his book *A Short History of Planet Earth*⁴, wrote as follows (at 213):

Most weather stations are where they always have been. Buildings have sprung up around them and forests have been cut down. Local temperatures are driven up, making analysis of data misleading for the computer models that are the basis for many weather and global climate predictions. If the atmosphere heats up like a giant greenhouse, then the troposphere should also be warming. It isn’t. Furthermore, the effects of natural variability in orbit, solar activity, the lunar tides, ocean currents, ice sheet dynamics and volcanicity,

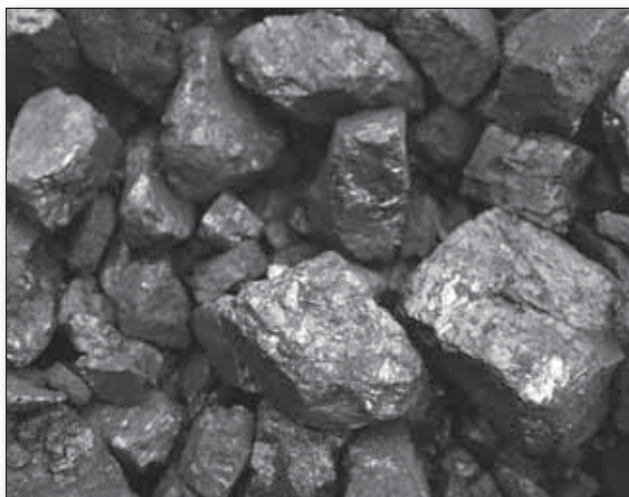


sedimentation, mountain building, subsidence and continental drift are far greater for temperature changes than those calculated for the worst human induced greenhouse scenario. There is an inescapable conclusion: observed slight surface warming in the 20th Century is related to factors other than the greenhouse effect.

It seems fair to say that such dissenting scientific opinion as that of Professor Plimer, while contributing to a lively public policy debate in the area, is decidedly in the minority amongst scientific experts.⁵ Most importantly for the discussion of climate change in recent Australian case law is the fact that such views are at odds with the conclusions of the Intergovernmental Panel on Climate Change (IPCC).

Other scientists who support views similar to that of Professor Plimer, for example Dr Robert Carter and Sir Ian Byatt, have produced a critique of the Stern review.⁶ This critique was in fact considered and relied upon by Queensland Land and Resources Tribunal in the recent case.⁷ The Queensland Court of Appeal⁸ held that the manner in which the tribunal chose to rely on this critique (involving a notification of the parties after the conclusion of the hearing that it had come to the tribunal’s attention) involved a process that did not give the Queensland Conservation Council ‘fair opportunity to test or refute the critique by other information or submissions’. This resulted in a denial of natural justice and led to the tribunal’s decision being overturned. This decision on appeal was not surprising considering that it was common ground at the hearing that anthropogenic climate change due to greenhouse gas (GHG) emissions was occurring⁹. Some environmentalist commentators have been particularly scathing of the decision of the tribunal and of its president, President Koppenol, in the *Xstrata* case.¹⁰

The reasoning in the *Xstrata* case (apart from exhibiting error of law for failure to accord procedural fairness) was unusual in its adoption of a robustly sceptical approach to climate change science. The scientific reference point for most other contemporary Australian climate change case law is the material published by the IPCC. In its *Fourth Assessment Report*, November 2007, the IPCC concluded as follows:



Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level...' (page 1, Summary for Policy Makers).

Rising sea level 'consistent with warming' has also been documented by the IPCC:

Rising sea level is consistent with warming. Global average sea level has risen since 1961 at an average rate of 1.8mm per year and since 1993 at 3.1mm per year, with contribution from thermal expansion, melting glaciers and ice caps, and the polar ice sheets. Whether the faster rate for 1993-2003 reflects decadal variation or an increase in the longer term trend is unclear. (page 1, Summary for Policy Makers)

The IPCC has confirmed that climate change is having an effect on natural systems:

Observational evidence from all continents and most oceans shows that many natural systems are being affected by regional climate changes, particularly temperature increases. (page 2, Summary for Policy Makers)

The IPCC noted that while there are multiple natural causes of climate change:

Global GHG emissions due to human activities have grown since pre-industrial times, with an increase of 70 per cent between 1970 and 2004. ...

Global atmospheric concentrations of CO₂, methane (CH₄) and nitrous oxide (N₂O) have increased markedly as a result of human activities since 1750 and now far exceed pre-industrial values determined from ice cores spanning many thousands of years.

Atmospheric concentrations of CO₂ (379 parts per million) and CH₄ (1,774 parts per million) in 2005 exceed by far the natural range over the last 650,000 years.

... Most of the observed increase in global average temperatures since the mid 20th Century is very likely to be due to the observed increase in anthropogenic GHG concentrations...

During the past 50 years the sum of solar and volcanic forcings would likely have produced cooling.

Observed patterns of warming and their changes are simulated only by models that include anthropogenic forcings...' (page 4, Summary for Policy Makers).

The IPCC also commented on the likely effects of continued GHG emission at projected levels:

Continued GHG emissions at or above current rates would cause further warming and induce many changes in the global climate system during the 21st Century that would very likely be longer than those observed during the 20th Century.

For the next two decades warming of about 0.2°C per decade is projected...' (page 6, Summary for Policy Makers)

The predicted implications for Australia and New Zealand are noted as follows:

- ◆ By 2020, significant loss of biodiversity is projected to occur in some ecologically rich sites including the Great Barrier Reef in Queensland Wet Tropics.
- ◆ By 2030, water security problems are projected to intensify in southern and eastern Australia and, in New Zealand, in northland and some eastern regions.
- ◆ By 2030 production from agriculture and forestry is projected to decline over much of southern and eastern Australia, and over parts of eastern New Zealand, due to increased drought and fire. However, in New Zealand, initial benefits are projected in some other regions.
- ◆ By 2050, ongoing coastal development and population growth in some areas of Australia and New Zealand are projected to exacerbate risks of sea level rise and increases in the severity and frequency of storms and coastal flooding.' (page 10 of the IPCC's Summary for Policy Makers)

Australia is not a major contributor (by reason of GHG emissions produced within its territory) to global GHG emissions in absolute terms (producing around 1.5 per cent of world emissions).¹¹ Australia does have one of the highest per capita emission rates. The practical significance of a per capita rate of emission for this global environmental problem constituted by the absolute amount of greenhouse gases in the planet's atmosphere has been the subject of much recent popular debate.

The IPCC report noted that a number of mitigation measures can be taken at a global level to address the problem:

A wide variety of policies and instruments are available to governments to create the incentives for mitigation action. Their applicability depends on national circumstances and sectoral contents ... They include integrating climate policies in wider

development policies, regulations and standards, taxes and charges, tradeable permits, financial incentives, voluntary agreements, information instruments and research, development and demonstration. (Summary for Policy Makers, at page 18)

It is apparent that such mitigation measures taken on a global level will have impacts, economically, on fossil fuel exporting nations such as Australia:

Fossil fuel exporting nations (in both Annex 1 and non-Annex 1 countries) may expect, as indicated in the TAR, lower demand and prices and lower GDP growth due to mitigation policies. The extent of this spill over depends strongly on assumptions related to policy decisions and oil market conditions. (Summary for Policy makers, at page 19)

The IPCC report regarded both international and national or local action as important in mitigating climate change:

Many options for reducing global GHG emission through international co-operation exist. There is high agreement and much evidence that notable achievements of the UNFCCC and its Kyoto Protocol are the establishment of a global response to climate change, stimulation of an array of national policies, and the creation of an international carbon market and new institutional mechanisms that may provide the foundation for future mitigation efforts. Progress has also been made in addressing adaption within the UNFCCC and additional international initiatives have been suggested.

Greater co-operative efforts and expansion of market mechanisms will help to reduce global costs for achieving a given level of mitigation, or improve environmental effectiveness. Efforts can include diverse elements such as emissions targets; sectoral, local, sub-national and regional action; R&D programs; adopting common policies; implementing development oriented actions; or expanding financing instruments.

Notwithstanding that Australia is only a relatively small contributor to global GHG emissions, contemporary planning and environmental law at the level of judicial and tribunal decision-making and increasingly at a regulatory and legislative level has now decisively moved towards acceptance that such local action by Australia is a matter of importance.

Further, several recent New South Wales Land and Environment Court decisions have accepted that the impacts of global climate change need to be factored into the environmental assessment process in relation to local development. In these and other ways, climate change science, and in particular the reasoning of the IPCC, are impacting on Australian environmental jurisprudence. Climate change is an issue that cannot be ignored by those practising in the environmental and planning area for this reason alone.

2. Historical overview: Redbank, Nicholls and Leatch

The application of the science of climate change in environmental law to the environmental assessment of proposed developments involves the application of science that, while accepted, necessarily

involves predictions with considerable margins of error about future consequences. This means that the principle of ecologically sustainable development (ESD) known as the 'precautionary principle' is of particular importance in decision-making in the area. ESD consists of a number of related principles including the precautionary principle (others are the principle of intergenerational equity and the polluter pays principle). The precautionary principle provides that the absence of complete scientific certainty should not be used as a reason for not taking or postponing protective environmental measures. For example, the 1992 Rio Declaration isolated the precautionary principle as its Principle 15 and defined it as follows:

In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The first Australian judgment to meaningfully adopt and rely upon the precautionary principle in environmental assessment litigation was the merits appeal decision of Stein J in *Leatch v Shoalhaven City Council* (1993) 81 LGERA 270. At 282 Stein J held that the precautionary principle was not made an irrelevant or extraneous consideration by the object, scope and purposes of the *National Parks and Wildlife Act 1974* (NSW) and in particular, Part 7 concerning the issue of licences to harm threatened species. In so reasoning, Stein J relied on the analysis in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24.¹²

Other decisions of the Land and Environment Court of this period were not so favourable to the application of the precautionary principle in New South Wales law and reference may be made to the decisions of Talbot J in *Nicholls v DG NPWS* (1994) 84 LGRA 397¹³ and Pearlman J in the *Redbank Power Station* case.¹⁴ The objector's appeal in *Redbank* based upon climate change and the adverse impact of greenhouse gas (GHG) emissions produced by the proposed power station was unsuccessful before Pearlman J. While her Honour held that the precautionary principle and the contribution to global warming of GHG emissions from the proposed power station should be taken into account in her merits appeal decision (applying *Leatch* in this respect) she went on to reason that while relevant, the precautionary principle applied to this greenhouse threat should not outweigh all other considerations.¹⁵ The case can therefore be properly regarded as a significant precursor for a series of climate change cases brought some years later under different applicable legislation and in a different public policy climate. These later challenges, as will be seen below, had significantly different results.

In most recent Australian litigation since 2005 concerning climate change it has not been at issue that climate change was occurring and will have substantial adverse environmental impact on Australia and the rest of the world. The issue generally has been whether that impact or likely impact has been taken into account insofar as a particular development project has been concerned and, if not, whether it was mandatory to take it into account. While the matter has been raised by applicants, by and large, defendants and respondents have conceded the fact of anthropogenic GHG induced climate change in their pleadings. This

is a sensible pragmatic approach to litigation in the area as the weight of scientific opinion is clearly in favour of the proposition that climate change is happening, and that GHG emissions are the primary cause, and the chances of persuading a court to rule to the contrary are quite low. The costs associated with calling relevant dissenting experts in the area would in most cases not be justified by any forensic advantage that would accrue from such an approach. Accordingly, it is questionable whether it is in fact correct to conclude that:¹⁶

A fundamental question remains whether or not our courts and tribunals are willing to rule that climate change is happening.

Applicants, and those NGOs supporting them, see climate change litigation as a vehicle for articulating their concern that the science of climate change (along the line of that promulgated by the IPCC) be publicly accepted and vindicated. A substantial purpose of bringing the cases is to raise the profile of this particular environmental issue. In this they have by and large been an outstanding success.¹⁷ For example, it is noted¹⁸ that while the applicant was unsuccessful in the Isaac Plains litigation (discussed below), the case was useful in assisting the progress of public debate about climate law and the EPBC Act.

3. The EPBC Act – Isaac Plains and Anvil Hill

In *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister of the Environment and Heritage and Ors* [2006] FCA 736 (the Isaac Plains case), Dowsett J considered a challenge under the *Administrative Decisions (Judicial Review) Act 1977* seeking review of two decisions by the federal minister for the environment pursuant to s75 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The two decisions were that two proposed coal mine projects in Queensland were not controlled actions within the meaning of that term in s75 of the EPBC Act. Section 75(2) provided that the minister in considering whether the referred action was a controlled action was required to consider all adverse impacts of the action on a matter protected by Part 3 of the EPBC Act (matters of national environmental significance). In this case important matters of national environmental significance were the Great Barrier Reef world heritage area and the Wet Tropics heritage area. Further, it was argued that due to the GHG emissions that would be produced from the burning of the extracted coal, the projects would necessarily have an adverse impact on listed threatened species, listed threatened ecological communities, migratory species, and wetlands of international significance. The applicant's argument was that the ultimate purpose of the coal projects was to supply coal for combustion in power generation and that:

The production of greenhouse gases is almost certain to occur as a result of the action and can reasonably be imputed as within the contemplation of the proponent of the action.

In this case the minister's delegate, a Mr Flanigan, was called by the respondent and subject to cross-examination. His evidence was that he did consider 'indirect impacts' and that he considered indirect impacts to include the issue of GHG emission and climate change. The calling of the actual decision-maker in such litigation against environmental decision-making is unusual.¹⁹ The availability of the decision maker

for cross-examination in court exposed the impugned decision to an unusually elevated degree of scrutiny. Mr Flanigan was called despite there being written evidence that he had considered GHG (judgment [18]) in the form of a handwritten note made by Mr Flanigan on the departmental recommendation leading to the decision. What can be said is that in this case there was a particularly detailed forensic investigation during the proceedings into the decision-maker's state of mind and reasoning process. Some lines of cross-examination were disallowed ([36] and [37]). Ultimately the decision of Dowsett J turned on his acceptance of the truthfulness and reliability of Mr Flanigan as a witness ([38]). This fact may limit the significance of the Isaac Plains decision for subsequent litigation based on different evidence.

The judgment at [43] dealt with a line of argument commonly forming part of respondents' cases in this area of climate change litigation against coal projects:

[43] Understandably, the applicant sought to advance its case by pointing to the paucity of detail concerning these matters in the reasons. It may well have been better had Mr Flanigan said rather more than he did. However, as I have previously observed, the applicant raised the matter as one of general concern. Mr Flanigan concluded that the possibility of increased concentration of greenhouse gases in the atmosphere resulting from each project was speculative and merely 'theoretically possible'. There was no suggestion that the mining of coal pursuant to these proposals would increase the amount of coal burnt in any particular year, or cumulatively. It was not suggested that in the absence of coal from these sources, less coal would be burnt. Mr Flanigan also considered that if there were any such increased emissions, the additional impact on protected matters would be very small and therefore not significant.

The line of reasoning employed by Dowsett J (that Australia's relative contribution to global GHGs or the relative contribution of any particular project is so minimal as to be insignificant at a global level and hence in terms of environmental impact at a local level) is a matter of hot philosophical dispute and a theme running through much recent climate change litigation. The applicant's rejoinder to this line of reasoning is set out at [55] in Dowsett J's judgment:

[55] Finally, the applicant sought to make much of the fact that threats posed by the emission of greenhouse gases are cumulative. It was argued that it was inappropriate to seek to identify the actual effect attributed to the action in question, as opposed to the general threat posed by greenhouse gas emission and climate change.

Dowsett J rejected this rejoinder and accepted Mr Flanigan's reasoning that, while he considered the impact of the burning of coal produced by the project on global climate change, he concluded that the impact on Australian matters of national environmental significance was not significant (therefore meaning that the project was not a controlled action). In closing obiter remarks his Honour commented:

[72] I have proceeded on the basis that greenhouse gas emissions consequent upon the burning of coal mined in one of these projects might arguably cause an impact upon a protected matter, which impact could be said to be an impact of the proposed action. I have

adopted this approach because it appears to have been the approach adopted by Mr Flanigan. However I am far from satisfied that the burning of coal at some unidentified place in the world, the production of greenhouse gases from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter, can be so described. The applicant's concern is the possibility that at some unspecified future time, protected matters in Australia will be adversely and significantly affected by climate change of unidentified magnitude, such climate change having been caused by levels of greenhouse gases (derived from all sources) in the atmosphere. There has been no suggestion that the mining, transportation or burning of coal from either proposed mine would directly affect any such protected matter, nor was there any attempt to identify the extent (if any) to which emissions from such mining, transportation and burning might aggravate the greenhouse gas problem. The applicant's case is really based upon the assertion that greenhouse gas emission is bad, and that the Australian government should do whatever it can to stop it including, one assumes, banning new coal mines in Australia. This case is far removed from the factual situation in *Minister for Environment and Heritage v Queensland Conservation Council* [2004] FCAFC 190; (2004) 139 FCR 24. [*The Nathan Dams case*]

Dowsett J has been much criticised by some commentators for these obiter remarks.²⁰ Yet the comments were subsequently approved by another judge of the Federal Court.

The decision of Stone J in the Federal Court of Australia²¹ delivered on 20 September 2007 in the case of *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources and Centennial Hunter Pty Ltd* involved a challenge to the decision of a delegate of the minister that the proposed Anvil Hill coal mine in the Hunter Valley of New South Wales was not a controlled action within the meaning of s67 of the EPBC Act. The reasoning of the minister's delegate as set out in the judgment of Stone J at [25]-[27] is more detailed than the reasoning of Mr Flanigan the minister's delegate in the Isaac Plains decision. The nub of the delegate's reasoning is set out at [25] as follows:

The delegate then considered whether the proposed action was likely to have 'indirect impacts' on matters protected under Part 3 of the Act 'as a result of any possible contribution to greenhouse gas emissions'. The delegate accepted that greenhouse gases in the earth's atmosphere are causing damage to that atmosphere and to weather patterns and that these changes might affect matters protected by Part 3 such as the Hunter Estuary Wetlands Ramsar Site. She found that if all the coal produced by the proposed mine were to be consumed by end users, the combustion of that coal would produce per annum the equivalent of 0.04 per cent of the current annual global greenhouse gas emissions. She found that 'such emissions are a small proportion of the total possible emissions from all other sources'.

Stone J found that the submission of the applicant in this regard was not distinguishable from that considered by Dowsett J in Isaac Plains and should be dismissed for the reasons his Honour gave. In particular, Stone J rejected the applicant's proposition that a 'common sense approach' to causation such as that applied to tort actions at common law (reference was made in argument and in the judgment to *Henville*

v Walker (2001) 206 CLR 459 at 490 per McHugh J) was applicable to the requirement in s75 of the EPBC Act that the decision-maker consider adverse environmental impacts of a proposed action. The evidence was that the emissions from the burning of coal produced by the mine would not be a substantial cause either of climate change or of any resulting impact on matters of national environmental significance protected by the EPBC Act. Stone J accordingly found that the conclusion that the relatively small contribution of the proposed emissions to total global emissions could not be seen as having a significant impact was a conclusion open to the minister's delegate to make (Judgment at [40]). Stone J rejected an argument that the significance of the proposed action was to be judged by reference to other proposed actions that may be assessed under the EPBC Act (an argument directed towards emphasising the relative significance, alleged by the applicant, of the burning of coal from the project and countering the respondent's argument that at a global level the relative impact was insignificant). Stone J rejected this argument at [44]. Her Honour reasoned as follows:

The delegate was entitled to assess the significance and substantiality of the impact of the proposal as a whole rather than merely in comparison with other potential actions. The applicant's assertion must be rejected.

The challenge brought by the applicant was dismissed with costs.

The decision of Stone J was upheld on appeal in *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* [2008] FCAFC 3, per Tamberlin, Finn & Mansfield JJ. The appeal was on grounds unrelated to GHG but it is notable that the full court chose to repeat the delegate's reasoning in relation to the GHG issue by way of background and without criticism at [8] – [11] of its judgment.

4. Recent Land and Environment Court decisions – Anvil Hill and Drake-Brockman

Perhaps the climate change decision which has received most prominence (in NSW) in recent years is the decision of Pain J in *Gray v Minister for Planning and Ors* (2006) 152 LGERA 258; [2006] NSWLEC 720.²² The decision has been largely misunderstood by those commenting on it, particularly in some media reports appearing immediately after the decision. The applicant in Gray challenged decisions made by the director-general under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (EP & A Act) and, in particular, a decision to accept as adequate an environmental assessment lodged by the coal miner Centennial in support of its Anvil Hill project. The principal argument raised by the applicant was that the environmental assessment (EA) should not have been accepted as adequate because it did not adequately address the environmental assessment requirements (EARs) promulgated by the director-general under s75F of Part 3A.

As noted at [4] of the judgment, there was no dispute that the burning of coal produced by the project would release substantial quantities of greenhouse gases into the atmosphere, nor that the Anvil Hill project was for the mining of 10.5 million tonnes of coal per annum over a project life of 21 years mainly for power generation with 50 per cent

being intended for export for use in overseas power stations, generally in Japan: judgment at [4].

Section 75H(3) of Part 3A provided as follows:

(3) After the environmental assessment has been accepted by the director-general, the director-general must, in accordance with any guidelines published by the minister in the Gazette, make the environmental assessment publicly available for at least 30 days.

The EA lodged by Centennial in support of its project included an assessment of Scope 1 and 2 GHG emissions (that is, from the project itself) but not Scope 3 emissions (that is, from the downstream burning of coal produced by the project). The EARs required the following of the EA:

The EA includes a comprehensive air quality assessment that adequately assesses the potential air quality impacts of the project, including a detailed greenhouse gas assessment.

The applicant argued that the EA as lodged did not comply with the EARs. There was no detailed GHG assessment. The applicant further argued that the director-general was required to take into account the principles of ESD in determining whether the EA was adequate to comply with the EARs. The applicant relied on the decision of the Land and Environment Court in *Telstra v Hornsby Shire Council* (2006) 146 LGERA 10, a decision which decided that the principles of ESD were mandatory relevant considerations required by the consideration of the 'public interest' under s79C of the EP & A Act in relation to the processing of a development application under Part 4 (not Part 3A and the project approval process under Part 3A).

The respondents contended that ESD principles were not mandatory relevant considerations as determined in *Minister for Aboriginal Affairs v Peko- Wallsend Ltd* (1986) 162 CLR 24. Further, it was argued that the evidence supported the proposition that the director-general did take ESD considerations into account given the large number of environmental matters considered in the 'adequacy checklist' in the EA itself. Pain J decided that the EA not including Scope 3 emissions did not comply with the director-general's EARs as the impact on the Australian and New South Wales environment due to any GHG emissions produced by coal from the Anvil Hill project had a sufficient proximate link with the mining of that coal. In applying this test of sufficient proximate link, Pain J was reasoning consistently with the earlier decision of Bignold J in *Bell v Minister for Urban Affairs and Planning and Port Waratah Coal Service Ltd* (1997) 95 LGRA 86. Pain J reasoned that she did not find the comments of Dowsett J at [72] of the Isaac Plains judgment as persuasive. At [100] Pain J expressed her conclusion on this point:

I consider there is a sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of GHG which contributes to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Part 3A.

Pain J also found that the director-general was in error in not considering the precautionary principle and the principle of intergenerational equity being components of the principle of ESD which was a mandatory relevant consideration given the director-general's adequacy decision and in formulating EARs which did not require the assessment of Scope 3 GHG emissions. Pain J found at [115] that the discretion to be exercised under s75F in formulating the EARs had to be exercised in accordance with the objects of the EP & A Act. As Pain J reasoned at [126]:

While the court has a limited role in judicial review proceedings in that it is not to intrude on the merits of the administrative decision on the challenge ... it is apparent that there is a failure to take the principle of intergenerational equity into account by a requirement for a detailed GHG assessment in the EAR if the major component of GHG which results from the use of coal, namely Scope 3 emissions, is not required to be assessed. That is a failure of a legal requirement to take into account the principle of intergenerational equity.

There was a similar finding in relation to the precautionary principle at [135]. Pain J therefore concluded at [143] that there was a failure to take into account any ESD principles in relation to the decision by the director-general that Centennial's EA was adequate and that this decision gave rise to invalidity. Pain J made a declaration to this effect but, due to a variety of circumstantial factors including the fact that Centennial had lodged a further submission expressly dealing with Scope 3 emissions, Pain J did not order re-exhibition as sought by the applicant. Accordingly, the approval process for the Anvil Hill project proceeded and the project was ultimately approved by the minister in mid-2007.

In terms of the relief sought by the applicant in the proceedings, the outcome of the case can fairly be considered to be evenly balanced. It was certainly not a complete victory for the applicant, although it may have been perceived as such by the applicant due to the case's important role in raising the profile of the issue of climate change in relation to an important proposed coal mining project. The case did have this effect.

It has been correctly noted²³ that there was nothing in Pain J's decision to prevent the director-general from framing EARs to exclude Scope 3 emissions, although he would be required to consider ESD principles in reaching that decision. Such documentation can be readily prepared and lodged by proponents. David Farrier²⁴ noted that this would be the preferable approach:

Far better, it would seem, from a political/public relations perspective, for both government and the proponent to get on the front foot and present the relevant data from the outset.

This is in fact exactly what was done by Centennial in the Anvil Hill proceedings and was the reason for Pain J's rejection of the applicant's claimed injunctive relief against the approval process for the Anvil Hill mine.

The EARs issued by the director-general for coal mines in the Hunter Valley now require the assessment of GHG emissions produced by the combustion of product coal (that is Scope 3 emissions). The recent

SEPP (Mining, Petroleum Production and Extractive Industries) 2007, gazetted on 16 February 2007 applying to assessment of development applications under Part 4, now expressly requires consent authorities to consider GHG emissions including any downstream emissions caused by the proposed mining, petroleum production or extractive industry development prior to granting development consent.

The Gray decision was distinguished by her Honour Jagot J in *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490. Drake-Brockman involved a challenge to the approval by the minister for planning of a concept plan relating to the former CUB site at Chippendale under s750 of the EP & A Act. One of the grounds of challenge was that the minister failed to consider ESD when granting the approval. At [130] Jagot J correctly observed that the decision in Gray depended on the EARs for the Anvil Hill project issued by the director-general requiring a 'detailed greenhouse gas assessment' and that it was in this context that Pain J found that the director-general's adequacy decision failed to consider the precautionary principle and intergenerational equity. At [131], Jagot J observed that the case before her involved no complaint of any disjunction between the EARs and the EA that the director-general had accepted as adequate under s75H(3). Importantly, Jagot J noted that:

Gray does not stand for a general proposition that Part 3A of the EP & A Act requires any particular form of assessment of greenhouse gas emissions for each and every project to which that part applies. Any such understanding would be inconsistent with the statutory provisions and established principles of judicial review ... The decision in Gray therefore does not assist the applicant.

At paragraph [132], Jagot J rejected the proposition that the minister can only consider ESD by considering a quantity of analysis of greenhouse gas emissions. Such a proposition had no support in the statutory scheme enacted by parliament. In the case before her Honour it was conceded by the respondents that climate change generally induced by GHG emissions poses a risk of serious and irreversible harm to the environment in that the development would involve the production of greenhouse gases (at [132]). Jagot J observed that this was not decisive as the respondents did not go on to concede any net increase in greenhouse gases as a result of the approval of the concept plan and the evidence did not establish this. Because her Honour rejected the applicant's proposition that the minister had failed to consider ESD including the precautionary principle and intergenerational equity, she did not need to go on to consider the further argument put by the respondents that the minister had no obligation to do so, and her Honour did not do so.

While the future of climate change arguments as a limb of judicial review challenges to the approvals process for major projects in New South Wales appears assured, the viability of such arguments in relation to projects that do not involve mining and in particular coal mining must be questioned. Even in the case of challenges brought to coal mines, the prudent proponent will be able to adequately defuse the greenhouse issue by preparing comprehensive and detailed environmental assessment documentation. As long as the information concerning GHG emissions, including scope 3 emissions, is put before the relevant decision-maker and given proper consideration, the



approval of the project will not in itself give rise to any legal error on this ground. Put another way, it is difficult to conceive of an Australian coal mine approval being justifiably found to have been unreasonable in the Wednesbury sense where the decision-maker has had a properly documented appreciation of the *worst possible* impact that the mine may have by way of downstream (scope 3) GHG emissions on global climate change and consequently upon the global and local environment. Due to the sheer magnitude of global GHG emissions, it would appear highly likely that the issue of GHG emissions in relation to Australian mining projects, however large, will continue to represent only a procedural hurdle, not a substantive bar against the grant of any required approval.

5. Taralga and the amelioration of GHG emissions

The GHG issue and principles of ESD may be a positive factor for a proponent in the approvals process for projects that are designed to provide renewable energy and thereby facilitate the reduction of overall GHG emissions. In *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59, Preston CJ observed as follows:

[1] The insertion of wind turbines into a non-industrial landscape is perceived by many as a radical change which confronts their present reality. However, those perceptions come in differing views. To residents, such as the members of Taralga Landscape Guardians Inc (the guardians), the change is stark and negative. It would represent a blight and the confrontation is with their enjoyment of their rural setting.

[2] To others, however, the change is positive. It would represent an opportunity to shift from societal dependence on high emission fossil fuels to renewable energy sources. For them, the confrontation is beneficial – being one much needed step in policy settings confronting carbon emissions and global warming.

On balance, as Preston CJ noted at [3] in this Class 1 merits appeal, the balance was in favour of the broader public good in approving a positive development confronting global emissions and warming.

The case before Preston CJ was a merits appeal by an objector to a project constituting designated development under the EP & A Act. The proposed wind farm was proposed to be built upon ridge lines stretching about 11km north to south across rural property about 3km and 7km east of the village of Taralga. The problem posed by global climate change was summarised with particular cogency by his Honour at [70]:

Although natural and human ecosystems are adaptive in nature, the rate at which the global climate is changing outweighs the rate at which the systems can adjust. Available data indicates that regional climate changes have already affected a wide range of physical and biological systems across the world. Examples given by the IPCC of the effects of climate change include the shrinkage of glaciers, thawing of permafrost, later freezing and earlier break up of ice on rivers and lakes, lengthening of mid to high latitude growing seasons, poleward and altitudinal shifts of plant and animal ranges, declines of some plant and animal populations, and earlier flowering of trees, emergence of insects, and egg laying in birds, as well as the death of coral reefs, atolls and mangroves. Although some species may thrive under the new conditions, many of these systems will be irreversibly damaged.

At [75] Preston CJ noted that renewable energy sources were an important method of reducing GHG emissions and preserving traditional energy resources for future generations. In conclusion, Preston CJ concluded at [352] that the overall public benefits arising from the project outweighed any private disadvantages either to the Taralga community or specific landowners. The project was approved subject to 116 detailed conditions of consent.

6. The Walker decision – adaptation to climate change

The issue of climate change can also be a factor in challenges to development approvals not due to the project's likely emission of GHGs, but due to a project's failure to address the likely consequences of global climate change, such as insidious sea level rise. The case of *Walker v Minister for Planning* [2007] NSWLEC 741 is a case in point. In this decision the applicant challenged in Class 4 of the Land and Environment Court's jurisdiction the validity of a concept plan approval by the minister for planning under Part 3A of the EPA Act. The concept plan was for a residential subdivision and retirement development of 25 hectares at Sandon Point, an area of cleared coastal plain 14km north of Wollongong.

In this decision, Biscoe J analysed in great detail the historical evolution of international and local climate change law and policy. His Honour noted that in 1987 (and earlier) the World Commission on Environment and Development in its influential report 'Our Common Future/The Bruntland Report' highlighted the problems posed by the combustion of fossil fuels, being gradual global warming due to the greenhouse effect: at [51]. His Honour noted the clear articulation of the principle of ESD in the Rio Declaration of 1992: at [52]. His Honour noted that it was established law in the Land and Environment Court that in Class 1 development appeals the court would apply ESD unless there were cogent reasons to depart from it and referred in this regard to *BGP Properties v Lake Macquarie City Council*²⁵.

Biscoe J noted that as at November 2007 New South Wales had 55 Acts and Regulations which refer to ESD and the Commonwealth had 19: at [69]. His Honour analysed the history of climate change litigation from the Leatch, Nicholls and Redbank decisions (at [85], [88] and [89]).

Biscoe J analysed in detail the long history of reports from the IPCC and noted at [122] that that body considered the two trends, increases in global temperatures and in anthropogenic GHG concentrations, were related and that global warming presented climate change risks including sea level rises, increases in the severity and frequency of storms and coastal flooding. His Honour noted that 2001 and more recent 2007 IPCC reports set out in detail the likely consequences of climate change for Australia and New Zealand (at [125]).

Relevantly to the case, important likely impacts included increasing coastal vulnerability to storm surges and sea level rise. The following passage from the IPCC's third assessment report (TAR) is referred to by Biscoe J at [125]:

At Collaroy/Narrabeen Beach (NSW), a sea level rise of 0.2 metres by 2050 combined with a 50 year storm event leads to coastal recession exceeding 110 metres and causing losses of US\$184 million.

His Honour's judgment itself sets out in detail the history of climate change litigation both in Australia and elsewhere and refers to a range of relevant academic literature: at [126], [127].

Ultimately, Biscoe J upheld the challenge on the basis (at [164]-[167]) that there was an implied obligation arising from the subject matter, scope and purpose of the EP & A Act and EP & A Regulation 2000 that a decision to approve development under Part 3A was to be made on the basis of the most current material available to the minister which has a direct bearing on the justice of the decision. In so reasoning, Biscoe J relied upon *Minister for Aboriginal Affairs v Peko-Wallsend* at 44-45. The nub of Biscoe J's reasoning appears at [166]:

In my opinion, having regard to the subject matter, scope and purpose of the EP & A Act and the gravity of the well-known potential consequences of climate change, in circumstances where neither the director-general's report nor any other document before the minister appeared to have considered whether climate change flood risk was relevant to this flood constrained coastal plain project, the minister was under an implied obligation to consider whether it was relevant and, if so, to take into consideration when deciding whether to approve the concept plan. The minister did not discharge that function.

In the judgment Biscoe J, for example at [161], emphasised that climate change presented a risk to the survival of the human race and other species and was a 'deadly serious issue'. The problem with the decision-making process in this case arose substantially from the fact that the director-general's report prepared under clause 8B of the EP & A Regulation did not include any consideration of the flooding impacts of climate change: at [160]. Biscoe J reasoned that if the report had considered the matter (and rejected its relevance) the court would not have concluded that the minister was under an independent obligation to consider whether it was relevant. It was the omission to expressly consider the matter, and the absence of any other reference to it in the documentation associated with the minister's decision, that gave

rise to an inference that the minister had not considered its relevance: at [160].

The decision of *Biscoe J* is a significant development in the Land and Environment Court in the area of climate change litigation having regard to the earlier decisions of *Anvil Hill* and *Drake-Brockman*. One result of the decision is that, despite the confinement of the reasoning in *Anvil Hill* and *Drake-Brockman* to cases where ESD has not been considered or the EARs are inconsistent with the EA, it has now been found that in certain circumstances it will be a direct implication from the object, scope and purpose of the EP & A Act that not only ESD but the particular local consequences of climate change be in fact taken into account, by reference to the most recently published or available material, by a decision-maker under Part 3A. If these matters are not in the material before the minister he or she must obtain this material. This represents a significant development and arguably an expansion of pre-existing law in the area.

A notice of appeal with appointment against his Honour's decision was apparently filed on 20 December 2007.

7. Conclusions

The objective of those commencing climate change court proceedings has frequently been unashamedly to draw public attention to the climate change issue.²⁶ The decision in the *Anvil Hill* litigation before *Pain J* was thus regarded as somewhat of a victory by the applicant, despite the rejection of what was obviously Mr Gray's primary claim which was for injunctive relief against the approval process for the *Anvil Hill* mine.

More recent decisions and, in particular, the decision of *Biscoe J* in *Walker* indicate that increasingly the aim of environmentally-minded litigants in this area need not be so modest. The direct implication drawn from the object, scope and purposes of the EP & A Act that a particular practical consequence of climate change was a mandatory relevant consideration for a decision-maker under the EP & A Act, and one that he or she had a duty to inform himself or herself about, whether there was material before him or her concerning it or not, indicates that an extremely high level of judicial scrutiny tantamount to a review of the merits of a proposed development may take place in this area, even in the judicial review jurisdiction. As *Biscoe J*'s judgment articulates, this is a direct consequence of the extreme seriousness with which the climate change issue is perceived, for sound reasons, by the Land and Environment Court.

Endnotes

1. Reader, Eighth Floor Selborne Chambers, Phillip St, Sydney.
2. The Text Publishing Company, Melbourne, 2006.
3. *Climate Law in Australia*, T.Bonyhady and P. Christoff (eds), 2007, The Federation Press, Sydney, at 16.
4. ABC Books, Sydney, 2001.

5. See the discussion in the Lavoisier Group's 'Submissions to the Garnaut Climate Review', 7 January 2008. The Lavoisier Group is apparently an organisation constituted as a forum for climate change scepticism.
6. *Stern Review on the Economics of Climate Change*, HM Treasury, 2006, Sir Nicholas Stern.
7. *Re Xstrata Coal Queensland Pty Limited* [2007] QLRT 33.
8. *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Limited* [2007] QCA 338.
9. As is, almost invariably, the case in contemporary climate change litigation in Australia.
10. *Climate Law in Australia*, op cit, at 15-16.
11. *Climate Law in Australia*, op cit, at 93 citing the 2004 Commonwealth Energy White Paper.
12. It has been commented (not critically, but apparently by way of approbation) that there was 'no clear statutory mandate' for Stein J to apply the precautionary principle in *Leatch: Climate Law in Australia*, op cit, at 11. However, while it is true that the express words of the National Parks and Wildlife Act did not make the principle a mandatory relevant consideration, Stein J's conclusion that the matter was not an irrelevant consideration did not, as a matter of law, require such express statutory words.
13. Expressly not followed in relation to its discussion of the precautionary principle in *BGP Properties v Lake Macquarie City Council* (2004) 138 LGERA 237.
14. *Greenpeace Australia v Redbank Power Company* (1994) 86 LGERA 143.
15. The case has been criticised as a 'profound discouragement to greenhouse litigation in Australia' and as a statement that Pearlman J was of the view that 'climate change was not for her': at 12 in *Climate Law in Australia*, op cit. The textual basis for this pejorative commentary on the case is questionable, and the judgment, of course, says no such thing.
16. As concluded in *Climate Law in Australia*, op cit, at 13.
17. See the comment on the Isaac Plains litigation (below) at 185, *Climate Law in Australia*, op cit.
18. *Climate Law in Australia*, op cit, at 185.
19. *Climate Law in Australia*, op cit, at 177.
20. *Climate Law in Australia*, op cit, at 180.
21. NSD 870 of 2007.
22. The author instructed senior counsel for the miner, Centennial, Mark Leeming SC, in this litigation.
23. *Climate Law in Australia*, op cit, at 205-6.
24. *Climate Law in Australia*, op cit, at 206.
25. (2004) 138 LGERA 237 at [93] per McClellan CJ; at [57].
26. DS White, 'Climate Change at a Local Level', paper delivered to EPLA annual conference, November 2007, at page 11.



Climate change 'refugees' and international law

By Jane McAdam¹

Introduction

Around the globe, millions of people are at risk of displacement due to climate change. At the end of last year, it was reported that the first inhabited island was submerged as a result of rising sea levels,² and island nations across the Central Pacific, South Pacific, and the Indian Ocean, as well as large tracts of land from Bangladesh to Egypt, risk partial or complete displacement by the middle of this century.

The impacts of global warming on habitat are being felt in different ways around the world. Rising sea levels are threatening the very existence of small island states, while Inuit communities in North America and Greenland fear displacement due to melting ice. Climate-induced displacement is of particular relevance to Australia given its geographical proximity to islands such as Kiribati and Tuvalu, where whole nation displacement is imminent. Australia is an obvious destination country in the region for so-called climate change 'refugees'.

Although precise numbers of those likely to be displaced as a result of global warming are impossible to ascertain, scientists place the figure at somewhere between 50 million and 250 million in the next 50 years.³ Yet, people forced to move as a result of climate change do not fit the international legal definition of 'refugee', which requires individuals already outside their country of origin to show that they have a well-founded fear of being persecuted because of their race, religion, nationality, political opinion or membership of a particular social group. As a result, the rights, entitlements and protection options for people displaced by climate change are uncertain in international law, and there is no international agency, such as the United Nations High Commissioner for Refugees, with a mandate to assist them.

Earlier this year, the Intergovernmental Panel on Climate Change observed that '[m]ost of the observed increase in globally averaged temperatures since the mid-twentieth century is very likely due to the observed increase in anthropogenic greenhouse gas concentrations',⁴ which has 'very likely ... contributed to a rise in mean sea level'.⁵ It is now more than 95 per cent certain that global warming over the past 50 years is only explicable because of human activities. Yet, while moral or factual accountability for global warming may be attributable to particular countries, establishing legal causation and responsibility is very difficult.

