

Bar News

The JOURNAL of the NSW BAR ASSOCIATION Summer 2002/2003



2002 Maurice Byers Lecture:

Legalism, realism and judicial rhetoric in constitutional law

Working part-time at the Bar

The Parramatta Bar

Discovery before or after mediation?



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Summer 2002/2003

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The barristers of the Parramatta Bar.

Photo by Murray Harris.

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The role of the Bar Association

David Jackson QC ended his speech at this year's centenary Bench & Bar Dinner by posing the question whether the New South Wales Bar Association can perform adequately all the roles it now has. The question is a valid one. The association currently seeks to discharge a wide range of functions; probably greater than those of most other professional organisations. Whereas once the role of the association was largely confined to that of trade union, social club, ethical body and occasional lobbyist to government on behalf of its

members, it now has a formal role in the statutory structure for the determination of consumer and disciplinary complaints which extends to the role of investigator, prosecutor and even in the case of bankruptcy and tax issues, judge and jury. It seeks to advise the government on what is good legislation as well as being a lobbyist for members.

Can this position successfully continue? Should the association be providing trade union-like advice and assistance to members whose financial affairs are mismanaged, as opposed to striking them off? Should it hand back regulatory powers to some government body and act solely in the defence of members in trouble? Should the association be lobbying harder for

legislation which benefits members and leave other matters for law reform commissions? Should the association be concentrating on improving the delivery of services to members, for example such as through the very successful BarCare scheme? These are valid questions which exercise the minds of members. This publication is intended to be a magazine of the members for the members. Any views on these or other

questions of debate will be gratefully received and published.

Another longer term trend is the breakdown in the unity of the Bar itself. Specialisation has dramatically increased. There are few barristers who could successfully conduct a criminal jury trial and a commercial cause and few who would want to. In a few years none will be able to state (without fear of breaching the Trade Practices Act) as did, accurately, Tom Hughes QC in the *New South Wales Barristers Directory* under areas of practice: common law - general; equity - general; appellate law - general. The physical fragmentation at the Bar continues to increase, certainly within the Sydney CBD. The Bar common room, after continual decline in attendances, will be closed. All barristers face the succession of demands on small businesses which limit the time for communal activity. One of the common themes of the plight of many barristers who fell foul of the disciplinary regime for bankruptcy and tax offences was that it is just not easy to meet the demands of a busy court schedule and ensure that the finances of a business are running smoothly. The sole practitioner rule has all the virtues of independence but requires a barrister to spend considerable time on business practices, even if only in engaging, paying and overseeing the work of qualified experts. The association has, perhaps belatedly, attempted to provide some services in this latter area, including seminars in the CPD programme on business and tax management. There is scope for greater activity in these areas. Again, these are the topics which, if they are engaging the minds of members, would be suitable for contributions to this journal.

The aim of this journal is to provide on a twice-yearly basis a forum in which some of the different issues and aspects affecting barristers and the association can be aired. The Editorial Committee is particularly pleased that we have been able to bring forward in this issue a piece on the Parramatta Bar, featured on the cover, and on part-time practice at the Bar. The address of Karpal Singh to

the Association was a memorable event in the middle of the year and we have an interview conducted with him prior to that address. This year Leslie Zines AO delivered the Sir Maurice Byers lecture and this is an important annual feature of this journal. Norrish DCJ gave a stirring speech at the launch of the Bar Association - Aboriginal Legal Service pro bono scheme, which we reproduce. The CPD programme at the Bar is now well established and we include some of the papers given.

Finally, the Bali Bombing was a terrible event. *Bar News* expresses its sympathy to those affected. We include a moving piece by Colin McDonald QC of the Darwin Bar.

Justin Gleeson SC

Should the
association be
providing trade
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off?

Dear Sir

I note that recently, the Pope, John Paul II, has made a saint a person who appeared in two places at once.

I suggest that this person be made the Patron Saint of the New South Wales Bar Association.

Lindsay Ellison

Dear Sir,

I'm laying on a typical hard wooden bed in the small town of Jorabat up in the thick forested mountains, about half an hour drive from the city of Guwahati in north east India. It is a pleasant day and the heavy rain of yesterday has stopped. The cool breeze generated by the ceiling fan is refreshing and its swirling swishing sound is soothing.

My mind goes back to yesterday in the heart of Guwahati when amongst the rain and flooded roads small children, some as young as six or seven years of age, rummaged in the foul stinking piles of garbage that were piled up on the sides of the road. What they were doing I'm not sure but I presume they could get some money or other benefit from what they could salvage from those vile piles.

It broke my heart to see those little children suffering such misfortune and my grief increased when I thought of my own little nine year old daughter and the absolute horror it would be to her if she was in like position.

We in Australia are indeed fortunate and even more so we members of a privileged profession. Such good fortune is a blessing from God and not so much from our own efforts. Some of those poor children and adults work from sunrise to sunset like beasts of burden with little reward, just enough to survive another day.

I would be mighty proud of barristers if it they could expand their presence to present to Guwahati a home titled 'The New South Wales Bar Association's Home for Destitute Women and Children'.

The virtue of course springs from compassion and is similar to the heart of the Bar Association's 'justice'. Compassion and justice both being virtues, but compassion, using the words of St. Paul is the greater.

I appeal to my brother and sister barristers and lawyers to help me found a 'Home'. We could start small and then if it is God's will it will increase from its own momentum.

I could probably start a 'home' going

from about \$A100 to \$A150 per week which would cover a leased house for 10 children, food and a couple of workers to run the 'home'. I have a contact in north west Bengal who would for free oversee and monitor the whole project in Siliguri, a town in North West Bengal, with similar problems.

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Dear Sir

Financial advisers often talk about the need to match one's temperament with one's investments. The same can be said about charities - we probably have a natural inclination to prefer some types of charities over others.

With that in mind, I have a proposal for people who may wish to contribute a little and get a lot in return. There is absolutely no risk. There is a guaranteed, very high return.

Shortly before his death in 1990, Sir David Martin, former governor of New South Wales, established a foundation to assist young people to recover their lives. The foundation, in conjunction with Mission Australia, runs a farm at Robertson in the Southern Highlands called the Triple Care Farm. The residents undertake a programme which involves detoxification (if necessary), re-establishment of self-esteem and personal confidence and training in an area of interest which may lead to employment. If successful, the residents graduate at a special ceremony and are supported in finding accommodation in the community as well as employment. This approach has been extraordinarily beneficial to a large number of young people - they have been able to break the cycle, regain control and move forward in their lives.

The foundation employs only one administrator and is supported by various groups and individuals, including many friends of Sir David Martin from the Royal Australian Navy. There is a Board of Governors and several committees that organise functions to raise money for the foundation.

There is a natural relationship between members of the Bar and the work that this particular charity undertakes. Very many of the people seeking assistance have been victims of

crime as well as being perpetrators. Barristers, as agents in the administration of justice, have a very real interest in seeing that these young people have an opportunity to rehabilitate.

The people who work with the residents of the farm have, and certainly need to have, enormous tolerance and resilience. But to keep going they, like everyone, need support.

The proposal is to form a 'resource group' of barristers. It is not intended to be just another fund-raising committee. The idea is to, first, let the foundation, the residents and the farm workers know that a group of people are interested in, and support what they are doing. Secondly, the foundation can approach the group from time to time if it needs specific assistance. Sometimes that assistance may be in the form of the farm needing a microwave or a printer or some sporting equipment. Someone in the group may have that item to contribute or know someone who could help. Or advice may be requested about what to do or who to speak to in relation to some problem that arises.

It is not intended that any person's involvement will be onerous or that there will be any ongoing commitment. Most communications will probably be by e-mail. However being part of the group will provide the participating barristers with an opportunity to make a small contribution to other people's lives which may have a huge impact. The mere show of support counts.

Please send me an e-mail or call if you are prepared to help. The more barristers involved, the more effective will be the message it sends.