In March 2007, the Inuit of the Arctic regions of the United States and Canada sought a declaration from the Inter-American Commission on Human Rights that the United States was responsible for irreparable changes to their environment.⁶ They argued that impacts of global warming and climate change, caused by acts and omissions of the United States, violated their fundamental human rights, including their rights to the benefits of culture; to property; to the preservation of health, life, physical integrity, security, and a means of subsistence; and to residence, movement, and inviolability of the home.

Like many indigenous peoples, the Inuit have an intimate relationship with the land. Their culture, economy and identity depend upon the ice and snow. In a 200 page petition, representatives for the Inuit Circumpolar Conference outlined how animals on which the Inuit rely are disappearing, damaging their subsistence harvest and health;



thawing permafrost is causing landslides and complicating food storage; and travel is increasingly dangerous and difficult due to unpredictable weather, with the warmer climate making traditional knowledge about the safety of sea ice unreliable, and more people drowning each year.

At the other end of the globe, inhabitants of Papua New Guinea's Carteret Islands are preparing to leave for mainland Bougainville, with rising sea levels making their traditional homeland uninhabitable.⁷ Not only are the islands expected to be submerged by 2015, but the islanders' traditional livelihoods are also being destroyed due to salt water contamination, severe storms and the destruction of ecosystems on which they depend. The islands are only one-and-a-half metres above sea level, and at high tide, areas that were once fertile agricultural plots are submerged by the sea. This incursion of salt water 30 to 40 metres inland, which began in the late 1970s, has made their traditional livelihoods and food sources impossible, with traditional crops of bananas and sweet potato no longer able to grow. The constant wet ground has also led to an increase in mosquitoes, which has led to an increase in malaria. The islanders' diet is limited now to fish, coconut and seaweed, supplemented by rice delivered from the mainland once every six months. These changes to diet have led to increased rates of diabetes and diarrhoea. The people of the Carteret Islands see their relocation to Bougainville as the only viable option, despite the fact that it remains a dangerous place rife with automatic weapons that remain from the conflict. Despite the perils they face, it is not an easy decision to move. It means uprooting cultural, family and traditional ties, and leaving an ancestral home. Some of the islanders would rather drown than move at all.

But are the Carteret Islanders, or the Inuit people, 'refugees', or simply victims of environmental catastrophe, and is this relevant to international responses? Do states have international legal obligations to 'protect' people displaced by climate change? Do states which emit particularly high levels of greenhouse gases, or which refuse to agree to binding targets to reduce their emissions, have any special responsibilities? Should flight from habitat destruction be viewed as another facet of traditional international protection, or as a new challenge requiring new solutions?

The answers to these questions are not straightforward, and depend upon a principled analysis of the obligations states have voluntarily accepted under an array of different treaties and practices.

Refugee law

First, although refugee law does not strictly apply, certain protective principles, and the status envisaged for those displaced, might be relevant. In particular, the principle that no one should be sent back to persecution or other forms of serious harm (the principle of non-refoulement) is key.

People displaced by climate change do not qualify as ‘refugees’ under international law. The refugee definition under international law is contained in a 1951 treaty, the Refugee Convention, and reflects its post-Second World War context. It defines refugees as people who are outside their country of origin, with a well-founded fear of persecution on account of their race, religion, nationality, political opinion or membership of a particular social group.

The requirement of exile poses an instant definitional problem for those who have not yet moved. Indeed, many of those displaced by climate change are ‘internally displaced people’ (IDPs), the subject of soft law principles rather than binding treaty obligations. Furthermore, while UNHCR is the lead agency for IDPs, it deals only with IDPs forced to move as a result of conflict. There is an obvious institutional gap. Ironically, there is a danger that climate-induced displacement will create conflict as resources become increasingly scarce. It would be the ultimate perversion if UNHCR’s mandate were triggered due to non-action making a non-violent situation escalate to one of conflict. Ironically, this may have been the case in relation to Darfur; according to UN Secretary-General Ban Ki Moon, the situation in Darfur ‘began as an ecological crisis, arising at least in part from climate change’, with increasing food insecurity and lack of rainfall – and ultimately insufficient food and water for the population – leading to conflict.⁸

Secondly, the Refugee Convention says that ‘refugees’ are people who are unable or unwilling to return to their country of origin because of a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’.⁹ An immediate obstacle to locating environmental displacement within the framework of international refugee law is characterising it as persecution. Storms, earthquakes and floods may be harmful, but they do not constitute ‘persecution’ according to the way that term has been interpreted.

Thirdly, even if it were possible to establish legal causation, the Refugee Convention poses an additional hurdle for those displaced by climate change: namely, that persecution is on account of the individual’s race, religion, nationality, political opinion, or membership of a particular social group. Movement precipitated by climate change is inevitably indiscriminate.

That said, global warming has particularly dire consequences for developing countries which lack the resources to combat it. The outlook for similarly low-lying countries such as The Netherlands and Bangladesh is vastly different, with the former able to safeguard itself

from rising seas through the construction of dykes and sea walls, while the latter remains exposed to considerable land submersion due to a lack of resources and technology to prevent this, with 10 to 17 million people currently living less than one metre above sea level.

Definitions

The inapplicability of international refugee law is linked to the challenge of how to describe people displaced by climate change. Since 1985, the term ‘environmental refugees’ has been floating about,¹¹ but the choice of the term ‘refugee’ is highly controversial.¹² Although it provides a useful descriptor of displacement, it does not accurately reflect in legal terms the status of those who move.¹³ Politically and legally, it is provocative, but also reflects the law’s inadequate response to dealing with displacement of this kind. At the most basic level, it highlights the absence of analysis in international law of the movement of people spurred by climatic rather than directly political upheaval; at the same time, the human element of the upheaval cannot be ignored, since governments’ failure to reduce greenhouse gas emissions has, ultimately, contributed to the situation.¹⁴

Interestingly, it is my understanding that representatives for Kiribati have eschewed the refugee label, fearing that it might lead to scattered, individual, and uncoordinated resettlement breaking down cultural integrity, heritage and—fundamentally—the sense of a Kiribati State and people. What they would prefer is a government-in-exile; the continuation of an imagined community once the physical territory disappears.

Once a people become state-less, are they stateless as a matter of international law? In other words, do people at risk of whole nation displacement fit within the international legal regime on statelessness? Despite literal, physical statelessness being the factual outcome, the two international statelessness treaties do not anticipate this eventuality and therefore do not encompass this notion in their conceptualisation of statelessness.¹⁵ The legal definition of ‘statelessness’ is premised on the denial of nationality through the operation of the law of a particular state, rather than through the disappearance of a state altogether. It deliberately embodies a very narrow and legalistic understanding of statelessness, and does not even extend to the situation of de facto statelessness, namely where a person formally has a nationality, but which is ineffective in practice.

History of protection

It is worth recalling, though, that although climate-induced displacement challenges the assumptions which the international community has made about protection needs, those assumptions were not self-evident at the beginning of the construction of an international legal regime in the 1920s. The strong human rights imperative which we now associate with refugeehood only emerged in the language of protection in the 1940s, 20 years after the international community made its first attempts to regulate the flow of people forced to flee their homes.

We also have to remember that this is not the first time that the world has been faced by mass displacement. At the end of the Second World War, some 66 million people were displaced across Europe, with millions more in China.¹⁶ At that time, the international community 'responded with vision and imagination to tackle what must have seemed like an intractable problem.'¹⁷ The 'solution' was the creation of progressive United Nations institutions to assist with repatriation and resettlement. Between May and September 1945 alone, some seven million people were repatriated. Half a century later, we are at another crossroad, this time with displacement arising for different reasons, and with the prospect of repatriation not viable.

Human rights law

How, then, might international human rights law assist?

Respect for human rights can be viewed as one of the key modern principles of international relations. Yet it competes, and at times comes head to head, with other fundamental principles of international order, such as the principles of the sovereign equality of states and non-interference in other states' domestic affairs. Massive infringements of human rights are seen as violations which are of general international concern, and which make the state that inflicts them accountable to the whole international community. This means that in theory, any other state may seek to hold the offending state accountable, although in practice they prefer to diffuse the tension of this bilateral mechanism and instead go through international organisations such as the UN machinery, which in turn may result in more effective sanctions.

Under human rights law, everyone has the right to life.¹⁸ The Inter-American Commission on Human Rights has recognised that realisation of the right to life is necessarily linked to and dependent on the physical environment.¹⁹ Everyone also has the right not to be subjected to cruel, inhuman or degrading treatment.²⁰ International law recognises that if people are at risk of such treatment in their country of origin, then they must not be sent back there. Every person has the right to an adequate standard of living, including adequate food, clothing, housing and the continuous improvement of living conditions,²¹ and the right not to be deprived of means of subsistence.²² These can all be seen as necessary components of the right to life, which are compromised where global warming leads to the destruction of people's ability to hunt, gather, or undertake subsistence farming. People also have the right to enjoyment of the highest attainable standard of physical and mental health,²³ and the right to take part in cultural life. Ethnic, religious, linguistic or Indigenous²⁴ minorities must be allowed to enjoy their own culture, practise their own religion, and use their own language.²⁵ The Inter-American Commission on Human Rights has acknowledged that 'the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities'.²⁶ It has been argued that interference with these rights may lead to forced assimilation, which the right to culture is intended to prevent.²⁷

From a protection perspective, one problem is that under human rights law, states generally only have direct human rights obligations to people already in their territory or jurisdiction. Furthermore, even if a person forced to move due to climate change manages to reach the territory

of another country, only a handful of these human rights are presently recognized as giving rise to a protection obligation on the receiving state's part—in other words, preventing that person's return. It may therefore be necessary to try to re-characterise the violated human right, for example, violation of the right to an adequate standard of living, as a form of inhuman treatment, which is a right giving rise to international protection, but it is doubtful whether such violations which are not inflicted by the hands of the state which is being fled, will be seen as giving rise to a protection need.

Further, this traditional western approach of individualised decision-making on technical legal grounds seems highly inappropriate to the situation we are presently facing.

Environmental law

By contrast, climate change and the global atmosphere are a 'common resource' of vital interest to humanity.²⁸ International environmental law requires states to implement programmes for mitigating greenhouse gas emissions; to prevent, reduce and control pollution of the atmosphere and the marine environment; and to conserve biodiversity. The latter are relevant where displacement is due to a loss of livelihood or resources resulting from disappearing plant and animal species. Furthermore, states are prohibited from using their territory in a way that causes harm beyond their borders.

There is a basic principle of customary international law that says that every state has an obligation not to knowingly allow its territory to be used for acts that are contrary to the rights of other states.²⁹ In the Inuit claim, lawyers argued that that principle provided a context for assessing states' human rights obligations with respect to global warming, because the emission of greenhouse gases in one state causes harm in others.³⁰ This carries a presumption that states should, at a minimum, engage in international efforts to address global warming, and by failing to ratify the Kyoto Protocol, states like Australia and the US cannot be said to be doing so. Mere ratification is not enough – states must ensure that the international system is sufficiently strong to protect human rights, which means that if this cannot be achieved through international collaboration alone, domestic measures must be taken to ensure that such rights are protected.

As Judge Weeramantry of the International Court of Justice has said:

The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is [an indispensable requirement] ... for numerous human rights such as the right to health and the right to life itself.³¹

Institutional framework

Finally, the absence of an institution with responsibility for climate-induced displacement also poses a challenge. Although the United Nations Environment Programme introduced the issue of environmental displacement on to the international agenda over 20 years ago, there remains no international organisation charged with official responsibility for the issue.

While UNHCR might seem the obvious contender, it is already responsible for over 20 million displaced people. Each year it relies on donations and the goodwill of states to provide it with funds to carry out its work in 116 countries, and it has experienced significant budgetary crises over the years. Is it the appropriate agency to tackle the issue of climate-induced displacement? From a legal standpoint, it presently has no mandate to do so, and from a practical point of view, can it actually assume a protection or assistance function for over double the number of people for whom it already cares? It is seen as the institution with the best experience in the area, as we saw when UNHCR assisted after the Boxing Day tsunami, even though it was not formally mandated to assist. On the other hand, the root causes for displacement are very different. UNHCR is already overburdened and financially under-resourced to carry out its existing protection functions. It is of interest to note that the newly created UN website on climate change does not feature a single human rights-related agency on its list of interested UN parties.

Because there are numerous cross-cutting and intersecting issues raised by climate-induced displacement which relate to a variety of institutional different mandates (such as protection, human rights, indigenous rights, cultural rights, and the environment), there is a risk that the concept will be dealt with in an ad hoc and fragmented manner—if at all—rather than through a single organisation with a focused, holistic approach.

Conclusion

The status, treatment and protection of people displaced as a result of climate change is thus uncertain as a matter of international law. It is therefore imperative to identify and analyse the obligations which states have under international and regional refugee law, human rights law, cultural protection laws, and environmental law to determine which elements may be relied upon to promote a principled protection response to people at risk of climate-induced displacement. To provide maximum protection, international treaties must not be viewed as discrete, unrelated documents, but as interconnected instruments which together constitute the obligations to which states have agreed.

My concern is not primarily about finding ways to hold individual states accountable for breaches, but rather to pinpoint their responsibilities at the outset to demonstrate how forced movement due to climate change should be addressed from a legal perspective. It is intended to guide action—both in terms of showing that there is a need to do something, as well as in shaping what is done. It is dangerous to see the law as the solution; ultimately, even getting acknowledgement of legal obligations requires a political response, and certainly to get to the next step of a treaty, requires a serious commitment, in terms of substance, time and resources, and a willingness to acknowledge the fundamental issues. At this stage, the law may assist us by setting out the minimum standards by which states should inform their responsibilities towards impending climate-induced displacement, providing a principled legal framework for examining states' responses and a threshold against which their actions may be assessed.



Endnotes

1. BA (Hons) LLB (Hons) (Syd), DPhil (Oxon); Senior Lecturer and Director of International Law Programs, Faculty of Law, University of NSW; j.mcadam@unsw.edu.au . This paper was originally delivered at a CPD seminar on 24 October 2007.
2. G Lean, 'Disappearing World: Global Warming Claims Tropical Island', *The Independent* (24 December 2006), referring to research by Jadavpur University's School of Oceanographic Studies.
3. See: N Myers, 'Environmental Refugees in a Globally Warmed World' (1993) 43 *BioScience* 752; Intergovernmental Panel on Climate Change, *Third Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, Cambridge, 2001). In 2005, Myers revised his estimate, suggesting that it could be up to 200 million: N Myers, 'Environmental Refugees: An Emergent Security Issue' (13th Economic Forum, Prague. 23–27 May 2005). Sir Nicholas Stern described this as a 'conservative' assumption: N Stern, *The Economics of Climate Change: The Stern Review* (CUP, Cambridge, 2007). Myers has more recently revised this figure as closer to 250 million: interview with Christian Aid (14 March 2007), cited in Christian Aid, *Human Tide: The Real Migration Crisis* (2007) 50 endnote 10. Christian Aid adopted this figure in its own estimates: 6. See also figures in S Byravan and S Chella Rajan, 'Providing New Homes for Climate Change Exiles' (2006) 6 *Climate Policy* 247.
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6. Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations resulting from Global Warming caused by Acts and Omissions of the United States (7 December 2005) 1 http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf
7. See eg: J Stewart, 'Rising Seas Force Carteret Islanders out of Home', Lateline, ABC television (5 February 2007) Transcript <http://www.abc.net.au/lateline/content/2006/s1840956.htm>. Though described as 'among the world's first environmental refugees', they are more accurately characterised as internally displaced people, since their movement does not require the crossing of an international border. On 'refugee' terminology in this context, see below; K Romer, "'Environmental" Refugees?' (2006) 25 Forced Migration Review 61. Much of the information that follows on the Carteret Islands comes from a talk given by islander Ursula Rakova (Brown Street Community Hall, Newtown, 14 September 2007).
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9. Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1A(2), read in conjunction with Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
10. S Butzengeiger and B Horstmann, 'Sea-Level Rise in Bangladesh and the Netherlands: One Phenomenon, Many Consequences' (Germanwatch, 2004); World Bank, *Bangladesh: Climate Change and Sustainable Development* (Report No 21104 BD, 10 October 2000) Ch 2.
11. See, for example, N Myers and J Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (The Climate Institute, Washington DC 1995); E El-Hinnawi, *Environmental Refugees* (UN Environment Programme, 1985); A Suhrke and A Visentin, 'The Environmental Refugee: A New Approach' (1991) *Ecodecision* 73.
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13. See, for example, D Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"' (2004) 16 *Georgetown Intl Environmental L Rev* 209.
14. Even though scientists project that by the mid-21st century, all climatic events will be the result of human activity (T Flannery, *The Weather Makers: The History and Future Impact of Climate Change* (Text Publishing, Melbourne, 2005) 164), this remains problematic as a matter of establishing legal causation.
15. Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117. Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.
16. UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action* (OUP, Oxford, 2000) 13.
17. Christian Aid, *Human Tide: The Real Migration Crisis* (2007) 3.
18. International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6.
19. Report on the Human Rights Situation in Ecuador OEA/Ser.L/V/II.96 Ch 8; Yanomami case (case 7615 of 5 March 1985), cited in annual report of the Inter-American Commission on Human Rights, 1984-85, OEA/Ser.L/V/II.66, doc 10 rev.1.
20. ICCPR art 7.
21. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 11.
22. Art 1(2) ICCPR and ICESCR.
23. ICESCR art 12.
24. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 30.
25. ICCPR art 27.
26. Maya Indigenous Communities of the Toledo District (Belize Maya) Case 12.053 Inter-American Commission on Human Rights (2004) para 120.
27. See Inter-American Commission on Human Rights, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin 76, OEA/Ser.L/V/II.62, doc. 10, rev. 3 (1983) para II.B.15.
28. See Recommendations of the International Meeting of Legal And Policy Experts, Ottawa Canada, 19 EPL (1989), 78.
29. Corfu Channel case (*UK v Albania*) 1949 ICJ 4, 22.
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31. Case Concerning the Gabčíkovo-Nagymaros Project (*Hungary v Slovakia*) 1997 ICJ 92 (Separate Opinion of Judge Weeramantry), at para A(b).

Judicial Review Today

The 2008 Maurice Byers Address was delivered by the chief justice of New Zealand, the Rt Hon Dame Sian Elias, in the Bar Association Common Room on Thursday, 24 April 2008



The Profession

It is a great privilege to be asked to give the annual Sir Maurice Byers Lecture. It honours a great lawyer, whose influence has shaped the direction of Australian law and continues to set the tone for the profession.

Sir Owen Dixon as you will know, thought that the barrister's role was more important than the contribution made to justice by the judge.¹ That was not mere politeness. The system we have depends

on the ethical discharge by the profession of its responsibilities. There are real strains evident here. Lawyers have been important facilitators in commercial wrongdoing in some of the spectacular corporate collapses. In public law too, there have been serious lapses in standards. The most notorious recent example is the memorandum justifying torture signed by the assistant attorney-general of the United States, JS Bybee.² Harold Koh, the dean of Yale Law School said of this memorandum that it was 'perhaps the most clearly erroneous legal opinion I have ever read... a stain upon our law and our national reputation'.³

No one is immune from the pressure to give the answer the client wants. That is not the ethic of the Bar. As the torture memorandum signed off by Bybee demonstrates, those advising government are subject to special pressures and have special responsibilities to the legal order. Sir Gerard Brennan refers to the story related by David Bennett that when it was suggested that Sir Maurice might take instructions on some question of policy he replied, 'I don't take instructions – I give them.'⁴ It matters very much that a law officer of the Commonwealth has such independence and that Sir Maurice cared so deeply for justice. The New South Wales Bar is rightly celebrated for its standing in the common law world. A member it marks out for the distinction of an annual lecture is the best of the best.

I thought I would attempt this evening a survey of the place of judicial review in modern societies. Power and its control is a topic that exercised Sir Maurice throughout his career. Academic commentators both here in Australia and in New Zealand have referred to the 'exceptionalism' of Australian administrative law.⁵ The way in which we address questions of power and its exercise may vary between jurisdictions for good reason (New Zealand law, too is 'exceptional') but the issues we grapple with are the same. Over time, divergence is likely to be more exceptional than the common ground we will have in answering common problems, even if the dress is dissimilar.

I want to address this topic because in my jurisdiction I think we are too ready to jump to the conclusion that the rich Australian case law on judicial review has little to offer us because of the very different constitutional and legislative context. In fact, engagement with the

ideas expressed in Australian judgments would be very much to the benefit of our legal method. Conversely, it would be troubling if a self-perception of difference led to isolationism in Australian public law thinking. I should say that I am not at all sure this trend, identified by some, is accurate. I do not try to express a view on its validity – that would take much closer understanding of Australian law than I can pretend. I do think it is a great pity if the existence of statutory and constitutional bills of rights in other jurisdictions is used here to suggest that their case law is not of direct relevance to the problems of good administration under law which your courts have to consider.

In that connection, I was surprised to read some of the articles and letters to the editor in Australian newspapers today which seem to assume that Australian law is without fundamental values and that collecting them in a statement of rights would be revolutionary. It is similar to the misconception in my country that we have no constitutional law because we have no single written constitutional instrument. Courts in our jurisdictions have always had recourse to fundamental values whether found in a written instrument (in which at least they have demonstrable democratic validity) or are immanent in the common law (where judges are more exposed in identifying them). So I do not think that the existence of a written constitution or a statement of rights is properly to be an excuse for ignoring the ideas thrown up for judicial determination in societies as similar as ours. Brennan J described our conception of judicial review as well as yours when he said:⁶

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

I do not attempt anything comprehensive. That would be impossible. I touch on some selected themes.

First, our shared tradition. Chief Justice Gleeson has said that, with allowances for the very different constitutional arrangements, English law and Australian law were relatively consistent until English grounds of review and the standards by which they are measured moved apart with the growing influence of European human rights law.⁷ It may be that English law (and New Zealand law for that matter since its adoption of human rights legislation) has drifted apart from Australian law. I think however the trends have been there for much longer.

It is worth remembering how far our shared tradition has moved during the course of Sir Maurice's time in the profession. Indeed, it has been transformed since I studied constitutional and administrative law in 1968.

The gloom of administrative law

In an article published in 1961, Kenneth Culp Davis in reviewing SA de Smith's *Judicial Review of Administrative Action*, first published in 1959, expressed dismay about the future of judge made public law in England.⁸ In particular he criticised the failures to grapple with policy and the abdication of responsibility to ensure procedural fairness. He expressed the view that judicial review, properly limited, does not

weaken but strengthens the administrative process. He was 'often shocked by the extent to which English courts refused to enquire whether serious justice has been done in the administrative process'.⁹ Davis referred to Lon Fuller's verdict that in the field of commercial law, British courts had 'fallen into a 'law-is-law' formalism that constitutes a kind of belated counter revolution against all that was accomplished by Mansfield.'¹⁰ Davis says the position in respect of public law was much worse:¹¹

Most judge made public law is much more in need of constant re-examination than most commercial law, for the effects of decisions either way on living people are often more drastic, the policy problems are often more difficult, and the needs for predictability are usually less.

I suspect that the condition Davis described in relation to administrative law in the United Kingdom applied equally in Australia at the time. It certainly did in New Zealand. We were just emerging from what has been described as a period of 'slavish imitation' of English law¹² and still under the oversight of the Privy Council, although the recently established Court of Appeal was starting to feel its oats. Administrative law was a very new subject. Professor Wade has written of the 'deep gloom' that had settled upon English administrative law.¹³ All that was about to change. Wade says that the English judges, prodded by Lord Denning and then Lord Reid, woke up to 'how much had been lost'.¹⁴ In New Zealand, one of the changes on the horizon was the appointment of judges who had studied administrative law and legal method in the United States and in the United Kingdom. In Robin Cooke we had one of the more influential administrative lawyers of the common law world.

The comfortable assumptions on which judicial supervision of administrative power were based in 1959 have not lasted.

In Davis's view the test for the soundness or unsoundness of judge made law was 'its effect upon living people'.¹⁵

In the present generation, English judges have been limiting themselves too much to the tasks of the bricklayers and too much neglecting the functions of the architects.

That, he said, was wholly unsatisfactory in building the 'giant structure' of public law that had to be built during the coming century.¹⁶ What he was looking to was a changed culture in law, in better response to the needs of 'living people'.¹⁷

Change

For those of us who have practised law through most of the years since De Smith's book was published in 1959 it is hard to think back to how

things were. The book itself was a pioneering effort. De Smith described the scope of judicial review in terms of vires, jurisdiction, and clear demarcation between law and fact.¹⁸ Natural justice embraced the right to a hearing (which until *Ridge v Baldwin*¹⁹ exposed misapplication of a dictum of Lord Atkin,²⁰ was thought to arise in limited circumstances²¹) and decision-making free of bias. Discretionary powers had to be exercised within jurisdiction but were otherwise largely immune for correction for error. The exceptions were use of power for bad faith, cases where error of law appeared on the face of the record (a ground recently rediscovered) and those where the decision-maker had acted without evidence or had come to a conclusion no reasonable decision-maker could reach. The great administrative law cases of *Padfield*,²² *Ridge v Baldwin*, and *Anisminic*²³ had not been decided.

The comfortable assumptions on which judicial supervision of administrative power were based in 1959 have not lasted. So, in most jurisdictions, over time, the courts have pulled back from a strict application of the ultra vires rationale. It has not seemed to fit the needs of 'living people' in modern societies. In the first place, reliance upon open textured legislation with wide discretionary powers has made it difficult to separate legality or statutory interpretation from policy choices. In the second place, the ultra vires theory does not fit easily with the supervisory jurisdiction exercised in relation to non-public bodies, not regulated by statute. In addition, modern insight as to the nature in which power is exercised has prompted more fundamental rule of law justifications for supervision.

More fundamentally, there has been a shift in the way in which law is seen in our societies. Such shift has been described as a culture of justification.²⁴ In this vein, Chief Justice Gleeson acknowledges:²⁵

The development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of modern public life.

I do not think this climate has come about solely or even mainly because of increased suspicion of government. Rather, I think it is attributable to the increasing diversity of modern societies, an increased concern that social ends need to be balanced with individual autonomy and increased openness in government. These influences overlap. They have clearly been affected by the post-war adoption of statements of fundamental rights and the vocabulary and organising principles supplied by such statements dominate thinking. I do not think the transformation of judicial review is attributable to statutory and constitutional recognition of rights.

As Paul Craig has pointed out, the development of varied intensity judicial review, for example, was under way long before adoption of statutory statements of rights in most jurisdictions.²⁶ Similarly, JWF Allison agrees that recourse to substantive values and a substantive conception of the rule of law was evident in the decades before the passing of the Human Rights Act.²⁷ The development has been paralleled by scholarly writing, particularly that influenced by Ronald Dworkin's emphasis on legal principle. In this tradition, Trevor Allan focuses on the fundamental principle of equality in Dicey's rule of law and likens it to Dworkin's ideal of integrity.²⁸ Allan's principle of equality is a substantive

value.²⁹ It imposes a fundamental requirement of justification. The implications of rule of law analysis have yet to be fully explored. As Justice Keith Mason in his 2004 Maurice Byers Lecture suggested, the concept of the rule of law leaves 'much room for movement'.³⁰ The immediate point to be made, however, is that varied intensity review did not follow the enactment of explicit standards in statutory bills of rights. Its well-established use in other contexts was explained by Gleeson CJ and explained in *Plaintiff S157/2002*.³¹ It is commonplace that decision-making, whether judicial or administrative, is subjected to different degrees of scrutiny according to context, including most importantly what is at stake and questions of institutional competence. Variable intensity review responds to the insight that in decisions of great importance, judicial indifference to what happens within the four corners of vast discretion does not meet the needs and aspirations of the community.

In pluralistic modern societies, often secular or with diverse beliefs, law is one of the more important sources of the principles by which society operates civilly. The concept of human dignity as developed in the South African Constitutional Court is concerned not only with impact upon the individual but with the interest of the whole community in promoting mutual respect not only for individual difference but for group difference.

William Eskridge, in an article entitled 'Pluralism and Distrust' suggests that our societies have moved on from the one-sided battlefields in which the majority democratically oppresses minorities.³² They are the conditions which have led to engagement with fundamental rights, protective of the individual. He suggests that societies today are divided also by what he calls 'culture wars',³³ in which values clash. Eskridge is of the opinion that courts perform a valuable role in lowering the stakes in such wars and allowing the political processes to adapt. He allows that if courts raise the stakes they can fracture society.

The stakes can be raised as much by not-doing as doing. Although bold decisions may raise the temperature from time to time (and inevitably provoke charges of judicial activism), those cases are very rare indeed. The virtue of judicial process is to still controversies. That is sometimes done through vindication of claim of legal right, but much more frequently it is done through authoritative vindication of conduct which is substantively compliant with legal obligations, including obligations of fairness and reasonableness. Providing such legitimacy is a principal contribution of legal process to the rule of law. It is not achieved through supervision for procedural exactness but extreme deference in matters of substance.

Nor does extreme deference permit the valuable contribution to the political process of which Sandra Fredman has written.³⁴ 'Dialogue' is perhaps an overworked word today, but full exposition of the issues that may have been glossed over or overlooked in the political process is a benefit of the deliberative process of litigation which is valuable in itself. Those who litigate are demonstrating expectations about the system. They are working within it. Sometimes in the patient examination of claims dismissed out of hand in less deliberative, less disinterested processes there are important gains irrespective of formal outcome. In New Zealand, I have no doubt that litigation by Maori in the 1980s

In New Zealand, I have no doubt that litigation by Maori in the 1980s achieved a substantial shift in social and political values. The decisions in the landmark cases about lands, forests, fisheries and language delivered relatively modest direct results but they demonstrated a just claim, long ignored, and resulted in political will to respond.

achieved a substantial shift in social and political values. The decisions in the landmark cases about lands, forests, fisheries and language delivered relatively modest direct results but they demonstrated a just claim, long ignored, and resulted in political will to respond. Similarly, cases formally lost in seeking recognition for same sex marriages in New Zealand and some US jurisdictions led to the enactment of civil union statutes through the political process. The reasoning of the courts in these cases demonstrated the justice to which the political processes responded.

Thoughtful writers have long realised that a critical role played by law in our societies is as a method of argumentation. (It is a major theme of Neil MacCormick, a significant legal philosopher of our time). The processes of law mediate and explain change in social conditions. A dramatic example is the decision of the *United States Supreme Court* in *Brown v Board of Education*.³⁵ As Richard Posner has pointed out about that decision, it was not pondering the text of the Fourteenth Amendment that suddenly switched on a light bulb. It was recognition that American society and international society had changed and that the law needed to shift also.³⁶

A shift in expectations of law may also be attributed to the climate of openness that many of us embraced with freedom of information legislation. Such legislation lays bare the material relied upon by administrative decision-makers. In New Zealand, under the Official Information Act, someone affected by an administrative decision can ask to know the reasons for it. Under s23 of the *Official Information Act 1982*, where a department or minister of the Crown or one of a wide range of organisations makes a decision or recommendation in respect of any person, the person is entitled to a written statement, on request, of:

I realise that references to 'human dignity' set some people's teeth on edge. They fear its malleability in the hands of judges bent on vindicating personal preferences. It is however a standard which underpins the United Nations Declaration and the international covenants based on it...

- ◆ the findings on material issues of fact; and
- ◆ a reference to the information on which the findings were based; and
- ◆ the reasons for the decision or recommendation.

The requirement of reasons is also an applauded feature of the package of administrative reforms introduced in Australia in the early 1970s (even if the common law still lags in this³⁷). These requirements for information and reasons respond to a widely held need.

People want to know the reasons why official action is taken which affects them. It is an aspect of human dignity. It facilitates participation and prevents human beings being regarded as objects. Similar underlying themes are responsible for legislation which enables individuals to obtain information held about them by public agencies and employers.

I realise that references to 'human dignity' set some people's teeth on edge. They fear its malleability in the hands of judges bent on vindicating personal preferences. It is however a standard which underpins the United Nations Declaration and the international covenants based on it, as the South African Constitutional Court has emphasised.³⁸ South Africa may have acute reasons for some such social glue, but that hardly means we have no need for some ourselves.

Lorraine Weinrib makes it clear that the state cannot satisfy the modern expectation of substantive justification by 'merely asserting plenary political authority, promotion of the public good, fidelity to traditional moral values or social roles, or financial constraints.'³⁹ This, she says, is not a 'balancing exercise':⁴⁰

Justification requires connection to the core constitutional principles through a sequence of analytical steps that maintain the primacy of the constitutional principles even when a particular crystallisation of these principles must cede. The compendious name for this methodology is proportionality analysis.

Maintaining a strict division between merits review and legality, always difficult, is sometimes strained to breaking point in the new climate of openness that our societies have come to expect. Again, this cannot be set down simply to the adoption of statutory bills of rights in some jurisdictions. They certainly provide measures against which exercise of authority must be justified, in protection of values which have been democratically identified, and which cannot be divorced from some merits consideration, but they are an aspect of a wider phenomenon: the view that the possession of power is not sufficient to justify its use.

It may have been inevitable that, with the ubiquity of reasons and open access to official and personal information, judicial review could not maintain the line that it is not concerned with outcomes except where the decision-maker can be said to have taken leave of his senses. Aronson, Dyer and Groves in their excellent book *Judicial Review of Administrative Action*⁴¹ say that Professor William Wade thought that the availability of certiorari to correct non-jurisdictional error of law on the face of the record (a ground of review famously 'rediscovered' in *R v Northumberland Compensation Appeal Tribunal (Ex parte) Shaw*)⁴² was exceptional, arising only because the urge to intervene was 'more than judicial flesh and blood could resist'.⁴³ It seems to me that it is wrong to suggest that the reaction is a judicial reflex. Decisions which are wrong on their face are deeply offensive to anyone affected by them. With the spread of justificatory processes in administrative decision-making, it seems to me that expansion of the scope of judicial review rightly responds to that sense of human outrage. As Sir Robin Cooke pointed out in 1986 Lord Sumner's metaphor of the Sphinx in speaking of error of law on the face of the record⁴⁴ served a 'rather vicious purpose in suggesting that by leaving reasons unspoken an authority can emancipate itself from scrutiny.'⁴⁵ Cooke said:⁴⁶

It was always obvious to persons interested in administrative law that this could prove a blind alley or side road.

One of the interesting features of the working of Official Information Acts has been its demystification of administrative decision-making. The workings of the legislation have revealed what has been intuitively thought by many, that the courts are wrong to defer unduly to administrative expertise. As Justice Roger Traynor pointed out in 1968, very often a technical evaluation 'may have expertly skimmed the surface of a problem and never touched its depths'.⁴⁷ It may overlook altogether legal aspects. It may trench upon legitimate rights and interests without justification. Supervision through judicial review promotes better administrative decision-making and good government. This seems to me a good thing, provided the limits to judicial review are respected.

It is important not to throw the baby out with the bathwater. Review does not permit the court to substitute its discretion for that of the decision-maker. There is room for divergence in approach here, depending on the domestic solutions to supervision of administrative discretion. This is the area perhaps of Australian 'exceptionalism', which I want to touch upon before attempting to finish with what I think may be some of the challenges ahead.

Australian solutions

In a September 2007 lecture, Chief Justice Gleeson explained the differences between Australian solutions in judicial review and those of comparable jurisdictions as arising out of Australia's constitutional and statute law:⁴⁸

A search for jurisdictional error, and an insistence on distinguishing between excess of power and factual or discretionary error, remain characteristic of our approach to judicial review.

That difference arises out of the constitution and in particular the strict separation of powers it provides. A further cause of difference is the extensive system of merits review provided by federal legislation. As a result:⁴⁹

Australian administrative law has not taken up the North American jurisprudence of judicial deference, nor has it embraced the wide English concept of abuse of power as a basis for judicial intervention in administrative decisions.

Rather, the focus is on jurisdiction and legality.

A New Zealand academic, Michael Taggart, has suggested that the strong insistence of the High Court of Australia on the separation of judicial power has been at a cost to administrative law.⁵⁰ The strength on the constitutional side is mirrored by 'considerable restraint' in administrative law. A sharp division is drawn between law on the one side and 'policy and the merits' on the other.⁵¹

Peter Cane in his centenary essay for the High Court of Australia said that the establishment of the AAT 'fragmented administrative law by giving the distinction between judicial review and merits review a unique and rigidifying significance'.⁵² A second factor he identifies as 'contributing' to 'Australian exceptionalism' is that the judicial review jurisdiction of the High Court is remedially focused and contained in a document which is, by its very nature, tradition bound.⁵³ This he says makes it harder for the courts to re-fashion the common law than it has been for English courts. The third factor he identifies is a lack of an Australian Bill of Rights.⁵⁴ Finally, the new constitutional administrative law is 'informed by a strong commitment to conceptualism and historicism on the part of intellectual influential members of the Gleeson court'.⁵⁵ Cane accepts that if the merits review system had not been established in the 1970s 'judicial review would probably have developed to cover all or most of the grounds now occupied by merits review'.⁵⁶

Thoughtful writers have long realised that a critical role played by law in our societies is as a method of argumentation.

It may be that the combination of merits review and constitutional and common law review covers the field. I am conscious of the fact that

some of the decisions of the High Court that look odd in result to New Zealand eyes, cases such as *Tang*⁵⁷ and *Neat Domestic*,⁵⁸ may well have been inevitable given the form of the proceedings and the relief sought and the division of responsibilities within the Australian legal system. I certainly do not want to suggest that judicial review is always preferable to merits review of the type set up under the AAT legislation. It clearly is not, but it does seem that with respect to grounds of substantive review and standard of review, we are now in a phase where Australian law is picking its own path. To an outsider, there are two pressing challenges. The first is the ability to draw a distinction between policy and fact on the one hand, and legality on the other, on which a focus on legality and jurisdiction depends. The second is the ability to engage with developing standards for substantive review.

The line between law and fact or policy is notoriously unstable. Carol Harlow considers that Dicey made a malignant contribution to English public law by making 'scientific rationalism an essential component of British constitutional theory, an error of law to which it was arguably least appropriate'.⁵⁹ This, she says, left a 'disabling legacy for English constitutional law' by obscuring the close relationship between law and politics 'which he himself had always recognised'.⁶⁰ Much scholarship in recent years, some of the best of it Australian, has been devoted to the porous nature of fact, law and policy. That thinking may be influencing the shift in the United Kingdom to rule of law justifications for judicial review, which, with their importation of fundamental principles of equality, make substantive assessment inevitable, as Trevor Allan has pointed out.⁶¹ The view may be developing that in supervising administrative decision-making the courts are engaged in the same interpretative exercise both in deciding what limits are set by the words conferring discretionary powers and by the context in which they are exercised. That is why Taggart considers that the principle of legality and the presumptions of conformity with international law attach to discretionary decisions.⁶² What is then important is the standard of review.

That is I think the second challenge. Lord Cooke long expressed the view that the grounds of judicial review can be summed up on the basis that a decision-maker must act in accordance with law and fairly and reasonably.⁶³ Although review for unreasonableness was pitched by Lord Greene at a level that shaded into bad faith,⁶⁴ Lord Cooke contended that there is no need for any amplification of the standard of reasonableness, and that what is required of it takes its shape from context.⁶⁵ The important considerations in setting such context are the nature of the interests affected and the relative competence of the courts to judge what is reasonable. Although some of our case law has moved around, this approach is widely supported in my jurisdiction and fits with the principle of legality applied by the House of Lords.⁶⁶ On this view substantive unreasonableness has moved from the Wednesbury formulation maintained in the Australian legislation. How constraining that will be of the development of common law review here remains to be seen.

In the United Kingdom, Canada, and New Zealand, unreasonableness as a standard of review is giving way to proportionality analysis. On the Cooke approach to reasonableness, proportionality analysis is simply an application of varied reasonableness in context, but that is not how it is being generally treated.

Mine is the more modest point that where the content of human rights in context turns on what Sunstein has referred to as the 'qualitative actual experience and self-understanding within a society', the promotion of human rights may be better served in a particular case by accepting that the courts may not always consider they are best placed to make the assessment.

As is well known, proportionality analysis entails four sequential mandatory tests:

1. Is the objective of sufficiently high importance to warrant the infringement of right?
2. Does the law or action logically forward this objective?
3. Does it impinge on the right more than is necessary?
4. Does the benefit exceed the detriment?

Weinrib maintains that it is only in the last step (does the benefit exceed the detriment?) that there is any room for balancing.⁶⁷ I am not sure that the decisions in New Zealand and England are bearing this view out and indeed there is some concern that judicial 'balancing' in review in protection of human rights is diminishing those rights.

Weinrib is right, however, to say that proportionality methodology must be expounded in application.⁶⁸ It cannot be reduced to a text, but then, no more can reasonableness.

What is not clear yet in New Zealand and elsewhere is whether proportionality analysis will be reserved for human rights cases or whether it will be applied as the standard of substantive review, supplanting *Wednesbury*. If the varied intensity review that Cooke thought required when determining unreasonableness is used, it may not matter, although Paul Craig makes the case for proportionality as better methodology quite compellingly.⁶⁹

Challenges ahead

Substantive fairness has featured in New Zealand decisions at least since 1979,⁷⁰ but has never been authoritatively established. Whether that

position will be maintained in the face of gathering authority in favour of substantive fairness as a ground of review in the United Kingdom will no doubt arise for consideration before too long.