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The Bali bombing

By Colin McDonald QC ¹

It is twilight in Darwin. The scent of frangipani and jasmine hangs in the sticky air. Fruit bats chuckle over their mango feast in my neighbour's garden; they have beaten us yet again to the first fruits of the season. However, tonight I am distracted from the exotic rituals of the change in season in Australia's tropical north. I have just returned from the service at the Darwin Cenotaph observing a minute's silence where I joined with others to remember and respect those murdered in the bomb blast in Kuta, Bali. It is the evening of

20 October 2002 and Australia is in official mourning. Indonesia, too, is in mourning and in deep, urgent soul searching. The bomb blast in Bali is evidence that Indonesia's constitutional structure based on a secular state is at risk. Saturday, 12 October 2002 is a dark day in the history of both Australia and Indonesia, but it was also a day when the two nations' respective destinies converged.

In my mind's eye there are present so many vivid images. I try to make sense of the experiences of the past week. My

attention was drawn to the tragedy by phone calls from distraught Balinese friends overwhelmed by the killings. They spoke in disbelief that the peace of their island had been so swiftly disrupted and their livelihoods threatened. To their words of shock and sorrow I put faces, lives, families and friends. I saw the Indonesian Vice Consul quietly weeping at a church service. Television images of victims being air-evacuated from Bali to Darwin were verified by the actual sounds of the Hercules aircraft overhead my home.

Contradictions recurred powerfully night after night on the television and in the daily newspapers: Death tolls, graphic scenes of human despair and the toll mounting. Muslim students marched

again on the Australian embassy in Jakarta, but this time to express condolences, not outrage. Balinese people praying devoutly in their hundreds and thousands in the vicinity of where the bombs went off; while others held 24-hour vigils at the bedside of each of the injured victims at the under-resourced Denpasar hospital. Here is hate-inspired violence and cruel devastation on the one hand and compassion, empathy and solidarity on the other undiluted by racial, religious or philosophical differences.

have been unthinkable prior to 12 October 2002. A joint police task force was created to investigate the bombing and to bring those responsible to justice. Recent distrust and antagonism following September 1999 and the independence of East Timor were set aside. Instead, a joint desire to achieve justice and practical engagement have created new possibilities. Indonesia's acute problems have reached Australia but the disaster in Bali has given rise to a new, unexpected mutuality.

The bomb blast has produced a

The bomb blast
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Flowers placed on memorial pond at the Domain, Sydney. Photo: Chris Pavlich / News Image Archive

Any sense of Australia's isolation or immunity from the world's problems were destroyed on 12 October 2002. A potentially profound political step taken in the course of the week following 12 October 2002 was the Australian initiative to find joint solutions to the affront of violent terrorism. The Foreign Minister and the Justice Minister were dispatched to Bali and Jakarta. The willingness of Indonesia to allow Australian police, forensic and intelligence officers to work side by side with their Indonesian counterparts would

dramatic change in regional approach. From militant, naive isolationism on migration issues, Australia has reached out and engaged its most important neighbour on the issue of terrorism. Our approach has changed from reaction to symptoms to a search for causes.

The myriad of political and legal structural problems afflicting Indonesia has escalated to become a struggle to maintain the constitutional base of the secular state. For the third time in its constitutional history, Indonesia faces a fundamental fight for the rule of law. If

Indonesian history is any guide, this fight will be bitter and there will be casualties. The issues are complex. Indonesia faces a future which has essentially three options: continuing and struggling democracy under Megawati or the intolerance of an Islamic state or a return to the generals.

Those who employ terror and violence to achieve their ends can exploit so many economic and other injustices in our region and beyond. Poverty, shattered expectations and perceptions of injustice can lead people, in desperation, to resort to religious and political fundamentalism. We are seeing elements of such resurgence in our region: in Malaysia, Singapore, the Philippines and now, Indonesia. We saw it tragically in the genocidal fundamentalism of Pol Pot in Cambodia and unforgettably in the events of 11 September 2001 in America.

What sense are we to make of it all? How can we as lawyers help make a difference in our world? How can we turn despair into hope? In a recent reflection upon Australia and its place in the region in the context of the world problem of displaced people and refugees, Justice Michael Kirby suggested a path forward:

Australians share one continent. But we do not only share it among ourselves, selfishly and nationalistically. Australia is part of a wider region and a larger world. We must therefore consider how, in the future, we can do better. Doing better means more help to refugees here and abroad. But it also means urgent attention to the underlying causes of their terrible plight. And the journey to these truths will be helped by seeing refugees as we see ourselves – as people aspiring to life, dignity and hope.

Conquering the self-defeating path of hate now gripping our region and the

world has much to do with the ability and the readiness to understand, mutual respect, the hunger for justice and compassion. We need to address the causes of injustice not just the symptoms. Poverty, ignorance and intolerance remain barriers to justice. Lives led separately in the cities of Australia become interrelated with the lives of Balinese waiters, waitresses, cleaners and taxi drivers in Kuta. A bomb blast reminds us that we are all caught up in an inescapable network of mutuality. In our region our destinies are more than ever woven in the same tapestry.

So the efforts of Australian lawyers to engage with the region in reflection and in deed have become all the more important. The efforts of Australian lawyers beyond and at our borders can and do contribute to the common regional need for understanding; they contribute to the mutuality involved in achieving understanding, acceptance and justice. They contribute to people aspiring to life, dignity and hope.

Today Australian police officers are engaged in assisting Indonesian police in investigating the Bali bombing. Australian doctors, nurses and volunteers are engaged in Indonesia and at home attending to victims and alleviating their suffering. In a similar vein and with an identical humanitarian spirit Australian lawyers should bring their skills to bear to shape a more just region. The fragile but universal concept of justice is the lawyer's daily practical concern applied in an infinite diversity of factual issues.

Today the flags of Australia, Indonesia and the Northern Territory hang at half mast at the Darwin Cenotaph. Grieving Balinese and other Indonesian members of the Darwin community embrace their fellow Australian citizens and friends who have turned out to comfort and show support. The scene is replicated all around Australia.

The need for practical idealism and the search for justice at home and in our region is as urgent as ever. Here, lawyers have a role. Information, understanding and reason are the enemies of ignorance, hatred and bigotry. It is time to gather new

strength to remember that the unearned suffering of the many victims in Bali can and will be redemptive. In that process lawyers have a role and responsibility to discharge. We must address the problems and the injustices of our region. There are practical activities in which Australian lawyers can involve themselves in refugee and asylum seeker issues, to continue to expose the blight of mandatory detention in immigration, to assess critically Australia's laws introduced to deal with anti-terrorism, participate in AusAid projects and give up time to work



Memorial ceremony in Bali. Photo: News Image Archive

overseas with NGOs in our region, are to mention a few.

Martin Luther King's words, just before ignorance, hatred and intolerance took his life, are as true today as they were in 1968:

Now let me suggest first that if we are to have peace on earth, our loyalties must become ecumenical rather than sectional. Our loyalties must transcend our race, our tribe, our class, and our nation; and this means we must develop a world perspective.

¹ Reproduced with kind permission of the *Alternative Law journal*.

Costs in criminal cases

Solomons v District Court of New South Wales & Ors [2002] HCA 47 (10 October 2002)

By Christopher O'Donnell

In this decision the High Court held that the provisions for the granting of a certificate under the *Costs in Criminal Cases Act 1967* (NSW) ('the Costs Act') are not available to defendants found not guilty of federal indictable offences in the District Court of New South Wales. The same principle, by analogy, applies to defendants found not guilty of federal indictable offences in the Supreme Court of New South Wales.

The appellant, at a trial in the District Court, by direction was found not guilty on two counts under the *Customs Act 1901* (Cth) of being knowingly concerned in the importation of a trafficable quantity of ecstasy. He applied for a certificate under sec 2 of the

Costs Act, which empowers a New South Wales court to grant a costs certificate to a defendant acquitted or discharged as to a criminal offence.

Provision for payment under a costs certificate is made in sec 4 of the Costs Act. This allows a person to whom a costs certificate has been granted to apply to the Director-General (formerly the under-secretary) of the Attorney General's Department for payment from the Consolidated Fund (formerly the Consolidated Revenue Fund) of costs incurred in the proceedings to which the certificate relates. The Costs Act does not confer a right to payment. The making of a payment and the amount is within the discretion of the Director-General (formerly the treasurer).

Keleman DCJ refused the appellant's application for a costs certificate, holding that he had no power to grant the certificate under the New South Wales Costs Act in respect of the prosecution on indictment of a person charged with an offence against a law of the Commonwealth. By a 2-1 majority the New South Wales Court of Appeal upheld the decision of Keleman DCJ. Although the High Court caused constitutional argument to be raised during the hearing of the appeal, only Kirby J dismissed the appeal on constitutional grounds. The other six justices, all of whom dismissed the appeal, determined the appeal solely by reference to the construction and application of secs 68 and 79 of the *Judiciary Act 1903* (Cth). The appellant

argued that either or both of these provisions rendered provisions of the Costs Act applicable in criminal proceedings in the District Court involving the exercise of federal jurisdiction.

Sub-sec 68(2) of the Judiciary Act provides:

The several courts of a state or territory exercising jurisdiction with respect to:

- (a) the summary conviction; or
- (b) the examination and commitment for trial on indictment; or
- (c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the state or territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to sec 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

In their joint judgment Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ noted the distinction between legislative provisions that confer jurisdiction and those that confer a power. Their honours held that the 'better view' is that sec 2 of the Costs Act confers a power, which is not 'picked up' by sub-sec 68(2) of the Judiciary Act because that provision is limited to conferring on state courts exercising federal criminal jurisdiction 'the like jurisdiction' those courts have when dealing with state offences and is not concerned with the content of the powers to be exercised under that jurisdiction. None of the other sub-sections of sec 68 are capable of picking up the Costs Act.

Their honours also rejected the argument that sec 79 of the Judiciary Act rendered the Costs Act a surrogate federal law, the powers in which were then applicable in District Court proceedings involving the exercise of federal jurisdiction. Section 79 provides that:

The laws of each state or territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that state or territory in all cases to which they are applicable.

After noting the principle set out in *The Commonwealth v Mewett* (1997) 191 CLR 471 at 556 that sec 79 cannot operate selectively to pick up portions of an integrated state legislative scheme if to do so would give an altered meaning to the severed part of the state legislation, their honours stated that a certificate granted through the operation of sec 79 would have been granted by the operation of federal law on the Costs Act, not under that Act itself. But sec 79 cannot transmute sec 4 of the Costs Act in the same way because sec 79 does not apply to the state officials specified in sec 4 of the Costs Act. It only applies to state or territory courts exercising federal jurisdiction.

An additional reason given in the joint judgment for rejecting the appellant's sec 79 argument is that sec 79 cannot operate to require or empower courts exercising federal jurisdiction to pass beyond the limits of Chapter III of the Constitution. The granting of a certificate under sec 2 of the Costs Act would involve a court exercising federal jurisdiction moving beyond the limits of the judicial power conferred by Chapter III. It would be 'productive of a futility, not the resolution of any claim or controversy' and would not amount to an exercise of an administrative function 'truly appurtenant' to the exercise of judicial power.

McHugh J took a broader view of sec 2 of the Costs Act,

In their joint judgment Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ noted the distinction between legislative provisions that confer jurisdiction and those that confer a power.

holding that it simultaneously confers both jurisdiction and power. However, he held that sub-sec 68(2) of the Judiciary Act does not invest a state court exercising federal jurisdiction with federal jurisdiction to grant a costs certificate under sec 2 of the Costs Act. McHugh J stated the reason for this as follows:

state jurisdiction under sec 2 of the Costs Act gives the court or judge authority to determine whether the applicant, as a person acquitted of an offence against state law, has the right to be granted a certificate, which is a condition for a compensatory payment out of the Consolidated Revenue Fund of New South Wales. The grant requires the Under Secretary and Treasurer to give consideration to an application, made on the basis of the certificate, whether the applicant should receive a payment. Thus, there can be no 'like jurisdiction' in this context unless the applicant for a certificate has been acquitted of a federal offence and a federal law requires some official to consider whether the costs specified in the certificate should be paid. There is no federal law - and no state law - that authorises the reimbursement of costs after an acquittal and the grant of a certificate in federally invested criminal jurisdiction sec 79 of the Judiciary Act does not do so because, as will appear, it binds only courts, not state or federal officials.

McHugh J reached the same conclusion as that set out in the joint judgment that sec 79 of the Judiciary Act cannot pick up sec 2 of the Costs Act because the selective application of sec 2 in the absence of the other provisions of the Costs Act would give it a meaning different from that which it has in state jurisdiction.

Kirby J held, as a matter of legislative construction, that sub-sec 68(2) and sec 79 of the Judiciary Act on their face and according to their terms operated to pick up and apply the provisions of the Costs Act to the appellant's proceedings in the District Court. However, his Honour held that the provisions of the Constitution forbid the conclusion that the Judiciary Act provisions pick up the Costs Act in federal criminal proceedings in the District Court for the reasons set out in the following passage:

The result is that, to the extent that the Judiciary Act might, read without appropriate regard to the Constitution, be thought to 'pick up' and apply the Costs Act to the appellant's proceedings, when the former Act is read alongside the Constitution, it cannot validly have such an operation. To read it in such a way would sever its link with the federal legislative powers that sustain it. Moreover, so read, it would conflict with a fundamental postulate of the Constitution that respects and upholds the control over the state Consolidated Revenue Fund of the state parliament, save to the extent that the federal Constitution or valid federal law expressly or implicitly provides otherwise. Here there is no such express or implied provision.



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Determining the limits of an exclusionary provision under the Trade Practices Act 1974

By Ian Pike

Section 45(2)(a)(i) of the *Trade Practices Act 1974* (Cth) prohibits a corporation from making a contract or arrangement, or arriving at an understanding, if the proposed contract, arrangement or understanding contains an 'exclusionary provision'. Section 45(2)(b)(i) prohibits a corporation from giving effect to an 'exclusionary provision'.

These two prohibitions attempt to strike at the heart of market rigging practices and are an important weapon in achieving the overall purpose of Part IV of the TPA of procuring and maintaining competition.

Two recent decisions of the full Federal Court have considered the scope of the prohibition and have expressed, on one reading of the two judgments, conflicting views as to what amounts to an exclusionary provision. This article considers the recent cases.

In respect of one of the cases – the *South Sydney Rugby League* case – the High Court has granted special leave to appeal, with argument having been heard on the appeal, and judgment currently reserved. It is hoped that the High Court will clearly delineate what is, and what is not, an exclusionary provision.

The elements of an exclusionary provision

Exclusionary provisions are defined in sec 4D of the Act. It provides as follows:

(1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:

(a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any two or more of whom are competitive with each other;

(b) the provision has the purpose of preventing, restricting or limiting:

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

by all or any of the parties to the proposed contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.

(2) A person shall be deemed to be competitive with another person for the purposes of subsection (1) if, and only if, the first-

mentioned person or a body corporate that is related to that person is, or is likely to be, or, but for the provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding would be, or would be likely to be, in competition with the other person, or with a body corporate that is related to the other person, in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates.

Exclusionary provisions are generally referred to as either collective or primary boycotts: see *Gallagher v Pioneer Concrete (NSW) Pty Ltd* (1993) 40 IR 304 at 352 per Lockhart J. It is generally held that there are three elements that must be satisfied in order for there to be an exclusionary provision:

1. a provision of a contract arrangement or understanding made between the persons, any two of whom are competitive with each other;

2. the provision of the contract, arrangement or understanding must be for the purpose of preventing, restricting or limiting one of the acts referred to in sec 4D(1)(b); and

3. the purpose of the provision of the contract arrangement or understanding must relate to the supply of services to or the acquisition of services from particular persons or particular classes of persons in particular circumstances or in particular conditions: see *Trade Practices Commission v TNT Management Pty Limited* (1985) 6 FCR 1 at 74.