Linked to fairness in outcome is the question of rule-making and the extent to which a rule of law justification for judicial review may require processes to ensure equality of treatment. The balance between maintaining discretion to deal with individual cases and making sure benefits and detriments are not arbitrary has not been greatly explored but is the subject of increasing attention. There is no reference to 'equality before the law' in the New Zealand Bill of Rights Act. The White Paper which preceded it indicated that such expression was unnecessary because equality is part of the rule of law.⁷¹ Formal equality in application of law is a general principle of justice and even application of law is a central plank in the culture of law-mindedness on which the rule of law depends. Justice Jackson in *Railway Express Agency Inc v New York*⁷² struck a chord that resonates with most when he said:

Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

That presents challenges for judicial review of discretionary decision-making. As Justice Douglas said in his concurring opinion in *Furman v Georgia*, discretionary powers are 'pregnant with discrimination' and therefore potentially damaging to the idea of equal protection of law.⁷³ This is an area in which the courts in the United Kingdom have been busy in the last few years. It is too soon to know how it will turn out.

In administrative law it is necessary to re-think what leeway can be left to the decisionmaker to whom parliament has delegated responsibility. What level of scrutiny ought the courts to undertake? Where are the standards applied to be obtained? In the Denbigh High School case the decision of the school to exclude a pupil for wearing a jilbab which did not meet the school's uniform code, was subjected in the English Court of Appeal to close scrutiny for procedure.⁷⁴ The Court of Appeal thought the process deficient and would have sent the case back for reconsideration. On appeal the House of Lords agreed with academic criticism that the Court of Appeal had failed to address the substantive outcome of the decision.⁷⁵ Indeed, Thomas Poole memorably suggested that the elaborate and costly process suggested by the Court of Appeal would have put the judge into the decision-maker's head rather than over its shoulder.⁷⁶ The House of Lords considered rather whether the actual decision violated rights. The conclusion is one arrived at on the facts, without development of any legal test for future cases and the facts stressed were broadly contextual. The assessment was not simply a value neutral supervision as to whether the board had addressed the right question and come to an answer open to it on the material available to it.

In cases concerning what Eskridge describes as 'culture wars',⁷⁷ there may be good sense in not imposing the value judgment of the court. These themes of relative institutional competence in the context of decisions about incommensurable values are explored by Sunstein,⁷⁸ Alder,⁷⁹ Alexy⁸⁰ and others. This deep water I do not enter. Mine is the more modest point that where the content of human rights in context turns on what Sunstein has referred to as the 'qualitative actual experience and self-understanding within a society',⁸¹ the promotion

of human rights may be better served in a particular case by accepting that the courts may not always consider they are best placed to make the assessment.

Where as in a case like *R (Limbuela) v Secretary of State for the Home Department*⁸² a fundamental human need is in issue and no judgment about incommensurable balancing values is called for, strict review for compliance with human rights is appropriately directly undertaken by the courts. In other cases the option of accepting well-justified conclusions of the agencies primarily responsible is properly available. The reasons they give will be key to the courts having confidence in a particular case to respect the decision under review. If they do not give convincing reasons, the courts will have to undertake close scrutiny. At the other end of the spectrum, the nature of the decision under review will raise issues of institutional competence which may require patent error in law or reasoning to justify intervention.

Endnotes

1. *Jesting Pilate* (2nd ed, 1996), pp 245-6.
2. US Department of Justice Office of Legal Counsel, 'Memorandum for Alberto R. Gonzales Counsel to the President' (Aug 1, 2002).
3. As he told the Senate Judiciary Committee.
4. 'The Inaugural Sir Maurice Byers Lecture, Strength and Perils: the Bar at the turn of the century' (Summer 2000/2001) *Bar News* 32, p 33.
5. See, for example, Taggart, 'Australian exceptionalism in judicial review (Tenth Annual Geoffrey Sawyer Lecture, Australian National University, 9 November 2007).
6. *Church of Scientology v Woodward* (1982) 154 CLR 25 at p 70 (HCA).
7. 'Singapore Academy of Law Annual Lecture 2007: Australia's Contribution to the Common Law', 20 *Singapore Academy of Law Journal* 1, p 25.
8. 'The Future of Judge Made Public Law in England' (1961) 61 *Columbia Law Review* 201.
9. *ibid.*, p 207.
10. *ibid.*, p 213. Fuller expresses this view in his article 'Positivism and Fidelity to Law – A Reply to Professor Hart' 71 *Harvard Law Review* 630, pp 637-8.
11. Above fn 8, p 213.
12. Characterised by Jim Cameron as 'legal cringe' in 'Legal Change over 50 Years' (1987) 3 *Canterbury Law Review* 198, p 198.
13. In Wade and Forsyth, *Administrative Law* (9th ed, 1994), p 16.
14. *ibid.*, p 17.
15. Above fn 8, p 201.
16. *ibid.*, p 220.
17. *ibid.*, p 219.
18. See Chapter Three, p 55 onwards.
19. [1964] 1 AC 40 (HL).
20. In *Rex v Electricity Commissioners, ex parte London Electricity Joint Committee Co.* 1 Str 557 at p 567.
21. See Lord Reid in *Ridge v Baldwin* at pp 71-72.
22. *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 AC 997 (HL).
23. *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
24. See Gleeson CJ, 'Outcome, Process and the Rule of Law [2006] 65 *Australian Journal of Public Administration* 5, p 12.
25. *ibid.*
26. *Administrative Law* (5th ed, 2003), p 562.
27. *The English Historical Constitution* (2007), p 191.
28. *Constitutional Justice: The Legal Foundations of British Constitutionalism* (2001), pp 17-20, 40-41. See also Law, Liberty and Justice, *The Legal Foundations of British Constitutionalism* (1993), pp 21, 44ff, 163ff.
29. See Allison, above fn 27, p 194.
30. 'What is wrong with top-down legal reasoning?' (Winter 2004) *Bar News* 10, p 13.
31. (2003) 211 CLR 476 (HCA).
32. 'Pluralism and distrust: How Courts Can support Democracy by Lowering the Stakes of Politics' (2000) 114 *Yale Law Journal* 1279, p 1298. This title echoes John Hart Ely's *Democracy and Distrust* (1980).
33. *ibid.*
34. See, for instance, 'From Deference to Democracy: the Role of Equality Under the Human Rights Act 1998' (2006) 122 *The Law Quarterly Review* 53.
35. (1954) 347 US 483.
36. *The Problem of Jurisprudence* (1990), p 307.
37. This is a result of the High Court's decision in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656. Compare this to Canada where the Supreme Court in *Baker v Canada* [1999] 2 SCR 817 recognised a common law duty on administrative decision-makers to give reasons.
38. *Harkson v Lane* [1988] 1 SA 1 (CC).
39. 'Postwar Paradigm and American Exceptionalism' in Choudhry (ed), *The Migration of Constitutional Ideas* (2006) 84, p 96.
40. *ibid.*
41. (4th ed, 2004), p 104.
42. [1952] 1 KB 339. Wade's embarrassment based on the 'voidability' of such decisions was removed when the House of Lords in *R v Hull University Visitor (Ex parte Page)* [1993] 1 AC 682 treated all errors of law as presumptively going to jurisdiction.
43. In Wade and Forsyth, above fn 13, p 306. This passage was dropped from the current edition.
44. *R v Natbell Liquors Limited* [1922] 2 AC 128, 159 (HL).
45. 'The Struggle for Simplicity in Administrative Law' in Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (1986) 1, pp 6-7.

46. *ibid*, p 7.
47. 'Better Days in Court', *The Traynor Reader* (1987) 83, p 90.
48. 'Singapore Academy of Law Annual Lecture 2007: Australia's Contribution to the Common Law', 20 *Singapore Academy of Law Journal* 1, p 24.
49. *ibid*, p 25.
50. Above fn 9.
51. *ibid*, p 5.
52. 'The Making of Australian Administrative Law' in Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 314, p 332.
53. *ibid*.
54. *ibid*.
55. *ibid*.
56. 'Merits Review and Judicial Review' (2000) 28 *Federal Law Review* 213 at p 243.
57. *Griffith University v Tang* (2005) 221 CLR 99.
58. *NEAT Domestic Trading v AWB* (2003) 216 CLR 277.
59. 'Disposing of Dicey: From Legal Autonomy to Constitutional Discourse?' (2000) 48 *Political Studies* 356, p 357.
60. *ibid*.
61. See above fn 28 and 29.
62. 'Administrative Law (2006) *New Zealand Law Review* 75, p 83.
63. Above n 45, p 5.
64. In *Wednesbury Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 (CA).
65. Above n 45, pp14-15.
66. As described in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at p131 by Lord Hoffmann and at p 130 by Lord Steyn (HL).
67. Above in 39, p 97.
68. *ibid*, p 98.
69. Above n 26, pp 628-632.
70. *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 at p357 (CA) per Woodhouse and Cooke JJ. *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at p 149 per Cooke J.
71. A Bill of Rights for New Zealand (presented by the Minister of Justice, 1985), p 86.
72. (1949) 336 US 106 at p 113.
73. (1976) 408 US 238 at p 257.
74. *Regina (SB) v Governors of Denbigh High School* [2005] 1 WLR 3372.
75. [2007] 1 AC 100.
76. 'Of Headscarves and Heresies' (2005) *Public Law* 685, p 695.
77. Above n 32.
78. 'Incommensurability and Valuations in Law' (1994) 92 *Michigan Law Review* 779.
79. 'The Sublime and the Beautiful: Incommensurability and Human Rights' (2006) *Public Law* 697.
80. 'Balancing, Constitutional Review and Representations' (2005) 31 *International Journal of Constitutional Law* 572.
81. Above n 69, p 856.
82. [2006] 1 AC 396 (HL).

Verbatim

Spigelman CJ on the retirement of Mason P

'You are perfectly, indeed uniquely, placed to investigate and explain to us all how it has come to pass that Sydney has become a world centre, indeed one of the bastions of, both evangelical Anglican theology and evangelical equity scholarship. Is there a connection?'

Allsop P on his swearing in as President of the Court of Appeal

'I have received many letters of congratulations from my colleagues on the Federal Court. Only one of them began "Dear Rat".'



Why prosecutors should support a charter of rights

Anna Katzmann SC presented the following paper at the Crown Prosecutors Conference at Terrigal in March 2008

The fact is that a democracy's response to the threat of terrorism cannot simply be more stringent laws, more police and more intelligence personnel. The point was well made by European Commissioner for Justice, Freedom and Security, Franco Frattini, when he said:

[O]ur citizens entrust us with the task of protecting them against crime and terrorist attacks; however, at the same, they entrust us with safeguarding their fundamental rights . . .

[T]he necessary steps we take to enforce security must always be accompanied by adequate safeguards to ensure scrutiny . . .

The challenge of protecting security without undermining fundamental rights requires constant vigilance. But the reality is that the machinery of vigilance in Australia is deficient.¹

Introduction

At first blush this might seem an odd subject for a paper at an occasion such as this. Some people might think that crown prosecutors have no interest in charters of rights or are bound to oppose them; that this is an issue with which only defence counsel are concerned.

However, defence counsel do not have a monopoly over the high moral ground. Nor are they alone interested in the protection of basic civil rights. With judges, crown prosecutors are the custodians of the right to a fair trial. Moreover, crown prosecutors have a vested interest in securing a fair trial. After all, a conviction achieved after a fair trial is a secure conviction.

Ten years ago the NSW chief justice, the Hon J J Spigelman, argued that state legislation incorporating human rights protections was 'an option worthy of consideration' and looked to the model of the UK Human Rights Act.²

Since that time, Victoria and the ACT have introduced legislation protecting basic human rights ('rights legislation'). Rights legislation gives statutory recognition to certain rights, the subject of international instruments Australia ratified years ago. The legislation follows the models in New Zealand and the United Kingdom. Unlike the US and Canadian laws they are not constitutionally entrenched. For this reason they are more flexible. They can respond to contemporary concerns. They pose no threat to parliamentary sovereignty. They can be amended or even repealed, without the need for a referendum. The Bar Council supports legislation of this kind. Crown prosecutors have nothing to fear from it.

What is a charter of rights?

A charter of rights is a statute which gives effect to our international obligation to introduce into municipal law the protection for fundamental human rights which Australia at various times has undertaken to provide. It is a legislative statement about the kind of society in which we want to live. The statutory, non-entrenched model adopted in NZ, the UK, the ACT and Victoria, has a number of important features:

- ◆ Enactment by statute and maintenance of parliamentary sovereignty.

- ◆ Conferral of a power on the courts to issue declarations of inconsistent interpretation in the event that a statute contravenes or allows for contravention of a human right but with no power to invalidate the statute.
- ◆ Requirement that a declaration of inconsistent interpretation be communicated to the attorney-general to be laid before the parliament.
- ◆ Obligation on a member introducing a bill to deliver a reasoned statement to parliament about whether the bill is compatible with human rights or not.
- ◆ Requirement of public authorities and those who exercise a public power to act in accordance with human rights unless obliged by statute to act otherwise.
- ◆ Requirement of a court to interpret legislation in accordance with human rights as far as it is possible to do so consistently with the legislative purpose.

The latest legislation to incorporate these principles is the *Victorian Charter of Rights and Responsibilities Act 2006* which came into full effect at the beginning of this year. The Victorian Charter:

'[C]reates a system of checks and balances addressing the protection of human rights in relation to the interpretation of all existing Victorian legislation, . . . the drafting of new legislation and the decision making processes of Victorian public authorities. Although the charter's ambit is wide, the mechanisms introduced therein are not internationally novel and the rights have been the subject of considerable international jurisprudence.'³

Modern rights legislation grew out of the 1948 Universal Declaration of Human Rights and a number of international conventions, the most important of which are the International Covenant on Civil and Political Rights ('ICCPR'), the International Covenant on Economic, Social and Cultural Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ('the Refugee Convention'), the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. These international treaties in turn owe much to the the principles of the Enlightenment and liberalism.

Australia has ratified all of these international treaties. In doing so the various Australian governments undertook to 'adopt such legislative or other measures as may be necessary to give effect to the rights'.⁴ In Australia, unless the protections guaranteed by the international treaties are incorporated into municipal law, however, they form no part of it.⁵

The crown prosecutor as the guardian of human rights

The role of the criminal justice system is to maintain the rule of law. Its main objectives are to detect and prosecute crimes, to convict and punish the guilty and to discharge and free the innocent. Crown



YOUR PRIVATE SANCTUARY IN THE HEART OF SYDNEY...

prosecutors do not operate on their own behalf, nor on behalf of the political authority that appointed them, but on behalf of the community. For this reason, they are obliged to observe two essential requirements: to uphold the effectiveness of the criminal justice system and to safeguard the rights of the individual.⁶

A prosecutor's work is intimately connected with a number of basic rights recognised in the ICCPR but which, in the absence of a domestic statute making them part of our law, are vulnerable to interference from the executive. Those rights include:

- ◆ the right to life (Article 6 of the ICCPR),
- ◆ the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR),
- ◆ the right to liberty and security and the right not to be subjected to arbitrary arrest or detention (Article 9 of the ICCPR),
- ◆ the right to a speedy trial (Articles 9 and 14 of the ICCPR),
- ◆ the right to a fair and public hearing by a competent, independent and impartial tribunal (Article 14 of the ICCPR).

In addition, in the performance of his or her work a prosecutor may be exposed to considerable public scrutiny and his or her privacy (Article 17 of the ICCPR), not to mention security, may be invaded.⁷

Prosecutors, too, have a right to freedom of expression, belief (Articles 18 and 19 of the ICCPR), assembly (Article 21 of the ICCPR) and association (Article 22 of the ICCPR).

At common law prosecutors are regarded as guardians of the right to a fair trial. This view of prosecutors is reflected in statements of the higher courts, the ethical rules to which prosecutor advocates are bound and the *Prosecution Policy and Guidelines* issued by the Office of the Director of Public Prosecutions and which apply to all those exercising prosecutorial responsibilities.

The duty of a prosecutor is to act as 'a minister of justice'.⁸ It is central to the crown prosecutor's duty to present the crown case with fairness towards the accused,⁹ to assist in the attainment of justice, not the procurement of a conviction.¹⁰ Except in the rarest of cases, a prosecutor must call all material witnesses even if their evidence does not assist the case the prosecutor seeks to make.¹¹ A prosecutor is not permitted to secure a conviction at all costs.¹²

The duty of a prosecutor 'to act fairly and impartially to exhibit all the facts to the jury'¹³ is an incident of the fair trial.¹⁴ In *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-4 the High Court held that the failure of a prosecutor to act with fairness and detachment:

may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general proposition, that will, of itself, mean that there has been a serious miscarriage of justice with the consequence that any conviction of the accused should be quashed and, where appropriate, a new trial ordered.



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Doesn't the common law adequately protect our rights?

It can be seen, then, that the common law provides certain protections for some of the rights contained in the ICCPR. Courts in this country are zealous to protect an accused's right to a fair trial. There are also other ways in which the common law acts in defence of fundamental rights. At common law a court 'will not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language'.¹⁵

The chief justice of NSW listed these fundamental rights in a recent speech. They include the right to a fair trial, but also the right to personal liberty through habeas corpus, the presumption against retrospectivity, the privilege against self-incrimination, the rule against double jeopardy and the right to procedural fairness.¹⁶

Moreover, as Brennan J said in *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70:

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

So why bother legislating?

Why do we need a charter of rights?

The answer lies (at least in part) in history. Throughout the world, under the guise of protecting national security, governments of different political colours have introduced legislation that, at best, pays lip service to human rights and, at worst, ignores them altogether. In the common law world the presumption that the parliament did not intend to abrogate or curtail fundamental rights is rebuttable. Clear words – 'unmistakable language' – are all that is required to disturb it.¹⁷

There is nothing new about this. As Lord Walker said in his judgment in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [193]:

[A] portentous but nonspecific appeal to the interests of national security can be used as a cloak for arbitrary and oppressive action on the part of government. Whether or not patriotism is the last refuge of the scoundrel, national security can be the last refuge of the tyrant. It is sufficient to refer (leaving aside more recent and probably more controversial examples) to the show trial and repression which followed the Reichstag fire in Berlin and the terror associated with the show trials of Zinoviev, Bukharin and others in Moscow during the 1930s.

But we thought we had learned from the horrors of the 1930s. It was from that experience that the Declaration of Human Rights, the European Convention and the other international covenants sprang. Australia was at the forefront of international human rights advocacy after the Second World War. Now we have fallen far behind many other countries in the level of protection we offer. Australia is now the only democratic nation without rights legislation.¹⁸

Rights protected by international treaties such as freedom from arbitrary detention and the unlawful deprivation of liberty, the right to privacy, freedom of expression and association, freedom of movement and the right to a fair hearing, which we all accept as fundamental rights, have no legislative basis in this country except in the ACT and Victoria where rights legislation has been enacted.¹⁹

In Australia, most of us take our basic rights for granted.²⁰ However, increasingly state and federal governments (both Labor and Liberal) have interfered with many of these rights in legislation said to be necessary to safeguard the security of the state. Mandatory detention of asylum seekers, introduced by the Keating government in 1992, possibly unique to Australia,²¹ probably violates our international treaty obligations. Yet, the High Court held it was constitutionally valid.²² In *Re Woolley* the High Court also upheld the continued detention of children of asylum seekers.²³ As the chief justice explained in that case, unless the statutory language were ambiguous, which it found it was not, the court was not entitled to give the Migration Act 'a fair interpretation' consistent with Australia's international obligations under the Convention on the Rights of the Child.²⁴ A majority of the High Court also held that the lawfulness of detention is not affected by conditions that could be fairly categorised as harsh, even inhumane.²⁵ Indefinite detention of 'unlawful non-citizens' is also legal in this country²⁶ although it also probably offends Australia's international treaty obligations. As the Hon Michael McHugh QC has observed, a number of decisions of the High Court in the areas of immigration, race relations and indefinite detention for habitual criminals illustrate 'current deficiencies in the protection of human rights within Australia' and underscores the need for rights legislation.²⁷

Similarly, in the last few years criminal law reform has involved a steady erosion of fundamental rights.

After the attacks on the twin towers in September 2001 federal and state governments rushed to introduce legislation to protect us from terrorist attacks. Since then we have had what Ian Barker QC described in 2005 as an avalanche of new laws.²⁸ That legislation includes the *Terrorism (Police Powers) Act 2002*, amendments to the Commonwealth Criminal Code to ban various organisations, legislation giving ASIO sweeping new powers to interrogate and detain suspects, the *Anti-Terrorism Act (No 2) 2005* (Cth) introducing preventative detention and control orders and the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW) authorising detention of a suspect for up to 14 days without notice, let alone a hearing.

Legislation has not been confined to counter terrorist measures. In the name of child protection the NSW Government has introduced legislation prohibiting convicted sex offenders from engaging in otherwise lawful conduct even after they have served their sentences.²⁹ It has also passed laws enabling it to apply to the Supreme Court for the continued detention of serious sex offenders after their sentences have expired.³⁰ The constitutional validity of similar legislation in Queensland was upheld in the High Court.³¹

After the Cronulla race riots the New South Wales Parliament passed the *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW) ('the Cronulla legislation') which, amongst other things, provided for

significant curtailment of freedom of movement, facilitating cordons and roadblocks and the closure of licensed premises. It also conferred on police sweeping new powers of search and seizure. The legislation had a sunset clause of two years but late last year, and for no good reason, the sunset clause was lifted. The ombudsman recommended that parliament consider whether further safeguards were required to provide an assurance of the right to peaceful assembly. The government rejected that recommendation and the attorney told the parliament that 'no legislative requirement is required to guarantee the right of peaceful assembly because the Act was not concerned with peaceful assemblies'.³² Simple really.

Now the government has announced that it is considering the permanent introduction of the police powers conferred by the *APEC Meeting (Police Powers) Act 2007* ('the APEC legislation') despite the emphatic assurance given by the police minister when the Act was presented to the parliament that 'the Bill will apply only to this APEC meeting and will then terminate automatically'.³³ Like the Cronulla legislation, the APEC legislation gave police broad powers to close off streets, to stop and search people and cars and to seize and detain property without a warrant. It removed the presumption in favour of bail for any offence committed within the APEC security area that involved malicious damage, assault of a police officer or throwing a missile at a police officer. The Act also limited the free movement of individuals included at the discretion of the commissioner for police on an 'excluded persons list'.

Some of the most iniquitous provisions in the Act were the power to put people on the 'excluded persons' list and to forcibly remove them if they were found in the APEC area. At least on the face of the legislation there was no requirement to give people notice that they were on the list, let alone to give them a right to be heard about whether they should be on it. During oral argument in the Supreme Court during an unsuccessful challenge to the Act on constitutional grounds, the commissioner of police maintained that there was no requirement to accord procedural fairness to people on the list. Interpreted literally the Act would allow the police to forcibly remove a person on the list from the APEC area without that person knowing that he or she was ever on the list. Yet, resisting such a forcible removal would probably amount to a criminal offence (s546C of the Crimes Act). This is truly Kafka-esque.

Restrictions on individual movement, unfettered powers of search and seizure and the reversal of presumptions in favour of bail for certain offences are extraordinary measures which conflict with some of our most basic democratic freedoms.

It was Winston Churchill, who said:

Extraordinary powers assumed by the executive with the consent of Parliament in emergencies should be yielded up, when and as, the emergency declines . . . This is really the test of civilisation.³⁴

The problem in NSW, according to the shadow attorney-general, speaking at the time of the proposal to extend the powers ostensibly conferred to quell the Cronulla riots, is that the government is allowing the police to do what they like.³⁵

The troubling feature of much of this legislation is that many of the lawmakers appear to have lost sight of what they are seeking to protect. As Lord Hoffman said of the detention powers conferred on suspected international terrorists (but not on British nationals) by the *Anti-terrorism, Crime and Security Act 2001* (UK):

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for parliament to decide whether to give the terrorists such a victory.³⁶

These words echo those of the Australian prime minister, Robert Menzies, when he introduced the National Security Bill into parliament just after World War II had broken out:

Whatever may be the extent of the power that may be taken to govern, to direct and to control by regulation, there must be as little interference with individual rights as is consistent with concerted national effort . . . the greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.³⁷

We need the protection of a charter of rights to inhibit the excesses of executive government. The existence of rights legislation does not prevent the passage of counter-terrorism laws – even far-reaching ones – as experience in Britain and elsewhere has shown. It merely requires that the legislature pays due regard to fundamental rights, overriding them only where strictly necessary to protect other rights. A charter of rights would operate as a restraint on government,³⁸ provide an ‘ethical framework’ for judges, lawmakers and individuals,³⁹ increase public accountability, raise public awareness about human rights,⁴⁰ ‘inform the national conversation’,⁴¹ act as a constant reminder of the need to respect human rights wherever possible and nurture a culture of respect for human rights.⁴²

In the ACT, for example, the existence of rights legislation did not preclude the ACT’s agreement to introduce counter-terrorism measures but it ensured that there was a proper community debate about the Commonwealth’s proposals and it prevented some of the more draconian initiatives being introduced in the ACT and even NSW.

There are significant differences between the ACT and the Commonwealth anti-terrorism laws. For instance:

- ◆ In the ACT only the Supreme Court can make preventative detention orders (PDOs) whereas the Commonwealth allowed senior AFP officers to grant interim orders.
- ◆ In the ACT the full application and the reasons for it have to be provided to the person affected, whereas the Commonwealth is only obliged to provide a summary of the grounds and there is an exception permitting the exclusion of information on national security grounds.
- ◆ In the ACT a PDO can be made only if it is ‘the least restrictive means to prevent a terrorist act or the only effective way to preserve evidence’, whereas under the Commonwealth legislation an order can be made where it would ‘substantially assist in preventing a terrorist act, or is necessary to preserve evidence’.

- ◆ In the ACT children are not to be subjected to PDOs but under the Commonwealth law children 16 and above are caught.
- ◆ There are limitations in the ACT legislation on the monitoring of lawyer client communications but not under the Commonwealth scheme.
- ◆ The ACT has an explicit requirement for Legal Aid to help a person find legal representation but there is no such requirement under the Commonwealth regime.
- ◆ In the ACT a detainee can tell his or her family of the fact and place of detention while under the Commonwealth legislation he or she may only inform the family that he or she is ‘safe’ and unable to be contacted for the time being.
- ◆ Unlike the Commonwealth scheme, there are no ‘disclosure offences’ in the ACT. Under the Commonwealth legislation it is an offence attracting a maximum of five years’ imprisonment to tell someone that you are detained under a PDO. There is no comparable provision in the ACT.

But doesn’t a charter of rights threaten the sovereignty of parliament?

Our state attorney and other critics of a legislative charter of rights have argued that charters of rights undermine the democratic process, erecting a Trojan horse of interventionist judges creating social policy and threatening the sovereignty of parliament.

The argument, in my view, is specious.

First, it ignores the fact that, by legislating for a charter, parliament has authorised the judiciary to speak about these questions. Secondly, it fails to appreciate that over the last 50 years a body of international law has developed which defines the scope and limits of the rights. Thirdly, it overlooks the history of political appointments to judicial office. Fourthly, it wrongly presumes that judicial decisions in other respects do not have political implications. In his judgment in *Fardon v Attorney General for the State of Queensland* Gleeson CJ, speaking of *The Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) said:

It cannot be a serious objection to the validity of the Act that the law which the Supreme Court of Queensland is required to administer relates to a subject that is, or may be, politically divisive or sensitive. Many laws enacted by parliaments and administered by courts are the outcome of political controversy, and reflect controversial political opinions. The political process is the mechanism by which representative democracy functions. It does not compromise the integrity of courts to give effect to valid legislation. That is their duty. Courts do not operate in a politically sterile environment. They administer the law, and much law is the outcome of political action.⁴³

In its 2005 review of the UK Human Rights Act the Department of Constitutional Affairs found that the argument that that Act had significantly altered the constitutional balance between parliament, the executive and the judiciary had been ‘significantly exaggerated’.⁴⁴

In a recent speech Jack Straw, British lord chancellor and secretary of state for justice, told an American audience that in the case of his country's Human Rights Act:

[W]e have remained faithful to the principle of parliamentary sovereignty – whereby no power is preeminent to parliament, where any law can be made and unmade. The Swiss constitutionalist, Jean-Louis de Lolme described this in practice: 'parliament can do anything but change men into women and women into men'.⁴⁵

Opponents of a charter seem to want a sterile debate. A statutory charter will not empower the courts to strike down legislation passed by parliament. Far from derogating from parliamentary sovereignty, it will promote dialogue between the branches of government. It would put a brake on knee-jerk law making. It would require politicians to justify any new incursion into human rights.

As Rob Hulls, then Victorian attorney-general, explained in his second reading speech on the Victorian Charter:

The charter will make sure that there is a proper debate about whether proposed measures strike the right balance between the rights of Victorians and what limits can be justified in a free and democratic society.

When governments legislate in haste and fail to consult widely on the impact of their new laws, a charter of rights would force them to consider the impact of legislation on fundamental rights and to explain why the legislation is needed. That is precisely what happened at the time of the counter-terrorist legislation as a direct result of the ACT Human Rights Act.

In any case, surely there is a proper role for the judiciary where parliament takes away rights without sufficient justification or when it undermines the rule of law. Speaking of the UK *Human Rights Act* in 2002 Lord Woolf, the former master of the rolls, said:

What is the primary concern of the HRA is not so much rights in the ordinary common law sense, but values. These are the values which are increasingly being recognised around the developed world as being at the heart of the rule of law. They are the values which the Nazis ignored. Hitler may have obtained power as a result of a democratic process, but he forfeited the right to be regarded as a democratic leader of his people because he treated the rule of law with contempt. The recognition of the need to adhere to the rule of law by protecting human rights is essential to the proper functioning of democracy. The observance of human rights is a hallmark of a democratic society because it demonstrates that that society values each member as an individual. Just as it is of the essence of democracy that every individual has an equal right to vote, so each individual has the right to expect that a democratically elected government will regard it as its responsibility to protect his or her human rights.⁴⁶

Democracy (at least liberal democracy) is not simply about majority rule. Even the US State Department recognises (at least in theory) that majority rule is 'not just another road to oppression' and no majority should take away the rights and freedoms of individuals or minority groups.⁴⁷

In the words of Thomas Jefferson:

Though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable . . . the minority possess their equal rights, which equal law must protect, and to violate would be oppression.⁴⁸

This, of course, was the foundation of the US system of government.

Charters of rights provide some protection of minorities from the tyranny of the majority. This is important. Lawyers have traditionally spoken out in the interests of such minorities, for if we do not, there is often no-one else who will.

As Kirby J reminded us in *Fardon*, 'protection of the legal and constitutional rights of minorities in a representative democracy' is sometimes unpopular.⁴⁹ Politicians seeking re-election crave majority support. They are not usually interested in minorities.

Political background

As most of you will be aware, in March 2006, the then attorney-general for NSW, Bob Debus, expressed his support for a charter of rights. Flush with optimism, he foreshadowed a Cabinet submission and further public consultation on the rights and values that should be enshrined in such a charter.⁵⁰

What became of Mr Debus's submission in the Cabinet Office labyrinth, I cannot say. Quite possibly, he couldn't either. What I do know is that on 4 May 2006 the Bar Council resolved to support his informal notice of motion and directed the association's Human Rights Committee to prepare an options paper on the available models.

Consultations with members of the Bar

In 2007 that committee, of which the NSW director of public prosecutions is a member, submitted an options paper to Bar Council with a recommendation that a statutory charter of rights be enacted in New South Wales. Council resolved that it was disposed to support the idea but was concerned to consult the membership before a final decision was reached.

To assist members to reach an informed opinion, two forums were held, addressed by the retired High Court justice, the Hon Michael McHugh QC, Professor Hilary Charlesworth, professor of international law and human rights at the Australian National University, and Noel Hutley SC of the New South Wales Bar.

Ironically, at the same time as the Bar was moving towards a charter, the Australian Labor Party, which had formerly supported a bill of rights, removed that plank from its platform, substituting for it a promise to launch a public inquiry and support for public consultation.⁵¹

A new attorney-general

Then, in March 2007, after Bob Debus left state parliament to try his luck in the forthcoming federal election, a new attorney-general, John Hatzistergos MLC, took office and the political terrain shifted. Mr

Hatzistergos has made it clear that he opposes rights legislation. He made the subject the focus of his speech at the Law Society's Law Term Dinner and an opinion piece for *The Australian* newspaper and is shortly expected to speak against it at the Sydney Institute.⁵² In his speech at the opening of Law Term, Mr Hatzistergos, not generally driven to hyperbole, stated his unequivocal opposition to a charter, which, he said, would:

seek to transform the relationship between our institutions of governance, make the courts a social laboratory, and make it impossible for ordinary citizens to rely on the individual instruments of the parliament they have democratically elected.

As will be obvious, I do not accept the validity of this argument.

The committee reports

Soon after the attorney spoke at the opening of Law Term, the Bar Association's Human Rights Committee reported to Bar Council on the outcome of the consultation process.

A substantial majority of those barristers who submitted the committee's views supported the recommendations of the committee. The gist of its report is that 'human rights are poorly protected in New South Wales in an unduly limited and ad hoc combination of the common law and statute'. The committee cited the passage in recent years of laws that infringe human rights with insufficient safeguards or public discussion of civil and political rights.

Other salient points of the Human Rights Committee's report include that:

- ◆ NSW has fallen behind the common law world by not enacting specific provisions for the protection of human rights;
- ◆ Victoria and the ACT already have legislative protection of human rights;
- ◆ Human rights have been ignored or overridden in specific cases such as Hicks, Haneef and the NT Aboriginal intervention; and
- ◆ The requirement for public authorities to act in accordance with human rights will improve government decision making and increase protection of human rights without litigation.

Importantly, the committee found that the legislative model proposed allows for a 'dialogue' to occur between the judiciary and the legislature without threatening the sovereignty of parliament.

The council resolved to recommend the adoption of a charter of rights for NSW with the following features:

- (a) Maintenance of the sovereignty of the NSW Parliament;
- (b) Enactment by statute;
- (c) Protection of the following rights (taken from the Victorian Charter adapted in accordance with NSW law): equality before the law, right to life, protection from torture or cruel, inhuman and degrading treatment, freedom from forced work (slavery, servitude or compulsory labour), freedom of movement, protection

of privacy and reputation, freedom of thought, conscience, religion, belief, expression, peaceful assembly and freedom of association, protection of families and children, right to take part in public life, cultural and property rights, right to liberty and security of the person, right to humane treatment when deprived of liberty, right to a fair hearing, rights in criminal proceedings, right not to be tried or punished more than once, rights in relation to retrospectivity of criminal laws ('human rights');

- (d) Public authorities and those exercising a public power be required to act in accordance with human rights unless required by statute to act otherwise;
- (e) Requiring a member introducing a Bill to deliver a reasoned statement to parliament as to whether the Bill is compatible with human rights or not; and
- (f) Incorporating a review mechanism no later than five years after commencement to ascertain whether rights in the charter should be reviewed, whether human rights might more adequately be enforced and whether a right to damages should be added to the charter.

What would a charter mean for crown prosecutors?

A charter of rights would affect prosecutors. Under a charter it would be unlawful for any public authority to act in a way that is incompatible with a protected human right. The ODPP would be considered a public authority and would therefore be bound to apply the principles contained in the charter. But this would make no practical difference to the role of the prosecution service or to the work of the crown prosecutors. I have already referred to the prosecutor's duty to safeguard the fairness and integrity of a trial. In addition, the code of conduct published by the ODPP emphasises honesty, integrity, consistency and independence in decision-making, all incidents of a fair trial.

If the UK experience is anything to go by, there would be no significant increase in litigation as a result of the introduction here of rights legislation. This appears to be the experience in the ACT, too. In Britain, the Department of Constitutional Affairs reported that the Human Rights Act has had a greater effect on the operation of government departments and a negligible effect on criminal law. Earlier statistics revealed that the Act was raised in less than 0.5 per cent of criminal cases in the Crown Court. In the first 14 months of its operation the Act was relied on in 2997 cases and arguments based on the Act upheld in 56.⁵³

As the senior crown prosecutor has noted in his *History of New South Wales Crown Prosecutors 1830-1901*, other, conflicting pressures have been part and parcel of the crown prosecutor's lot in New South Wales since the very beginning of the service.

Even in the days before Productivity Commission reports, audits and court performance monitoring, prosecutors have been expected to assist the courts in the expeditious disposal of court cases.

In these modern times of median delays and performance reviews, time and resource pressures can weigh even more heavily on the prosecutor.

A charter of rights can play a significant role in reinforcing the need for an independent and fearless prosecutor for whom the process is as important as the outcome (if not more so).

In a speech delivered in January last year, the head of the Crown Prosecution Service of England and Wales, Ken Macdonald QC, said that the prosecutors' embrace of the Human Rights Act was central to the public's confidence in the criminal justice system. Everyone has an interest in safe convictions for criminal offences.

[E]very time a conviction is achieved, it can only be sustained and built upon by ensuring that it is fair – and therefore safe from being overturned on appeal. Equally that it enjoys the widest public confidence. People must be able to trust the decisions of the courts.⁵⁴

Nowhere could this be more important than in the fight against terrorism. The purpose of fighting terrorism is to secure freedom. As one British commentator has written, 'freedom cannot be delivered by legislation which substantially diminishes civil, political, economic or social life'.⁵⁵

A charter of rights would enhance our security by entrenching a culture of respect for rights. In the UK there is a growing recognition that national security, or 'maintenance of the Queen's peace', requires that attention be given to relations between the state and sections of the community that may be susceptible to terrorist 'grooming' and whose assistance is vital in combating religious extremism. Ken McDonald QC noted:

Terrorism is designed to put pressure on some of our most cherished beliefs and institutions. So it demands a proactive and comprehensive response on the part of law enforcement agencies. But this should be a response whose fundamental effect is to protect those beliefs and institutions. Not to undermine them.

...

We wouldn't get far in promoting a civilising culture of respect for rights amongst and between citizens if we set about undermining fair trials in the simple pursuit of greater numbers of inevitably less safe convictions.

[The Human Rights Act] makes it more likely that investigations will comply with the rules and that abuses of the process are avoided. Equally it will make it less likely that the state brings cases which shouldn't be brought and which are not justified by any sufficient evidence.

And I believe that in terrorism cases in particular, where there can be huge community sensitivities, this provides massive re-assurance.

In Philip Noyce's recent movie, *Catch a Fire*, about South Africa under apartheid, Patrick Chamusso is accused of being complicit in an ANC attack on a strategically vital oil refinery. There is one scene that

illustrates how law without justice, otherwise known as the rule by law, simply exacerbates the conditions that are so conducive to terrorism.

The police investigator, Nic Vos, realising that he doesn't have sufficient evidence to charge Chamusso, releases him. His fellow investigators are incensed:

'He confessed on tape,' said one of them.

'Confessed? To what? That he cut a hole in the fence? They got in with a key. You know that', said Vos.

'He said he did it. Okay? That's good enough for me.'

'So we lie to get a conviction,' replied Vos.

'We hang him.'

Vos: 'We lock him in jail for the rest of his life for something he didn't do. In the meantime, there's a terrorist loose on the ground. What the hell is the point in that? Our job is to find the terrorists.'

Conclusion

A charter of rights offers a framework for balancing the rights against competing public interests at a time when governments are under increasing pressure to legislate in response to constantly changing threats to the peace and security of our community. In short, it provides certainty and confidence.

By offering support for a charter of rights crown prosecutors can make a statement that in a time of terrorism, the rule of law need not be sacrificed in order to gain an expedient conviction.

A charter of rights is not a panacea for all social or political ills. No-one has suggested as much. However, it would be a step in the right direction. It would represent a reaffirmation of the values we share and we expect our leaders to respect. If our politicians could always be trusted to protect our rights we would have no need of a charter. Regrettably, the reality is otherwise.

Endnotes

1. Petro Georgiou, MP for Kooyong, House of Representatives, 17 March 2008, p 76.
2. Address by Hon JJ Spigelman, chief Justice of New South Wales, at the 50th Anniversary of the Universal Declaration of Human Rights National Conference, Human Rights and Equal Opportunity Commission, Sydney 10 December 1998, entitled: Rule of Law – Human Rights Protection.
3. Brian Walters SC and Simon McGregor The Charter of Human Rights and Responsibilities: a practitioner's guide 15 February 2008, p. 6.
4. See, for example, article 2 of the ICCPR.
5. *Al-Kateb v Godwin* (2004) 219 CLR 562 at [179].
6. E Myjer et al (eds) *Human Rights Manual for Prosecutors International Association of Prosecutors*, 2003.