An exclusionary provision is a per se prohibition, there is no need to prove a substantial lessening of competition, and therefore no need to engage in an analysis of markets. This approach may reflect a belief that primary boycotts invariably lessen competition and that as a result, it would be wasteful to require this to be established in every case. One reason for the strict per se approach is that boycotts may be seen as objectionable on non-economic grounds as well as because of their potential to have an adverse impact on competition. In particular, they are disliked because they can be used to take away the freedom of firms and individuals to trade as they wish and because they can be used to threaten the very existence commercially or professionally of targets having little or no countervailing economic power. The potential for boycotts to generate and exploit power is seen as inherently objectionable, regardless of whether or not they are used to lessen competition. For this reason they are seen as being properly the subject of a per se prohibition: see *Clarke & Corones, Competition Law and Policy Cases and Materials*, Oxford 1999 at 252-3.

1. Competitive with each other

For there to be an exclusionary provision, the contract, arrangement or understanding must have been made between two or more people who are competitive with each other. Section 4D(2) contains a deeming provision for this purpose. It deems people to be competitive with each other *only* if:

- they or related bodies corporate are or are likely to be

The potential for boycotts to generate and exploit power is seen as inherently objectionable, regardless of whether or not they are used to lessen competition.

competitive with each other; or

- they or related bodies corporate would be or would be likely to be competitive with each other but for the contract, arrangement or understanding

in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision relates.

The key element in this regard is that the area of competition has to coincide with the area of contractual restriction in relation to the exclusionary provision: see *Eastern Express Pty Limited v General Newspapers Pty Ltd* (1991) 30 FCR 385. Put another way, there will not be an exclusionary provision if the parties to the contract, arrangement or understanding are in competition with one another, but in respect of goods or services different to those which the alleged exclusionary provision relates.

2. Purpose

For a provision of a contract, arrangement or understanding to amount to an exclusionary provision, the provision must have the purpose of ‘preventing, restricting or limiting’

- the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or
- the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions.

Purpose in this regard, has been held to refer to the subjective purpose of the parties to the contract, arrangement or understanding: see *ASX Operations Pty Limited v Pont Data Australia Pty Limited (No. 1)* (1990) 27 FCR 460. In the absence of direct evidence of the parties’ intention, regard can be paid to all the surrounding circumstances including their conduct and the natural consequences of that conduct: see *Hughes v Western Australian Association (Inc)* (1986) 19 FCR 10 at 38 per Toohey J.

Further, sec 4F of the Act makes it plain that it is sufficient that a purpose was or is a substantial purpose, it need not be the sole purpose: see *News Limited v Australian Rugby Football Ltd* (1996) 64 FCR 410.

The purpose of a provision is determined at the time that the contract, arrangement or understanding is made: see *Stokely-Van Camp Inc v New Generation Beverages Pty Limited* (1998) ATPR 41-657 at 41,297 per Young J.

Preventing, restricting or limiting

The provision must have the purpose of preventing, restricting or limiting the supply or acquisition of goods or services from or to particular persons or classes of persons.

They boycott must relate to ‘goods or services’. These terms are defined broadly in sec 4(1). Excluded from the definition of services is ‘the performance of work under a contract of service’. In *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242 (the Rugby League Draft Case) it was held that because rugby league players were employed by their clubs under contracts of service, they did not supply services within sec 4(1) the acquisition of which could be the subject of a boycott by those clubs.

In this regard, ‘prevent, restrict or limit’ are words of ordinary English usage.

3. Persons or class of persons

The purpose of the provision must be to prevent, restrict or limit the supply or acquisition of goods or services to or from, ‘particular persons or classes of persons’. It is clear in this regard that the persons or class of persons must be identified. It is not an exclusionary provision if there is no particular person or class of

person that is the subject of the proposed restriction. It has been held that the adjective ‘particular’ applies both to ‘person’ and ‘class of person’.

In *ASX Operations Pty Limited v Pont Data Australia Pty Limited (No. 1)* (1990) 27 FCR 460 at 487-488, the full court of the Federal Court held that the particular persons or class of persons may be identified by the fact that they were precluded from access to certain goods or services unless they accepted certain restraints imposed by the supplier. In other words, the particular persons or class of persons, can be defined by the simple fact of exclusion.

This aspect of an exclusionary provision has been considered recently in two cases – *South Sydney District Rugby League Football Club Limited v News Limited & Ors* (2001) 111 FCR 456, and *Rural Press Limited v Australian Competition and Consumer Commission* [2002] FCAFC 213. These cases are discussed in more detail below. For present purposes, it should be noted that what constitutes a particular class of person for the purposes of sec 4D is uncertain. The High Court has heard argument in the South Sydney appeal, and it is hoped that when judgment is handed down in this matter, the High Court clarifies the precise meaning of ‘particular persons or classes of persons’.

Recent cases on exclusionary provisions

The recent decisions of the full Federal Court in *South Sydney* (supra) and *Rural Press* (supra) provide useful illustrations of what is, and what is not, an exclusionary provision.

South Sydney District Rugby League Football Club Limited v News Limited & Ors (2001) 111 FCR 456 concerned the well-known restructuring of Rugby League in Australia after the conduct of separate ARL and Super League competitions, which resulted in South Sydney being excluded from the 2000 rugby league season.

It will be recalled that in 1997 there were two premier rugby league competitions, the ARL Optus Cup competition organised by the Australian Rugby League and the Super League competition organised by News Limited and its subsidiaries. Twelve clubs fielded a team in the ARL Optus Cup competition, and ten clubs fielded a team in the Super League competition. It was universally accepted that the running of two competitive rugby league competitions was not only a financial disaster, but was killing rugby league as a sport. As a result, in December 1997, News and the ARL reached an agreement to merge the two competitions into one unified competition, the National Rugby League (NRL) competition.

In December 1997 the ARL and News each publicly announced the details of an in-principle agreement to merge the two competitions. The arrangements were then formally documented over the following six months.

The essential elements of the agreement included that a joint venture company owned by News and ARL would grant licenses to participate in the unified NRL competition, that applicants would have to satisfy licence criteria determined by that company, that twenty teams would be licensed to play in 1998, sixteen teams would be licensed to play in 1999, fourteen teams would be licensed in 2000 (the 14-team term), mergers or joint ventures before certain dates would receive financial grants and a longer license, and licenses would be allocated in the following order of priority: merged clubs, regional clubs and stand alone Sydney clubs.

A finalised version of the criteria to be used to reduce the number of teams, was adopted in September 1998. The criteria

included basic criteria, to be satisfied by all clubs, dealing with such matters as playing facilities and solvency, and selection criteria, which were to be applied to all clubs that had participated in the relevant years.

The unified NRL competition began in 1998. Two super league clubs had ceased to exist at the end of 1997 and one ARL did not participate in the unified NRL competition in 1998. The nineteen remaining clubs and one new club each fielded a team in the NRL competition making up the allocated twenty teams for the 1998 NRL season. At the end of 1998, two clubs withdrew teams from the NRL competition and two other clubs merged so as to field a combined team. Consequently, the 1999 NRL season commenced with seventeen clubs fielding seventeen teams. In late July 1999, a joint venture was formed between another two clubs which fielded a combined team. The consequence was that sixteen teams played in the 1999 NRL competition, as agreed. Souths fielded a team in both the 1998 and 1999 NRL season.

Under the 14-team term, the 2000 NRL competition was to be limited to 14 teams. This meant that there would have to be a reduction of two teams from the sixteen that had been available at the end of 1999. One club (Norths) failed, for solvency reasons, to meet the basic criteria for eligibility to compete in the 2000 NRL competition. It later entered a joint venture with another club (Manly) to field a combined team (the Northern Eagles). Souths met the basic criteria but received the lowest number of points under the selection criteria. Souths was therefore excluded from the 2000 NRL competition by reason of the 14-team term. Souths were advised of their exclusion on 15 October 1999.

In November 1999, Souths commenced proceedings in the Federal Court claiming that the 14-team term was an exclusionary provision within sec 4D(1) of the Act, and that there was a breach of sec 45(2) of the Act. Souths sought an interlocutory injunction to enable it to participate in the 2000 NRL competition. This injunction was refused (see *South Sydney District Rugby League Football Club Ltd v News Ltd* (1999) 169 ALR 120 per Hely J). A substantive trial was then heard before Finn J, who dismissed Souths' claim (see *South Sydney District Rugby League Football Club Ltd v News Ltd* (1999) 177 ALR 622). Souths then appealed to the full Federal Court which, by a 2–1 majority (Moore and Merkel JJ, Heerey J dissenting), upheld the Souths appeal. The High Court granted News special leave to appeal from the decision of the full court of the Federal Court. Argument was heard on the substantive appeal on 6 August 2002, and judgment is currently reserved. (For a detailed case note on the decision of the full Federal Court see Duns 'Super leagues and primary boycotts – a whole new ball game' (2002) 10 TPLJ 115).

Souths contention was that the 14-team term amounted to an exclusionary provision in that:

- 1) there was an agreement or understanding between the ARL and News, being competitors in relation to competition organising services, or in relation to the acquisition of team services;
- 2) One provision of the agreement or understanding was the 14-team term. The purpose of the 14-team term was to prevent, restrict or limit the supply or acquisition of four discreet types of services:
 - a) organising and running top level rugby league competitions;
 - b) acquiring the services of rugby league teams;
 - c) supplying entertainment services; and

d) providing funding to clubs participating in the top level rugby league competitions; and

3) the 14-team term had the purpose of

a) restricting or limiting the supply of competition organising services to particular persons, namely '...the clubs which have participated in the ARL competition and the Super League competition prior to 19 December 1997 and who have not withdrawn from those competitions before that date'; and

b) preventing the supply of competition organising services to particular classes of persons, namely:

- i) the clubs which participated in the 1997 ARL and Super League competitions and who have not withdrawn from those competitions before that date, other than the 14 clubs (including merged clubs as a single club), who would be selected to participate in the competition from the year 2000; and
- ii) all rugby league clubs which were willing and able to participate competitively in a top level rugby league



South Sydney Rabbitohs celebrate appeal court victory at South Sydney Leagues club. Photo: Andy Baker / News Image Archive

competition other than the 14 clubs (including merged clubs as a single club) who would be selected to participate in the NRL competition from the year 2000.'

The two key issues were 'purpose' and 'class of persons'.

Finn J rejected Souths' contention that a substantial purpose of the 14-team term was one of the proscribed purposes. Whilst Finn J held that both News and the ARL had the purpose of encouraging mergers or joint ventures to avoid exclusion of clubs from the services, it was one of their purposes that, if the requisite reduction in numbers could not be achieved by joint ventures and mergers, then one or more of the clubs that had participated in the 1997 season in either competition would be denied entry in 2000. Notwithstanding this, Finn J concluded that the 14-team term was included in the overall understanding to create a new business running a new competition. This was to secure the future of the game, to ensure that rugby league was financially viable and sustainable in the future. In effect, the purpose of the 14-team term was to achieve the viability and sustainability of a national competition. Finn J also held that there was no particular class of

person the subject of the prevention, restriction or limitation. It was not possible to define the class simply by reason of the fact of their not being selected.

There was a divergence of views expressed by the three members of the full court (Heerey J, Moore J and Merkel J) on these two issues. The discussion of these issues by the three members of the full court highlights the difficulties in the two concepts. Hopefully, the High Court will provide some guidance in its judgment.

Heerey J dissented in the full court. He agreed with Finn J that the purpose of the 14-team term was not one of the prescribed purposes, and that in any event, there was no particular class of person, the subject of the prevention, restricting or limiting.

The essence of Heerey J's reasoning on purpose was as follows:

- the trial judge found (and this was not challenged on appeal) that of the three key persons involved (Messrs Whittaker, Macourt and Frykberg) - none of those gentlemen wanted or desired or sought to achieve the exclusion of Souths (or any other club or clubs) from the 14-team competition in 2000. They believed that in the two years that followed mergers and joint ventures – encouraged by very substantial financial assistance – would result in all clubs being accommodated in a 14-team competition, which was in their view the only viable solution for the possible terminal crisis facing top level rugby league in Australia;
- the inherent logic of these findings was compelling. Why would the men running rugby league want to exclude Souths, or any other club?;
- the recognition of a possible outcome detracting from the desired purpose does not alter of the nature of the purpose. Assume a surgeon is about to perform a major operation which historically has had a fatal outcome in 10 percent of cases. The surgeon knows and accepts this, but believes the operation is essential and the risk acceptable (as does the properly informed patient). If the operation is not performed the patient is likely to die anyway. The operation is performed but the risk materialises and the patient dies. It would surely be a misuse of language to say that the purpose (or a purpose) of the surgeon in performing the operation was to cause the patient's death;
- as at 19 December 1997, any exclusion of a club for the 2000 14-team competition was two years in the future. It was something hypothetical and dependent on multiple, interacting contingencies; and
- exclusion of clubs was not a purpose at all.

Moore J and Merkel J held that the 14-team term was included for a proscribed purpose, although they reached this result by different reasoning. The essence of the reasoning of Moore J was as follows:

- a purpose of the 14-team term, which was a substantial purpose, was to bring about a situation where some of the clubs participating in the rival 1997 competitions would not field their team in the year 2000 as they had done in 1997 but would do so in conjunction or collaboration with other clubs. This meant that the services that would be supplied or acquired from 2000 onwards would be restricted or limited in comparison with the services that had previously been supplied and acquired; and

- the fact that the 14-team term was included in the 19 December understanding to achieve particular commercial objectives which were, in a sense, unexceptionable, did not lead to some other characterisation of the purpose of the 14-team term.

The third member of the court, Merkel J, reasoned thus on the issue of purpose:

- the recognition of a possible outcome detracting from the desired or intended purpose does not alter the nature of the purpose (and in this sense be agreed with Heerey J);
- Finn J did not conflate the overall purpose of the agreement, arrangement or understanding with the purpose of the 14-team term;
- Finn J failed to distinguish between the purpose of the club merger, joint venture and regional participation provisions (referred to as the 'carrots') on the one hand and the purpose of the 14-team term (referred to as the 'stick') on the other. His Honour appeared to assume that the purposes of the two sets of provisions can be conflated. If the two sets of provisions have discrete purposes, which is a question of fact, his Honour would have fallen into error in conflating the purpose of the merger, joint venture and regional participation provisions with the purpose of the alleged exclusionary provision;
- Finn J's conclusion that the 14-team term was only a means to an end did not absolve him from determining the purpose of the means selected; whether it was a substantial purpose and, if so, whether it was a prescribed exclusionary purpose;
- the ultimate purpose of the term (the end) is the achievement of a viable and sustainable competition, but its immediate purpose (the means) is to exclude any clubs or entries in excess of the 14 selected to provide teams to participate in the 2000 NRL competition. Put another way, the immediate purpose is to limit or restrict the supply or acquisition of the relevant services to or from (as the case may be) the 14 clubs or entities selected to provide the 14 teams. The ARL partners' contention that the possibility of exclusion as a result of the 14-team term was an 'undesired consequence' of the term incorrectly focuses on the purpose of clause 7 rather than on the purpose of the 14-team term; and
- the purpose of the 'stick' was to achieve exclusion.