7. Witness the publication in the *Daily Telegraph* of photographs of the home of a leading member of the private bar when he was counsel assisting in the AWB inquiry and when he had been previously been threatened as a result of a prosecution he had conducted.
8. *Randall v R* [2002] 1 WLR 2237 at 2241 citing *R v Puddick* (1865) 4 F & F 497 at 499 [176 ER 662 at 663] and *R v Banks* [1916] 2 KB 621 at 623.
9. *Libke v R* (2007) 235 ALR 517; [2007] HCA 30 at [71] per Hayne J.
10. *R v McCullough* (1982) Tas R 43; (1982) 6 A Crim R 274 (at 285).
11. The exceptional case the prosecutor will still be obliged to call the witness so that he or she may be cross-examined by the defence: *The Queen v Apostilides* (1984) 154 CLR 563.
12. See, for example, *Whitehorn v The Queen* (1983) 152 CLR 657 at 682 per Dawson J.
13. *R v McCullough* (1982) Tas R 43 at 57-8.
14. Cf. *Subramaniam v The Queen* (2004) 211 ALR 1 at [54].
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20. The consultations conducted in other states have shown that many Australians, doubtless affected by a surfeit of American culture, mistakenly believe there are legislative guarantees.
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22. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
23. *Re: Wooley* (2004) 225 CLR 1.
24. *ibid.*, at [11].
25. *Behrooz v Secretary, Department of Immigration & Multicultural Affairs* (2004) 219 CLR 486.
26. *Al Kateb v Godwin* (2004) 219 CLR 562; *Minister of Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.
27. MH McHugh AO QC, 'Does Australia Need a Bill of Rights?', A paper delivered to the NSW Bar on 8 August 2007.
28. Ian Barker QC, 'Human rights in an age of counter terrorism' (2005) 26 ABR 267.
29. *Child Protection (Offenders Prohibition Orders) Act 2004*.
30. *Crimes (Serious Sex Offenders) Act 2006*.
31. *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575.
32. Hansard, Legislative Council, 28 November 2007.
33. Hansard, Legislative Assembly, 7 June 2007.
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37. Commonwealth of Australia, Parliamentary Debates, House of Representatives, 7 September 1939, p 164 (Robert Menzies, Prime Minister) cited in *What Price Security? Taking Stock of Australia's Anti-Terror Laws* by A Lynch and G Williams, UNSW Press, 2006 and MH McHugh AO QC, 'Terrorism Legislation and the Constitution' (2006) 28 ABR 117.
38. See the exhortation by the Rt Hon Malcolm Fraser for a federal bill of rights in 'Finding Security in Terrorism's Shadow: The importance of the rule of law', Inaugural professorial lecture, Asia Pacific Centre for Military Law, The University of Melbourne, 25 October 2007.
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40. Home Office, Rights Brought Home: The Human Rights Bill (Cm 3782) (London, TSO, 1997).
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44. Review of the Implementation of the Human Rights Act p 4.
45. 'Modernising the Magna Carta', a speech delivered at George Washington University by the Rt Hon Jack Straw MP, lord chancellor and secretary of state for justice, 13 February 2008.
46. <http://www.britishacademy.ac.uk/pubs/src/tob02/woolf.html>
47. <http://usinfo.state.gov/products/pubs/principles/majority.htm>
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A new military court

By Cristy Symington

In a significant milestone for military justice, in October 2007 the Australian Military Court was established and the inaugural military judges were sworn in. The new court provides members of the Australian Defence Force with an even more transparent and impartial military justice system reflecting world's best practice.

The Australian Military Court replaces the system of individually convened trials by Court Martial or Defence Force Magistrate. The court will be a 'service tribunal' under the *Defence Force Discipline Act 1982*. It is an important part of the military justice system, which contributes to the maintenance of military discipline within the Australian Defence Force.

Establishing the court is one of many reforms to the military justice system. The enhancements ensure a modern and effective approach to military justice, while striking an appropriate balance between effective discipline to allow Australian Defence Force personnel to operate safely and effectively, and protecting individuals and their rights.

Brigadier Ian Westwood AM was sworn in as the first chief military judge at a ceremony in Canberra on 3 October 2007. He has 24 years of military law experience gained through full-time Army service. He was admitted to the Supreme Court of New South Wales in 1978 and appointed to the Australian Army Legal Corps in 1983. Brigadier Westwood, who resides in Canberra, is responsible for ensuring the orderly and expeditious discharge of the business of the Australian Military Court and managing its administrative affairs. He will also sit as a military judge on the court and report to parliament annually through the minister for defence.

Two permanent military judges, Colonel Peter Morrison and Lieutenant Colonel Jennifer Woodward were also sworn in. Colonel Morrison, hailing from Townsville, has a combination of private and military legal experience spanning more than 26 years. He was a judge advocate and Defence Force magistrate prior to his appointment.

Lieutenant Colonel Woodward was previously a senior prosecutor for the Australian Capital Territory and a commercial litigation practitioner. Prior to becoming a military judge, she was director of advising, General Counsel Branch, Department of Defence. Lieutenant Colonel Woodward also spent seven years as a permanent legal officer in the Australian Army.

At the swearing in ceremony, chief of the Defence Force, Air Chief Marshal Angus Houston said Defence was strongly demonstrating its commitment to improving the military justice system and delivering impartial and fair outcomes through enhanced oversight, greater transparency and improved impartiality.

'Since the beginning of my tenure as chief of the Defence Force, I have been absolutely delighted with the progress we have made to our military justice system,' he said. He added:

It is critical to the Australian Defence Force's operational effectiveness and the protection of individuals and their rights that we have a strong military justice system – one that not only underpins our discipline and command structures but also enables our personnel to work in a fair and just environment.



At the swearing in ceremony from left, Military Judge Lieutenant-Colonel Jennifer Woodward, Chief Military Judge Brigadier Ian Westwood and Military Judge Colonel Peter Morrison.

The new court is judicially independent from the military chain of command and Executive and, although based in Canberra, is fully deployable and able to conduct trials within Australia and overseas, including operational areas.

The Australian Military Court has the same jurisdiction as courts martial and Defence Force magistrates did previously. It only exercises jurisdiction under the *Defence Force Discipline Act 1982* where proceedings can reasonably be regarded as substantially serving the purposes of maintaining or enforcing discipline. The Australian Military Court meets the disciplinary needs of the Australian Defence Force in maintaining and enforcing service discipline by trying more serious or complex service offences.

How does it work?

As well as the chief military judge and two permanent military judges sworn in recently, there will be a panel of part-time (Reserve) military judges. Military judges are independent from the military chains of command and Executive in the performance of their judicial functions. They may sit alone or with a military jury. Military jurors perform a role akin to jury members in a civilian court system and determine on the evidence whether an accused person is guilty or not guilty of the service offence.

Essentially, the trial procedures of the Australian Military Court are similar to those of civil courts exercising criminal jurisdiction. The general principles and laws of criminal responsibility as provided for within the Criminal Code (Cth) apply in respect of service offences prosecuted before the Australian Military Court, as do formal rules of evidence. The presumption of innocence to the accused applies as it does in a civilian court which means that the prosecution is obliged to prove the case against an accused beyond reasonable doubt.



Because of the unique nature of warfare, the Australian Defence Force applies a far greater level of regulation than that encountered in other forms of employment and demands behaviour which is consistent with its role as an armed force.

All prosecutions before the court are conducted through the office of the statutorily independent director of military prosecutions, Brigadier Lynette McDade. This area consists of several full-time and Reserve prosecutors. The Directorate of Defence Counsel Services, led by Group Captain Chris Hanna, arranges legal representation for the accused. The directorate administers the Defence Counsel Services Panel, which contains more than 150 lawyers from the Australian Army, Royal Australian Navy and Royal Australian Air Force, who are located across Australia. These lawyers are admitted to practise in a state or territory of Australia and come from various branches of the legal profession.

Colonel Geoff Cameron, who is the statutorily independent registrar of the Australian Military Court, assists the chief military judge with the administration of the court and discharges statutory functions.

Other changes to the military justice system include introducing rights of appeal from decisions of the Australian Military Court to the Defence Force Discipline Appeals Tribunal (presided over by tribunal members who may be Federal Court, state or territory justices or judges). In the case of the accused it is available on both conviction and punishment or court order. In the case of the director of military prosecutions it is available for punishment or order only. Following the next tranche of legislative changes, an accused will also have the right to elect trial by the Australian Military Court for certain categories of disciplinary offences.

If an accused is found guilty, punishment as provided for by the *Defence Force Discipline Act 1982* is imposed by the presiding military judge taking into account mitigation evidence, the sentencing principles applied by civil courts and the need to maintain discipline in the Australian Defence Force.

Enhancing impartiality and fairness

The selection of the chief military judge and military judges was through an independent merit process. They were selected from current qualified permanent and reserve Australian Defence Force legal officers and any other person who satisfied the statutory selection criteria.

Key features of the Australian Military Court include:

- ◆ statutory appointment of legally qualified military judges,
- ◆ security of tenure (10 year fixed terms),
- ◆ remuneration set by the Commonwealth Remuneration Tribunal,
- ◆ mid-point promotion during tenure,
- ◆ the necessary para-legal support to be self administering,
- ◆ judges to sit alone or with a jury in the case of more serious offences (military judge presiding), and
- ◆ appeals on conviction or punishment to the Defence Force Discipline Appeals Tribunal.

The Australian Military Court proceedings are open to the public except where the military judge orders otherwise (for example, if it is contrary to the interests of security or defence of Australia, the proper administration of justice or public morals).

Further enhancements to the military justice system

The Australian Military Court is one of a range of enhancements to the military justice system being introduced by Defence. With the two-year implementation schedule due to finish at the end of this year, Defence is well advanced in putting in place the most significant changes its military justice system has seen in more than 20 years. Twenty-three of the 30 agreed recommendations from the 2005 Senate report *The effectiveness of Australia's Military Justice System* are now complete.

Major achievements to date include:

- ◆ A new joint Australian Defence Force investigative unit now investigates serious incidents with a service connection.
- ◆ There is no longer a backlog of complaints and redresses of grievance due to the additional resources being provided and the hard work of Defence personnel.
- ◆ A civilian with judicial experience now presides over chief of the Defence Force (CDF) commissions of inquiries into deaths of ADF members in service or other matters as determined by the CDF.

The *Learning Culture Inquiry Report into ADF Schools and Training Establishments* was released in December 2006. It followed the military justice inquiry, which found that some aspects of ADF culture may be related to deficiencies in the military justice system. Action to reinforce ADF culture consistent with core values has reduced the risks of inappropriate behaviour, improved the care and welfare of trainees, and improved the management of minors in particular. More than half of the agreed recommendations are now underway.

For further information about the range of enhancements to the military justice system visit, www.defence.gov.au/mjs



A history of the Navy Legal Panel

By Gregory Nell SC

The New South Wales Bar has for many years now had a close association with the Australian Defence Force. In particular, each of the branches of the Defence Force has practising barristers as legal reservists, who provide the respective branches and their members with legal advice and legal representation in varying forums and in the context of many different types of proceedings. No doubt these reservists will continue to provide such advice and representation in relation to proceedings before the newly established Australian Military Court (the details of which are discussed in the accompanying article by Cristy Symington). But the roles of and responsibilities undertaken by these reservists are not now nor likely in the future to be so limited.

This breadth of what may be asked of a legal reservist can for instance be seen from the experience of the members of the New South Wales Reserve Naval Legal Panel, who have been providing legal services and assistance to the Royal Australian Navy and its members for over 40 years now.

The Naval Legal Panel was first established in 1964. Its genesis lay in the collision between the destroyer HMAS *Voyager* and the aircraft carrier HMAS *Melbourne* on 10 February 1964, and certain consequences flowing from the navy's participation in the subsequent royal commission into that incident. According to a note of the history of the panel written by Sir Laurence Street¹:

The Naval Board and its advisers were not equipped with the knowledge or provided with reliable advice as to the approach that should be taken by the navy in relation to the royal commission. Whilst the legal aspects of disciplinary matters such as courts martial and lesser disciplinary procedures were well understood, as were naval boards of inquiry, a civil royal commission involved significantly different considerations. The navy did not have the benefit of experience in, or advice in relation to, the forensic nature of a royal commission such as this.

...

The uncomfortable position in which the navy had been placed in consequence of the initial decision to retain a single team for the navy and HMAS *Melbourne* clearly demonstrated the importance of the navy having access, within its own establishment, to sound and experienced legal advice.²

Following the conclusion of the royal commission, the then chief of naval staff, Admiral Harrington, approached Laurence Street QC (as he then was) and asked that he put together a group of lawyers who could constitute a Naval Reserve Legal Branch for the purpose of providing legal advice, assistance and support to the various branches of the navy. Sir Laurence was at that time a leader of the New South Wales Bar and had previously served with the Australian Navy from 1943 to 1947, including as a seaman officer in an Australian corvette attached to the British Pacific Fleet in 1945.

In response to Admiral Harrington's request, three panels were established. The principal panel was located in Sydney and included responsibility for the fleet and naval establishments in New South Wales and Queensland. Panels were also established in Melbourne and Perth. The former was responsible for Victorian and South Australian naval



The damaged bow of HMAS *Melbourne* after the accident with HMAS *Voyager*.
Photo: Newspix

establishments; the latter was responsible for naval establishments in Western Australia and the Northern Territory.

The panel was initially headed by Sir Laurence Street, until his appointment to the Supreme Court of New South Wales in October 1965. Sir Laurence was succeeded by (in turn) Harold Glass QC (who was to be later appointed to the New South Wales Court of Appeal), John Sinclair QC (later Sinclair DCJ), Terence Cole QC (who was later appointed a judge of the Supreme Court of New South Wales and later still to the New South Wales Court of Appeal and who is currently heading the Australian Government's inquiry into the sinking of the HMAS *Sydney* off the Western Australian coast during World War II), Murray Tobias QC (who was also later appointed to the New South Wales Court of Appeal, a position which he still holds), Peter Callaghan SC and Michael Slattery QC. The panel is currently headed by Jeff Hilton SC, with the Bar Association's treasurer, Alexander Street SC, the deputy head of the New South Wales Panel.

The size of the Naval Legal Panel has grown considerably since its inception and currently has more than 40 members (almost half of whom come from the New South Wales Bar). The Naval Legal Panel is the largest of the legal reservist panels in the ADF. The current members of the panel include both practising lawyers with no prior naval experience as well as a number who left employment in the permanent navy to take up private practice at the Bar, but upon doing so retained their link with the navy by becoming members of the panel.

In relation to the work of the panel, Sir Laurence Street wrote in his history of the panel:

It was envisaged from the outset that officers from the Reserve Legal Branch would be available to appear in courts martial and other inquiries and proceedings involving the navy, that they would be available to provide general advice to the navy as well as to individual navy personnel in that connection, that they would be available generally for use where required in all other disciplinary

proceedings and that over time they would be available to provide pastoral advice and help naval personnel in relation to personal problems somewhat akin to, but extending far beyond, what had theretofore been the role of divisional officers.

It was also envisaged that the Reserve Legal Branch would grow to become a source of advice, both at sea and ashore, on the international law complexities of peacetime and wartime naval operations.³

Not only have these initial expectations been achieved since the panel's inception, but its role has expanded and its importance not diminished.⁴

Over the last 40 years, the panel has provided judge and deputy judge advocates-general; naval judges and magistrates, prosecutors and defending officers in connection with courts martial and criminal proceedings; counsel presiding over, assisting and representing interested parties in boards of inquiry (now commissions of inquiry); and advisers on international, criminal, administrative and other branches of the law. Professor Ivan Shearer (of Sydney University) played a particular role (as a member of the panel) in providing advice and assistance in relation to international law. Prior to joining the panel, Professor Shearer had been an officer with the Royal Australian Air Force and member of its legal reserve. The participation of panel members in boards of inquiry has included most recently the Sea King Board of Inquiry, which was established to inquire into the cause of an Australian Navy Sea King helicopter crash in the town of Amandraya, on the island of Nias, in Indonesia in April 2005 and in which nine Australian service personnel died and two others were seriously injured.

Since its inception, Panel members have provided advice to all ranks from sailors up to chiefs of the Defence Force. During this time, members of the panel have also lectured both serving defence personnel (including for example on national security law) as well as those training to join the navy (including as part of the service's staff of permanent lawyers); provided relief staffing at the Fleet Legal Office thereby making sea-ready legal officers available for sea deployment; been themselves appointed to HQ, operational and sea-going postings; and conducted investigations for and on behalf of the navy under the Defence Inquiry Regulations and other investigative powers. The above list is not exhaustive.

Similar functions have also been performed by the many legal reservists in both the Australian Army and Royal Australian Air Force.

Whilst many of the foregoing functions and responsibilities are broadly similar to those performed by members of the Bar in private practice, a number of the members of the Naval Legal Panel have also been being involved in less conventional or orthodox legal roles, including in or in relation to theatres of war and operational matters.

For instance, in 2003 Michael Slattery QC swapped the luxury and comfort of his room and a half at Seven Wentworth Chambers for the narrow bunks and crowded mess room of HMAS *Kanimbla* in Iraq's territorial sea, whilst conducting an inquiry into complaints associated

Over the last 40 years, the panel has provided judge and deputy judge advocates-general; naval judges and magistrates, prosecutors and defending officers in connection with courts martial and criminal proceedings; counsel presiding over, assisting and representing interested parties in boards of inquiry (now commissions of inquiry); and advisers on international, criminal, administrative and other branches of the law.

with the vaccination against anthrax of navy personnel scheduled for deployment in the Middle East at that time. The full account of Slattery's Middle East tour of duty is recounted in *Bar News* Summer 2003:2004 edition at pp 36 to 39.

Such experiences are not confined to the senior members of the panel. Prior to being called to the New South Wales Bar, Felicity Rogers had been employed as a lawyer in the permanent navy for about eight years. In that capacity, she worked closely with members of the Naval Legal Panel, including members from the New South Wales Bar who persuaded her to go to the Bar. However, upon doing so, Felicity retained her links with the navy by joining the Naval Legal Panel. As a panel member, Felicity has been deployed on exercises with the military from the US, UK, Canada, Malaysia and Singapore, providing advice on the Rules of Engagement, Law of the Sea and Law of Armed Conflict. She has also flown off the aircraft carrier USS *Independence* in an EA6 Prowler aircraft. Through her participation on the panel, Felicity also found herself in Dili as part of the contingent of Australian service men and women assisting East Timor on its path to independence. This is said by her to have entailed sleeping both with a rifle under her pillow and under a desk under a window in order to avoid any incoming missiles (precautions that are rarely necessary whilst napping at one's desk in Phillip Street).⁵

Participation in the more traditional operational role is not confined to the members of the Naval Legal Panel. David McLure, an army reservist, is currently serving a tour of duty with the Australian Army in Afghanistan. Members of the army reservists were also involved in the preparation of the security put in place for last year's APEC conference.

To assist in preparing for the possibility that they may have to provide legal services in other than the relative comfort and safety of a courtroom and in conditions and circumstances more usually experienced by permanent members of the navy, applicants to the Naval Legal Panel are put through a programme of rigorous physical training. In an accompanying article, Kate Traill, one of the panel's latest recruits, gives a personal account of the arduous imposed by this strenuous and demanding programme and of her successful completion of that programme on the sun-kissed beaches of Jervis Bay, despite all of the obstacles placed before her.⁶

Whilst each of the branches of Australia's armed forces undoubtedly benefit from the participation of their legal reservists, including those from the New South Wales Bar, it is also said by those who participate as reservists that this is a not a one way street. Michael Slattery QC has described his participation in the Naval Legal Panel as both very fulfilling and a privilege. As he concluded his 2003 article on his visit to the Middle East :

Almost every working day of the year a member of the New South Wales Bar will do legal work for the Navy, Army or the RAAF. We are all privileged to do so.⁷

Endnotes

1. Sir Laurence established the Naval Legal Panel (in the circumstances identified later in this article) and was the first panel leader.
2. 'The Naval Reserve Legal Branch – An Historical Note on its Origin' in *The New South Wales Reserve Naval Legal Panel – 40 Years of Service* (Sea Power Centre – Australia Working Paper No. 17) at pp 1 and 4.
3. *ibid.*, at p 6.
4. Foreword to *The New South Wales Reserve Naval Legal Panel – 40 Years of Service* (Sea Power Centre – Australia Working Paper No. 17) by Lieutenant Commander James Renwick RANR at p vii.
5. Felicity is quick to point out that there is no truth in the rumour that Lisa McCune's role in *Sea Patrol* was modelled on Felicity and the work that Felicity has undertaken as and since becoming a panel member.
6. Kate denies that she is modelling herself on Lisa McCune's role in *Sea Patrol* and that it was Kate's desire to emulate that role and the prospect of wearing navy whites that prompted her to apply to become a panel member in the first place.
7. *Bar News* Summer 2003:2004 edition at p 39.

The author would like to acknowledge the contributions of and assistance provided by Michael Slattery QC, Alexander Street SC and Felicity Rogers in the preparation of this article.

H.M.S. Pinafore

By W S Gilbert (barrister)

When I was a lad I served a term
As office boy to an Attorney's firm.
I cleaned the windows and I swept the floor,
And I polished up the handle of the big front door.
I polished up that handle so carefuller
That now I am the Ruler of the Queen's Navee!

As office boy I made such a mark
That they gave me the post of a junior clerk.
I served the writs with a smile so bland,
And I copied all the letters in a big round hand –
I copied all the letters in a hand so free,
That now I am the Ruler of the Queen's Navee!

In serving writs I made such a name
That an articled clerk I soon became;
I wore clean collars and a brand-new suit
For the pass examination at the Institute.
And that pass examination did so well for me,
That now I am the Ruler of the Queen's Navee!

Of legal knowledge I acquired such a grip
That they took me into the partnership.
And that junior partnership, I ween,
Was the only ship that I ever had seen.
But that kind of ship so suited me,
That now I am the Ruler of the Queen's Navee!

I grew so rich that I was sent
By a pocket borough into Parliament.
I always voted at my party's call,
And I never thought of thinking for myself at all.
I thought so little, they rewarded me
By making me the Ruler of the Queen's Navee!

Now, landsmen all, whoever you may be,
If you want to rise to the top of the tree,
If your soul isn't fettered to an office stool,
Be careful to be guided by this golden rule –
Stick close to your desks and never go to sea,
And you all may be Rulers of the Queen's Navee!



Bench and Bar meet the Royal Australian Navy

By Kate Traill

It was going to be about ships, helicopters, big guns and strong men in uniform – and dramatic court scenes à la *A Few Good Men* and *Jag*.

Why not join the navy and serve my country? I thought magnanimously.

In October 2007, after an arduous administrative and physical regime, which mainly consisted of filling out forms, filling out forms and filling out more forms, I was selected by the Australian Defence Force (ADF) Board to be part of the NSW Reserve Naval Legal Panel. I had no idea what was in store.

To ensure that new recruits commence their first two week Reserve Officer Entry Course (REOC) with a modicum of physical fitness, they are required to pass a 'beep test'. Having never heard of a 'beep test' (which seemed well known to all who play competitive sports, rugby or just attended a boys' school), I was not concerned until my first attempt saw me achieve level three on the 'beep test' scale. Without being technical, low numbers are bad, higher numbers are good. The minimum requirement was 6.1 on said nebulous scale.

Clearly the only course of action open to me was to hire a personal trainer, and one who was in the army, at that. For two gruelling hours, every day for eight weeks, (who said there is no time for exercise in a busy practice at the Bar!) to the commands of 'CHANGE, CHANGE' this martinet pushed me to the limits of physical endurance. Imagine my joy when I passed the beep test the day before the course started. As a newly appointed lieutenant in the Royal Australian Navy, I duly reported to my divisional officer at HMAS *Creswell* in Jervis Bay for my first two weeks of officer training, known as 'Phase 1'.

The first order of business was to be kitted out. The uniforms include navy whites, navy blues and winter rig, boiler suits, combat boots, black shoes, white shoes – in fact a different uniform for every occasion. The next order of business was to learn how to march correctly in the said uniforms. Navy tradition dictates that land-based bases are treated as ships, so marching on the quarterdeck did not mean stomping about on a grey metal deck in the middle of Jervis Bay, but in fact meant marching to-and-fro on a beautiful grassy area in front of a clock tower overlooking the bay, dodging kangaroos. Or, more accurately, kangaroo poo. Sword drill to the chant of 'Hats ON', 'Hats OFF' and the lexicon of various marching commands, became my constant companions, as we recruits – who included orthopaedic surgeons, anaesthetists, dentists, intelligence officers and lawyers from all over Australia – took it in turns to be the squad or division leader.

The mornings began at 5.30 a.m. with the somewhat prosaically titled 'early morning training' or EMT. In keeping with its somewhat unimaginative title, it consisted of an hour-long run around the base and along beautiful Hyams Beach. Mornings were varied by the inclusion of a 4.30 a.m. fire drill. The academic side of the course included classes on everything from the more basic dress-wearing protocol and drill salutes to the intricacies of the Defence Force Discipline Act, Rules of Armed Conflict, defence writing and naval history.

One of the most difficult parts of the course, for those of us who had not picked up an iron for 20 years, and believed in outsourcing anything which vaguely smacked of laundry, was the daily ritual of



Kate Traill, Jodi Steele, Justice Dennis Cowdroy OAM, Mark Hayes

'rounds'. 'Rounds' required rendering one's room identical to that of one's neighbours – right down to ensuring the smiley faces on socks faced the same way! I had to form more than a nodding acquaintance with a steam iron and starch, learned to fold socks – properly, and can now make a bed with hospital corners. Once I had mastered polishing my shoes, I finally looked the part.

My next hurdle was to stop looking around elsewhere when someone said 'Ma'am', saluted me, and looked to me as if I should know what I was doing!

After having to come to grips with an iron, I now had to come to grips with some rather more serious hardware, as I learned how to dismantle and rebuild a 9mm semi-automatic weapon within 10 seconds, and how to fire it. After a day of theory: 'Get to Know Your Weapon' and walking around with a gun holster strapped around my thigh, my fellow recruits and I went out on the rifle range where we were allowed to shoot a real target.

That evening I sent the following text message to my husband:

'Hi Hon. Great day. Pistol shooting 9mm semi-automatics. I can take apart and put together my gun in 10 seconds'.

He text messaged me the only appropriate response:

'I love you'.

He was a bit concerned however when I came home with photographs of my successful day on the range showing that nearly all of my rounds had hit the groin area of the male target.

Two particularly gruelling exercises are now firmly lodged in my memory as the somewhat exotically named 'Coral Sea' and 'Sunda Strait'. 'Coral Sea' began with us having to inflate eight life rafts, into which we then embarked. My life raft had a hole strategically placed in the aft section (that's the back end) causing it to start sinking as we paddled across Jervis Bay. Somewhat unsurprisingly, this exercise was



designed to test how we would cope with a sinking life raft. The CO decided that the best way to cope was to make me, as the smallest of the group, clamber over everyone to reach the front of the eight life rafts. After only several hours of paddling across Jervis Bay we then had to march – dripping wet – for 15km carrying stretchers bearing patients with broken legs.

Upon my group's triumphant arrival at the HMAS *Creswell* airfield, we had no time to celebrate, but immediately returned to base for flying fox exercises, and then frogmarched back down to the wharf. To our unconfined elation we were given four barrels, assorted planks and rope with which to make a raft to again traverse the bay. I am proud to say that we are only the second group in the history of those exercises to have made a raft that didn't fall apart. Jodi Steele, commanding officer in the exercise, and I were rowed in state across Jervis Bay.

Each night in 'red sea rig' – yet another of our many uniforms – we new recruits attended the wardroom for dinner. At the culmination of our two weeks in October was a hilariously funny mess dinner: each recruit was required to recount an amusing anecdote from their time and travails during the course. Sadly most of those anecdotes are too rude to relay to the gentle readers of this publication. Suffice to say, I now understand the origins and meaning of the phrase 'language that would make a sailor blush'.

So ended Phase 1.

In April 2008, I returned to the picturesque HMAS *Creswell* in beautiful Jervis Bay, for Phase 3 (Phase 2 consists of written exams and assignments), delightfully (and appropriately as it turns out) nicknamed: 'Gassing, Burning and Drowning'. The Combat Survivability course included being tear-gassed, being thrown into a burning ship and stopping leaks on another. Also participating were fellow panel members Justice Dennis Cowdroy OAM and Jodi Steele. Mark Hayes, another recent recruit, was also on base as he was completing his final stages of the New Entry Officers Course or NEOC. As mess president, he hosted our group one night in the Gunner's.

I barely had time to renew my friendships with the members of the

Phase 1 group I had not seen since we parted in October when we had to don orange life preserving suits – yet another uniform variant – for survival at sea. Said suits were – in theory – not supposed to allow any water in, but as they were used for training, such regular use had rendered them full of holes. When it came to buddying-up for the exercise I, with determined practicality, headed straight for the biggest doctor I could find, as I thought him the most likely able to save me if anything untoward happened in the course of jumping off the ship, inflating the life vest, being dunked under water, or swimming to the life raft.

The life raft had rations of chocolate, biscuits, water, cards and a fishing line. As it was a beautiful sunny day I took the opportunity to sunbake while waiting to be 'rescued'. Rescuing normally consisted of being winched out of the water by a helicopter some eight hours later.

The next major exercise was: 'Stop, Leak and Repair' (a pattern was starting to emerge, in clues for chosen titles). In a ship simulator with water pouring in through various holes and bulkheads (walls), the Phase 3 recruits broke up into groups to shore up bulkheads and stop leaks, such repair work to be done using oxy torches and compressor guns. Failure to properly stop the leaks or shore up the bulkheads would result in the water going over our heads: as the shortest in the group, this was of grave concern to me. I am pleased to report that my group did not drown. One low note came in the course when learning how to repair leaking pipes. After watching me with the hammer, my instructor decided that I should not be allowed to progress to a chisel. My disappointment was short-lived however, as I was allowed to take control of the dramatically flaming and hissing oxy torch and compressor gun!

Next came 'Burning'. Again in a ship simulator, the galley and engine room were set on fire. Into thick black smoke we were sent in a chain – hanging on to the person in front, while the person behind clung onto you like grim death! Once was clearly not enough: again we ran in, this time with overalls on, holding writhing but rock-hard fire hoses, fierce torrents of water staunchly storming out of them. The force of water was phenomenal: trainers stood behind us, supporting us to ensure we didn't propel backwards! Then for good measure, we donned 25 kilos of breathing apparatus and helmets, and went in to an even bigger conflagration. It was a lot of fun and, of course, we had to sit more exams. We also studied nuclear, chemical and biological decontamination.

To complete the trio: 'Gassing'. Unsurprisingly, we donned gas masks, entered a chamber, and were tear-gassed. What more can I say?

I survived.

My experience as a reservist in the navy to date – while extremely physically and mentally draining – has been amazing. I have met some fantastic people, all of whom are willing to use their skills and serve their country. They are my heroes. It has definitely taken me outside my comfort zone. However, I am looking forward to my next deployment, this time on a ship. (Oh yes and also doing some legal work).

It is an honour and privilege to be part of the NSW Reserve Naval Legal Panel.



Procedures for complex commercial cases

By Jeremy Stoljar

Large scale commercial cases cause problems of a special kind. Often vast quantities of documents are involved, electronic and otherwise. Discovery becomes voluminous, sometimes almost unmanageable. Witness statements are long and complex. Even the pleadings can be so intricate they are hard to follow.

All this makes large commercial cases highly expensive. This article looks at two recent attempts by courts to curb these problems – and thereby make commercial litigation cheaper and faster.

Developments in the United Kingdom

In December 2007 the Commercial Court Working Party on Long Trials delivered its report and recommendations (the report).¹

The report includes various proposals for the efficient and swift conduct of what it described as 'heavy and complex' litigation, including that:

- ◆ pleadings be limited to 50 pages;
- ◆ no two party trial, however complex, be listed for more than 13 weeks;
- ◆ time limits be set for every component of the trial, including cross examination and closing submissions; and
- ◆ no opening 'should ever ordinarily be estimated to exceed two days, even in the heaviest case'.

Central to the new procedures contemplated by the report is a judicially settled list of issues. According to the report, the working party became increasingly convinced that a list of issues should be the 'keystone' to the proper management of commercial cases:

The WP [working party] concluded that the list of issues should be the key working document in all commercial court cases, whether small or large and whether involving few or many issues. The list of issues will be based on the pleadings of the parties, but in future it should become, effectively, a court document. It should, once settled, be the basis on which decisions are made about the breadth and depth of disclosure, provision of witness statements, what experts will be permitted and, ultimately, the shape of any trial.

The report contemplates that once the list of issues is settled pleadings 'will thereafter increasingly only have secondary importance'. Pleading points will be actively discouraged by the court.

The report includes the following:

The collective view of the [working party] is that frequently almost the only time a [pleading] is examined in detail by the court is when an issue arises on whether a party is entitled to raise or pursue a particular point, either in an expert's report or at trial. Then there is a minute analysis of the contents of [the pleading].

The scope of discovery and the content of witness statements will also be regulated by the list of issues. For example, witness statements will address, by reference to the list, the particular issues on which that witness is giving evidence, arranged by appropriately worded headings.



In respect of expert evidence the recommendations of the report include the following:

- ◆ permission for expert evidence should not be given until after the list of issues has been judicially settled;
- ◆ the list of issues should identify, in summary form, the issues on which expert evidence is required, and permission for expert evidence should be limited to those issues; and
- ◆ the court may give directions limiting the length of expert reports.

The report contemplates that judges will be involved in the case management of complex commercial cases from an early stage. As already noted, a judge will settle the list of issues. A 'two judge team' may be used if the case is 'sufficiently heavy/complex'.

The working party also recommended that judges be encouraged to give provisional views on the merits of particular issues if that seemed appropriate. Judges would also be encouraged to exercise their powers with regard to giving summary judgment, or for strike outs.

In a statement in court², Mr Justice Andrew Smith, judge in charge of the Commercial Court, stated that the judges of the Commercial Court will adopt the approach of the report in managing all cases which are issued, or in which a case management conference is held, in that court after 1 February 2008. This trial period will continue until the end of November 2008.

Developments in the Federal Court in Victoria

On and from 1 May 2007 in Victoria the Federal Court of Australia introduced a Fast Track List, on a pilot basis.

In this list matters will not proceed on pleadings. Rather, there will be case summaries: statements of a party's claim or cross claim, points of defence and points in reply.

A 'scheduling conference' will be held not less than 45 days from the commencement of the proceedings. At the scheduling conference the presiding judge will set the matter down for final hearing. The trial

shall be between two and five months from the date of the scheduling conference, sooner in urgent cases.

Discovery will ordinarily, at least as regards to liability, be confined to documents in the following categories:

- ◆ documents on which a party intends to rely; and
- ◆ documents that have a significant probative value adverse to a party's case.

A pre-trial conference will be held approximately three weeks prior to the trial.

At the pre-trial conference the presiding judge will decide the total time that each party will be allocated to present its case at trial, with due allowance for questions from the judge. As noted in the Fast Track List Directions issued by the court:

Each party shall receive a fixed block of time for its oral submissions; a fixed block of time to present its case in chief, cross examination, and any re-examination; and a small amount of flexible time to be used as needed. It shall be counsels' responsibility to determine how to allocate and best use each party's available time.

A trial of a case in the Fast Track List will be conducted in what is described as 'chess clock' style, i.e., as also noted in the Fast Track List Directions:

The judge's associate will be responsible for keeping track of each party's time used and time available. At the conclusion of each day of the hearing, the parties and the judge will confirm how much time each party has used and how much time each party has remaining.

The court will ordinarily deliver judgment within six weeks of the conclusion of the trial, sooner if necessary.

It appears from information published on the Federal Court of Australia website that, at the time of writing, some 28 matters are currently in the Fast Track List. Five of these matters appear to be applications commenced by the ACCC. A number of these matters have proceeded to final judgement.

Endnotes

1. A copy of the report is at http://www.judiciary.gov.uk/docs/rep_comm_wrkg_party_long_trials.pdf
2. A copy of the statement is at www.judiciary.gov.uk/docs/long_trials_statement.pdf



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How borrowing in super has stepped up a gear

By Chris Magnus*

If you've recently heard that you can now borrow within super, it's true. What isn't true, however, is that it's a new concept.

Borrowing within super has been common practice for many years through the use of instalment warrants and geared managed funds. However, in 2006 the regulators came to the view that gearing in super using instalment warrants involved a breach of the borrowing exception in the legislation.

After feedback and consultation with the industry, the Australian Parliament passed legislation in September 2007 which exempted instalment warrants from breaching the borrowing rules. In addition, the legislation broadened the scope of the rules to not only apply to instalment warrant products, but to a wider range of share and property arrangements – hence the reason many people may think that it's 'new'.

However, it's not as simple as a super fund taking out an investment loan. The borrowing arrangement needs to meet a long list of conditions.

Utilising this strategy largely depends on your retirement objectives and appetite for risk and return. It can be a high risk strategy and should only be undertaken if your objectives are for growth in the run up to retirement. In addition, unlike gearing outside of super, generally your capital cannot be accessed until you reach at least 55 years of age and are retired. So, if the capital is required to fund a lifestyle event prior to retirement then this strategy is probably not appropriate for you.

Taking into consideration the above, gearing in superannuation may suit those who:

- ◆ have a need to accelerate wealth to fund their retirement;
- ◆ have a reasonable super balance and/or adequate cashflow in super;
- ◆ are investing for the long term and have an appetite for risk.

Your current super balance and also cashflow position will determine the level of borrowings and whether you can fund the loan repayments. In order to ensure that you can meet the loan repayments, it's essential that your cashflow position is monitored vigilantly.

For instance, you should make sure that you will always have enough cash to avoid a situation should the interest expense on a loan be greater than the investment income earned within the fund. You do not want to encounter a scenario which results in you having to make an injection of capital into the loan, particularly if the contribution limits have been utilised that financial year. This could result in the forced sale of assets.

However, borrowing inside of super can be an efficient means of accumulating wealth as earnings and gains are taxed at concessional rates. It also provides the opportunity to increase your retirement capital further in an environment where your capital can be drawn tax-free after the age of 60. While there are limits on the amount that can be contributed to super there is no limit to the amount that you can accumulate.

ACCOUNT NUMBER:	
YOUR OVERDRAFT LIMIT, AS OF THE STATEMENT DATE IS 1,000.00. THIS MAY BE CANCELLED WITHOUT NOTICE. OVERDRAFTS ARE SUBJECT TO A TRANSACTION CHARGE. SEE REVERSE FOR DETAILS.	
TRANSACTS	TOTAL DEPOSITS
1.39	2,710.00
YTD INTEREST PAID	
YTD INTEREST RECEIVED	
DESCRIPTION	

Gearing within super can be very effective for assets that are expected to provide good long-term capital growth well in excess of borrowing and other expenses, given the lower tax rates applicable within super on earnings and in particular capital growth (when compared to an individual's marginal tax rate). It may suit assets with a high income expectation or those with a low loan to value ratio which means that the total income may be above the total interest payable. Based on this, growth assets may include shares, private equity and property. Given the current environment, it is important to be selective about the assets that you choose and the way that you finance them.

A number of new products have been released recently to allow you to gear in super and access the above assets. Macquarie Private Wealth has modelled a number of different scenarios and assessed the benefits and risks of each one. There is a wide range of different options to choose from, especially around the borrowing arrangements. Where products are being used, they should generally have a product ruling from the ATO. There is also the option of tailoring your own gearing arrangement using a self managed super fund to suit your needs using specialist legal, taxation and financial planning advisers. With this option, however, there are even more risks to be aware of, especially as there are still some grey areas around the rules that are awaiting clarification.

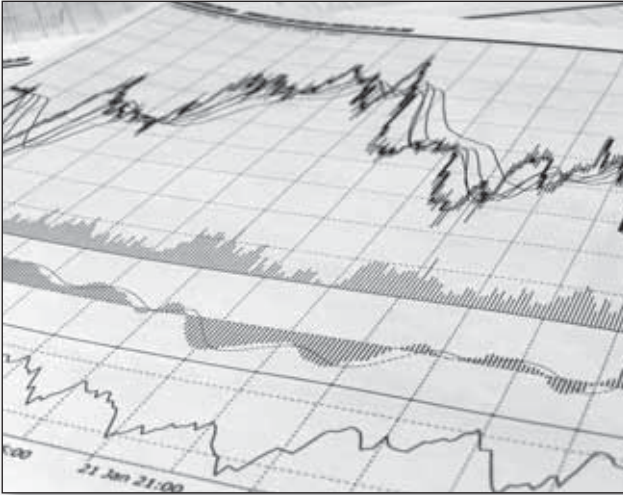
In all cases, however, it is important you talk to an adviser for the most appropriate arrangement for your personal situation.

If you have any questions about the information included in this article, please contact Chris Magnus, private wealth manager, Macquarie Private Wealth on 02 8232 0365 or chris.magnus@macquarie.com

Endnotes

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Macquarie Private Wealth's services are provided by Macquarie Equities Limited (MEL) ABN 41 002 574 923, Participant of Australian Securities Exchange Group, AFSL No. 237504, Level 18, 20 Bond Street, Sydney NSW 2000.



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Verbatim

In family law proceedings before Waddy J, it was apparently necessary for a pair of old, slightly battered shoes to be tendered. Debate ensued over how the exhibit should be described. There then followed this exchange:

Hodgson: 'The shoes will speak for themselves, your Honour.'

Waddy J: 'That's why they've got tongues, I suppose.'

Indigenous Literacy Day

There is a strong tradition of philanthropy at the Bar and one example can be found in the donation of \$65,000 by the silks of 2007 to the Indigenous Literacy Project, a partnership between the Australian book industry and the Fred Hollows Foundation. The following speech was delivered by Peter Tomasetti SC.

Australia is fortunate to count itself among the most literate, well-educated countries in the world, yet within its first-world status there is a stark and an unacceptable level of illiteracy, which sees some of our citizens severely disadvantaged, potentially for life. I refer of course to the state of literacy in remote Indigenous Australia.

On 10 December 1993, the Prime Minister of the day, Paul Keating in his now famous Redfern Speech to mark the Australian Launch of the International Year of the World's Indigenous People said:

Ever so gradually we are learning how to see Australia through Aboriginal eyes, beginning to recognise the wisdom contained in their epic story.

I think we are beginning to see how much we owe the indigenous Australians and how much we have lost by living so apart.

I said we non-indigenous Australians should try to imagine the Aboriginal view.

It can't be too hard. ...

There is one thing today we cannot imagine. We cannot imagine that the descendants of people whose genius and resilience maintained a culture here through 50 000 years or more, through cataclysmic changes to the climate and environment, and who then survived two centuries of dispossession and abuse, will be denied their place in the modern Australian nation.

We cannot imagine that.

We cannot imagine that we will fail.

It is with this spirit of imagination that the NSW Silks of 2007 support the Indigenous Literacy Project, a partnership between the Australian Book Industry and The Fred Hollows Foundation. The project grew from a recognition within the Australian Book Industry of the need to help address the impact that such low rates of literacy is having on the life prospects of those affected.

Through the distribution of funds from donations, the Project's objective is to buy books and other essential materials, and to support programs designed to address



L to R: Francois Kunc SC, Karen Williams, project officer at the Indigenous Literacy Project and Peter Eichhorn, ILP Committee member

illiteracy in remote Indigenous communities particularly amongst the young.

The Fred Hollows Foundation, through whose Literacy programs the Project's funds are spent, is an organisation uniquely positioned in Australia to help. Their commitment to addressing chronic health problems in these communities carries with it an explicit understanding of the proven links between education and literacy levels and healthy outcomes. As an organisation the Fred Hollows Foundation has demonstrated an outstanding capacity to work within these communities, to work for solutions and relationships from within, which gives this Project its best chance of success.

The Silks of 2007 are very proud to be associated with the Indigenous Literacy Project and the Fred Hollows Foundation.

We are proud to announce our donation of \$65,000 to assist in this essential work. It is singularly appropriate that this group of NSW

barristers with the privilege of an education and possessed of literacy skills do something to advance literacy in those who are not so fortunate through no fault of their own.

There was a time when white Australians believed that because our indigenous Australians had no written history, their very existence could be denied.

This donation will go to the immediate expansion of the literacy of indigenous people in over 20 communities in remote Northern Territory, to Warburton in Western Australia and to six communities in NSW including: Wilcannia, Engonnia, Ivanhoe, Brewarrina, Bourke and Menindee.

It is the intent of the Silks of 2007, that through this gift, Aboriginal people will be able to better fight for their rightful place in the modern Australian nation.

An interview with Attorney-General Robert McClelland

An interview by Andrew Bell SC, Arthur Moses, Jenny Chambers



Attorney-General Robert McClelland. Photo: Gary Ramage / Newspix

The Honourable Robert McClelland MP is the attorney-general of Australia and the Member for Barton, NSW. He was elected to parliament in 1996 and was shadow attorney-general for five years from 1998 to 2003. While the Labor Party was in Opposition, he served in a number of other shadow ministerial portfolios, including workplace relations, homeland security and defence.

Born in 1958, the attorney-general grew up in his current electorate in the St George area of Sydney. He completed his HSC at Blakehurst High School, where he was school captain, before going on to study at the University of New South Wales where he graduated with a Bachelor of Arts and Bachelor of Law. He later obtained a Master of Laws at the University of Sydney. From 1980 to 1982 he was an associate to the Hon Justice Philip Evatt of the Federal Court of

Australia. He practised as a lawyer for 14 years and was a partner at Turner Freeman Lawyers. His principal areas of practice were industrial law and sporting law.

Since being appointed to the office, the attorney-general has identified the following policy objectives as key priorities for his department:

- ◆ Improving national security through the better coordination of counter-terrorism investigations and prosecutions;
- ◆ The development of counter-radicalisation strategies to build the capacity of minority communities to resist extremism and prevent the radicalisation of vulnerable individuals;
- ◆ Improving access to justice by increasing funding to legal aid and community legal services;
- ◆ Simplifying the native title system to provide indigenous people with an avenue of economic development as well as delivering certainty to business and land-holders;
- ◆ Instituting a more transparent and consultative process for making appointments to the federal courts;
- ◆ Working with the states and territories to reinvigorate the harmonisation agenda;
- ◆ Promoting the rule of law throughout the Asia-Pacific region and also at a global level by re-engaging with the United Nations and becoming a party to a number of key international instruments, such as the Optional Protocol to the Convention Against Torture.

On 7 May 2008, the attorney-general spoke to *Bar News* at the Commonwealth Parliamentary offices in Sydney.

Bar News: Mr Attorney, you assumed the office of attorney-general on 3 December 2007. What has been your biggest challenge in your first six months of office?

A-G: There have been many significant challenges, but if had to nominate only one, it would be confronting the challenge of access to justice at the Commonwealth level, after 11 ½ years of neglect by the former government of services such as legal aid and community legal centres. I recently announced a one-off injection of \$10 million for Commonwealth-funded community legal centres – the largest ever injection into the program – and a one-off \$7 million boost for Legal Aid to address the most immediate pressures on the system.

I also took the lead in placing the issue of legal aid on the agenda of the Standing Committee of Attorneys-General and have committed to working with the states and territories to develop a paper for the next meeting on ways we can improve the administration of the legal aid system in the interests of disadvantaged Australians.

I believe legal aid and community legal services often stand at a critical point on the road towards social exclusion on which a person facing a

family breakdown, or the loss of a home or a job, can find themselves. I want to do all I can to improve access to justice through these critical services.

Bar News: One initiative of yours that has sparked quite a lot of interest at the Bar is the recent call for expressions of interest for appointments to the Federal Court and the Federal Magistrates Court. Obviously calling for expressions of interest is a new initiative and, from the Bar's point of view, people are genuinely interested in the process and there seem to be different views about whether it's a good thing, whether it's a bad thing and indeed how it will work.

A-G: I'm convinced it's a good thing. We've sought applications and also nominations if someone doesn't want to self-nominate. It will also be the case that if the interview panel thinks that there is a more desirable candidate out there who hasn't been nominated or applied, that the panel will have the ability to approach and invite that person to submit their name. So we're covering all options off by the belt and braces. But what I specifically want to do is to remove any perception that political patronage is involved. That neither personal friendship,

association with me, nor indeed support for political parties, is a criterion. I also think it's worth mentioning that Sir Gerard Brennan has agreed to participate on the Federal Court panel. Sir Gerard would only participate if he was assured it was going to be a serious process and we would have regard to the recommendations of the panel.

Bar News: When you talk about the panel, earlier in your answer you described it as the 'interview panel', is it intended that there will be interviews of nominees?

When I was in the United Kingdom recently, I met with Lord Chancellor Jack Straw. He wasn't overly impressed with the way the United Kingdom's judicial commission had functioned.

A-G: No, not in the Federal Court. The Federal Magistrates Court, yes, they'll shortlist and then conduct interviews. There are 500 who have applied for the federal magistrate's positions. That's really amazing. I'm not sure how many have applied for the Federal Court positions. But it's not anticipated, and it's probably unlikely, that there will be interviews for the Federal Court, although the panel may decide to do that. I personally won't be participating in any interviews.

Bar News: Does the panel have a process or a procedure which it will follow or is that evolving?

A-G: It's evolving, is the short answer.

Bar News: Do you anticipate that once the decision-making process does evolve, whether that process would be made public consistent with a push towards transparency?

A-G: To be frank, I'd have to discuss that with the panel.

Bar News: Is the constitution of the panel public information? You mentioned Sir Gerard Brennan in relation to the Federal Court panel.

A-G: The panel is comprised of the chief justice of the Federal Court, Michael Black, Sir Gerard Brennan, former Federal Court Justice Jane Matthews, and a representative from the Attorney-General's Department, either the secretary or the deputy-secretary, Ian Govey.

Bar News: The call for expressions of interest and the appointment of a panel et cetera has some hallmarks of a judicial appointments commission but it's perhaps not an independent judicial appointments commission in the fully-fledged form. Does the Rudd government intend to establish a judicial appointments commission?

A-G: We haven't closed our minds to that. When I was in the United Kingdom recently, I met with Lord Chancellor Jack Straw. He wasn't overly impressed with the way the United Kingdom's judicial commission

had functioned. He found considerable delay. He found that it hadn't necessarily broadened the scope of traditional appointments from middle-aged white Anglo-Saxon males. So he was reviewing their appointment process. So we'll look at these things incrementally but I think this broader consultation and broader input is something that I'm personally going to appreciate. If I can say here, it's been a very happy position for me – where I have been able to say to friends, associates, colleagues who give me CVs for a wish list of appointments to the Federal Magistrates Court, the Federal Court, the Family Court – 'thanks very much but we've got a process'.

Bar News: Do you regard the process of appointments to the High Court as being in a different category to the Federal Court and the Federal Magistrates Court?

A-G: Yes it is. We've brought in extensive consultation. We've written extensively to not only the attorneys-general which we're obliged to do, but also to the Bar associations and law societies, the deans of universities, the community legal sector and legal aid commissions to receive their input, but there won't be any interview panel or a panel recommending an appointment. That will be done at the traditional political level, albeit supported by this process of broad consultation.

Bar News: Does that involve consultation with the shadow attorney-general, George Brandis?

A-G: I was shadow attorney-general for five years and on not one occasion was I consulted. I'm not sure that's something that's appropriate.

Bar News: Regarding appointments to the High Court, is it of concern to the Rudd government that the members of the High Court represent an even geographical spread of Australia's states and territories? Is a candidate's state or territory of origin a matter that will be taken into account in the decision-making process?

A-G: First and foremost, the issue of ability is the guiding principle. If it was to be the case that there were equally qualified, equally experienced people and it was a line ball, then you'd be looking at the issue of geographical balance but it would only be when it came down to such a fine line that such a consideration would become relevant. First and foremost, we'll be after ability.

Bar News: The work of the High Court seems to have grown enormously over recent years, in part because of the former government's approach to judicial review and privative clauses but, more generally, the High Court has been constituted by seven judges for many, many years. Do you see any possibility of expanding the court, say to nine?

A-G: No that's not on the agenda. There have been submissions put forward to that effect but it's not on the agenda.

Bar News: Are you in a position to say anything about the future of the Federal Magistrates Court. In particular, whether that court will be absorbed into the Federal Court?

A-G: Well we have a review of Australia's federal courts underway now. That was one concerning thing when I came into the role of attorney-general that there are a lot of problems. I have to be honest here, as

almost primary school conflicts were occurring. I just spoke to a few people and said this can't continue. I'm not picking sides in it but it just should not have been happening.

I have appointed Des Semples of KPMG to conduct a review of the federal courts structure. Two or three things that I would like to come out of the review are the more efficient and effective use of resources. Both the Family Court and the Federal Magistrates Court are losing a lot of money in circumstances where there is duplication occurring. That's a straight out budgetary matter. But I also want to ensure that the resources, and in particular, the family consultants are moved to the front door of the Family Court where they can assist in resolving matters early in the piece. And I want to ensure that there is the ability for greater interchange of caseloads between the magistrates and the judges. For instance the Family Court judges are putting aside several days at a time to hear complex matters. If their case settles in the first day, generally speaking, they are not currently requesting matters to be referred from the Federal Magistrates Court. I want to create that culture to break down the divide between the two courts.

Bar News: Another question we wanted to ask you concerns the superannuation surcharge introduced by the former government in 1996 which applies to the pensions of some Federal Court judges (and which was found to not apply to state or territory judicial officers in *Austin v Commonwealth*¹). Some people see the superannuation surcharge as first, an anomaly and secondly, possibly creating a structural problem, that is, an incentive for very capable, very well-respected Federal Court judges caught by the timing of that surcharge to leave the Bench early and in so doing, either return to private practice at the Bar or migrate to a Supreme Court. It would seem that it could be very bad for the morale of the Federal Court as very high quality judges leave. Does the government have a policy on this?

A-G: No, save insofar as we have invited a submission from the Federal Court on the matter. That's the short answer. The long answer is that it was an issue that was considered by the former government, and it's an issue that is before this government as well. We have to bear in mind community standards here too. From the community's point of view, Federal Court judges are well remunerated. Additionally, they receive a car, plus a 60 per cent pension of that very high salary until the day they die or it passes to their spouse. We have to have regard to community standards in formulating any response. Members of Parliaments are hit by the surcharge as well. Having said that, the reality is we're in an environment where the Bar, particularly the Sydney Bar and the Melbourne Bar, are doing exceptionally well and we have to bear that reality in mind. There's some balancing involved there.

Bar News: On a different topic, will Australians be asked to vote as to whether Australia ought to become a republic in the Rudd government's first term of office?

A-G: We must not forget we lost the last referendum we had ten years ago. We don't want to lose the next one. We must build a consensus and get it right.

But our immediate priority remains implementing our election commitments that tackle the immediate problems facing working families. From the government's point of view, there are priorities in

the global economy, the domestic economy, challenges in education, health, climate change and water that should be seen to first.

These are occupying the full attentions of government right now.

Bar News: At the Australia 2020 Summit held in April 2008, a majority of the Australian Governance stream expressed strong support for a statutory charter or Bill of Rights. You have also expressed a commitment towards the enactment of a Charter of Rights on a number of occasions. Does the Rudd government intend on enacting a national Charter of Rights and if so, what can you tell us about it? In particular, would the charter include a mechanism which would empower a court to make a declaration of incompatibility in respect of any law the court construes as inconsistent with the human rights enshrined in the charter, thereby referring the law back to parliament for reconsideration, such as exists in Britain, the ACT and Victoria?

I think we've really got to redouble efforts to have a profession that is regulated in a uniform way. Now whether that's implemented by nationally consistent rules within the state and territory frameworks, or otherwise, I'm comfortable, but there really does need to be that national framework.

A-G: The government believes the recognition and protection of human rights and responsibilities is a question of national importance for all Australians. That's why we're committed to consulting with the Australian community to determine how best to recognise and protect human rights. The consultation will provide an opportunity for all Australians to have their say on this issue. It's important to note that the government does not presuppose the outcome of these consultations.

A legislative Charter of Rights is just one of many options that might emerge from this process. What the government has indicated is that it would not support the inclusion of a Bill of Rights in the Constitution. I'm also adamant that any proposal must preserve the sovereignty of parliament to pass laws in the national interest. The government is currently considering how the consultation will be conducted.

Bar News: One issue that has sparked recent controversy among barristers in New South Wales is the proposed change to the *New South Wales Barristers' Rules* by way of the introduction of new Bar Rule 35A. Arguably, in some circumstances, the rule would place NSW barristers at a forensic disadvantage compared to interstate practitioners when appearing against each other as the NSW barristers would be subject to one set of ethical guidelines on a fairly fundamental topic of the



approach to cross-examination, which would not apply to interstate practitioners. This issue of comparative advantage or disadvantage would not arise if the profession was regulated at a national level. Do you have a view on the national regulation of the profession as opposed to the traditional state regulation?

A-G: We've really got an obligation, I think, to the country, but I think for the profession generally, to have nationally consistent regulation. If we want to really make Australia a commercial hub, a services hub of the region, it necessarily must be the case that businesses operating in our region can understand the Australian legal system. I mean you're starting off on the basis of the consequences of *Re Wakim*², which means businesses often require extensive advice before choosing the appropriate jurisdiction. To have a fractured profession is just not in the national interest and I don't think that's it's in the profession's interest. I think we've really got to redouble efforts to have a profession that is regulated in a uniform way. Now whether that's implemented by nationally consistent rules within the state and territory frameworks, or otherwise, I'm comfortable, but there really does need to be that national framework.

Bar News: Another quite interesting conceptual issue relates to the notion of a user-pays system. This suggestion was made after the C7 litigation in particular which was a significant public event but not unique in terms of massive large scale corporate litigation. The judge in that case suggested that, perhaps for certain types of cases, there should be greater cost recovery from the participants in the process. The other view, a philosophical view, of course, is that the courts are open to everyone, people's taxes contribute to the courts and once you start introducing a system which suggests that your access to the courts is subject to a tariff other than a nominal tariff, then that's a fundamental change in our democratic system. Do you have a view?

A-G: I think, having regard to the comments of Justice Sackville in that case, that it's certainly an issue worth exploring. The Federal Court itself is doing some work having a look at the issue and, to cut a long story short, it's an issue that we are not hastening about but having a look at. I think there are some steps that can be taken. It's been put to me, and again I haven't formed a definite view on it, that it may be the case for instance, that while there is a presumption that costs follow the event in litigation, should that necessarily be the case if someone takes a range of fanciful points? Should they be entitled to recover the

time as against the other party for taking those fanciful points? These are issues that, I think, in the context of what you're saying, warrant consideration.

Bar News: In 1999 while you were the shadow attorney-general, you authored a paper entitled 'In Defence of the Administration of Justice: Where is the attorney-general?' (1999) 1 *UTS Law Review* 118. In that article you referred to a paper delivered by the then attorney-general, the Hon Daryl Williams QC MP (which was presented in 1994, prior to Mr Williams becoming attorney-general)³ in which Mr Williams expressed the view that 'there are good practical reasons why neither judges nor the public should look to the attorney-general to take up cudgels for judges in media debate'. You opined in that article that:⁴

the judiciary should be vigorously defended by an objective and considered attorney-general. That is not to say that an attorney-general is obliged to defend judicial decisions per se. Rather, the attorney-general has a clear obligation, as chief law officer of this country, to defend the institution of the judiciary.

Do you still subscribe to that view?

A-G: I have long expressed the view that there remains a role for the attorney-general to defend the judiciary from politically-motivated attacks. That is not to say that an attorney-general is obliged to defend every judicial decision from criticism. It will require objective and considered judgment. But where I differ from my most recent predecessors is that I do believe the attorney-general has an obligation, as chief law officer of the country, to defend the institution of the judiciary from politically-motivated attacks.

Endnotes

1. (2003) 215 CLR 185.
2. *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
3. Paper presented to the National Conference, 'Courts in a Representative Democracy', on 11 – 13 November 1994, cited at 118, 'In Defence of the Administration of Justice: Where is the Attorney-General?' (1999) 1 *UTS Law Review* 118.
4. 'In Defence of the Administration of Justice: Where is the Attorney-General?' (1999) 1 *UTS Law Review* 118 at 126.

Citizenship & David Hicks: an interview with David McLeod

Interview by Richard Beasley

The Halifax bomber flown by Flying Officer Douglas McLeod was shot down over Isenabruk, Germany in 1942. It was night time, and the crew was forced to bail out. All were captured, and all but one would survive the war.

Upon his capture, Doug McLeod was imprisoned at Stalag Luft III, along with other Allied air force prisoners of war. Stalag Luft III was soon made famous by a daring but largely unsuccessful escape, itself made even more famous by the 1963 film starring Steve McQueen.

McLeod was liberated by the Russians in 1945, and returned to Australia to study law, and in partnership started his own law firm.

Sixty years after his father's release from a prisoner of war camp, David McLeod, also a lawyer, found himself at a modern day POW camp, if that is not too glorious or inaccurate a term: At Camp Delta, at Guantanamo Bay, Cuba; as the principal Australian lawyer for Guantanamo 'Detainee 002' – David Matthew Hicks.¹

When he arrived at the gates and barbed wire fences of Camp Delta, McLeod told me that he briefly thought of his father, and the three years he spent as a POW. His father, he told me, made little complaint – at least to him – of his years in the Stalag, or about the treatment he received from the German soldiers and guards. Whether this was as much a product of the reticence of men of his era for complaint about such things, or of the German guards' general compliance with the Geneva Convention, McLeod isn't sure.

'His only real complaint was with the Russians', he told me. 'After the German guards all disappeared one morning in 1945, they thought they were free, but the Red Army then arrived and locked everyone back up.'

Soviet suspicion about Allied airmen was either alleviated, or forgotten about after a few days, and the POWs, including McLeod's father, were liberated all over again.

If Douglas McLeod didn't complain about Stalag Luft III, the same cannot be said of David McLeod and Camp Delta, and the treatment enjoyed by his client Hicks.

There were some obvious reasons why McLeod was chosen to be the Australian lawyer for David Hicks. He is a group captain in the RAAF (the army equivalent of full colonel), and is the head of the RAAF Defence Legal Service in South Australia. He had practical experience too. Only 18 months prior to becoming involved in the Hicks case, McLeod had seen active service for three months in the Iraq war, as a legal adviser to the group commander of the Orion contingent in the Persian Gulf. And, over a 25 year period, he estimates that he had been involved in at least 100 court martial and other disciplinary hearings as an advocate. From a military and legal perspective, he appeared a sound choice. But there were other issues at play.

'I was considered conservative politically, which was probably a fair enough description', McLeod told me. 'There was a perception I think, that I was someone the government might listen to. David, by 2005, needed as much PR and political level assistance as he did legal.'



David McLeod, Australian lawyer for David Hicks, talks to media at his office in Adelaide. Photo: Sam Mooy / Newspix

Until February 2005, Hicks's Australian lawyer had been Stephen Kenny, another Adelaide-based practitioner, but one unlikely to describe himself as 'conservative politically'. Kenny, McLeod told me, 'did a fantastic job for David.' Rightly or wrongly though the perception grew that Kenny's criticism, however valid, was strident enough that it might not be helping to soften the harsh and even aggressive stand that the Australian Government had adopted against Hicks. In May 2005 McLeod was asked to accept the Australian brief for Hicks.

Reading through the transcripts of interviews McLeod gave to the press after becoming Hicks's legal adviser, the change in tone from his early interview to the later is both obvious and startling. As well as changing his rhetoric, acting for Hicks it seems has changed McLeod as both a lawyer and as a man.

In his first interview after his appointment, prior to travelling to Guantanamo to meet his client, McLeod indicated a concern to not unduly upset a government that generally became excitable at the first hint of criticism. He described the Australian Government as 'being very sensible and sensitive to the issues involved', and because of that he anticipated that a 'dialogue [would] ensue that would be in the interests of both the Australian Government and David Hicks'.²

'Well, I was wrong about that', McLeod says now when this is read to him.

The military commission process that Hicks was subject to when McLeod was first appointed as his Australian lawyer was, to quote McLeod 'a complete sham'. Lord Steyn of the House of Lords, having called Guantanamo Bay a 'legal black hole', has described it this way:

The prisoners have no access to the writ of Habeas Corpus to determine whether their detention is even arguably justified. The military will act as interrogators, prosecutors, defence counsel, judges, and when the death sentences are imposed, as executioners. The trials will be held in secret. None of the basic guarantees for a

fair trial need be observed. The jurisdiction of the United States courts is excluded. The military control everything.³

Although delicate initially with the government, McLeod nevertheless was on the front foot concerning the legality of the three charges that Hicks then faced (subsequently dropped after the US Supreme Court decision in *Hamdan v Rumsfeld*) and for which he had then been detained for three and a half years without trial.

The first charge was ‘conspiracy’.

‘A charge previously unheard of under the rule of law’, McLeod told me.

Unsurprisingly, four of the eight justices of the US Supreme Court who sat on *Hamdan v Rumsfeld* ruled that conspiracy was not a valid offence under the rule of law.

The second charge was ‘attempted murder by an underprivileged belligerent’.

‘I still don’t know what that means’, McLeod said. ‘I’m not sure the prosecution did either. The suggestion was that David could somehow be curiously liable for members of the Taliban who were shooting at US forces. It was ridiculous.’

The third charge was ‘aiding the enemy’.

‘The first time that David Hicks ever heard of the name ‘Al Qaeda’’, McLeod told me, ‘was when he was in detention at Guantanamo Bay’.

Hicks was originally detained in Afghanistan by the Northern Alliance. Although some members of the then federal government like to perpetuate the myth that Hicks was captured on the battlefield while fighting with Taliban forces, he was actually first detained in civilian clothes while attempting to catch a taxi – from a taxi stand – to Pakistan. He was handed over in December 2001 by the Northern Alliance to the US military for a fee of \$1000.

‘I think that David thought – in a real sense – that he was defending Afghanistan, not waging some international war of terror’, McLeod said.

In any event, in *Hamdan v Rumsfeld*, the US Supreme Court ruled that such a charge required the defendant to have an allegiance to the United States, something not owed by an Australian citizen.

While the original charges may have been fundamentally flawed, McLeod saw that the bigger picture was to get a change of attitude from the government. Ultimately, given Australia’s cooperation with the US in the Iraq war, they had the power to bring Hicks home in the manner the British had with its nationals at Guantanamo Bay. Hence the softly-softly approach on the government in the early interviews. That all changed in late June 2005 when McLeod saw his client at Camp Delta.

Upon his return McLeod told the ABC that the conditions at Camps X-ray and Delta were ‘an absolute and utter disgrace’.⁴ He compared them to enclosures at a zoo. A man who does not give the impression of being likely to often succumb to hyperbole, he was ‘shocked, genuinely shocked’ when he first saw David Hicks.

‘He looked like he was dying, like someone from a cancer ward’, he said. ‘He was pallid. His eyes were sunken. He had long greasy hair. His face was bloated. His skin was almost translucent.’

At this point, Hicks had spent 16 months in solitary confinement. He was in his cell 23 hours a day. He was taken out for one hour at night.

For the length of their interview – conducted in a tiny hut in the camp and in the presence of Hicks’s military lawyer Major Michael Mori and Michael Griffin – Hicks was chained to a bolt in the floor.

‘The first time David walked more than 20 feet in a straight line in over five years was on the tarmac at Adelaide airport when he returned to Australia’, McLeod told me.

David Hicks has always maintained that he was tortured during the period of his detention. He has alleged that:

- ◆ he was beaten during interrogations, including while handcuffed
- ◆ he was deprived of food, sleep and access to reading material, or any social contact
- ◆ he had his head rammed into a wall several times while blindfolded
- ◆ he was threatened with firearms and other weapons.⁵

Despite McLeod’s concerns about the unfairness of the commissions, the federal attorney-general (Philip Ruddock) continued to make a number of public declarations as to what he said were ‘fundamental safeguards’ that would ensure a fair trial for David Hicks under the regime.

McLeod would not comment directly on those specific allegations, other than to say this: ‘of course he was tortured. He was detained for over five years without a trial. He was placed in solitary confinement for a prolonged period. He was in a cell for 23 hours a day. He knew that the British detainees and also the other Australian had all been discharged from detention. He went for years without knowing what was going to happen to him. That is torture. It is physical and mental torture.’

McLeod did offer me an even more precise example. When he visited Guantanamo Bay, on a noticeboard that the detainees had access to,

was a picture of Saddam Hussein being hanged. There was a message next to it: 'This is what happens to those who do not co-operate.'

'We asked them (the guards) to take it down', McLeod told me. 'Eventually they did.'

Despite the conditions that Hicks was forced to endure, and despite the extreme concern McLeod had for his client's physical and mental condition, the Australian Government remained entirely unsympathetic. According to the then foreign minister, Alexander Downer, Hicks's only problem was a 'bad back', and he was not, apparently, 'depressed'.⁶ At Camp Delta or X-Ray, who would be? A camp psychiatrist, so Downer reported, assessed his mental health as 'good'.⁷

Conversely, McLeod – whose dealings with Downer during the time Hicks remained at Guantanamo, became more and more strained – thought his client would 'die in custody'.

'After my first trip to Guantanamo', McLeod said, 'I made a decision that it was important that we fight a public relations battle for David.'

This was primarily because McLeod thought that Hicks had absolutely no hope of a fair hearing under the military commission system that was set up under the new legislation rushed through Congress after *Hamdan v Rumsfeld*. Despite McLeod's concerns about the unfairness of the commissions, the federal attorney-general (Philip Ruddock) continued to make a number of public declarations as to what he said were 'fundamental safeguards' that would ensure a fair trial for David Hicks under the regime. These included the right to be present at trial (an odd standard for fairness) and the right to cross-examination.

'What the attorney did not point out', McLeod said, 'was that the prosecution could present its case entirely on written statements and documents. It is very hard to make headway cross-examining a piece of paper.'⁸

Perhaps this, together with the fact that there was a likelihood that evidence would be presented that had been obtained by inhumane methods, led observers like Lex Lasry QC to describe the military commission process 'as a charade that only served to corrode the rule of law'⁹, and commentators like Robert Richter QC of the Victorian Bar to describe them as something that 'would have done Stalin's show trials proud'.¹⁰

McLeod began to use a stronger tone when publically discussing the government's position. At about this time the Fairfax journalist Michelle Grattan offered him some advice. 'She told me that I would get nowhere with the government or Howard for David until 50.1 per cent of the population was against the government's position.'

He began publicly describing Ruddock as 'smug' and 'lacking common sense', and posed the rhetorical question on the ABC as to whether his client would 'have to die in custody' before his own government would say 'that's enough'.¹¹

'I felt that the government was spending more time in demonising David Hicks than attempting to resolve the situation where a national had been detained without charge for a number of years', McLeod said. 'That, to me, made no sense then, and makes no sense now.'

The government has to show some allegiance and support for its citizens when they are in trouble. The British went in to bat for their nationals. We didn't. We let our national be the last Western man left in that bloody awful place. A new country ought to believe in itself enough to look after its own.

Still, this criticism is moderate compared to that of Richter QC, who in an article published in *The Age* suggested that the then attorney-general could be charged with war crimes for 'counselling and procuring an illegal process' in relation to an unfair trial or illegal process. He also described Ruddock as a 'liar' and challenged him to sue for defamation.¹²

As at the date of writing this article, it appears no such charges, nor any defamation proceedings have been brought.

'The really frustrating thing is', McLeod told me, 'that if government had simply asked the United States to send David back home, they would have. I just find that unforgivable.'

The thing that most disappointed McLeod, he said, was that the government placed its own political ends 'ahead of the citizenship of one of us.'

'The government knew that the evidence against David was paper-thin [the chief prosecutor, Mo Davis, has recently stated that the evidence was so weak that charges should not have been brought], and they knew that the military commission process was a farce. They knew that David was being kept in the most appalling conditions, and had been for years, and they knew he would be sent home if they asked. But they wouldn't ask.'

I asked McLeod what impact acting for Hicks had had on him as a lawyer, and as a man. 'The lasting thing I've taken from acting for David is the importance of the Australian Government placing a value on citizenship. Not just for those of us that they like, but for all of us. The government has to show some allegiance and support for its citizens when they are in trouble. The British went in to bat for their nationals. We didn't. We let our national be the last Western man left in that bloody awful place. A new country ought to believe in itself enough to look after its own. Instead it was the 'mother country' that took the lead. That I think is a real shame.'



Photo: Newspix

The obligation of the government to assist Australian citizens was at the centre of proceedings brought in the Federal Court in late 2006, on behalf of Hicks. In this case – terminated after Hicks's plea bargain was agreed – McLeod instructed Bret Walker SC and Kate Eastman of the New South Wales Bar (Major Mori was also granted leave to appear) in proceedings that were heard at the interlocutory stage before Tamberlin J. 'In the claim we essentially sought an order in the nature of *habeus corpus*, for David's return to Australia. It was based on an obligation or a duty of the government to protect Australian citizens abroad.' A duty which, the solicitor-general argued on behalf of the government – unsuccessfully – was so untenable that the claim should be struck out.

Given his military and legal background, and given the allegations his client made about torture, I asked McLeod his views on what are now called 'enhanced interrogation techniques' – the Bush administration's euphemism for torture.

'The third Geneva Convention and the laws of war do not allow torture', McLeod said.

He told me that he agreed entirely with the president of the Supreme Court of Israel, Aaron Barak, who has held that 'the violent interrogation of a suspected terrorist is not lawful even if doing so may save human life by preventing impending terrorist acts'. The unlawfulness of torture

is simply one of the prices and consequences of living in a free and democratic society. It is part of our security.

It was after the Federal Court proceedings survived the strike out attempt that McLeod was called by Downer's chief of staff, and summoned to the family home of the then foreign minister in the Adelaide Hills. Within a short period of time following that meeting – relative to the time he had spent in detention – Hicks pleaded guilty to the somewhat un-specific charge of 'material support of terrorism', and was soon on a flight home back to Adelaide to spend seven months at Yatala prison before his release – subject now to a 'control order'.

McLeod says he was not entirely happy with the deal that was ultimately reached for his client – for whom he is still acting – but would not elaborate on the record. He is pleased that he's been released, is taking steps to assimilate back into society (with help from people like Dick Smith) – and that he is now, usually, off the front page.

Only one question for me remained: 'in the end, even when public opinion had swung behind David to an extent – at least in terms of the unfairness of detention without charge or trial for so long – why didn't the Government simply ask the US to send him home?'

'Because, I think, John Howard is a very, very stubborn man', McLeod said.

Just ask Peter Costello.

Endnotes

1. Sydney Lawyer Michael Griffin was also appointed as a 'foreign attorney consultant' for Hicks.
2. (ABC PM programme, 1/6/05).
3. 'Guantanamo Bay: The Legal Black Hole', Twenty Seventh F A Mann Lecture, 25 November 2003, By Lord Justice Johan Steyn.
- 4.
5. www.news.com.au from AAP 10 December 2004 – 'What Hicks Claims Happened at Guantanamo Bay'.
6. www.news.com.au, 14 June 2006, 'Hicks tortured in jail, says expert.'
7. *The Age*, 1 February 2007, 'Hicks charges false'.
8. See generally. 'A fair go for Hicks', published in *The Age*.
9. ABC News Online, 25 July 2007, 'Law Council slams Govt in Hicks report'.
10. *The Age*, 1 April 2007, 'A trial that was uncomfortably close to Stalinist theatre'.
11. *The Sydney Morning Herald*, 'Hicks mental health slides', 7 October 2006.
12. *The Age*, 18 and 27 February 2007 – 'Hypocrites breaking our law at every turn', and 'Ruddock safe from law, despite silk's challenge'.

Introduction to Roman law

By the Hon Justice Arthur Emmett

Challis Lecturer in Roman law at the University of Sydney

There are two great secular legal systems in the modern world, the common law and civil law systems. The civil law is found in virtually every country of modern Europe and in the overseas territories colonised by those countries. For example, the basic jurisprudence of Indonesia, Japan and many of the countries of South East Asia is based on the European Codes of the 18th and 19th centuries. Civil law jurisprudence is based on the *Corpus Iuris Civilis*, the compilations of Roman law carried out under *Petrus Sabbatius*, better known as the Emperor *Caesar Flavius Justinianus* in Constantinople in the first half of the sixth century.

The common law is found in the United Kingdom, other than Scotland, and in the overseas territories colonised by England, with some exceptions, such as South Africa, Louisiana and Quebec. Nevertheless, the common law also owes much to Roman jurisprudence.

The classical or golden age of Roman law was the second century and beginning of the third century. The *Pax Romana* established by Augustus, which had been in place for over 100 years covered the whole of Europe, Asia Minor, the Levant and North Africa. Roman civilisation, and the intricate commercial dealings that that civilisation brought about, were regulated by a sophisticated system of private law that was capable of resolving all of the disputes that arise in a complex society. The one great original genius of the Romans was the jurisprudence that they developed over many centuries.

The Roman Empire went downhill after the death of Alexander Severus in 235, although Diocletian re-established order after he came to the imperial throne in 284. He was the only emperor not to die in office, having abdicated in 305 to grow tomatoes near Split on the Dalmatian coast. Following Diocletian, the empire was divided into two, with different emperors ruling in Rome and Constantinople. Constantine established a new capital at Byzantium, which he modestly renamed Constantinople.

However, the Roman Empire in the west fell to the barbarians in 476, when Romulus Augustulus was hounded out of Rome. The Roman Empire in the east, however, continued for another 1,000 years until Constantinople fell in 1453, when the last emperor, Constantine 13th Palaiologos, died nobly trying to defend the city walls against the onslaught of the Ottoman Turks.

When Justinian came to the imperial throne at Constantinople in 527, he was determined to achieve greatness. Indeed, he is regarded as a saint in many Eastern Orthodox churches. The Cathedral of Sancta Sophia remains as a monument to his physical achievements.

But Justinian also turned his mind to the law. By the sixth century, the practice of the law had fallen into disrepute. While there were several law schools throughout the empire, most had an appalling reputation. Indeed, Justinian abolished all law schools other than those at Constantinople and Beirut.

The great jurists of the second and early third centuries had produced vast amounts of legal writing but it was very difficult to find anything and there were often conflicting views expressed. In addition, there were several centuries of imperial pronouncements that operated as general laws. Justinian conceived the idea of a complete and authoritative restatement of Roman private law.

Shortly after he ascended the throne, Justinian appointed a law reform commission of academics, practitioners and administrators to produce the Digest or Pandects in fifty books, the ancient predecessor of Halsbury's Laws of England. The difference, however, was that Justinian decreed, when the Digest was published, that it be promulgated as the law of the empire. Reference to all other legal writings was forbidden.

Justinian recognised, however, that the Digest was a difficult work to master. He therefore, appointed a smaller commission to produce a textbook for students, which would also be a map of the law as stated in the Digest. The textbook, known in English as the Institutes, or first principles, was also promulgated as the law of the empire. The Digest and the Institutes both came into force at the end of 533. However, they had little recognition in the barbarian West and were soon replaced in the east by Greek translations and epitomes.

At the end of the eleventh century, the Digest and the Institutes were rediscovered at Bologna, where the first university and law school in Western Europe were established and Irnerius began to teach the law of the *Corpus Iuris*. The teaching of the *Corpus Iuris*, or the civil law spread throughout Western Europe and was taught at the great mediaeval universities established at the beginning of the Renaissance. For example, by the 13th and 14th centuries, civil law was being taught at Oxford and at Cambridge. The common law was not taught at any English university until the middle of the nineteenth century.

Bracton's *De Legibus et Consuetudinibus Angliae*, or 'Concerning the Laws and Customs of England', was published in 1256. It was probably the first important book on English law, apart, perhaps, from Glanvil's *Tractatus* of the same name. Bracton's work was written in Latin and he resorted extensively to the *Corpus Iuris Civilis* in compiling it. Bracton was a trained jurist with the principles and distinctions of Roman jurisprudence firmly in mind. He used them throughout his work to rationalise and reduce to order the results hitherto reached in the English courts. Roman law supplied him not only with a framework under which his English subject matter could be fashioned into an articulated system of principles, but also with a precise technical vocabulary with which to describe and analyse the material.

Bracton's treatise was very influential in many areas of Anglo-Norman jurisprudence. Nevertheless, Anglo-Norman jurisprudence took a different course from the rest of Europe and from Scotland. Anglo-Norman jurisprudence was formed by practitioners in the king's courts, who turned away from civil, or Roman, jurisprudence. The teaching of Anglo-Norman law was carried out within the Inns of Court.

Notwithstanding the strength of the Inns of Court, however, from the age of the Renaissance and the Reformation onwards, Roman law continued to exert new influences on Anglo-Norman doctrine. While the development of Anglo-Norman jurisprudence was in the hands of practitioners in the Inns of Court, the members of the Inns were often educated at Oxford and Cambridge. Henry VIII founded the Regius chairs of civil law in both universities and the study of law at those institutions entailed, for the most part, the study of Roman jurisprudence. Accordingly, civil jurisprudence, founded on the *Corpus Iuris Civilis*, continued to infect Anglo-Norman jurisprudence through the universities.

Roman law was described by Barton J as 'the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe'.

Added to the influence of the universities was that of the law merchant. The position of merchants and mariners in the medieval period, when Anglo-Norman jurisprudence was developing, was peculiar, when compared with the position of other subjects of the English monarch. Merchants and mariners carried on their business by travelling from country to country. Accordingly, there was an international character attached to their dealings that gave rise to a need for universality in relation to the principles of law governing those dealings. It was necessary that such principles be generally the same in the various countries visited by merchants and mariners.

Further, when disputes arose among merchants and mariners, there was a need for speedy resolution. It was not appropriate to determine such disputes by means of a trial by twelve jurors and adherence to the other solemnities of the law of England. Such disputes needed to be determined by the law merchant, which developed with the growth of trade among the city states of Italy. The commencement of that growth coincided with the rediscovery of the *Corpus Iuris*, which provided a convenient source of principles for the resolution of disputes involving merchants and mariners. Thus, the law merchant was different from the ordinary law and was in fact administered by different courts. Nevertheless, the law merchant was recognised as part of the national law of England.

Anglo-Norman jurists also had resort to Roman jurisprudence where there was no clear rule on a particular subject. Roman law does not form any rule, binding in itself, on subjects of the British monarch, or on citizens of Australia. However, in deciding a case upon principle where no direct authority can be cited from Anglo-Australian jurisprudence, if Roman law supports the conclusion of the court, that will afford 'no small evidence of its soundness'. Roman law was described by Barton J as 'the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe'. Thus, from time to time, Roman jurisprudence has been called in aid, where Anglo-Norman jurisprudence was wanting, to supply an answer to a specific problem.