The second issue was whether there was a particular class of persons the subject of the boycott. Again, the court was split two one (Moore and Merkel JJ in the majority, and Heerey J in the minority) on this issue. Heerey J's reasoning was as follows:

- The reasoning of the High Court in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 to the effect that a 'particular social group' cannot be defined by the fact of persecution itself, applies to the concept of 'particular classes of persons' in sec 4D. To define the class, there must be something more than the fact of persecution (in the immigration sense) or the fact of exclusion (in the section 4D sense). The whole point of a boycott is that the conduct or interests of some person or class of persons is seen as being inimical to the interests of the boycotters. The boycott is adopted as a means of inflicting some adverse consequences on that person or class. A boycott necessarily involves a target, a person or persons 'aimed at specifically'. It is hard to see how this notion can apply to a class not

defined in advance but only defined in an essential respect by the fact of exclusion, if and when it happens. And if it is wrong, as Heerey J thought, to have a class defined by the fact of exclusion, it is in principle no different when exclusion is one of a number of defining characteristics. Either way, the class cannot be ascertained unless and until all putative members satisfy the test of exclusion – whether or not other tests must be satisfied;

- The class must be defined by some shared characteristic before it can be aimed at. The rules of good marksmanship dictate that the shooter first identifies the target and then aims at it;
- If Souths argument be correct, competitors who enter into a partnership and agree to provide a lesser range of services or goods (or deal with a narrower range of customers) will have contravened sec 45(2);
- If the argument be correct, there is an inevitable slide into prohibition of conduct which amounts to no more than persons deciding the limits of the business in which they wish to engage;

• Had this issue been determinative in the outcome of the case, Heerey J would have reconvened the full court, for the purposes of arguing the correctness of the earlier full court decision in *Pont Data*.

Moore J's reasoning was as follows:

• The expression (particular persons) is to be taken to be a reference to identified or identifiable persons whether or not there are other identified persons or otherwise on whom the apparently exclusionary provision is not intended to operate. That is, it is not necessary that a provision operates selectively in the way just discussed for it to be an exclusionary provision;

• Section 4D(1)(b) should have a wide operation in circumstances where the identity of each of the persons on whom the alleged exclusionary provision might operate are neither ascertained nor ascertainable at the time the agreement was entered.

Moore J did not need to consider the meaning of 'classes of persons', because he was satisfied that Souths were 'particular persons' for the purposes of section 4D.

The third member of the court, Merkel J, reasoned as follows on the issue of particular class of persons:

- In the present case it is more accurate to identify the distinguishing exclusionary factor by reference to the reason for the intended exclusion, that is, a club's failure to meet the requisite level in the selection criteria for inclusion in the 14-team NRL competition as from 2000 by reason of 14 other clubs better satisfying the criteria;
- In each case it is necessary to identify the characteristic distinguishing the class in order to determine if it is sufficiently particular to constitute a particular class that is the object of an exclusionary purpose proscribed by sec 4D(1). The fact of exclusion, without more, may not be a sufficient formula or distinguishing characteristic to identify the particular class intended to be excluded;
- The characteristic that identified and distinguished the class

intended to be excluded from participation, and makes it particular, was that its members, the top level rugby league clubs eligible to participate (for example, by meeting the 'basic criteria') by not having the requisite level in the selection criteria achieved by 14 other clubs or entities, would not be supplied with team organisation services and team services would not be acquired from them. Accordingly, the particular class the subject of the NRL partners' exclusionary purpose has a distinguishing or identifying characteristic in addition to the mere fact of exclusion; and

- Although the matter is not free of doubt, Merkel J concluded that the objects of the NRL partners exclusionary purpose are sufficiently distinguishable and specific to constitute a particular class.

As set out above, there was a divergence of views amongst the three members of the full court in *Souths*. On the majority reasoning, an exclusionary provision is a term of extremely wide import. The criticisms of Heerey J appear however to be appropriate – it would be an exclusionary provision for two competitors to form a partnership and then determine to restrict, or somehow limit, either the services or goods that are supplied by the new venture, or the customers to whom those goods or services are to be supplied. It is hoped that the High Court will clarify the meaning to be given to each of the key provisions in sec 4D.

Rural Press arose out of a decision in April 1998 by Waikerie Printing, the publisher of the *River News* regional newspaper, to withdraw from actively promoting circulation of the newspaper in the Mannum Area of South Australia and to revert to its previous 'prime circulation area', stopping at a line some 40 kilometres north of Mannum.

The allegation by the ACCC was that Rural Press and Bridge Printing (a wholly owned subsidiary of Rural Press), publishers of regional newspapers in adjoining areas, caused Waikerie Printing to withdraw from the Mannum area.

At the relevant times, Bridge Printing published the *Standard* in Murray Bridge, a township east of Adelaide with a population of about 13,000. The *Standard* was published twice weekly, on Tuesdays and Thursdays, at a price of 90 cents. Its circulation was about 4000 to 5000 on Tuesdays and about 4500 on Thursdays. The *Standard* covered local news occurring in the Murray Bridge district and solicited advertising mainly from that district.

Importantly, the prime circulation area for the *Standard* extended north upstream along the Murray River to include the township of Mannum (population 2000), 30 kilometres from Murray Bridge.

The *River News* was published twice weekly by Waikerie Printing, at a price of 60 cents, and had a circulation of about 2,000 to 2,500. Whilst a few copies of the *River News* were sold in Mannum, it was not regarded as part of the prime circulation area of the *River News*.

After the establishment of the Mid-Murray Council on 1 July 1997 (formed by the amalgamation of several district councils), the area of Mannum became part of Mid-Murray Council. The Managing Director and Editor of the *River News* decided that it would benefit the *River News* if it circulated through the whole of the Mid-Murray Council area. Procedures were put in place to source material and advertisements from Mannum and the River News expanded from 24 pages to 28 pages in order to carry material from the Mannum area. The extended circulation of the

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River News increased its circulation by 100 to 180 copies per week.

Thereafter there was considerable communication between, on the one hand, Rural Press and Bridge Printing, and on the other hand Waikerie Printing. The effect of the communications was that if Waikerie Printing did not keep the *Rural News* to its prime circulation area, Rural Press would have to respond commercially and that response might include publishing a newspaper in the Riverland area, being the prime circulation area of the *River News*.

In about April 1998, after considerable communication between the parties, the *River News* withdrew from Mannum, and thereafter ceased promoting circulation in the Mannum area and gathering Mannum news. It also ceased seeking advertising revenue on Mannum. In effect, it reverted to its prime circulation area.

The ACCC alleged that Rural Press and Bridge Printing engaged in conduct in contravention of sec 46 of the Act and that Rural Press, Bridge Printing and Waikerie Printing each contravened sec 45(2) of the Act. At first instance, Mansfield J upheld the ACCC's claims. On appeal, Rural Press and Bridge Printing were partially successful in that they overturned Mansfield J's finding of an exclusionary provision. The findings of Mansfield J of a breach of sec 45(2)(a)(ii) and sec 46 were upheld.

The unanimous judgment of the full court (Whitlam, Sackville and Gyles JJ) on exclusionary provisions, provides a useful contrast to the reasoning in *Souths*.

The principal argument of Rural Press on the issue of an exclusionary provision was that Mansfield J had erred in finding as to a class of persons the subject of the boycott. The argument was that Mansfield J had defined the class by reference to those who were excluded by the alleged provision. Further, it was contended that even if a particular class can be defined by exclusion, the provision alleged to be an exclusionary provision must nevertheless be aimed at the relevant class.

The court considered the legislative history of sec 4D. The court remarked (at [93] to [95]) as follows:

[93] What is the special feature marking out this particular form of restraint between competitors for such draconian treatment, compared with the myriad of other anti-competitive agreements that might be arrived at between competitors, which are

to be judged according to their effect upon competition in a market? It must, we think, lie in the abhorrence of a boycott, namely, an intentional shutting-out of particular persons or classes of persons from access to goods or services, where that is the aim or object of the agreement.