Workers' Compensation

An abridged version of a speech delivered on 13 March 2008 by The Hon Justice Michael Kirby AC CMG to celebrate the Compensation Court of New South Wales.

A sentimental journey

I began this day in my Sydney chambers working on a taxation case concerned with the concept of 'sham' in Australian revenue law. Believe it or not, it was hard to drag myself away from a subject of such fascination. Especially so when reading the contrast between the majority approach to the concept of 'sham' and the minority approach espoused by Justice Lionel Murphy in *Federal Commissioner of Taxation v Westrad Pty Ltd*.¹ Perhaps Lionel Murphy expressed his different, robust and forthright approach because he too had received his early training as a legal practitioner, appearing before the Workers' Compensation Commission. On the whole, it is an experience that tended to bring even the most erudite and brilliant lawyer down to earth.

My first visit to the Compensation Commission was on the day that I began my articles with Ray Burke. At the age of 19, I could not believe my good fortune to have a job that took me every day into the drama of contested litigation. In my very first case, there were two insurers. Each, alas, had firms that piled ascending disaster on my client.

One insurer was represented by Adrian Cook (later a judge of the Family Court of Australia); the other by Gordon Samuels (later my colleague in the Court of Appeal and later still, the governor of the state). Samuels had a singularly irritating habit of rattling the coins and keys in his pocket as he mercilessly cross-examined the applicant. For me, it was a baptism of fire. What a way to begin a life in the courts. Charity forbids me to mention the unfortunate barrister who that day carried the brief for the worker.

Every now and again the big guns were wheeled out. Greg Sullivan QC (later solicitor-general), Cedric Cahill QC, Clive Evatt QC, Jim Staunton QC, Tony Larkins QC, with monocle at the ready, Marcel Pile QC, Mick Boulter QC, who wrote the textbook, and the biggest gun of all, Eric Miller QC.

That case was heard before Judge Rainbow. He was a clever, quick and commonsensical man. But he was bored with the law. Judge Conybeare, as Chairman, was meticulous, punctilious and dutiful. Early in my career, he paid me a tribute which I have always remembered. He said that Hal Sperling (later a Supreme Court judge) and I were the most promising juniors he had seen for a long time. He himself had enjoyed a good practice at the Bar. He was, I believe, Frank Kitto KC's



L to R: the Hon Justice Michael Kirby AC CMG, Anna Katzmann SC, James Poulos QC, his Honour Judge JL O'Meally AM RFD

junior in the Joshua Smith case before Justice David Roper. He set high standards. Pity help the lawyer who did not attain them.

Judge Dignam, although always personally kind to me, annoyed many by his one line rejections of claims for compensation. Later, in the Court of Appeal, I was to join in many decisions insisting that proper reasons should always be given for important judicial determinations².

The fourth judge in 1959 was Colman Wall. He had one of the best judicial temperaments I have ever seen. I can still recall him sitting in the dining room of a hotel in Broken Hill with his staff and a court reporter on circuit. In those days, judges were remote, revered figures. Judge Wall was one who deserved that respect. He was a sensible and compassionate judge. That is, unless an applicant was caught out in a lie – after which the case was doomed.

The big players at the Bar when I arrived were Frank McAlary, Horace Millar, Tony Harrington, Neville Wran, Barrie Thorley, Reg Downing, Jim Baldock, Tony Collins, Jack Slattery, John Cummins and Les Downs. Later players included Hal Sperling, Alan Abadee, Marcus Einfeld, Cal Calaway, Peter McInerney, Peter Newman, John Brownie and Tim Studdert. A suave and brilliant advocate was Noel Westcott, later a judge. All of these were talented, hard working, efficient.

The solicitors and clerks were also memorable. George Bang, Joan Mulligan, Jean Agnew, Roy Turner, Frank White, Pat Moran (later a judge), Tim Kelly, Muriel Batten, Kerri Nicholson, Ron Jones, Charles Vandervoord, Leigh Virtue, John Bell, Alan Bishop (also later a judge), Doug Hawke.

The insurers were active players around the place. Jack Perram was always there with fat files and the prospects of slimmer settlements. So was Max Hungerford, arguing the cases for the GIO.

Every now and again the big guns were wheeled out. Greg Sullivan QC (later solicitor-general), Cedric Cahill QC, Clive Evatt QC, Jim Staunton QC, Tony Larkins QC, with monocle at the ready, Marcel Pile QC, Mick



David and Michael Kirby (as they then were) on the steps of the old Banco Court, circa 1973.

Boulter QC, who wrote the textbook, and the biggest gun of all, Eric Miller QC.

For those who practised in the commission and the court every one of these names will conjure up a host of memories and stories. All of them were respected colleagues. Sadly, few are still in practice. Many have passed over.

The bench of the commission in its last year in 1984 comprised Frank McGrath who was appointed the first chief judge as from 3 December 1984. The others who came from the commission to the court were (in order of seniority) John Williams QC, Bill Gibson, Noel Westcott, Michael Campbell QC, Kevin Coleman, John O'Meally, Brian Moroney, David Freeman, Geoff Herkes, William Thompson, Bob Mancer and Ray Burke. Of these, only John O'Meally is still on the bench, performing outstanding judicial service.

The Compensation Court had come about as a result of the decision of the state government and parliament to separate the administrative and insurance responsibilities that had been discharged by the members of the commission and to create a state compensation board to perform the latter functions. This was the beginning of the end of compensation entitlements as they had been known during the fifty-nine years that the original Workers' Compensation Commission existed. During that time, the members of the commission were encouraged by their administrative responsibilities to see rights to compensation as part of

the overall economic cost of industry. The insurance rates were fixed with this in mind.

The separation of the judicial and administrative functions reflected good reasons of principle that were explained by the minister³. However, the removal of the premium responsibility from the judges ended an era that had worked pretty well. Soon after the creation of the Compensation Court, a comprehensive new statute was passed by the state parliament. The *Workers Compensation Act 1989* (NSW) came into force. The 1926 Act was full of idealism.⁴ However, the 1987 legislation was the product of costs and politics. Mr Pat Hills, the minister for industrial relations and minister for employment, justifying the new law, explained that it was necessary to reduce the litigious nature of dispute settlement in workers' compensation cases. It was to this that he ascribed 'the cost escalation that payments increased from \$349 million to \$838 million in the period 1980-85, an increase of 140 per cent with similar increases predicted over succeeding years so as to almost double in four years'⁵. Interstate competitiveness and electoral imperatives propelled the state Labor government into action.

The saga did not finish there. In 1998 a later Labor government introduced what became the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).⁶ This aimed at promoting fresh attention to accident prevention. Once again, a Workers' Compensation Commission emerged. The right to a full hearing of cases before a specialised court of compensation judges came gradually to a close. Justice Sheahan was appointed the president of the new commission and his successor, appointed in December 2007, was Judge Greg Keating.

It became necessary once again to re-deploy the judges of the workers' compensation tribunal in New South Wales. Guaranteed constitutional protection of their offices, those who wished to do so were transferred, with full seniority, to serve in the District Court of New South Wales. The judges of the Compensation Court at the end of its operations were the Hon Michael Campbell QC, John O'Meally, Margaret O'Toole, Peter Johns, Brian Duck, Chris Geraghty, Brian Maguire QC, Alan Bishop, Dianne Truss, Garry Neilson, Christopher Armitage, James Curtis, Anne Quirk, the Hon Frank Walker QC, Linda Ashford and Allan Hughes. There were four acting judges at the time, John Bagnall, Ray Burke, Lorna McFee and Michael McGrowdie. Michael Campbell returned in due course to the Supreme Court. The treatment of John Bagnall, an

*... members of the commission
were encouraged by their
administrative responsibilities
to see rights to compensation as
part of the overall economic cost
of industry. The insurance rates
were fixed with this in mind.*

old colleague of mine from Hickson, Lakeman and Holcombe, was less than edifying. Sadly, it is a story that brings little credit on successive ministries of the state. It shows one of the dangers that lurk in court systems dependent on acting judges⁷.

Of the sixteen permanent judges of the Compensation Court of New South Wales at the end half elected to become judges of the District Court. Many of those are still in harness.

Things in common

What is it that has bound together the practitioners, young and old, who have joined in this celebration? Is it purely nostalgia – the remembrance of times past? Is it a shared resentment at the termination of independent courts? Is it anger at the end of a fruitful source of income for lawyers that lasted seventy years? I suggest that it is more than these considerations, though doubtless they are feelings shared by some participants.

Something else has brought us to this occasion to remember the past, including its good features. No doubt there were wrongs and inefficiencies. But there were also strengths in a community of lawyers who worked before the independent commission and court that administered workers' compensation law in New South Wales. We can remember those strengths. They are as important for the legal profession today as they were in the heyday of the Compensation Commission and the court.

1. Honesty and fidelity

First, there was a bond of honesty and fidelity. We knew each other. We knew that, given the word of another, it would be kept, without question. Very few would ever break their word or act discredibly. This is a feature of small group guilds. If anyone broke the rules of integrity and honesty in dealings, it would never be forgotten, or forgiven. In my experience it happened once. I still remember. It was very rare. Many dealings were purely by word of mouth. Promises were faithfully kept. Perhaps this cannot be guaranteed where a group expands in size into anonymity. But it was constantly a feature of the old days that we knew. It was, in short, a precious feature of professionalism, operating at its best. Trust. Fidelity. Mutuality.

2. Attention to detail

Secondly, we all quickly learned that most cases are won on the facts. Not, for the most part, esoteric law. The evidence. Getting on top of the facts was our most pressing daily duty. Mastering the file and the brief was our invariable challenge. Those who always knew the detail sometimes won the unwinnable.

Absorbing the detail was a great training that a practice in workers' compensation cases gave to its participants. I always thought that one of the reasons why Neville Wran and Lionel Murphy were such highly successful politicians was that they were both masters of the brief. As a young barrister, my duty with a junior brief was to arrive at 4.30 a.m.

Commonly, the cases of ordinary citizens meant the difference between a decent life of self-respect and a life with crippling physical and financial burdens.

and to make tea for Neville Wran. He always wanted to get on top of the file. Later, this was to serve him well in parliament and as premier of New South Wales. It meant that he could never be 'snowed'. Throughout my life, it has been a lesson I have applied to every case. Perhaps it is why, when I am asked to identify my most interesting case, it is usually the most recent one.

3. Skill with statutes

Thirdly, we learned, before most other Australian legal practitioners, the importance of statutory interpretation as the central function of the modern lawyer's craft. For the past decade, the High Court has been telling the lawyers of Australia that, where statute has entered a field of law, it is the duty of lawyers to begin their lawyering with the text of the enactment. Not past enactments. Not judicial dicta. The legislative words⁸. Harvard Law School, which, in the nineteenth century pioneered the case book method of instruction (involving close attention to judicial expositions of law), has lately replaced this with courses in statutory interpretation. Australian law schools must do likewise.

We were there first. We learned the importance of unravelling the words of the 1926 (and later 1987) Acts. Even well-worn words could sometimes yield new and surprising meanings. Occasionally, we had to admit, it was useful for outsiders to look at the statutory text, so as to disclose fresh insights⁹. Living with statutory law comes naturally to those raised in the field of workers' compensation law.

4. Orality

A fourth lesson we learned was the importance of orality. We now live in an age in which an increasing proportion of persuasion has switched to written submissions. But in the commission, and later the court, we had to express our arguments orally. Every day. Spoken words. Oral persuasion.

Within days of beginning as a young articled clerk at 26 O'Connell Street, I was on my feet seeking leave to mention matters; to adjourn hearings; to secure orders by consent. Nothing like that training in oral advocacy. A strength of the old tribunals was their adherence to the open public oral trial, which is the high tradition of the common law. This mode of legal procedure placed discipline on all of its

participants, including the judges. It was a protection that encouraged the attainment of manifest justice.

Now, young advocates must learn the skills of written persuasion. But oral argument remains at the heart's core of an advocate's talent. That core will never leave those who were trained in the oral traditions of workers' compensation hearings.

5. Efficiency

Fifthly, we learned efficiency. I have often said that I could not think of a better preparation for judicial duties on special leave days in the High Court of Australia than a typical day when I began my appearances in the Workers' Compensation Commission. It was not uncommon to be required to hold four or five or six cases in one's head – their different and sometimes similar features competing for recollection, presentation and analysis.

On a special leave day I must now commonly carry six or seven or up to twelve cases, neatly assembled for examination and decision. We learned efficiency in the despatch of many hearings. Juggling cases (and also witnesses, opponents and courts) is a talent essential to the life of busy advocates and judges.

It is true that, sometimes, lawyers were known to take on more briefs or files than they could perform properly. But I suggest that this was much less common than some critics contend. Judges showed stern disapproval if lawyers were under-prepared or absent when the case was called.

Highly expert practitioners could perform their cases with great efficiency. Moreover, they soon acquired a sure knowledge of the settlement value of claims, without which court litigation would break down or be forced to hearing procedures in other places – outside the independent courts. Looking back, it is amazing how smoothly and efficiently most of the cases were handled. Time management is one of the most important lessons that any legal practitioner can learn. The Compensation Commission and court were jurisdictions in which such talents were always at a premium.

6. Friendships

Sixthly, we learned the value of friendships in our profession. Strangely enough, such friendships were often with opponents rather than with those who typically appeared on the same side. It was opponents with whom we had to deal and whom we came to know and trust. The surest evidence of abiding friendships can be seen in the large attendance at this occasion – so many years on and where it is only the thread of friendship that holds most of us in connection.

I applaud the fact that this reunion is being filmed, so as to capture the images of this microcosm of the legal profession in Sydney. I have tried to persuade Chief Justice Spigelman, who has introduced an annual dinner for the judges of the Supreme Court of New South Wales, to film the occasion. Those who do not preserve the history of institutions pay the price that the history is soon erased. It is good to record the names and memories and now the faces of those who sharpened their legal

The organised legal profession seems sometimes to have its priorities wrong. Many attach great importance to commercial litigation, much of which is, in truth, nothing but elaborate debt recovery. In the estimate of ordinary citizens, the most important area of the law is, and always will be, criminal law. Citizens are not wrong. They know intuitively that criminal law defines the character of the society in which it operates.

skills in the high volume world of compensation litigation. But for the impetus of shared friendships, we would not be at this reunion. In life's journey, trusted friends are precious.

7. Human respect

There is a seventh consideration. It was mentioned by Judge O'Meally in his remarks. Of their nature, compensation claims take their practitioners close to the human condition. On whichever side of the record, the lawyer is dealing with human beings, not merely impersonal corporations or governments. In acting for a worker applicant (or the worker's dependants) the lawyer would soon learn the vital importance of the case to the lives and future happiness of those clients. Their cases are never calculated purely as investments or risks, as much commercial or public litigation is. Commonly, the cases of ordinary citizens meant the difference between a decent life of self-respect and a life with crippling physical and financial burdens.

The organised legal profession seems sometimes to have its priorities wrong. Many attach great importance to commercial litigation, much of which is, in truth, nothing but elaborate debt recovery. In the estimate of ordinary citizens, the most important area of the law is, and always will be, criminal law. Citizens are not wrong. They know intuitively that criminal law defines the character of the society in which it operates.

But so too do family law, industrial law and compensation law. These are 'people' areas of the law, affecting the lives of ordinary citizens. Those

who learn their law in such fields can never look on law with quite the same cool indifference as others in the ‘whispering’ classifications may do. Their players can barely establish the same bond of robust empathy that links the lawyers who have worked in ‘people’ law. If we have a slightly different attitude to law – one that is more practical, feet-on-the-ground and less desiccated – it is perhaps because we have had to learn our vocation looking across the desk at ordinary folks, whether claimants, witnesses, accusers, union officials or family members in conflict. In that kind of legal practice, one rarely enjoys the same luxury of mind games. Too many real people stand at risk of being hurt and damaged. In most instances, such games would never be tried, let alone accomplished.

8. Adaptability

There is one final quality that legal work in these areas has taught legal practitioners. It is adaptability. Optimism. Being able to adjust to new laws and new challenges. ‘People’ law is much more likely to shift with social, political and other moves than the fields of trusts and wills and bills of sale and transfers of property.

There is no point yearning for a return of the ‘good old days’ of workers’ compensation law. The old commission and the old court will not return. Those who are truthful will concede that there was room for improvement. Whether that improvement could have been achieved without abolition of entitlements to comprehensive recompense for wrongs, is a moot question. In so far as entitlement to recovery of compensation for employment and motor vehicle injuries shifted in the direction of caps and limits and restrictions and exclusions, the economic burden of injuries was altered. Now it often falls, in part at least, on the most vulnerable class – those who are injured and their families. To the extent that this has occurred it shifts somewhat the economic incentives for accident prevention. Now many injured people bear a significant proportion of one of the economic costs of conducting corporate enterprises – the risks of injuries. In the political discourse of recent times the injured and the vulnerable and their supporters have sadly proved ineffective lobbyists.

No one whom I know now expects a return to the ‘good old days’. So lawyers in ‘people’s law’ have to be resilient and to move with changing legislation. In the past, they have proved capable of doing so. I do not doubt that it will be the same in the future. The world owes no one a living, least of all a lawyer and certainly not a lawyer in the field of injury compensation. Such lawyers should continue to speak up for the rights on the injured because many think that the shifts in recent years have gone too far. But as for lawyers themselves, Lionel Murphy’s truth remains true. When one door of the legal profession closes, another invariably opens. New opportunities beckon. Adjustment can be painful, particularly in middle years. But somehow the trained professional usually survives. There are new worlds to conquer. The lawyering skills learned in workers’ compensation cases will stand most lawyers in good stead all their lives as they move on to other things. That has been my own experience. It has been the experience of many.

This is why I am glad to be one of those who shared the comradeship of litigation in workers’ compensation cases. I honour the independent judges who taught me the importance of impartial, reasoned, transparent, accurate decision-making. I honour fellow practitioners who taught me professionalism, efficiency, fidelity and dedication to clients. I remember the litigants who demanded respect and devotion to their causes. Above all, I cherish the friendships that are such a precious memory of my years in the community of lawyers engaged in a practice of law as it affects fellow citizens.

We honour the shades of the past. But we also honour ourselves by joining together in this celebration. It was not a waste of time; still less a dishonoured time. It was the time that taught us to be independent lawyers. We can be proud to have been part of it.

Endnotes

1. *Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 79.
2. e.g., *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Apps v Pilet* (1987) 11 NSWLR 350; *Palmer v Clarke* (1989) 19 NSWLR 158; *Yates Property Pty Ltd v Darling Harbour Authority* (1992) 24 NSWLR 156.
3. New South Wales Parliamentary Debates (Legislative Assembly), 2 May 1984, 82 (Debate on *Compensation Court Bill [No 2]*, 1984) (NSW).
4. New South Wales Parliamentary Debates (Legislative Assembly) November 1925, 2431. (Debate on *Workers’ Compensation Bill*, 1925 (NSW)). See *ibid.*, 3905.
5. New South Wales Parliamentary Debates (Legislative Assembly) 14 May 1987, 12205.
6. New South Wales Parliamentary Debates, (Legislative Council), 26 June 1998, 6706 (Debate on *Workplace Injury Management and Workers Compensation Bill 1998* (NSW)).
7. *Australian Securities and Investments Commission v Forge* (2006) 228 CLR 45 at 116 [177].
8. *Central Bayside Medical Practice v State Revenue (Vic)* (2006) 228 CLR 168 at 197-198 [81]-[84], fn [86].
9. *Scobie v KD Welding Co Pty Ltd* (1959) 103 CLR 314 is a good example.



Front row

Julie Wilcsek
Lisa Doust
Miranda Nagy
Jennifer English
Karen Robinson
Elisabeth Peden
Ramena Kako
Clarissa Amato
Jessica Glancey
Jennifer Beck

Second row

Patrick Reynolds
Geoff Harrison
Luke Fermanis
Gerald Ng
Stuart Lawrence
Kavita Balendra
Daniel Tynan
Gavin Jensen
Lucan Gorham

Third row

Alpana Roy
Caroline Spruce
William Edwards
Zali Steggall OAM
Chloe Burnett
David Stewart
Tim Breakspear
Bernard Brassil
Paul Bodisco
Andrew Norrie

Back row

Anthony Macri
Andrew Miller
Graham Connolly
James Arnott
Christopher Palmer
David O'Connor
David Lloyd
John Baird
Alex Morris

The new Bar Library



The newly renovated Bar library opened for business in February 2008. The aim of the design is to improve the working conditions of both users and librarians; to allow for growth of the collection and to increase and alter work areas to allow use of the new technologies.

Those of you familiar with the old layout will appreciate the quiet of photocopier-free study and reading areas, the availability of laptop and wireless connectivity and the improved ambience in which to browse, work or relax with newspapers and journals.

The librarians appreciate the improved design of the work areas, increased storage and not hearing the sound of flushing toilets overhead.

The library still maintains its outstanding levels of service. The library is open 8.00am to 6.00pm Monday to Friday. If you haven't been, please come down and visit.



Bench and Bar Dinner



On Friday, 9 May 2008, more than 655 members of the Bar Association and distinguished guests attended the annual Bench and Bar Dinner, which was held at Sydney's Hilton Hotel.

Speeches were delivered by 'Mr Junior', Brad Hughes, 'Ms Senior' Jane Needham SC and the guest of honour, the Hon Justice Susan Kiefel.

1. Anthony Payne, Kristina Stern, Melissa Perry QC, Neil Williams SC **2.** The Hon Associate Justice Joanne Harrison and Jeremy Morris **3.** The Hon M L Pearlman AO and John Webster SC **4.** Chris Ronalds AM SC and Ian Barker QC **5.** the Hon Sir Laurence Street AC KCMG KStJ and David Jackson AM QC **6.** The Hon Justice James Allsop **7.** Bob Gowenlock and Andrea Cotter-Moroz **8.** His Honour Judge Len Levy SC, Sarah Hill, Esther Lawson **9.** 'Mr Junior' Brad Hughes **10.** The Hon Justice Susan Kiefel **11.** Ms Senior Jane Needham SC **12.** President Anna Katzmann SC **13.** Susan Phillips, Gordon McGrath, Patricia Lane, Nicholas Nicholls, Emma Cupitt, Julien Castaldi



The Hon Justice James Allsop

On 2 June 2008, Justice James Allsop was sworn in as a judge of the Supreme Court of New South Wales, as a judge of appeal and as the eighth president of the New South Wales Court of Appeal. He had been a judge of the Federal Court of Australia since May 2001 (see *Bar News* Winter 2001) and since that time has rapidly established his name as one of the leading judicial figures in the country, known for the depth of his learning and scholarship, his prodigious industry, his civility, his commitment to the fair and efficient disposition of judicial business and his devotion to legal education.

His appointment was widely regarded as a coup for the Supreme Court of New South Wales and one of the more successful outcomes of cross-vesting. It has been mischievously observed that his Honour's well known views as to the breath of the Federal Court's jurisdiction may be shortly revisited! His Honour already commands enormous respect, and he is a worthy successor to the Hon Keith Mason AC QC.

At his swearing-in speech, Justice Allsop spoke warmly of his time on the Federal Court and of his judicial colleagues:

I was privileged to serve on the Federal Court for seven years. The collegial friendliness of the court (most of the time) was a source of much personal enjoyment and professional satisfaction. I made friendships which, I hope, will endure all my life. I would like to express my gratitude to my former chief justice, the Honourable Michael Black, who today is recuperating from surgery. He not only made life as a Federal Court judge both interesting and enjoyable, but also by his graciousness and generosity, made the announcement of my decision to leave the court an occasion of easy and well-meant congratulation.

I will miss aspects of the work of the court which are exclusive to it. Many people might assume that the migration work done by the court would not be one of those aspects to be missed. To the contrary; in particular when undertaking original jurisdiction, I found the work of dealing with information about a multitude of countries and, in most cases, with the profoundly-felt fears and hopes of struggling, decent people both rewarding and important. Repetition and lack of legal merit were common, but almost invariably the cases were of life-changing importance to the litigants, however hopeless their cases may sometimes have been.

The second aspect of the court's work that I will miss is native title. While the cases are sometimes difficult and, at times, exasperating to manage, I was privileged to be given the responsibility of managing a number of large claims in Far North Queensland. Those cases provided an illumination of the history of those parts of the country from the 1870s, and of the patient, but determined, confidence in the court system by the litigants, in particular Indigenous Australians. These cases provided me with an insight (however distorted through the lens of a privileged white legal background) into the basal and complex task of reconciling history and injustice with present day realities, rights and responsibilities. It is an extraordinarily difficult national task, involving the need for goodwill, patience and determination. I am grateful to have been permitted to play a tiny part as a member of the court in the execution of this task.

The decision to leave the court in which I have good friends and colleagues was not easy. This was particularly so when, the judges of



the court, especially in Sydney, had become recently bound together by the loss of so many colleagues in the space of such a short time. The loss in recent times to the court of so many judges, in barely two years, was very difficult for the judges on the court; not just because of the loss of talented colleagues, but because of the loss of close and dear personal friends: John Lehane, Richard Cooper, Peter Hely, Graham Hill, Bryan Beaumont and Brad Selway. The special talents of the four Sydney judges: Lehane, Beaumont, Hely and Hill are too well-known to a Sydney legal audience to need repeating (though, if I may say, I was recently one of the lucky handful to hear Roddy Meagher's prose poem portrait of Peter Hely at the University of Sydney). People here may not appreciate the talents of Richard Cooper from Queensland who was one of the finest maritime lawyers in Australia in the last 30 years and Brad Selway who was one of the nation's great constitutional lawyers and, if I may be permitted to say, surely someone who would have been South Australia's first High Court Justice. I would like to think that I have spoken with them about my decision and that they all approve.

Upon the news of my intended appointment, I was graced with the most generous congratulations of my colleagues on the Federal Court. I was deeply touched by that. Only one letter commenced 'Dear Rat', but that was followed by a quotation from Browning and the writer's warmest well-meant wishes.

His Honour continued by noting that:

One of the important constitutional mechanisms of the prosaic, but successful, Australian Constitution is the structure of s77, which permits the Commonwealth Parliament to use the mechanism of both Commonwealth and state courts to exercise its authority in the deployment of the judicial power of the Commonwealth. This mechanism (absent in the United States' Constitution) was placed in the Australian Constitution because of the anticipated trust, respect and comity among the Commonwealth and the states for each other, and each other's courts. The trust, respect and comity between the federal, state and territory courts for each other and each other's processes are matters of constitutional importance of the highest order. They should never be taken for granted,

undermined or disparaged, in any way. The warm congratulations of my colleagues in the Federal Court on the news of my intended appointment made me reflect, not only on the quality of their friendship, but also on that respect and comity between the courts of the different polities of the federation. I am deeply appreciative of their friendship, congratulations and graciousness.

I have also been warmly welcomed by my new colleagues, most of whom I have known the whole of my professional life. I am also very appreciative of that warm welcome. I am looking forward enormously to working with them, to returning to some of the work from which I hewed a living as a barrister and to coming to grips with new areas. It will be a big change and a big challenge – but I am looking forward to it very much. One matter of great sadness to me, however, is not being able to compare notes about life on the Court of Appeal with my former master solicitor Kim Santow.

On joining what he described as one of the ‘most respected intermediate courts of appeal in the common law world’, Justice Allsop observed that:

The statistics as to the Court of Appeal workload given last Friday at the farewell of Keith Mason illuminate the important role of this court in the administration of justice in Australia. I admit to doing some mental arithmetic when the throughput figures of the Court

of Appeal and Court of Criminal Appeal were mentioned until, as I looked around, and recalled the terms of the letter that I had written to the governor-general, I realised that it was probably too late to be concerned about the precise arithmetical answer I was seeking. I would find out soon enough.

I am conscious of the magnitude of the task before me to follow in the footsteps of the seven former presidents of the Court of Appeal. In particular, I am conscious of the responsibility in following such a truly great judge and scholar as Keith Mason. He is a great loss to the judicial system, but, academe’s equivalent gain. I had the good fortune to be his junior when he was solicitor general for New South Wales on a number of occasions before 1994. Sitting as a junior at the bar table, knowing the argument and being proximate to the court and the telepathic lines of communication from bench to bar, one is able to judge the skill of the appellate advocate and the respect in which he or she is held by the court. It is probably the best place to assess such matters. The deep respect and fixed and unswerving attention that his sophisticated, but clear and simply-expressed submissions always attracted from the High Court bench made me admire enormously his outstanding intellect and skill. That admiration has increased many fold in reading his work since 1997, being the work of one of the finest appellate judges ever to have graced the bench of any Australian court.

Recent appointments to the District Court

There were three new appointments to the District Court of New South Wales in the first half of this year.

The appointment of Judge Paul Lakatos SC was announced late last year, and his Honour was sworn in on 4 February 2008.

His Honour had a diverse practice, appearing before disciplinary tribunals, the Industrial Relations Commission and including coronial and ICAC inquiries, inquests and Police Integrity Commission hearings. He served as counsel assisting coronial investigations, including the inquests into a police shooting at Tumut and two fatalities at Macquarie Fields and, with Johnson J (until his Honour’s appointment) represented the ACT Government during the Bushfire Inquiry. His Honour had worked with Johnson J in the Public Solicitors Office, along with Howie and Johnson JJ, Murrell and Payne DCJJ, and many other senior and junior counsel.

Their Honours Judges Leonard Levy SC and Michael Elkaim SC were both sworn in on 15 May 2008.

His Honour Judge Levy SC had practised at the Bar for over 30 years, specialising in medical, criminal and disciplinary cases, and appearing

in a number of significant cases of cerebral palsy litigation. In addition to his successful practice, he had served as a director of Counsel’s Chambers Limited, and had made a significant contribution to the profession through his involvement in Bar Association committees and various Supreme Court consultative committees for Practice Note development. In addition, his Honour was a member of the British Royal Society of Medicine and a member of the Editorial Advisory Board for the journal, *Clinical Risk*.

His Honour Judge Elkaim SC began practising at the Bar in June 1980. He had graduated in Law at the University of Rhodesia and then studied, amongst other things, air and space law at London University, graduating as a master of laws. One of his Honour’s first major briefs was in the Advance Airlines of Australia Inquiry, as a result of his knowledge of air law. His Honour’s practice more recently was mostly in common law, including significant appellate work. In his speech at their Honours’ swearing in, the attorney general noted that his Honour Judge Elkaim SC was known as an advocate whose easy-going charm could disarm unsuspecting witnesses during cross examination, to such devastating affect that an allegedly injured plaintiff would happily admit they’d never hurt themselves at all, and then thank him for asking.

The Hon Justice Lucy McCallum



On 30 January 2008 Lucy McCallum SC was sworn in as judge of the Supreme Court of New South Wales.

Her Honour graduated with an Arts degree (majoring in Philosophy) and a law degree from the University of New South Wales in 1983 and 1986 respectively. Upon being admitted to practice her Honour commenced employment at Mallesons Stephen Jaques where she focused on commercial litigation. Her Honour then gained experience in criminal law as prosecutor in the Commonwealth Director of Public Prosecutions Office and the Queensland Director of Public Prosecutions Office. In 1991 her Honour commenced practice at the New South Wales Bar on the Sixth Floor at Selborne Wentworth Chambers where she remained until her appointment. Her Honour took silk in September 2005, and appointed to the Bar Council in 2007.

The speeches at the swearing in were replete with references to Her Honour's breadth of experience, and balance, both in law and in life.

The attorney-general, John Hatzistergos MLC took up that theme when describing Her Honour's practice at the bar:

Your practice areas have expanded to include defamation, administrative law, environmental law, professional negligence, trade practices and competition law. The fact that you have maintained a highly successful, wide-ranging practice renders you very well suited to serving as a judge of this court.

Since joining the Bar you have been involved in a number of important cases and commissions of inquiry. Your involvement as

counsel assisting HIH Royal Commission honed your ability to conduct an extensive and rigorous inquiry which will stand you in good stead in your new position. Incidentally, your colleagues recall that your time at the Commission was marked by both well-tuned advocacy and an impressive display of vocabulary...

You also made an important contribution to the [James Hardie] Inquiry. You acted with Michael Slattery QC and Tiffany Wong,... representing asbestos victims. Together you successfully argued that James Hardie had engaged in misleading and deceptive conduct by allowing corporate reconstruction to proceed on the assumption that the foundation was fully funded...

Even after leaving the Director of Public Prosecutions you continued to appear regularly before juries in your defamation practice. It is telling that when you were recently briefed as counsel in defamation cases your clients included a former appellant judge and many senior members of the Bar. The fact that such illustrious people chose you as their advocate is a testimony to your experience and professional reputation. When asked about your approach to your work one of your peers described you as the 'barristers' barrister'.

The attorney said that her Honour was known to be scrupulously fair in all that she did, never allowing court to be misled. He said that her Honour's rigorous and efficient cross-examination technique, combined with a powerful courtroom presence, had earned her a formidable reputation. This fusion of integrity and incisive, forceful advocacy was said to make her Honour a barrister to be respected and admired.

Attention was directed to her Honour's belief that the law should be the servant of the underprivileged. Her Honour's very strong sense of justice was said to have been reflected in the pro bono work she had performed over the years. That work included programmes at law school for disadvantaged inner-city schools and, in the early years of her legal career, work at the Redfern Legal Centre. Whilst at the Bar her Honour was briefed by the Public Interest Advocacy Centre to represent several refugees in immigration detention, successfully obtaining writs of habeas corpus. Her Honour also represented Greenpeace and the Environmental Defender's Office, pro bono.

The attorney then turned to what he described as her Honour's 'energetically balanced life':

More than one of your peers expressed their admiration for your ongoing pursuit of marathon running. You have run no less than five marathons including the Six Foot Track across 45 kilometres of the Blue Mountains in 2007. You also trained for six months before entering the Honolulu Marathon in 1993. It would appear your nickname, the Energiser Bunny, is well deserved. Your marathon running demonstrates your vigour and determination while your abiding interest in the physical challenge of endurance sport will keep you well grounded as you meet the challenges posed by life on the bench...

You have successfully handled a demanding law practice, given your time pro bono and participated in numerous marathons while having fun playing Laser Zone with your three children. The dedication you have demonstrated in balancing the different aspects of your life is deeply commendable. Not only have you developed

an enthusiastic approach to your diverse commitments but your intimate understanding of the realities of family life enhances your ability to empathise with many different people who will appear before you.

Your Honour possesses a myriad of personal qualities that will enable you to make a valuable contribution to the judiciary of this state. You are recognised as a meticulous, well prepared, patient and hardworking professional who has a keenly developed sense of justice. Your eloquence, approachability and perspicacity will help you serve the people of this state wholeheartedly.

Mr Macken, President of the Law Society, spoke on behalf of the solicitors of New South Wales. Mr Macken observed that the New South Wales' court system will benefit from the depth of expertise and life experience that her Honour would bring to the Bench 'enhancing the diversity, equality and public confidence of the judiciary'. He said that an old friend had described Her Honour as 'unstoppable' and 'conscientious' and had remarked she was always 'destined to succeed'. Another colleague and friend had recalled that her Honour was into everything at university: student legal education, law student president, law journal editing, mooting and was the 'star' of the soccer team.

Mr Macken had collected more accolades from former colleagues from the Sixth Floor: Justice Nicholas had described her Honour as 'extremely competent, meticulous and of sound judgment'; and Justice Tobias, who admitted that he regarded Her Honour as being 'one of his favourite people'; a 'bright, bubbly, focused practitioner' who 'would make a terrific judge'.

Mr Macken continued:

Your Honour is in many ways reflective of a very common legal demographic. You are female and the overwhelming majority of lawyers under the age of fifty are female. You are young. The average age of lawyers is now lower than when you were admitted and getting lower every day.

It is widely accepted that it is more difficult to achieve admission to a law degree and more difficult to finish it now days. The days of the single law degree are long gone. But in other ways you do not fit into any mould. You are supremely fit in a profession where physical wellbeing has not been traditionally highly prized.

You work harder than most. Perhaps because you have had to. Perhaps because you have wanted to.

You are brighter than most. The skill set required to achieve senior counsel at such a young age is reflective not only of hard work and devotion but also intelligence. You manage a life outside the law caring for your children and dealing with bruising encounters at the Annandale Hotel. The increasingly large demographic of the legal profession welcomes your appointment as you can truly be said to be one of our own.

McCallum J responded by noting what a great honour it was to be appointed to the Court which is so highly regarded "even by some

Victorians', so a Victorian silk said in his note to me'. Her Honour reflected:

I will miss private practice. I regret the fact that from today I will be constrained to cross-examine my children, particularly as they are already so adept at spotting my logical traps.

I hope I will discharge my duties of office fairly and with patience, courtesy and above all, impartiality. I am perhaps peculiarly well-placed to show impartiality since I owe success to no person. I have lost trials for the Crown. I have had clients sent to jail. I have suffered verdicts in all manner of civil trials against both plaintiff and defendant. I have appeared for decision-makers whose decisions were quashed and for persons aggrieved, the decisions against whom were not. I have not lost a coronial inquiry but have otherwise been unsuccessful in such a variety of causes that I can think of no category of party to whom I might be said to owe fear or favour, affection or ill-will. The first silk I briefed when I was a solicitor was the late Justice Peter Hely. At Hely's funeral Justice Jacobsen recounted Hely's three golden rules of litigation:

- ◆ There is no argument worth putting that can't be reduced to a page of written argument;
- ◆ there is no such thing as a case that can't be lost; and
- ◆ just don't you muck it up.

I wish Hely were here to tell me the three golden rules of judging, but I suspect he would have retained the third, so above all I will try not to muck it up.

Finally, her Honour acknowledged her family, paying particular attention to the qualities of her late father and her mother: 'He conducted the McCallum family dinner table much in the same way the Chief Judge in Equity conducts the duty list. His intellect was a combination of rigour and passion. It was tempered by my mother's quiet wit and her strong sense of social justice.' Her Honour's final comments paid tribute to her partner, Ged, 'who has as strong a sense of justice as any lawyer, and our incredible children, my three, Anna, Max and Charlotte and Ged's son Tom. They fill our lives with music and laughter and stories and the brightness of youth... If you will picture the chaos on a school morning in our household perhaps you will understand why I am undaunted by the supposed isolation of judicial life'.

The Hon Justice Nigel Rein



On 5 May 2008 his Honour Judge Nigel Rein SC was sworn in as a judge of the Supreme Court of NSW.

The Hon Justice Rein was educated at Vaucluse Boys High, where he was head prefect, and graduated in Arts and Law from the University of Sydney. He undertook articles at Minter Simpson & Co, and then worked for a year in Haifa in Israel, at the specialist maritime and insurance firm S Friedman & Co. Returning to Australia, his Honour worked at Stephen Jaques & Stephen and then joined Dudley Westgarth & Co where he was offered partnership.

His Honour was called to the Bar in 1984, and read with Rob Macfarlan QC. His Honour was appointed senior counsel in 1999, and in 2002 was sworn in as a judge of the District Court of NSW. While a judge of the District Court, his Honour also served as a deputy chairperson of the Medical Tribunal, and sat as an acting justice of the Supreme Court on three occasions, in the Equity Division.

The president of the Bar Association, Anna Katzmann SC, spoke on behalf of the NSW Bar and Hugh Macken for the solicitors of NSW. Rein J responded to the speeches.

In a break from the usual approach to the president's speech, Katzmann SC began:

It's ironic that Your Honour was elevated to the bench.

When you first left school you were asked at the time why you didn't become a judge. This is what your Honour said:

Yes, I could have been a judge but I never had the Latin, never had the Latin for the judging, I just never had

sufficient of it to get through the rigorous judging exams. They're noted for their rigour. People come out saying, 'My God, what a rigorous exam' – and so I became a miner instead. A coal miner. I managed to get through the mining exams – they're not rigorous, they only ask one question, they say, 'Who are you', and I got 75 per cent on that. I would much prefer to be a judge than a coal miner because of the absence of falling coal.'

Well your Honour finally got your wish.

Actually, of course, your Honour did not leave Vaucluse Boys High to become a coal miner. I drew my opening remarks from a Peter Cook monologue entitled 'Sitting on the Bench'. Your Honour is an avid fan of Peter Cook and his sidekick, Dudley Moore, and is reputed to do a mean impersonation of both Pete and Dud. Curious that. Peter Cook once described Pete as the 'informed idiot' and Dud as the 'the uninformed idiot'. Cook added: 'They're both idiots but Pete is always slightly superior. In fact, he knows nothing either'.

Your Honour could never be accused of knowing nothing.

Katzmann SC noted that his Honour's mentors were the late Chris Gee QC and Macfarlan QC. The president also noted that his Honour's time at the Bar was characterised by his unselfishness and generosity, both through his involvement in conducting continuing legal education sessions and as a fine and caring tutor in the best traditions of the Bar.

Rein J referred also to his mentors:

The late Christopher Gee QC, whom I had briefed in a number of aviation matters, was extremely generous in introducing me to his solicitors when he took silk in 1984. We had many cases together and even one opposed, and it was fitting, I think, that I was asked to pass to him my brief for one of the re-insurers in the HIH Royal Commission when I accepted appointment to the District Court.

Rein J also paid tribute to the support of Chief Judge Blanch in permitting him to take

on the role of acting justice of the Supreme Court on three occasions, which he described as 'long enough to gain some experience in the Equity Division, and short enough not to reveal the deficiencies in my knowledge'.

His Honour said that his three commissions as an acting justice 'demonstrated not only the enormous breadth of work that the Equity division is engaged in, but also an atmosphere of considerable collegiality and warmth'. However, his Honour noted some concern on the topic:

when I recently received a mysterious unsigned letter in Spanish but with an English translation purporting to be from a person I had met in Bolivia in January that warned me about the foibles of some of my new colleagues in the Equity Division. There were two features of the letter that lead me to conclude who the author really was. First, curiously, the letter singled out only one judge as worthy of emulation – Mr Justice Einstein. Secondly, it was 33 pages long (without the footnotes). Justice Einstein has made no admissions about any of this. I have counted him as a friend since I was a final year law student. His Honour introduced me to Minter Simpson, which lead to me being engaged as a post-graduate articulated clerk with that firm. Subsequently I was involved in a number of cases with him, both as a solicitor, and as his junior.

His Honour recognised the other justices of the court who had played an important part in his career, as lecturers (Austin and Hamilton JJ and Giles JA), colleagues on the District Court bench (Latham and Price JJ) or as colleagues – on Ground Floor Wentworth (Simpson J), or 11 St James Hall, (McClellan CJ at CL and Hammerschlag J). His Honour said he had known Rothman J the longest, taking over possession of the prefects' room at Vaucluse Boys High from him 38 years ago, and coincidentally moving into the chambers Rothman J had been occupying in the Supreme Court building. His Honour noted that Einstein J and three current silks have also attended Vaucluse Boys High: 'In recognition of what the school has done for, or some might say, to the law, it has been decommissioned and will shortly be demolished'.

Stephen Gageler SC



On 30 May 2008 Attorney-General Robert McClelland announced the appointment of Stephen Gageler SC to succeed David Bennett QC as Commonwealth solicitor-general.

Stephen Gageler's appointment has been received with universal acclaim. He could

not have been better qualified for the job. A graduate of the Australian National University and Harvard University, he was associate to Sir Anthony Mason between 1983 and 1985, years in which the High Court delivered judgment in such groundbreaking constitutional matters as the *Tasmanian Dams* case. Following his associateship, he acted as assistant to the then solicitor-general, Gavan Griffith QC, and regularly appeared in constitutional cases before the High Court. He came to the New South Wales Bar in 1989, initially as a member of the Ground Floor Wentworth Chambers, and then, from 1991, as a member of the Eleventh Floor Wentworth Chambers. He took silk in 2000.

His practice was initially public and constitutional law but in more recent years it has broadened widely to encompass trade practices, taxation, corporations, commercial law, class actions and litigation funding. It is

no exaggeration to say that he has appeared in the vast majority of leading constitutional cases in the last 20 years. He has also acted for and advised the Government of Fiji on a number of occasions in the last decade. Significant recent cases reflecting the diversity of his practice include *Betfair v Western Australia* (2008) 82 ALJR 600, *XYZ v The Commonwealth* (2006) 227 CLR 532; *Toll v Alphapharm* (2004) 219 CLR 165; *Combet v The Commonwealth* (2005) 224 CLR 494; and *Campbell's Cash & Carry v Fostif* (2006) 229 CLR 386.

At the time of his appointment, he had one of the largest private law practices before the High Court and was noted for the clarity, precision and succinctness of his legal submissions and written and oral advice. Those qualities reflect his admiration for two significant mentors, Sir Maurice Byers QC and Sir Anthony Mason.

P G Hely: an appreciation

By the Hon R P Meagher AO QC

On 27 May 2008, the University of Sydney launched the Justice Peter Hely Memorial Scholarship. Many members of the Bar had contributed to the endowment of this scholarship. On the occasion of the launch, Roddy Meagher offered the following brief tribute.

When I saw the fliers for this event, I felt a shock at the sight of such an excellent photo of Peter Graham Hely, my close friend and barristerial colleague. One can see in his face high intelligence, a sense of seriousness beneath a sunny smile, the lips poised to utter an acerbic little epigram. His secondary school was Sydney Boys' High, a selective high school of which he always spoke with a deep devotion shared by everyone except some local politicians. After school he attended this law school, at which (incidentally) I had the pleasure of tutoring him. Despite this, he came out very well educated. His naturally sophisticated mind needed little honing.

Two of the qualities which he had in abundance, like his judicial colleague John Leane, were a great precision of thought and a concise manner of formulating that thought. He could analyse and summarise any factual situation, however complex, into a small but accurate statement. This meant that he was a great barrister. He had an enormous practice both at first instance and at an appellate level. He appeared in a large number of very important cases. His knowledge of case law

was awesome. His written opinions were masterpieces of succinct learning. He was probably the most outstanding company lawyer of his time. He served many years on the Bar Council. He had many pupils, including two High Court judges, Justices Gummow and Heydon. He was a dominant forensic figure in the fields of company law, equity, constitutional law, administrative law and commercial law. But he was more than this, he was not only a walking monument of higher learning – he also did a spot of criminal law, and played tennis in his spare moments.

One of his qualities, and a very endearing one, was his brevity of expression. I can remember once doing a case against him before Street J. It was a rather complicated case. Going through the list we had to say whether the case was short or not short. I told Hely it was obviously not short. 'Short' was less than ten minutes; 'Not short' was more. He replied 'Nonsense, watch me'. He called it 'short' when it came on for hearing. He said: 'Your Honour, I am for the plaintiff, Mr Meagher is for the defendant. The only relevant facts are ... My submissions are 123. Mr

Meagher's submissions are 456 – is that right Mr Meagher?' I said 'Yes'. He said: 'It is now up to your Honour to decide.' Street J said: 'Yes I do decide, in favour of the plaintiff.' The whole episode took nine minutes. The only person unhappy with this was my client, who could not understand why he had lost without counsel saying anything. Hely then said to me: 'Let's have a glass of French champagne.' And, of course, with brevity went speed. No opinion was ever more than a week late, and when he was a judge no judgment lingered in arrears as in the NSW Court of Appeal. To gild the lily went a wry wit. Many more pedestrian lawyers copped a sharp sting.

His many qualities combined to make him an admirable judge. If his life had not been terminated tragically early, he would have made it to a seat on the High Court. I have not mentioned another of his qualities. He was generous to anyone, with his time, his talent and, even though he did not have much of it, with his money. We owe it to him to be equally generous to his memory, because some of you have deep pockets but short fingers.

The Hon Justice Keith Mason AC



On Friday 30 May 2008, Justice Keith Mason AC retired as president of the Court of Appeal. He had held this position for over 11 years and for 10 years prior to that had been solicitor-general of New South Wales. Immediately prior to that, he had been full-time chairman of the Law Reform Commission of New South Wales (from 1985) and, prior to that, he had had a vast practice at the Commercial and Equity bars. As observed in the editor's note, he was universally respected and made an outstanding public contribution to the system of justice and legal education in this country.

In speaking at his retirement ceremony, Spigelman CJ observed that:

The long term significance of your term of office will be found in the intellectual leadership you have displayed for the judiciary of this state and the development of the law. Your Honour has delivered judgments of the highest quality and depth of learning over the entire jurisdiction of this court – torts, contracts, trusts, fiduciary duties, insurance, defamation, environmental law, conflicts, restitution, estoppel, evidence, procedure, criminal law, as well as the full range of statutes which have required exegesis of the principles of statutory interpretation. By reason of your experience as solicitor-general you understood the interface between government and the law and the web and weave of current issues in constitution law

...

The quality of your judgments, both in terms of exposition of facts and depth of understanding of the law, are widely recognised throughout the state, indeed, throughout Australia. Many of your judgments will stand the test of time though, perhaps regrettably, you will frequently suffer the obscurity of an intermediate appellate judge whose reasoning is accepted, and often enough replicated, in an unsuccessful appeal to the High Court, whose judgment will in the future stand alone as authority for the proposition first articulated with force and clarity by your Honour. This was, for example, the case with your Honour's judgment on litigation funding.

Chief Justice Spigelman continued by observing that:

Beyond cases which are of sufficient difficulty or significance to attract the attention of the High Court, stands a formidable body of judgments by your Honour which have clarified the law in virtually every field of legal discourse and which will guide practitioners and

judges in matters of significance in the administration of justice in this state for many years to come.

and that:

You brought all your formidable intellectual skills to bear on the frequently complex range of specific facts involved in this core of the appellate jurisdiction. These are not the cases which make it to the law reports or excite academic interest. Nevertheless, they constitute the day-in day-out service that the judiciary provides for the fair and effective operation of our economy and society. They require personal empathy, an understanding of individual motives and social forces, a capacity to bring practicality to bear on legal learning and an ability to identify the relevant legal principles and apply them to the circumstances of each case. All of which you consummately displayed. ...

You set high standards for the relations between judges and each other, particularly for judges such as yourself towards the top of the judicial hierarchy who have more than the usual range of opportunities to treat others in a manner in which they would not wish to be treated themselves. We have all been chastened by your careful analysis of the importance of civility on the part of appellate courts when explaining why it is that an appeal should be allowed, so that adverse conclusions are expressed without any sense of discourtesy to the judge below and, perhaps even more importantly, without diminishing the status and respect of that court in the public eye. You were always scrupulous in this respect yourself.

In reply, Justice Mason delivered the following remarks which are reproduced in full:

Thank you chief justice, Ms Katzmann and Mr Macken for your most kind remarks. Only my mother will have failed to detect the exaggerations. I am honoured by the presence of so many friends inside and outside the law who have walked with me through the past eleven years of my career as a judge, many of you for much longer.

It is a special pleasure to acknowledge the presidents of the Court of Appeal of Queensland, Victoria and Western Australia. I thank you for your support and friendship as we have toiled in our appointed roles as the enforcers of the High Court's changing orthodoxies. You have had the opportunity last night of meeting my most worthy successor, James Allsop.

The pressures of intermediate appellate litigation in state courts have increased markedly over the decade or so of my term of office. Statutory intricacies have complicated standard processes such as the assessment of damages. They are provoking a spate of judicial review proceedings that seek to overcome caps and restrictions. The sentencing of offenders is now much more than the so called instinctive synthesis it once was. Many appeals are disposed of only to be prolonged by sometimes complex costs disputes flowing from unaccepted settlement offers. Self-represented litigants including those whom the Americans call 'frequent filers' press constantly for the reargitation of their usually doomed causes.

Last year the New South Wales Court of Appeal delivered 377 judgments as well as disposing of a large number of leave applications. The Court of Criminal Appeal delivered 373

judgments. The judges of appeal are assisted occasionally by judges from the trial divisions in civil matters, and usually sit with two members of the Common Law Division in criminal matters. Nevertheless, this is remarkable productivity from a small group of very hard working judges of appeal, many of whom have already outlasted my judicial longevity.

My successive roles as a solicitor, a barrister at the private and then the public Bar, in law reform, and as an appellate judge in both secular and church courts have given me wonderful opportunities to observe both the constancy and change of the law.

As many of you know, I have written a good deal on the topic of judicial method. Even more than restitution, it is the closest to an intellectual passion for me. All judges have passions, including black letter judges, not that I would use that label for myself. It is in this context of judicial method that I wish to take this last opportunity to voice some concerns about the unduly inward focus of the Australian legal system in the early twenty-first century.

On the occasion of his swearing in as chief justice in 1987, Sir Anthony Mason said:

Our courts have an obligation to shape principles of law that are suited to the conditions and circumstances of Australian society and lead to decisions that are just and fair. [Please note the plural 'courts'.]

He continued:

In stating the common law for Australia, we [and here he was referring to the High Court itself] now place closer attention to the common law as is reflected in the judicial decisions and academic writings of other countries.

In 2007, when exercising its constitutional functions of correcting error and declaring the common law, the High Court signalled a departure from these principles. The topic does not matter, but the profound shift in the rules of judicial engagement does. New and now binding rules of precedent that were ushered in on this occasion declare that the earlier decision of any intermediate appellate court in Australia is now generally binding on all others. So too are the 'seriously considered dicta' of a majority of the High Court in any case, regardless of its age. These rules and the High Court's response to this Court of Appeal's erroneous though genuine attempt to develop legal principle go well beyond giving effect to the principle of a unitary common law of Australia. They have been read throughout the country as the assertion of a High Court monopoly in the essential developmental aspect of the common law.

In the same appeal, the High Court resolved an issue of controversial legal principle with a haughty declaration that it did not propose to examine a recently published critique on point emanating from a current English law lord or to examine other legal writing which 'might offer support' for the legal proposition suggested by the Court of Appeal that the High Court proceeded to reject in categorical terms.

In combination, these discouraging rules of process for inferior courts and this adopted methodology for the High Court itself will have the effect of shutting off much of the oxygen of fresh ideas that would otherwise compete for acceptance in the free market of

Australian jurisprudence. In my respectful opinion, decision-making by these blinkered methods will be stunted unnecessarily, whether it proceeds in the particular to the affirmation of older rules of law or to their principled development. If lower courts are excluded from venturing contributions that may push the odd envelope, then the law will be the poorer for it.

In short, my plea to the High Court is to keep other appellate courts in Australia in the loop.

I wish publicly to thank Chief Justice Gleeson and Chief Justice Spigleman with whom I have been most privileged to serve on this court. I thank all of my fellow members of the Supreme Court and the judges of other state courts for their cooperation in the administration of justice in this state. To my colleagues on the Court of Appeal I shall miss the stimulation of your intellectual intercourse, your personal support, your differing senses of fun and above all your friendship that will endure today's separation. Jim, Margaret, Roger, the two Davids, Murray, Ruth, John, Joe, Virginia and the two Peters: thank you.

A court is much more than its judges. Without the assistance of our associates, tipstaves, registrars, registry and administrative staff and court officers we judges would be quite incapable of administering justice on any terms. I wish to record my deep appreciation for the work of my tipstaves and researchers, especially those currently in office, Danielle Gatehouse and Myra Nikolich, who have done so much to help me in the press of these final months in office. Above all I thank my secretary, associate and friend Meg Orr for her 29 years of unstinting service to me in my various legal endeavours, for her own services to the administration of justice in this state and for her personal support in wider, often painful processes to secure or administer justice within the Anglican Church.

My family is the most important thing in my life. My mother and my late father made considerable sacrifices to bring me to a new land and to provide me with a good education. My children David and Priya give me great satisfaction and joy as I watch them maturing as independent adults and struggling to cope with their difficult parents. Above all, I wish to thank my dear wife Anne, for the constant warmth and excitement she brings to my life, for enabling my career to flourish often at the expense of her own, and for her deep senses of compassion and practical concern for others.

Today I step out of public office and into what I know will be a stimulating new phase of my life. My reasons for retiring as a judge at exactly this stage of my life are complex. Like much involving causation in the law they, are incapable of exhaustive explication. But I know that the time is now right, when I feel the energy to do other things and before what would be for me a judicial sub-prime onset. I almost became a teacher rather than a lawyer, and I am relishing the idea of expounding the true impact of the Judicature Act to minds that are eager and open.

There is much that goes on behind the scenes in this building that I will particularly miss, including communal lunches with colleagues, a judges' bible study group led by a distinguished theologian, and the judges' yoga class. But for everything there is a season. I am happy to be moving on. Thank you again for the honour you have done me today.

President of the Industrial Relations Commission of New South Wales: A farewell and an appointment

By Arthur Moses

Justice Wright

On 22 February 2008, the Hon Lance Wright retired as the president of the Industrial Relations Commission of New South Wales and Industrial Court of New South Wales. His Honour had been president of the commission for a decade, having been appointed to that office in 1998.

His Honour completed his education at the University of Sydney, and worked as an industrial advocate for several trade unions including the Water Board Salaried Officers Union, the Miscellaneous Workers' Union and the New South Wales Public Service Association. His Honour then completed his articles with the firm Taylor & Scott before being called to the Bar in 1979. His Honour for many years practised from the Tenth Floor Selborne / Wentworth Chambers before becoming a member of HB Higgins Chambers. As a junior, his Honour's leaders included A M Gleeson QC, Keith Mason QC, K R Handley QC (as they then were) David Jackson QC and David Bennett QC. His Honour took silk in 1991 and thereafter affirmed his reputation as a leading light of the industrial bar by regularly appearing in the New South Wales Court of Appeal and the High Court to argue vexed points of constitutional and industrial law.

In 1998, his Honour was appointed as the tenth president of the Industrial Relations Commission of New South Wales. In the decade that followed his Honour presided over a turbulent period of industrial relations. Amongst other things, during the period the ever present debate as to the role of the Industrial Relations Commission of New South Wales and the need for national regulation manifested itself in the advent of the now ill-fated *Work Choices* legislation. Despite these and other challenges, his Honour presided with a firm sense of industrial fairness and equity. His Honour was involved in making several landmark decisions which entrenched basic standards for the working population of New South Wales, including the *Librarian's Case* which established the principle of equal pay for work of equal value, the *Secure Employment Test Case* which conferred protections to workers in precarious and casual employment, the setting of improved

parental leave provisions in industrial awards and the establishment of the child employment protection principles. His Honour also made a significant contribution to the development of occupational health and safety law. His Honour's contribution as a jurist has been variously described as 'scholarly' and 'profound'.

During his term as president, his Honour was also a member of the Judicial Commission of New South Wales, edited the *Industrial Reports*, was a member of the Advisory Board of the Faculty of Business and Law at the University of Newcastle and lectured extensively in industrial law including at the University of Sydney. Showing his sense of history and tradition, upon the centenary of the Industrial Court in 2002 his Honour commissioned a book in memoriam of the past presidents of the Industrial Court, *Laying the Foundations of Industrial Justice: The Presidents of the Industrial Commission of New South Wales 1902-1998*. This book would have only added further strain on his Honour's impressive library, which his colleagues and friends describe in monumental terms.

At a farewell ceremony held on 22 February 2008, the Hon Justice Michael Walton, vice-president of the Industrial Relations Commission of New South Wales, spoke on behalf of the commission, Mr Sexton SC, solicitor general of New South Wales, spoke on behalf of the Bar, Mr Hugh Macken, president of the Law Society of New South Wales, spoke on behalf of the solicitors of New South Wales, Mr Michael Lennon spoke on behalf of the union movement of New South Wales and Mr Michael Goodsell of the Australian Industry Group spoke on behalf of the employers of New South Wales. His Honour was unanimously praised for his work as a jurist and as an administrator of the Industrial Relations Commission of New South Wales. Walton J noted that his Honour's judgments:

bespeak of a jurist who not only understood the nature and significance of the modern economy, but also recognised the needs and aspirations of ordinary men and women who had given good service to the enterprises within it. The philosophy which underpinned many of his Honour's judgments is a search for a



The NSW Industrial Relations Commission.
Photo: Per Groth / Fairfaxphotos

balance of between the needs of enterprises and those that work in them in a way that recognises the values of each of them. The hallmark of those judgments is the respect and compassion shown to those engaged in work in the great enterprises of this state.

Mr Sexton SC observed that:

Over the last ten years your Honour has combined a high degree of scholarship on the Bench with the demanding administrative role that has to be undertaken as the president. Although counsel were often pressed about some aspect of their submissions, this was always done in a courteous and thoughtful fashion. It was always a pleasure to appear in your Honour's court.

His Honour paid gratitude to the speakers, the practitioners who had appeared in the court, his staff and his extended family whom he described as the 'rock' of his life. His Honour then reflected:

When I commissioned the book mentioned by the vice-president, *Laying the Foundations*, I of course contributed an introduction, the easiest part of the job, compared to the efforts of the five authors who did such a wonderful job. I was reading my very short introduction last weekend and I remember concluding that introduction and saying that book was a story well told, of a group of able well motivated judges, perhaps somewhat ahead of their respective times, dealing with the real problems of real people who made significant contributions to the development and well-being of the State of New South Wales and its people –

Robert Anthony Gray (1942-2007)

judges who played a key role in laying the foundations of industrial justice... I hope I, in my own way, have lived up to at least some of those precepts.

With the passing of time, it will become apparent that his Honour did indeed live up to the precepts of his predecessors.

Justice Boland

Following upon the retirement of the Hon Lance Wright on 19 April 2008, the Hon Justice Boland was sworn in as the eleventh president of the Industrial Court of New South Wales and the Industrial Relations Commission of New South Wales. His Honour was admitted to the Bar in 1984, however took up practice as an industrial advocate with the Metal Trades Industry Association of Australia, which later became the Australian Industry Group of which his Honour became a director. In March 2000, his Honour was appointed as deputy president of the Industrial Relations Commission and a judicial member of the Industrial Court of New South Wales. His Honour has regularly been a member of the full bench of the Industrial Court in appeals and has contributed significantly to the development of appellate and other principles within the jurisdiction of the Industrial Court, particularly in relation to unfair work arrangements and occupational health and safety. His Honour's elevation was welcomed by all sides of politics. The Bar Association congratulates Justice Boland upon his appointment as president.



Family and friends of Robert – I have been asked to speak about Robert's professional life as a barrister. My only qualification for this is that Robert and I had adjoining rooms on the Eleventh Floor for 20 years and have been friends and colleagues for over 30 years.

Nothing I could say would do justice to Robert's 35 year career at the Bar, so I won't even try. What I would like to do is to share with you some of my memories of him.

Robert was larger than life. Let's be honest, he could be quite overpowering. His distinctive laugh and voice could often be heard on the Eleventh Floor. When he was away from his room there was never any doubt about where Robert was. It was no accident that Poulos somewhat unkindly gave him the nickname 'Foghorn Leghorn'.

But despite what could be a rather overpowering presence, there was a softer and very considerate side to Robert. He always had a kind word for the non-professional staff. At any Eleventh Floor function he would always speak to the secretaries and support staff to make them feel welcome. His banter with some of our receptionists became famous. I simply refer to Debbie and in more recent years, Melinda.

When I first joined the Eleventh Floor as a reader in 1976, Robert was very senior, or at least he appeared so to me. He had been a barrister for almost 4 years. When I first met him I didn't know what to make of him, it was like being hit with a whirlwind. He

could have ignored me completely which is often the fate of readers, but he didn't. He took me aside and gave me a wickedly humorous description of some of the senior barristers on the floor and their foibles. It took me a couple of years to realise just how accurate those descriptions were. He also gave me a friendly and very useful warning about which barristers paid readers for chamber work and which did not.

That was one of Robert's great skills – the ability to accurately assess people and situations. He could look at situations and always find something amusing in them. He would then summarise it all with an amusing phrase. Some of his descriptions of such situations were bitingly funny and very much to the point. The laws of defamation prevent me from going into too much detail, but I do remember one incident some years ago. A senior silk and a young female barrister were in a somewhat volatile relationship. During one of their disagreements, he ejected her from his chambers. As you can imagine, this caused quite a stir on the floor. Robert dismissed the whole thing with the comment 'Hell hath no fury like an old silk scorned'.

There was something very distinctive about Robert's chambers which separated them from all other chambers. There were very few books. Robert worked on the basis – why should he clutter his chambers with books when there were plenty of books in other chambers. While this was a wise financial decision, it did cause some problems. The basic rule for many years on the Eleventh Floor was if you were missing a book you went to Collins' chambers, and if the book wasn't there it was certainly in Robert's.

There was a certain book of mine – *NSW Workers Compensation Practice* – it was always missing and mostly ended up in Robert's room. To stop this I marked it with a large yellow sticker 'Do not remove'. It had no effect on Robert at all. Robert simply took it as a challenge. When I took him to task about it on one occasion he explained that by keeping the practice in his room, it made sure that no-one else would borrow it and I would always know where it was. There was no answer to that logic.

Robert never seemed to panic or appear under pressure. I was not sure whether this was a true reflection of how he felt or whether it was like the duck on the pond – serene on top and legs moving furiously underneath. No matter what happened, he maintained this calm demeanour. I remember quite a few years ago when there was a problem with a bank involving investment in Swiss francs. It all looked terribly serious to me. Robert's response was typical 'When things are going badly, there's only one thing to do – throw a party' – and that's exactly what he did.

Of course when it came to throwing parties, Beatrice and Robert were legendary. Every aspect was carefully planned – the guests, the food and the occasion. They operated like a well-oiled military machine. They were wonderful hosts. In April 1985 I was going to a ball and told Robert I couldn't attend one of his cocktail parties. But as we all know when Robert wanted you to attend something he wouldn't take no for an answer. As it turns out, I met my wife at that party so I became a great fan of parties at the Gray's.

As most of the older Eleventh Floor members would know, for almost 15 years Robert used those same organisational skills to arrange the Eleventh Floor functions. Meticulous care went into the selection of the venue, the selection of the menu and most importantly when members of the Bench, both retired and active, were involved, seating the right people next to each other. The wrong seating plan could produce disastrous results. Despite the amount of time involved (which was often considerable) he maintained his high standards over all those years. I think

it would be fair to say that the functions organised by Robert for the Eleventh Floor were spectacularly successful.

One can't say anything about Robert without also talking about Beatrice. They had a strong and loving marriage and together they formed a formidable team. The remarkable thing was the way their two powerful personalities blended so well together. In all the years that I knew him, I never heard Robert once make a disparaging remark about Beatrice. The strength of that relationship was demonstrated, if any demonstration was needed, over the last 12 months. Without being obvious, Beatrice supported Robert in every possible way particularly over the last six weeks when Robert was hospitalised.

Robert was a good friend. He had that wonderful ability to be able to listen. There were many on the Eleventh Floor who were grateful for Robert's robust common sense and advice on a number of personal issues. Of course it helped that he was the only barrister on the floor who knew anything about the Family Law Act. On other occasions it was just good to sit down in his room and get stuck into some good old-fashioned gossip. Robert seemed to know almost everyone in Sydney and he certainly knew what most of them were doing.

Professionally Robert was a courageous advocate. He had a reputation as a very effective cross-examiner. I say he had a reputation because oddly enough, despite our years together at the Bar, I only ever appeared in a case with Robert once. We were both representing defendants in a personal injuries action. The thing which

impressed me in that matter was not only Robert's ability as a cross-examiner but the fearless way in which he dealt with the Judge. It would be fair to say that the particular Judge was leaning heavily towards the plaintiff. Not an unusual situation you might think. Robert without being offensive and in a rather humorous way put it fairly and squarely to the Judge that the playing field was not level. It was an impressive performance.

Not only was Robert a courageous advocate – he was courageous as a man. It is difficult to imagine a greater test of one's moral courage and strength than what Robert had to endure over the last 12 months. Although he knew that he was living on borrowed time, there was no complaint about the unfairness of his situation and no indication of self-pity. On the contrary, he made a heroic effort to see all his friends, go to lunch with them and to give the impression that all was well and under control. It was only when one made inquiry of Beatrice or the boys, that you realised that after the simple activity of going to lunch, he was likely to spend the next two or three days in bed recovering. He went to great lengths not to let people know how sick he really was. Throughout it all he maintained his wonderful sense of humour, albeit with a significant touch of gallows humour just to remind you that you were still dealing with the old Robert.

Today we say farewell to a man who was larger than life, who was completely unique. We loved him. We will miss him greatly.

By the Hon Justice CRR Hoeben

His Honour Judge Brian Donovan QC

The strong connections between Judge Brian Donovan QC, music, the law and the Catholic Church of which he was a devoted member were evident at his funeral on 12 May 2008. There was standing room only in St Mary's Cathedral with a congregation of well in excess of 1,000 in attendance. In addition to the celebrant of the mass, there were ten concelebrating priests, as well as former solicitor Bishop Anthony Fisher, present in full choir dress, representing the archbishop of Sydney, Cardinal George Pell. Two choirs with legal connections provided the music: the Bar Choir (comprising judges, counsel, solicitors, legal academics and court staff) conducted by Justice Peter Hidden and Cappella Sublima conducted by barrister Richard Perrignon, who had also written one of the motets which that choir sang in honour of the late judge. The cathedral cantor, Francois Kunc SC, also took part. The eulogy, an edited version of which appears below, was delivered by Judge Donovan's close friend Judge Christopher Geraghty of the Compensation Court.



Despite the inconvenience of celebrating the life of Brian in a building under renovation, we have gathered here in St Mary's Cathedral because this is Donovan territory. For over thirty years Brian has acted as a lector of the cathedral. There are four Donovan family stained-glass windows in the northwest corner, at the back of the altar. Unfortunately, for the moment, the building is somewhat untidy. But then so is life – our lives – your lives and mine. And Brian's life too was like this cathedral – a work in progress; a thing of beauty, but lived out in the midst of noise and dust – with sections barricaded off and protected.

Some months ago, in a cramped antiseptic room at Royal North Shore, a prison cell for a judge on death row, I was carefully feeling my way toward discussing something important with Brian. I looked at him straight in the eye, full face, and whispered –

'Brian, what's it been like?'

'What's what been like?'

'You know. Life. Your life'.

He looked over his glasses, straight at me, fixing me with his deep brown eyes :

'It's been great. It's been great.'

It was an answer I did not expect.

Brian Harrie Kevin Donovan began his life in Middleton-on-Sea in Sussex, England, during the war. His father Kevin, a doctor, had left Sydney in 1939 with his wife Phillis so he could obtain his fellowship. Enlisting in the Royal Air Force when World War II broke out, his father had become a squadron leader and was there as a medical officer in the middle of the evacuation of allied forces from France.

After the war, in August 1945, the Donovan family returned to Australia. Brian had just turned two. His father worked as a general medical practitioner at Cowra, and later in Balmain, while his mother acted as his receptionist. Brian attended Riverview Preparatory School (Campion Hall) at Point Piper and later boarded at Riverview from 1954 to 1960.

Brian studied arts/law at Sydney University. He resided at St John's College where he was elected president of the student body, and later in life, a member, and then chairman of the College Council. Initially he hesitated about whether to pursue a legal or an acting career. Having developed a burning passion for the theatre, opera and art, he was involved with the Genesian Theatre while at university, and later became the director of the theatre.

In 1967 he graduated and took up his articles of clerkship with L Rundle & Co solicitors, working in general practice. He practised criminal law under the tutorship of Barrie Perriman. Although he had developed a

love for the law, he continued his association with the theatre. He was a member of the board of the Australian Opera from 1968 to 1975, leaving the law for a time to work with the Australian Opera Company as a trainee stage director. He returned to the law in 1974, went to the Bar on 8 November 1974, took silk in July 1988, serving as a member of the Bar Council and for three years as its treasurer. After several periods as an acting justice on the Supreme Court of New South Wales, Brian joined the District Court Bench on 11 April 2005 – a career move which gave him more time to enjoy his other interests, including theatre, acting, directing, painting, visiting art galleries at home and abroad, and sewing tapestries. Though the cross-stitching was blighted sometimes by small mistakes, he was a master of long-stitch needlework. His framed handiworks decorated the walls of his chambers.

For fifteen years he was a member of the faculty of the Australian Advocacy Institute, teaching the art of advocacy in Australia and overseas. He was a consultant at the Centre of Continuing Legal Education, and in later life became a member of the advisory board on the Faculty of Law at the University of Notre Dame.

One of Brian's consuming interests focused on his church life. He was awarded a degree in theology from the Theological Institute of Sydney. He was a knight of the Order of St Lazarus; a knight of Grand Cross of the Equestrian Order of the Holy Sepulchre of Jerusalem; a member of the Sovereign Military Hospitaller Order of St John of Jerusalem, of Rhodes and of Malta.

Under all his activities, Brian battled constantly against dark dreams, struggling in hand-to-hand conflict with phantoms of the night. Since 1992, his wife Brenda has

been a redemptive presence in his life. He loved and cherished her – but he was never purged, never liberated.

Brian was a man of faith – He believed his world had meaning – He did not give it meaning – He discovered its significance. He shared in the meaning of the world in some tiny, humble manner. When he listened to Wagner, when he experienced the thrill of Puccini, when he laughed at Beckett or Wilde, or wept for Hamlet or Othello, when he wandered out into the night and gazed up at the Milky sky in all its immensity, he glimpsed eternity in the mysterious depths of space. He saw the face of God in a grain of sand. For Brian, the heavens were not a soundless, silent empty void of nothingness. The forest and the stars were never robbed of meaning when he was not thinking of them, when he was not present for them. He was a man of God – a fathomless, mysterious, ever present, ethereal being. He was part of creation, an ant-sized part of God's plan, full of mystery for us.

Brian believed. He believed he was special. He believed he was blessed. He believed he was loved. Not in any super-exalted way. He was like everyone else – like the lilies of the field. The sparrows in the streets. Even the hairs of his head were strangely, unimaginably numbered by some prodigal, untouchable, intimate being.

When some of us look forward into the distance, we see nothing. We peer into the shadows, and see a yawning void. When we search for meaning, that meaning, for some of us at least, is extinguished when the coffin lid drops closed, or continues only in others' memories or our genes. Some of us look ahead and see everything in clear radiant detail – the seraphim and ineffable cherubim – the torment of the bad, the medieval Gregorian peace of the blessed, all singing or groaning in some Dantesque world.

Brian was a man who peered ahead into the shadows and glimpsed sacred phantoms just out of reach, precious jewels hidden in the earth, figures as in a glass darkly. Brian was a man of faith – and his faith gave him much strength and comfort. He trusted in the Lord. He would often cast his cares and anguishes into his cosmic lap.

He was a courageous man – in overcoming his chronic asthma; in bravely prosecuting the claims of little litigants; in keeping those who disliked one another apart. In 1980 when Brian found his drinking had increased, he turned to a great spiritual movement, the Alcoholics Anonymous, where he found strength, acceptance, and many friends – they are here with us together to celebrate his life. His dying wish was to pay tribute to these, his brothers and sisters. Brian would attend four or five meetings every week and could be sometimes seen sitting quietly, knitting.

For a man so challenged by his health from childhood, so weakened by chronic ill-health, living in a body so tortured with a daily fight for oxygen, often facing insoluble family tensions, answering to constant demands, and an overpowering craving to cloud his mind, it is indeed humbling to know what Brian achieved in the course of his life. His life is a commentary on the lives of many of us who appear to live so easily, so presumptively.

Brian loved to dress up – on stage as Henry VIII or the grumbling gravedigger; as a knight of the Holy Sepulchre in a flowing white cape and a blood red cross; as a pulchritudinous senior barrister with a Louis XIV style wig; as acting Supreme Court judge in cardinal red and soft feminine ermine; as a citizen of the world in a flashy multicoloured vest, fluorescent green braces supporting purple bloomers, a spivvy bow tie. On one occasion he attended a pre-Christmas dinner at his associate's home, wearing yellow gumboots.

He loved dressing up, and had a wide collection of baubles – icons, statues, relics, paintings, a collection of cuff links and expensive pens, antiques, every opera recording known to man, and books of every description – theology, law, music, history. He was a serious hoarder of things, but with an angelic detachment from money, wealth and the good life. He used to insist on driving me home to McMahon's Point most afternoons after we had finished at the Chelmsford Commission – in his blue Rolls Royce. He would attach himself to his nebuliser and we would breeze down Elizabeth Street, into Macquarie Street and over the bridge. Then one day the Roller was repossessed, and overnight Brian was driving a Mini-Moke. He continued to drive

me home, with the canvas sides flapping in the wind, still on his nebuliser, the profession agog as we swept by. Brian was not the least phased or self conscious. Sometimes he would shave as we drove along. Not a minute to waste. And no aristocratic, superficial false sense of dignity. He was a dignified man – but he was not reliant on artificial support to bulk out his status. His was a natural dignity which overflowed from the richness and depth of his soul.

Brian was not weakened or weighed down with any huge complicated and pretentious ego often associated with luminaries of the law. Paradoxically, however, he had hanging at home and in chambers a series of self-portraits and photographs. But there was no sense of grandeur, no vacuous self-importance, no pomposity, no pretensions. He was a deeply humble man, proud of his church; proud of his profession; proud of his family – modest, gentle in himself.

Donovan earned the reputation of being the only judge in Australian history, perhaps the first in the world, to write to the Court of Appeal confessing a sentence he had imposed was too harsh and asking the judges to make it more lenient. The judges were rattled. There was no precedent. They pretended he had not written, although they did reduce the sentence.

And on the bench Brian proved a soft, compassionate judge of his fellow brothers and sisters. All his justice was tempered with mercy and tenderness. A rare judge who was not judgmental – accepting and understanding of human weakness, able to let even those close to him be free to find their way and make their mistakes.

He had an enriching sense of his common humanity, balanced against a warm acceptance of the uniqueness of the individual. He was of course himself an individual – a one-off, a multilayered character. But he accepted and welcomed others just as they were. He was inclusive, forgiving, accepting of faults and foibles, without criticism.

Brian lived his life on a vast stage, amid a cast of thousands – many dressed in colourful, extravagant robes and vestments, with much to-ing and fro-ing, loud heroic music, solemn

pronouncements, drama and pageantry. The law in all its solemnity, with ermine, crazy horsehair big wigs, colourful sashes, arcane language and honorific titles; the church with its colourful processions, the embroidered cloaks, the floating incense, the Gregorian chants and polyphonic hymns, the whispered prayers in celestial Gothic buildings, plaster saints on pedestals, oils, candles, indulgences, intrigue; and the theatre where his heart thrilled and fluttered with the athletic music of Wagner, the echo of drums, the shrill of horns, marches, bloody battles, and tragic deaths. He loved the world of the stage, the universe created by Shakespeare, Puccini, Verdi. His life was full of art and music, of comedy and tragedy, full of colour and characters from the streets and from every age, full of the mystery and fascination, of grandiose religion and of exclusive

brotherhoods. Not a minute to waste; not a moment of boredom; not a bit of regret; not a tear of bitterness.

A life full of pleasant smiles and laughter; honest, trustworthy, polite, generous. A man for all seasons. A Byzantine man. A Renaissance man. A truly Christian man.

He wanted to please everyone – and it proved impossible. Some needy people actively pursued him, cruelly playing on his innate generosity and good nature, exploiting his overpowering desire to be loved. He was never his own man – he belonged to everyone. The Genesians had a claim on him – as did St John's University College, and the knights of Malta, the knights of St Lazarus, and the knights of St John. And many members of the AA. He belonged to his two daughters, Philippa and Johanne, children of his first

wife, Noelene Bell. He shared his busy life with his beloved Brenda – with Bridie his ever-attentive step-daughter and her husband Gavan. Many people loved him and had a claim on him. Even his canine companion, Fergus, demanded his attention.

But above all, he was possessed by his generous, ever forgiving God. He was God's child. He knew he was treasured inside God's jewellery box. He was God's little creation. And he belonged to God. Finally, his admiring friends and loving family entrusted Brian into the warm arms of his smiling, prodigal father. Life is short. We are here for almost no time at all. For Brian, it was indeed a good life – many are proud to have shared part of it with him. He was a good man. His friends are comforted that he found his life satisfying. All are so pleased that his life was 'great'. Now, he rests in peace.

Mark Gerard McFadden (1957-2008)



Mark McFadden, a barrister since 2004 and member of Frederick Jordan chambers, died on Thursday, 5 June 2008. Mark's sudden death came as a terrible shock to his friends and colleagues at the Bar. He was 51 years old and fondly regarded as a very engaging,

grounded and thoughtful person. We will sadly miss him.

Conversation with Mark quickly revealed his deep affection for his family – his beloved wife Cath; his four young adult children Matthew, Naomi, Cushla and Jack, who seemed tirelessly to generate achievements for their father to recount; and his mother Colleen. He loved the outdoors, especially a holiday on the coast or a camping trip, and a good run or a surf down at Cronulla.

Mark's first career was in education. He held a Grad Dip Ed (Syd Tchrs Coll), BA and MEd (Syd) and PhD (CSturt). During the 1980s he was a high school English teacher. In the 1990s he was a teacher and academic at Charles Sturt University. His doctorate concerned techniques for re-engaging and educating disadvantaged and alienated young people. From 1998 to 2001 he was professor and head of that university's School of Education. He later became a director of

St Stanislaus College, the high school his sons had attended.

In 2003 Mark graduated in law from the University of Sydney, with first class honours. His adventurous decision to come to the Bar almost immediately was well executed. He was a meticulous, dedicated and reliable barrister. His developing practice included regular work in professional negligence, property law and charitable trusts. He often spent long days at hospitals around Sydney, appointed to represent patients whose mental health was being assessed, a brief both demanding and rewarding for a man of his patience and humanity.

A requiem mass for Mark was held on 12 June 2008 at St Aloysius in Cronulla, followed by a huge farewell from his family and friends from the Shire and beyond.

Richard Lancaster

The Hon Justice GFK Santow AO

On Friday 14 December 2007, a formal ceremony was held to mark the retirement of Justice Kim Santow AO as a judge of appeal in the Supreme Court of New South Wales. Tragically, less than four months later, he died, after a bout with cancer of which he had no knowledge at the time of his retirement. His life was one which went well beyond the law, as was attested to at a ceremony in the Great Hall of the University of Sydney on 23 April 2008. He had recently retired as the chancellor of the university where he had studied as a student, was a rowing blue, and at whose law school he had also taught for many years. He was instrumental in securing for the University of Sydney the prestigious United States Studies Centre and was a driving force behind the funding and building of the new Law School building on the campus. Of the gathering in the Great Hall to celebrate his life, the journalist Paul Sheehan wrote in *The Sydney Morning Herald*:

There is a view, a cliché, that the Emerald City glitters with a shallow greed behind its brilliant harbour. That is only partly true. There is also a steel spine of intellectual rigour, a discriminating elite that holds the city together. Discrimination is a good thing, so is elitism.