[94]

[95] The rationale which we favour is pellucid in relation to sec 4D as originally framed, since it required the target to be a particular person or persons who would obviously need to be individually identified at the time the prohibited conduct came into effect.'

It was not until 1986 that the words 'or classes of persons' were added into sec 4D. This was because, ordinarily, you could not identify each person the subject of the boycott.

The full court expressly stated that they agreed generally with

the construction of sec 4D outlined by Finn J at first instance in *Souths*, an approach which broadly accords with that taken by Heerey J in the full court (see [99]).

The exclusionary provision case was really one where it was alleged that a market sharing arrangement on a geographic basis amounted to an exclusionary provision. There was no discussion by Mansfield J, however, which pointed to any of the persons involved in the arrangement having the actual purpose of specifically targeting the persons in the nominated geographic area or communicating such a purpose among themselves. The real purpose of Rural Press and Bridge Printing was to maintain their market power in Murray Bridge and to tell competitors to 'keep off their grass'.

Whilst it was obvious that the provision for geographic zoning would limit the ability of persons in the area to have access to a second local newspaper, that was the effect of the arrangement, not its purpose.

The full court concluded that 'market sharing or zoning of the kind involved in the present case, without more, is not an exclusionary provision' (see [104]). It was not necessary for the full court to consider the correctness of *Pont Data* because of the court's conclusion that there was no evidence or finding that the parties agreed upon a particular class at the time that the arrangement came into effect.

The decision of the full court provides a useful discussion of the elements of an exclusionary provision and demonstrates the distinction that exists between exclusionary provisions on the one hand and agreements etc that have the purpose or effect of substantially lessening competition on the other.

Conclusion

It is submitted that there are difficulties associated with both of the recent decisions discussed above. In relation to the *South Sydney* case, on the basis of the result reached by the majority of the full court, and as noted by Heerey J in dissent, if competitors were to form a joint venture for a limited purpose, and seek to restrict, in any way shape or form, the services that are supplied by the joint venture, or to whom those services are supplied, that would likely amount to an exclusionary provision. In relation to *Rural Press*, the result would suggest that geographic market rigging arrangements will not amount to an exclusionary provision, and will only contravene the Trade Practices Act if they have as their purpose, or likely effect, a substantial lessening of competition, or amount to a misuse of market power. This is not withstanding the fact that an exclusionary provision was intended to target market rigging arrangements, and to be a per se prohibition.

As set out above, it is hoped that the High Court in the *Souths* case clarify what is meant by the key concepts of an exclusionary provision and therefore give some guidance to practitioners as to what is, and what is not, an exclusionary provision.

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2002 Sir Maurice Byers Lecture

Legalism, realism and judicial rhetoric in constitutional law

Delivered by Professor Leslie Zines[†] AO at the New South Wales Bar Association on 16 October 2002

In the past few years Sir Maurice Byers's peers have testified to his outstanding ability as an advocate in all types of cases, whether involving narrow technical points or broad concepts and principles.

It would be regarded as an impertinence for me to say anything about that – particularly in this company. I do, however, want to express my personal view that Sir Maurice was most joyous when he had a case which provided him with a large canvas on which to work; involving big principles, fundamental doctrines, important policies and large consequences.

During the last years of his life he said that there were four cases of which he was most proud.¹ They were:

1. The *Tasmanian Dam Case*² decided in 1983 and which, among other things, gave a broad, one might say national, interpretation to the external affairs and corporations powers and upheld legislation prohibiting Tasmania from building the Franklin Dam.
2. *Australian Capital Television Pty Ltd v Commonwealth*³ which held in 1992 that there was in the Constitution an implied freedom of communication on political and governmental matters, and which held invalid an attempt to restrict the broadcasting of such matters.
3. *Wik Peoples v Queensland*⁴ decided in 1996, which held that the existence of a pastoral lease under Queensland legislation was not necessarily inconsistent with the exercise of native title rights.
4. *Kable v DPP*⁵ decided in 1997, which held that Chapter III of the Constitution — the Judicature chapter — restricted a state's power to control its courts, either if they possessed federal jurisdiction (which is probably all of them) or, alternatively, when they exercise that jurisdiction. The Act providing for the continued detention of Gregory Wayne Kable, subject to periodic judicial review, was held invalid, because it was incompatible with the court's federal jurisdiction.

Each of these cases established new doctrines or principles, which became a new starting point for future development, forensic argument and scholarly exposition. Each of them was, substantially, decided by a majority of four judges. Each of them, within its scope, changed the way we perceive things; that is, what we legally take for granted. Each of them, in varying degrees, caused strong, sometimes bitter, criticism and, in the case of the first three, outrage from a variety of sources. These included business, farming and mining groups, state and federal governments and politicians, editorial writers and what are known as radio 'shock jocks', as well as some lawyers, judges, and former judges.

Sir Harry Gibbs in retirement gave papers and wrote articles attacking the *Tasmanian Dam Case* as a threat to the federal system.⁶ Sir Garfield Barwick, after having, in the media, upbraided the court for *Cole v Whitfield*⁷ (the case which revolutionised the interpretation of sec 92), which he called nothing but 'tosh', delivered a paper to the Samuel Griffith Society declaring that the *Australian Capital Television Case* threatened Australian democracy.⁸

In all these cases (although to a lesser extent in *Tasmanian Dam*) the arguments which led to success could be described as novel and professionally imaginative. However, an argument which seems to have those qualities to some persons or in one particular period might appear as absurd, way out or illegitimate to other persons or at other times.

Sir Maurice's arguments fell on receptive ears as far as the majority of the court was concerned. But I think it is not improbable that if each of those cases had arisen for decision fifteen or twenty years earlier the arguments which later found favour would have been rejected and, in some cases, quickly rejected.

I well remember Sir Garfield Barwick telling me that he could not understand why Justice Richard Blackburn had taken months to hear and determine the *Gove Land Rights Case*⁹ in 1971 (the first attempt at recognition of native title) when he (Barwick) could have wrapped it up in twenty minutes. I do not think he meant that he would have decided in favour of native title.

It is this phenomenon which brings me to the thrust of this address, which could be subtitled 'Changing fashions in constitutional interpretation and judicial rhetoric'.

The nineteenth-century historian, Thomas Babington Macaulay, would occasionally introduce some obscure fact, for example relating to the Aztec empire, by saying 'As every schoolboy knows'. I think I am fairly safe in saying that, as many Australian lawyers know (and the rest ought to know), Sir Owen Dixon on being sworn in as chief justice fifty years ago said he would be sorry if the High Court was *not* regarded as excessively legalistic, because there was no other safe guide to constitutional decisions than a strict and complete legalism. It was the only way to maintain the confidence of all parties in great federal conflicts.¹⁰

Whatever Sir Owen meant by that, it did not stop him from inferring a particular theory of federalism and intergovernmental relations, not from any specified provision or group of provisions, but from what he called 'the very frame of the Constitution'.¹¹

Legalism did not prevent the Dixon court from finding a broad doctrine of the separation of judicial power in Chapter III of the Constitution, resulting in the overthrow of the Arbitration Court, which had been thought valid for thirty years.¹²

Section 90 of the Constitution, making exclusive Commonwealth power in respect of customs and excise duties and

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bounties, was interpreted by Dixon J in accordance with a policy he divined of giving the Commonwealth a real control of the taxation of commodities and, therefore, of the levels of production, unhampered by state taxation policies.¹³

In the *Communist Party Case*¹⁴ he resorted to the broad political and philosophical concept of the rule of law, as an ‘assumption’ of the Constitution, to determine the scope of Commonwealth power.

It is clear that whatever ‘strict and complete legalism’ referred to, it was not inconsistent with the finding of some large implications in the Constitution, with attributing broad social and economic purposes to particular provisions, or with the application of external theories and concepts in constitutional interpretation.