This spine does not usually seek, nor often grace, the mass media. But it is there, it is sizeable, it is crucial, and it was amply evident in the Great Hall of the University of Sydney last Wednesday night.

In short, this gathering represented the leaders of the state, in its various manifestations, to pay worthy tribute to one of its greatest and most tireless contributors.

Justice Santow was appointed as a judge of the Supreme Court on 30 August 1993, having being a partner at Freehills. He was appointed a judge of appeal on 29 January 2002. During that period, as noted above, his Honour was also the chancellor of the University of Sydney. His Honour also served on the Appeal Panel of the Takeover Tribunal, and in the court served on the Rules Committee, the Legal Practitioners Admission Board and the Education Committee of the court. Beyond and before his time on the court, his Honour's engagement with the community of Sydney and the public interest was manifested in a daunting array of extra-mural roles including as chairman of the Malcolm Sargent Cancer Fund for Children, chairman of the Board of Trustees of Sydney Grammar School, membership of the council of the Australia Asia Institute of the University of New South Wales, the Art Gallery of New South Wales, the Sydney Opera House, VisAsia, St Vincent's Hospital and the Commonwealth Attorney General's Advisory Committee on Company Law. He was awarded the OAM in 1990 and the AO in 2007. He was also awarded an honorary LLD by the University of Sydney in 2008.

At the farewell ceremony for Santow JA, Chief Justice Spigelman spoke on behalf of the court, the Hon John Hatzistergos MLC, attorney-general of New South Wales, on behalf of the Bar and Mr Hugh Macken, acting president of the Law Society of New South Wales on behalf of the Law Society of New South Wales.

Spigelman CJ noted that his Honour was only the second solicitor appointed as a judge of the court, but said his Honour 'swiftly overcame the lingering prejudices of your new former barrister colleagues by reason of the depth of your legal learning, your personal charm and



L to R: Beazley JA, Santow JA, Spigelman CJ

your capacity for hard work'. Spigelman CJ noted that his Honour's judgments 'have made significant contributions to the development of the law', and emphasised one contribution made by Santow JA:

of a character which simply could not have been made by any other person. You brought to the realm of commercial disputation a breadth and depth of knowledge of the world of commerce that few judges of this court have ever had. Over decades as one of the most accomplished commercial solicitors in Sydney you acquired an understanding of the interface between law and commerce, especially of its creative potential, which was rarely if ever available to barristers, whose primary source of knowledge in these respects is cleaning up after a disaster.

From the time that your Honour assumed responsibility for the management of corporations law cases, this court established itself as a pre-eminent court in the corporate field. Supported by other judges, your Honour brought a unique combination of talent and experience to ensuring that the court resolves disputes in corporations' law at the highest quality of decision-making and with a full recognition of the commercial realities underlying the disputes, both in terms of the need for speed and the determination of the result. It is, accordingly, appropriate to highlight the special contribution your Honour has made to the development of corporations law as a judge.

For many years, you were the author of more judgments reported in the *Australian Corporations and Securities Reports* than any other judge in Australia. Your judgments covered the full range of corporations law including statutory demands, preferences, the court's remedial powers, selective capital reductions, valuation of minority interests, schemes of arrangement, including such high profile cases as Advance Bank, the NRMA and James Hardie. Your Honour's judgments are, and will remain, the leading judgments in many areas of corporate law.

...

Many of these judgments called for the exercise of discretions and an understanding of the need to reconcile different interests in a practical and positive way, perhaps most notably in schemes of

arrangement. In this regard your background as a commercial solicitor made you more likely to look for solutions to problems, rather than to act only as the umpire of a fight.

The chief justice paid tribute to Santow JA's contribution to the Education Committee of the court, to which his Honour brought the breadth of his general knowledge and interest together with his depth of understanding of social, economic and political issues and of the arts:

This contribution was invaluable, not least by introducing to the court a wide range of international contacts, particularly in the law but not limited to the law, many of whom at your invitation came to address the annual conference of the court to the delight and education of all of your colleagues. This included a number of the most senior judges from England but extended to a wide range of others, including Pierre Rykmans, Australia's pre-eminent Sinologist, and Margaret Marshall, chief justice of the Supreme Judicial Court of Massachusetts and her husband, the legally literate *New York Times* columnist, Anthony Lewis. They and others were introduced to us as your friends. The intellectual curiosity, energy and sophistication of yourself and of your wife Lee, will be missed by us all. Together you have expanded all of our horizons'.

The attorney-general noted his Honour's contribution to the body of law in New South Wales, especially in the area of corporations law:

Your decision in the NRMA demutualisation case, *Re NRMA Insurance*, raised many important issues on the principles of mutuality. It was a case posing almost every question of principle applicable to schemes of arrangement and dealt with the treatment of schemes on a comparative law basis. Your drawing together of the principles that apply to civil penalties and disqualifications under corporations' legislation in *ASIC v Adler* is widely cited judicially and academically. It was subsequently cited with approval by Justice McHugh in the High Court as a leading case on civil penalty and disqualification.

As you know, special leave was sought from the High Court to appeal aspects of the decision of the Court of Appeal handed down by your Honour, but the High Court refused that application. In *Allianz Australia Insurance v GSF Australia*, Allianz's argument to the Court of Appeal was that injury was not an injury within the meaning of that term as defined by the Act, and that was dismissed by a majority decision. However, a subsequent appeal to the High Court was allowed, saying that the finding of the Court of Appeal was in error. Your Honour had wisely dissented in that case.

The attorney-general noted that earlier in 2007 Santow JA was made an officer of the Order of Australia, having been awarded the medal of the Order of Australia in 1990, awards that recognised his Honour's 'service to the judiciary and to the law, to education, particularly in the area of university governance, and to the arts'.

The attorney-general concluded:

When you were sworn you alluded to Vikram Seth's *A Suitable Boy* and the case of a recalcitrant candidate for the bench who refuses to accept the offer of chief justiceship until he is moved by the simple yet profound words of his former law clerk, 'Do you not want to do justice?' Your Honour has answered in word and indeed this calling. You understood well the perennial challenge facing the law, that of

continuity and change, a challenge which your Honour embraced. As John Henry Newman observed in his clever oxymoron, 'Great ideas change in order to remain the same,' a remark that equally applies, I would venture, to the law.

You have served the people of this state with distinction and for that the community is grateful. Knowing your fondness for the arts, I thought it would be fitting to conclude with a line from Shakespeare. There is a memorable scene in *The Tempest* where Prospero breaks his staff, buries it certain fathoms in the Earth and, deeper than you ever plummet sound, drowns his book. But in your case I think a line from *King Lear* is better suited. 'Men must ensure their goings hence, even as the coming hither ripeness is all.' The passage of time has certainly not wearied your Honour. I believe yours is a lasting ripeness.

Mr Macken referred to his Honour's contribution to corporate and commercial law and his Honour's mentoring ability, promoting collegiality within the profession and excellence in professional practice, emphasising the importance of building and contributing to a profession rather than a business.

Over decades as one of the most accomplished commercial solicitors in Sydney you acquired an understanding of the interface between law and commerce, especially of its creative potential, which was rarely if ever available to barristers, whose primary source of knowledge in these respects is cleaning up after a disaster.

His Honour reflected on the question 'Do you not want to do justice?' to which he had referred at his swearing-in:

That insistent question... was first posed for me by my Hungarian father, who had so happily emigrated to Australia, escaping the horrors that beset his judicial brother who would not leave. My father was a deeply reflective, humanitarian surgeon and obstetrician. His hope was that I would aspire to judicial work. Sadly he died long before this could have even been contemplated. When finally I had the privilege of joining this court, no longer a commercial solicitor though not leaving that craft behind, my concerns were more akin to those of a caring doctor. In equity particularly, I drew upon the metaphor of a public hospital, engaged in a healing operation under

a constrained budget, our patients often poor. That operation had to be conducted with as much humanity and individual concern as the traumatic encounter allows, necessarily with an eye to efficiency and cost but not sacrificing fairness. I learnt early on from Brian Page, senior partner in my old law firm, that a legal answer which offended common sense or basic fairness was usually wrong, however cleverly contrived. That conviction sustained me throughout my time on the court.

When later I joined the Court of Appeal from Equity, I became ever more conscious of how important it was to explain in the clearest and simplest of language, especially to the losing party, why the court has decided as it has. This is no less important than explaining what is important about the decision itself in legal principle. Our President Keith Mason's dedicated and unselfish leadership has marked my time at the Court of Appeal, for which I will always be grateful. I have been especially fortunate to have served in such a collegiate court, so well led, its members bringing an intellectual breadth rarely to be found in any institution. I think for example of Justice Hodgson, testing ideas of guilty intent in the criminal law against his profound interest in philosophical concepts of free-will and of consciousness itself. Or of Chief Justice Spigelman – writing of Thomas à Beckett, relating those issues of conflict between church and state, to the constitutional problems of our time.

To return to family influence, I was strongly beckoned towards judicial office by the letters written by my father's brother, Uncle Imre, whose ruptured career was a tragic loss both to legal scholarship and to the Hungarian judiciary. His 'retirement' from the judiciary was no thing of honourable stepping down. He was brutally dismissed – under the Hungarian anti-Jewish laws passed during that Nazi era. Stripped of office, he was sent into the countryside to work as a labourer, before finally meeting his death in Buchenwald; a stark reminder of the vulnerability of our own judicial status to the

cataclysms that engulf an apparently ordered society, and exploit its fault lines. Recent events in Pakistan demonstrate yet again how the rule of law depends upon the community's support for an independent judiciary, itself dependent on the judiciary staying within its own proper sphere.

Uncle Imre's daughter (Ildiko), here to-day, will recall the words her father wrote as a young student in his twenties, studying comparative law at the Sorbonne. He rejected the lucrative prospects of commercial legal practice, instead choosing that slow progression towards a professional judicial career, starting at the lowest rung as one did in Europe. This is what Imre wrote:

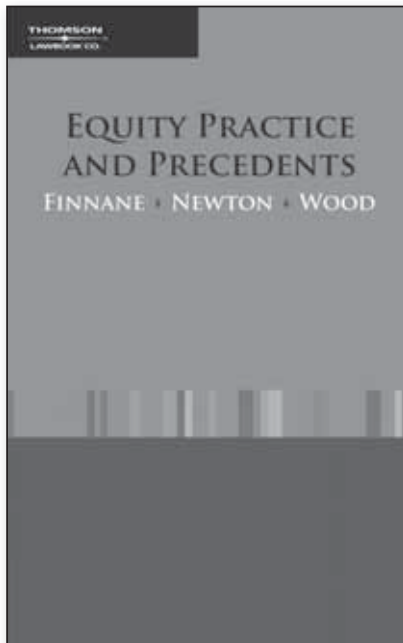
If I wait until the time when I will be able to undertake the most inferior tasks of a judge, then in this way I would perhaps have in my reach the most wonderful and purest of legal work a lawyer is ever able to undertake ... I will not have to view affairs and cases, from a single vantage point.'

...

These, then, were the contradictory influences on my life. On the one hand Imre's absolutist sense of civic duty, and on the other my father's own idealism, tempered by clear-sighted realism and his Irish wife's practicality. Both made their mark. Unlike Imre I gained much from my experience as a commercial solicitor at the then firm of Freehill, Hollingdale & Page. I was fortunate to be appointed at the behest of an attorney-general who, like his successors, sought to widen the ranks of the judiciary with those bringing a diversity of background and experience. This was so long as, to quote Sir Anthony Mason, they had 'an intellectual capacity to acquire in a relatively short time the requisite professional legal skills appropriate to judicial work.' I sought to bring to bear, as have my successors, a commercial sense of what lay beneath the water-line, in what remains the busiest corporations list in the country.

Equity Practice and Precedents

Christopher Wood, Edmund Finnane, Nicholas Newton | Lawbook Co., 2008



The judges of the Equity Division of the Supreme Court conduct the division's business as efficiently as they do largely because of the work of the junior bar. Whilst silk may conduct the longer cases, the junior Bar produces and dispatches well over 80 per cent of equity business in this state.

Whilst the senior Bar may at first find it startling that so much should happen without its intervention, the reality is that with close judicial supervision, equity practice has ever been thus. It was certainly the case when I came to the Bar 30 years ago. The then chief judge in equity, the Hon Justice Michael Helsham, used to administer an impromptu but searching oral examination to all new equity juniors at their first appearance in his list. It was colloquially known as the 'Helsham test of competence'. It was normally only administered once. Failure meant banishment into exile in the darkness beyond his list. There was little point in even trying to return. Success led to other lesser tests which when all passed ultimately meant that a barrister's urgent equity applications could be conducted rapidly using a high degree of judicial trust in the skill and candour of the practitioner concerned.

Michael Manifold Helsham was a Second World War RAAF hero. He had been awarded the Distinguished Flying Cross for nursing a stricken aircraft back to Darwin after it had been disabled by Japanese fire in battle, thereby saving the lives of his bomber crew. Barristers undergoing the Helsham test of competence felt rather like new flying officers being put through their paces on arrival at Justice Helsham's Equity Squadron.

Prior to this year and during the last hundred years, four major books collecting precedents in equity have been published in New South Wales. Unsurprisingly given the traditions of equity practice, not one of their authors was a silk. Mason and Weston were equity juniors who authored the first well remembered text *Precedents in Equity* in 1915 just 35 years after the passing of the *Equity Act 1880*. In 1934 Eric Miller and John Horsell, published *Equity Forms and Precedents*. Miller was a prominent equity junior of the day who joined in the publication with Horsell, one of the staff of the master in equity. This text survived a virile 47 years before it was succeeded in 1981 by the work of two Supreme Court registrars Nevill and Ashe, who wrote *Equity Proceedings with Precedents*. This was followed later in the 1980s by a loose-leaf service produced by a later equity registrar, John Leslie. Nevill and Ashe is now long out of print.

This year three busy equity juniors from Thirteenth Floor Wentworth/Selborne Chambers, Edmund Finnane, Nicholas Newton and Christopher Wood, have identified the need for a new text in this field and have embellished this fine publishing tradition with a remarkably useful book, *Equity Practice and Precedents* Law Book Co, 2008. This work has three important strengths. First it fully captures for the junior Bar all the breadth and variety of modern equity practice. Second it does not just provide precedents of applications and pleadings but introduces the precedents with a dense but practical discussion of the essential relevant law. Third it contains tightly crafted working precedents that are easy to use.

The variety of the law and the jurisdictions covered in *Equity Practice and Precedents* is perhaps its most striking feature. Earlier

precedents texts were written for practice in the Supreme Court of New South Wales. *Equity Practice and Precedents* considers the expansion of equitable jurisdiction within the Federal Court and Federal Magistrates Court. In the past equity precedents books have tended to look at Corporations Act jurisdiction as a separate field of discourse not to be addressed in such a work. Finnane, Newton and Wood have usefully taken a different approach and support the busy practitioner with chapters on Setting Aside a Statutory Demand, Provisional Liquidation, Administration and Winding up.

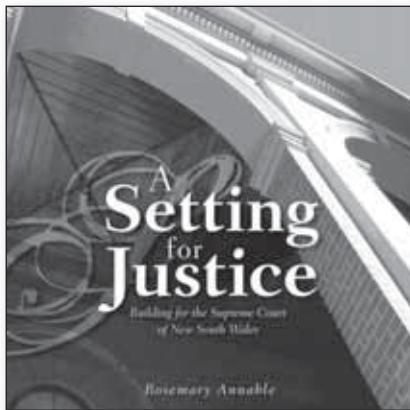
A complete collection of equity precedents must now include developing equity and associated statutory jurisprudence. *Equity Practice and Precedents* has chapters on Mareva orders, the Contracts Review Act and the statutory remedies for unconscionable conduct. Precedents are even provided for the exercise of jurisdiction by court appointed referees. In the traditional content of equity precedents the work still excels. Jim Thompson, a floor colleague of the authors, has contributed a concise chapter on the essentials for gaining injunctive relief. The chapter contains a thoughtful checklist of what must be covered by the perpetually time poor equity barrister heading up to the duty list.

Lawbook Co has published this text in soft cover perhaps not fully appreciating the frenetic way of life of the busy equity junior. An indispensable equity precedent text such as this will be regularly tossed into the blue bag and dragged home to draft pleadings and applications. It will appear at dinner, over coffee, at bedtime, in the country, on the train, and whilst waiting for the youngest to exit day-care. The book is so comprehensive it deserves to be treated as a miniature set of portable equity chambers. Given the wear and tear expected through daily use I recommend the purchase of any hard cover version that is available. With it I expect that the equity barrister of 2008 will be well equipped to survive any modern version of the Helsham test of competence.

Reviewed by Michael Slattery QC

A Setting for Justice: Building for the Supreme Court of New South Wales

Rosemary Annable, UNSW Press, 2007



In an 'Historical Sketch of S. James' Sydney Written for the Commemoration of the Hundredth Anniversary of the Laying of its Foundation Stone October, 1919', the unnamed author describes the Venerable Archdeacon Thomas Hobbes Scott as being 'of a somewhat exacting and overbearing disposition'.

The author goes on to mention the record of his quarrel with an (unnamed) parishioner. The latter was expelled from his pew, resented the expulsion, and re-entered it. The good archdeacon had the pew locked and nailed up, and boarded over. The expellee (or re-enterer?) climbed to the top – with his family – and was removed by the constables. The author adds that legal action was taken, with the re-enterer winning his case and receiving damages.

What was anonymous in 1919 is well-known to us now. The litigant was none other than Edward Smith Hall, described in 2004 by Mr John Pilger as the one journalist who 'did more than any individual to plant three basic liberties in his country: freedom of the press, representative government and trial by jury'.

For those who want to know more about Hall qua litigant at large, see the index to *Dowling's Select Cases*. For those who want to know more about Hall qua the impenitent parishioner, see Justice Keith Mason's 2005 Cable Lecture, 'Believers in Court: Sydney Anglicans going to Law'.

But as to the church itself, our anonymous pamphleteer records Governor Macquarie's report to Lord Bathurst in 1820:

'Some few months since I had a plan of a large and commodious courthouse made out, the foundation cornerstone of which was laid on October 7th last. Commissioner Bigge having, however, lately suggested and strongly recommended that instead of going on with a new courthouse it might be converted into a second church on a smaller scale than the large one already begun, I willingly adopted the commissioner's advice, and there is now a church erecting on the site of the originally intended courthouse...'

And, in fact, the governor's journal for 7 October 1819 records that 'At 2 p.m. the commissioner and the lieutenant-governor and the judges, with a great many other gentlemen, accompanied me to the site of the new courthouse...'

Given Macquarie's relationship with Bigge, I can only guess that the words 'lately suggested and strongly recommended' must have been infused with as much irony as a military man could muster. For this isn't the whole story. The anonymous pamphleteer of 1919 quotes from a paper by Andrew Houison, who I assume is the same Andrew Houison who was foundation president of the Royal Australian Historical Society:

While the commissioner was in Van Diemen's Land, Macquarie on the 20th March, 1820, laid the foundation stone of a school house for the education of the poor, to be called 'The Georgian School.' When the commissioner returned to Sydney he upset this project by converting it into a court house, the Supreme Court House. The foundation stone of this building contains a plate to the effect that it is a public school called 'The Georgian School.'

'Governor Macquarie was not to be balked by Commissioner Bigge over the dedication of the Georgian School House for a court house. He saw Thomas Rose, who held the block of land between King, Elizabeth and Castlereagh Streets, and almost to Market Street. In lieu of this – the present site of S. James' School – he received a farm at Appin (300 acres). Rose's hotel was called the 'Crown and Anchor,' and occupied the site of the present Metropolitan Hotel (since pulled down, and now the office of the

'Daily Telegraph') at the corner of King and Castlereagh Streets.

'When this building was completed it was not used for a school for some years. The court house, through a serious defect in construction, was not finished for some years, and the new school house was used as the court house, and after the court moved into the present Supreme Court building, the school house was spoken of for years as the Old Court House.'

Which, finally, brings me to Rosemary Annable's delightful tome, a book about that seriously defective building which is today as much part of our Supreme Court as ever.

A Setting for Justice is the history of the building – or, more correctly, buildings – which might have been knocked down but for the prescience of the then chief, Sir John Kerr. As is implicit in her work, were mere architectural and structural integrity the criteria for preservation, the structures ought not to have survived their first decade. Shades of other great Sydney buildings, its first and most well-known architect – in this case, Greenway – got the sack, budgets changed, and designs seem simply to have disappeared into the ether.

It seems to me a thing of excellent aptness that one of the architects, Standish Lawrence Harris, sued in the court house he worked on for fees incurred during his time as civil architect. (Dowling J allowed the suit, although others alleged a problem in that the plaintiff was said to have valued the works from which he received his percentage.)

Annable properly acknowledges Dr J M Bennett's 1974 *A History of the Supreme Court of New South Wales* as remaining 'the major authoritative published source' on the topic of the buildings. But she herself is no Jill-come-lately, being a past president of the Royal Australian Historical Society and the honorary archivist of St James. Moreover, as the book shows and as those who attended her 2006 Frances Forbes lecture on the topic will recall, she comfortably and lucidly moves across the various disciplines the work necessarily touches upon.

Those who want to know about the buildings should simply buy the book. However, I can't end the review without drawing attention to two things which I particularly enjoyed, two might-have-beens. The first is the reproduction of James Barnet's 1864 design for new courts on – and over – the Barracks site. Barnet, who built the GPO, was proposing a whopper, about 170m long, although a more modest 50m wide, and 20m high. The price tag was a bit much, so he had to be satisfied with his department clocking up 130 court houses during his tenure as colonial architect.

The second is the 1935 design, this time set to be 'the biggest single building in Australia', a mere 270m long, still 50m wide, but with an awesome 66m high tower which was to face Martin Place. The design is, well, clearly a design circa 1935. Had the then chief justice been a demagogue – instead of being, it is said, a man of a few well-frozen words – this would have been the type of place from which he could have declaimed to all.

Last year, Chief Justice Myron T Steele of Delaware addressed the Bar's common room. As I recall, the filing fees for corporations and other bits and pieces mean that the third branch of government in that fair state accounts for some extraordinary percentage of its revenue and can carry consequential muscle to budget time.

Annable's book is a reminder that the courts elsewhere can be much less lucky. That said, the lawyers and the laypeople of Sydney can be grateful that the executive branch through a number of officers in the Attorney General's Department has given its support to ensure that this strange edifice remains part of our legal heritage, including the arrangement of the production of this important book.

Reviewed by David Ash

The High Court on the status of Justice Young

Mr Pembroke: We have said it is irrelevant and unnecessary. Maybe circular is adding more than is necessary. Your Honours, I would like to draw your attention to some features of the reasoning and conclusions of the chief judge in equity.

Kirby J: You keep calling him that, but he was not the chief judge in equity when he was sitting in the Court of Appeal. He was an acting judge of appeal.

Mr Pembroke: Yes. That is an interesting question, your Honour. He retains that title and he is described as such in the judgment.

Kirby J: Is that right? I thought he was AJA.

Mr Pembroke: No. I think it is one of those mysteries that - - -

Gummow J: No, it is not a mystery. There is a section in the Supreme Court Act, is there not, that gives, as it were - - -

Heydon J: He has an entitlement to sit in the Court of Appeal.

Kirby J: What is he called in the - this may be some battle of long ago. Yes, he calls himself CJ in Eq.

Mr Pembroke: He has a statutory entitlement to sit in the Court of Appeal by dint of that office.

Kirby J: That is true. Yes, he sat with me many, many moons ago.

Gummow J: And survived too.



Bradman Cup Cricket 2008

For the eighteenth year, the annual match between Eleventh Floor Wentworth and Edmund Barton Chambers was played at Bradman Oval in Bowral for the Lady Bradman Cup. The redoubtable Thos Hodgson (30 not out in 21 overs) and James Poulos QC (2 for 9) have played in every match. Talented 'ring-ins' Ireland QC (custodian of the stumps) and Scruby (30 not out and eligible to play by marriage) assisted Bell SC (32 not out), Durack SC (31 not out on the usual strained hamstring) and Sullivan QC (10 not out and 15 kilos under weight) to a comfortable victory for the Eleventh Floor after public law tearaway Griffiths SC and the demon Lancaster bomber had 'held' Edmund Barton to 165 from 35 overs. The game was played with great spirit and camaraderie.

New South Wales Bar retains the Callinan Trophy

On 15 March 2008 the New South Wales Bar XI played its annual match against the Queensland Bar at Boronia Park, Hunters Hill. NSW had won the previous two matches, including an elusive away win in Brisbane in 2007, the first since 1993, so the visitors were keener than ever to get back into the winners' circle.

The boundaries were long, the outfield was slow and the track had plenty for the bowlers, so from the outset we knew that every run would count. In the end it did.

Traves SC the Queensland skipper called correctly and chose to field. Steele and Chin opened for the home team, although Steele's finely tuned hamstring was not able to withstand a quick single in the early overs and he required a runner to complete his entertaining innings of 17.

Chin was the first to go caught behind off the bowling of Katter with the score on 12. Bilinsky went shortly afterwards, followed by Steele and Docker (again LBW), and the home side was in trouble at 4/37 off 17 overs.

The ball was moving about and the Queensland bowlers were on top but Carroll, fresh from a match winning innings at Brisbane Boys Grammar, again steadied the ship and set about building a competitive score for the home side.

He received good support from Scruby and Durack in taking the score up to 122 until he was caught off Collins, the wily Queensland spinner, for 61. Neil and Naughtin then batted out the overs with the home side finishing at 9/137 off the allotted 42 overs.

The question was whether this would be enough, particularly with the wicket improving and the outfield drying out over the morning session.

The old firm of Drysdale and Traves opened for the visitors and got away to a solid start until Traves top edged an Eastman delivery high towards the square leg boundary. Thankfully the safe hands of Naughtin were waiting and the catch was taken centimetres from the ground. A big wicket as Travesy will generally only give one chance, if that.

Drysdale and Williams had taken the score to 35 off 12 overs, when Docker replaced Naughtin and had Williams caught. Carroll then picked up the key wicket of Crawford, caught by Scruby for a duck, and at 3/37 NSW were back on top.

Drysdale and Katter then steadied the ship and things were evenly poised when Qld had advanced to 3/85 in the 28th over, then requiring less than four runs per over to win with seven wickets in hand.

Bilinsky then bowled Drysdale for a fighting 40, and McLeod joined Katter, taking the score up to 104 before Naughtin came back into the attack and had Katter caught by Docker for 21. Johnston then came to the crease with a steely determination and set about trying to overhaul the NSW score.

In the end, Qld required seven runs off the last over to win. Bilinsky was given the ball with the danger man Johnston on strike and hitting the ball well. Four runs came off the first four balls. There was then a run out off the second last ball and Qld were then nine down requiring three runs off the last ball to win, two to tie.

Johnston swung and the ball ballooned out towards backward point. The batsmen completed their first run and set off for the second. Chin gathered the ball. The speculation was that an underarm throw may have been enough, or possibly that he even could have run in and broken the stumps himself. The worst case was the ball going for an overthrow which would have meant victory for Qld. Most would not have thrown the ball as hard as they could.

Anyway, Chin did just that. He threw the ball so hard he nearly dislocated his shoulder. He later said that he hadn't wanted to but he couldn't help himself. An out-of-body experience. It may become known as the 'Chin Defence'. The ball flew low towards the stumps. The wicketkeeper cursed. The fieldsmen held their breath. The Qld batsman flew down the wicket for the tying run.

And then ... the ball cannoned into middle stump, the bails flew off and the finger of the square leg umpire was raised.

A win for the locals by one run and the Callinan Trophy was retained by the barest of margins, but as was agreed by all at the Woolwich Pier after the game, cricket really was the winner.

Lachlan Gyles

Great Bar Boat Race

The annual Great Bar Boat Race was held on Monday, 17 December 2007. A fleet of 28 competitors, spread across three divisions, headed off from the starting point at Shark Island. For the second successive year, line honours went to Roger Hamilton QC and the crew aboard *Bashful*.

The winner's trophy was presented by Thibault de Polignac of Thomson Reuters at an informal ceremony on beautiful Store Beach.

Profits from the event have been donated to the Indigenous Barristers' Trust Fund.



The surrealism of Salvatore Tedeschi QC



Sunil de Silva



Shadow Attorney General Greg Smith SC



Sarah Huggett



Director of Public Prosecutions Nick Cowdery AM QC

An exhibition of 20 photographs by Tedeschi QC is on view at the Josef Lebovic Gallery in Paddington. Previously they were displayed at the Justice and Police Museum.

The exhibition is entitled 'Legal Chameleons' and shows mostly establishment barristers from the correct side of the street, that is to say those who prosecute the wicked and not those who defend them.

The barristers are photographed in everyday situations such as in the kitchen, in a restaurant, rowing a boat, kick boxing or pruning the garden. But the surprise is that

each one is fully robed and wigged. Cowdery QC is depicted about to fall out of a rowing boat, Babb SC is playing golf. Meagher QC is unconscious on a sofa and Cunneen SC is washing up dishes instead of washing up criminals.

Once upon a time, where a barrister could be seen robed and wigged was subject to strict rules. It was a hanging offence for a robed barrister to be seen in public except in King Street between Macquarie and Elizabeth and Phillip Streets to about 50 yards north of Martin Place.

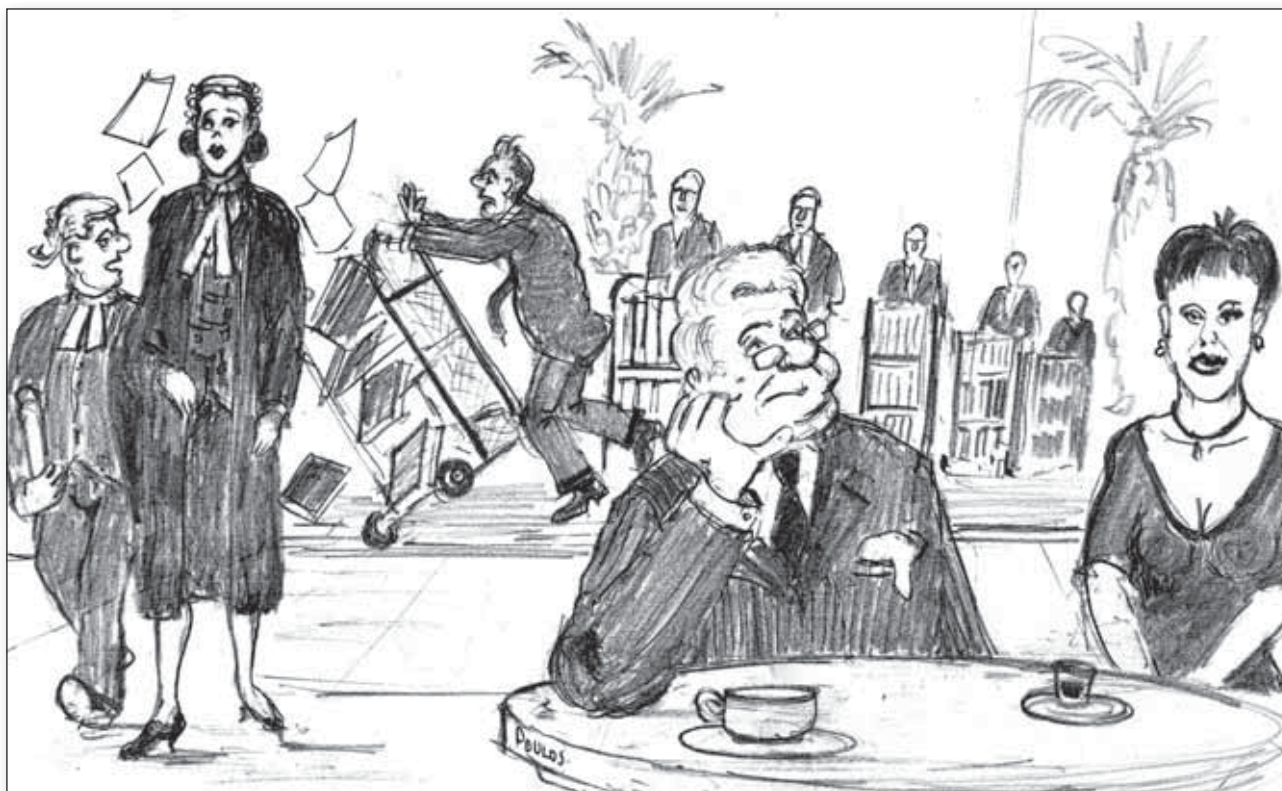
Junior barristers were reported if they did not carry briefs, and silks if they did. In 1957 there was the infamous case when H A (Horrie) Millar (admitted 1945) was seen munching a pie fully robed in Phillip Street. The Bar Association was in pandemonium. There was an emergency meeting and Horrie just escaped being struck off. This scandal was discussed for years. Even Clyne was shocked.

Congratulations to Tedeschi for something imaginative and exciting.

Reviewed by Clive Evatt

Bullfry and the cold latte

By Lee Aitken



‘Was it time for him to make a full disclosure and seek the safety of the Consolidated Fund?’

The dust-laden mistral blowing down the street was cooling the latte nicely. Bullfry winced as a trolley-man lost control, sending thousands of dollars worth of useless photocopying headlong into the gutter. He remembered with pride his own skill as a junior with the trollies. (He had acquired the expertise at the fruit markets in his youth, moving palettes of bananas and pineapples – there were many similarities between the personalities at the markets and at the Sydney Bar).

In his prime he had been a two-trolley man, forcing his way over protest into the crowded lift with five minutes to go before the hearing – his famous war cry – ‘Ramming speed!’ – (loosely adapted from ‘Ben Hur’) – always cleared him a pathway. Sometimes he had gone ‘over the top’ via the café interchange floor to the horror of the visiting tourists; sometimes he had changed in the lift as well. Then, late in the day after a few ‘refreshers’, he was wont to return to the ‘dead trolley’ room on the ground floor of the Supreme Court which, like the elephants’ graveyard, was where the cleaning staff took all those trollies whose users had abandoned, or fled from them. He loved the democracy of the trolley. Nothing showed true character more than the way in which a driver put up with losing its entire contents down the front steps of Selborne (Bullfry had always scorned the ramp). The fact that most of a trolley’s contents was irrelevant to any forensic purpose was one of the mysteries of the age – far better to introduce a 100 page rule under which a party had to tender and rely only on the vital one hundred pages.

Betimes Bullfry had come across former ace students now reduced to the manual labour of the trollies. As he always told his classes, there were three ages of Man. First, the student – usually circumspectly respectful of Bullfry. Secondly, the same student now elevated as the associate to the judge – Bullfry now more circumspect himself while the ex-student, adopting the graces and powers (such as they were) of his judicial master, smiled benevolently while Bullfry fought a hopeless case. And then the third stage – the ex-student, ex-associate, ex-D Phil (Oxon), now trainee solicitor – pushing a trolley in the pouring rain up Phillip Street for Deacons! (Bullfry had noted with distaste the recent degenderising of trollies so that a soubrette of 17 from a progressive floor might be found in a hernia-inducing struggle as she tried to push a trolley into court. Bullfry was no Galahad but he always had to take charge himself in such a situation – a full trolley was no task for a young or old lady – it was a task to be entrusted only to a fit and sober junior, or for choice, the two or three braw lads who were to be found on every traditional floor to carry out a range of vital banausic tasks.)

He turned back to his coffee and reread the advertisement very slowly. Was it time for him to make a full disclosure, and seek the safety of the Consolidated Fund? Unfortunately, of course, any application from him would be out of temper with the times. Editorialists from all sides called constantly for greater ‘diversity’ – usually, this was code for the appointment of more women, notwithstanding that very few women counsel indeed were long in silk.

There was no revolving mass of female senior counsel, all in their late fifties, all of whom bore the ravages of endless and unsuccessful forensic battles – to the contrary, a female silk was assured of an offer (which was almost a command) from the attorney to take a judicial appointment as soon as she decently would. That was why all talk by the editorialists and academics of the need for ‘diversity’ and ‘merit’ was nonsense.

It did not matter that half the law graduates were women, and they were better students than the men. The key question was: how many of the top-level female graduates would put up with twenty to thirty years of sleepless nights, lost weekends, barrister’s impotence, wig-induced baldness, just for the chance to be a judge? How many female barristers were to be found leading a six trolley team deep into Indian territory before a full court in Melbourne? Nary a one. A successful male applicant would come from a pool of maybe twenty fifty-seven year old former thrusters; a female appointee would be one of the three new female silks appointed in any given year. Those figures said it all.

And Bullfry knew well the very large personal sacrifices in terms of hearth and home that any female jurist had made. The reason there were so few senior female silk was not a question of competence but of a lack of desire to satisfy a system which demanded that every waking moment be spent on avals, or manslaughter, or drains. What woman of fifty with a grown family would want to waste her time on those inquiries – women’s egos were far stronger than those of men – they did not depend on the supposititious glamour of wandering toothless and balding up Phillip Street in an ill-fitting grey suit with a gaggle of juniors in tow – much nicer to have a cup of coffee at the Double Bay shops before attending a prize-giving. So, unless the goal posts were uprooted entirely there would always be far fewer women than men available for appointment.

The old Halsburyian system – ‘Merit be damned, I’m appointing my nephew’ – has always worked tolerably well. The sad need of modern society for accountability and accreditation on every side did not fit in well with the process of judicial appointment. Indeed, the very notion that some sort of quota arrangement should operate so that every part of society was ‘represented’ on the Bench would only make sense if you were then able to choose your judge. (Or did it perhaps imply that a judge from a different ‘background’ would administer a different sort of law? That was not how things were meant to work).

Now Bullfry, in his youth, was well-known for judge-shopping, within limits. It was, for example, common knowledge in a certain division, that if a particular judicial officer indicated his availability to take on extra cases to assist the duty judge, matters would begin to settle with alacrity. This always gave Bullfry his chance – he would leap headlong into the fray – ready to chance his arm with an obscure equity, or a revitalised affidavit while lesser spirits compromised claims promptly and headed for the comfort of chambers. But the notion that – to take an extreme example – Bullfry should be able to ‘choose’ as his judge someone who conformed to his own prejudices – say a reformed alcoholic, who enjoyed reading works published by the Selden Society, dozing, and watching the Waratahs – was so bizarre as to be instantly

dismissed. (Of course critics of the current system would say that Bullfry stood a good chance of drawing a jurist of that type at present purely by luck).

The problem of appointment was insoluble – God forbid that it should come to require some formal application. That would inevitably mean failed applicants were entitled to review and to reasons – far better to leave it in the situation as it was years ago when Hayden Starke asked Leo Cussen why Sir Leo could not get on the High Court and proposed some solution: ‘Mr Justice Cussen found on the whole proposal that there were all sorts of difficulties in it – but most of all that they had asked Starke and not Cussen’. That is the way it still should be. It cannot be said of many advocates that their appointment was ‘not only inevitable but belated’. And looking with modern eyes, would the same thing be said now about an older, European male appointed to the High Court as it once was by Sir Harry Gibbs about Sir Keith Aickin – Bullfry thought probably not because of the modern temper of the times. And if a latter-day Piddington slipped through the net, the uproar in a lower house would soon remedy the situation and a chastened attorney would have learnt her lesson.

As usual, the call for a ‘diversity’ of interests simply disguised the desire of certain players to get onto the Consolidated Fund without undergoing the stresses and work required of others to get there. In England, as a distinguished editorialist had pointed out, there was now the offer of a judicial ‘roadshow’ so that the ‘customers’ of the courts could be sure of the validity of the selection process. This seemed to Bullfry a very dangerous path to follow. How would the new system differ from the old – in the end someone needed to make a choice – would it be any better if a failed contracts lecturer was also putatively in the running.

There were two prerequisites of appointment to judicial office – an absolute absence of moral hazard (on which ground Bullfry was manifestly out of the running) and an ability to synthesise the essence of a heap of statements in a simple sentence, as Dickens once said of Serjeant Stryver. While many aspirants satisfied the first condition, the second was more problematical. On an appellate court, the inability of any individual judge to put pen to paper consistently over sixty cogent paragraphs delayed the whole system and meant that any timetabling for judgment delivery was consigned to the scrapheap. No doubt for this unexpressed reason, the present policy seemed to be to allow the prospect of judicial promotion from the trial court to the appellate for those judges who demonstrated an aptitude for judgment writing.

For himself Bullfry would have loved nothing more than a permanent appointment as duty judge. Where was the balance of convenience? What was the equity? When was morning tea? Or perhaps without disrespect to the current office-holders he should aim a little lower – ‘First access to the plaintiff!’ – that about summed up the range of his unvaunting ambition.

He turned back to the advertisement – the latte was cold but he did not repine – it gave him yet another excuse to engage in innocent banter with the backpacker from Slovenia.