But what one did not find, generally speaking, was any recognition that legal reasoning applied to the provisions of the Constitution could, at least sometimes, lead to more than one legally sustainable conclusion from which a judge had in some way to choose. This might rationally require consideration of what in the circumstances was either just or socially desirable; in other words, of values or policies. That in turn might require an

examination of the social consequences of any particular interpretation.

Under legalism any difference among judges was put down to a difference of ‘impression’ (to use the language of Gleeson CJ) or of ‘perception’, as used by Stephen Gageler in a concise and lucid entry on legalism in the *Oxford Companion to the High Court of Australia*.¹⁵

Sir Owen Dixon elaborated on the matter in a lecture given at Yale Law School in 1955, but this time in the context of common law and equity. His aim was to show how it was, sometimes, possible to avoid an undesirable conclusion that seemed to follow from a simple application of legal rules by means of an aspect of legal methodology, which he called ‘logic and high technique’.¹⁶

He spent little time, however, on the motive for using the high technique, namely, to ensure a just or socially preferable decision. Sir Owen declared that a legal principle should not be abandoned in

the name of justice or social necessity or of social convenience. Yet it appears that those ends could be the spur for the use of logic and high technique in order to achieve them. What this came down to was that change had to come out of existing doctrine.

In his lecture he said that it was taken for granted that the court’s decision will be ‘correct’ or ‘incorrect’, ‘right’ or ‘wrong’, as it conforms with ascertained legal principles. The court would, he declared, feel that the function it performed had lost all meaning and purpose if there were no external standard of legal correctness.

In the case of the Constitution the standard is the text and the legal rules and principles that govern its interpretation.

Sir Garfield Barwick (who had expressed support for Dixon CJ’s remarks, as providing for stability in constitutional law)¹⁷ was presumably applying the method of strict and complete legalism when, in 1980 in the last important sec 92 case he presided over,¹⁸ he said, in relation to the words ‘absolutely free’, that his duty was merely to give effect to the language of sec 92. Nothing he had ever written, he added, had depended on any other consideration than the words of the Constitution.¹⁹

The appointment of Lionel Murphy to the court in 1975 put an

end to the view Dixon had expressed in his lecture that the court had produced no deliberate innovator bent on express change of acknowledged doctrine, but Murphy did not seem to influence other judges, at any rate while he was on the bench. Nevertheless there was some movement away from strict legalism, as understood by Sir Owen Dixon, in the late 1970s. In 1977 the court was asked to overrule a case, decided only the year before, upholding legislation providing for full Senate representation for the two mainland territories.²⁰ It was argued that that case should not be followed because it was ‘plainly wrong’. Stephen J and Mason J, who had been on opposite sides in the earlier case, each said that that decision could not be called, in any true sense, right or wrong because, so far as the text and recognised legal principle were concerned, the competing arguments were all rational.²¹ As Stephen J put it, ‘no one view could be regarded as inherently entitled to any pre-eminence in conforming better than others to principle or precedent’.

The issue in the first case was thus which of two competing values or policies should prevail: federalism or representative government?²²



Members of the Tasmanian Wilderness Society celebrate the High Court decision to prevent a dam being built on the Gordon-below-Franklin river. July 1983. Photo: News Image Archive

The first of the four cases mentioned by Sir Maurice Byers — the *Tasmanian Dam Case* — was probably the beginning of an express recognition that the text and accepted legal rules and principles of interpretation will not always determine the issue, and that it may be necessary to resort to other factors if a reasoned conclusion was to be reached; that is, one not fudged or disguised by indeterminative doctrinal language.

The majority and the minority judgments are replete with policy considerations and value judgments. While the issue was the meaning of ‘external affairs’, the judicial debate was about the place of Australia in the world and the relationship of the states to the nation.

In 1986, the year before he became chief justice, Sir Anthony Mason, in a lecture delivered at the University of Virginia, said that the court was moving away from the doctrine of legalism ‘toward a more policy oriented constitutional interpretation’.²³ Later he referred to the new approach as ‘a species of legal

The ever present danger is that ‘strict and complete legalism’ will be a cloak for undisclosed and unidentified policy values.

realism'.²⁴ He said that the judges took account of the relevant policy considerations for the principles of law and, where appropriate, of community values. In his view the 'ever present danger is that 'strict and complete legalism' will be a cloak for undisclosed and unidentified policy values'.²⁵

During the time Sir Anthony was chief justice other members of the court accepted this general approach, which was not, of course, limited to constitutional law. Deane J, for example, spoke of occasions where the ordinary practices of legal reasoning are inadequate or the court finds it is necessary to reassess a rule 'in the context of current social conditions, standards and demands and to change or reverse the direction of the development of the law'.²⁶

Both before and after his appointment to the High Court McHugh J wrote articles which described the limits of legalism and the necessity for the application of values or the pragmatic consideration of social interests, even in constitutional and statutory interpretation.²⁷

Sir Gerard Brennan adopted the same approach, but seemed to make an exception in the case of constitutional law which is difficult to understand. He said that strict and complete legalism

masked the truth of judicial method.²⁸ In a tribute to Sir Anthony Mason he also said that 'the risk of confusion between judicial policy and political policy had to be run in order to guarantee the integrity of the judicial process and to bring the influence of contemporary values to bear on modern expositions of legal principle'.²⁹

This was no doubt particularly so because, as he said in his address on being sworn in as chief justice: '[T]he court has had to grapple with issues on which two or more views can reasonably be held'.³⁰ Yet in *Theophanous v Herald and Weekly Times Ltd*³¹ he said that, unlike the situation in respect of common law, 'In the interpretation of the Constitution judicial policy has no role to play'. If that is so he did not explain how the matter is resolved when the principles of interpretation lead, in his words, to 'two or more views that can reasonably be held'. Later, in the *Oxford Companion*,³² he said that changing values might call for new applications of the text in the light of contemporary conditions.

The period from the mid-1980s to mid-1990s, known as the Mason court, saw striking changes to our law in nearly all areas — common law, statutory interpretation, administrative law and constitutional law. In constitutional law an assault

was made on what was seen as one aspect of legalism, namely formalism. This manifested itself in the creation of a formula for determining whether a law came within a constitutional provision, usually a guarantee or a restriction on power.

The policy that had been declared to be the object of sec 90 was converted in the case of excise into a formula, namely whether the criterion of liability of the tax was the process of bringing goods into existence or passing them down the line to the point of receipt by the consumer.³³ Attention was, for a number of judges, concentrated on the interpretation and application of the formula (as to which minds differed) rather than directly to the declared purpose of the provision and the practical effect of the Act in

relation to that purpose.

Although the Dixon court (with the approval of the Privy Council) held that the object of sec 92 was to give the individual a right to engage in interstate trade, the test of whether the section was breached was whether the criterion of operation laid down in the legislation was an act of trade, commerce or intercourse or its interstate aspect.³⁴ Economic and practical effects and social policies were said to be irrelevant,³⁵ although they would occasionally sneak in under cover of a heap of technical language.

Section 117 prohibiting discrimination against non-alien residents of other states was held in 1973 not to be breached by a law which required twelve months residence in South Australia for admission as a legal practitioner of that state.³⁶ The reason was that the criterion of operation in the Act was not *permanent* residence.

It was difficult, in many cases, to see the point of these constitutional provisions or their declared purposes if they could be easily avoided by technical means and clever drafting.

The purpose of creating rules and formulae such as these seems to have been to confine the matters for judicial consideration to strict legal interpretation and to exclude taking into account social or economic effects in the particular case or the necessity to balance conflicting social interests or values. It did not work.

For one thing, the principles themselves needed interpreting. Some judges did so in a way that ignored the policy that begat the formula, some interpreted them in the light of the policy at the cost of some straining of the language, while others interpreted the formula with the purpose of impairing the original policy and to see it replaced by a new one.³⁷ A forthright attack was made on this approach in respect of all these constitutional provisions.³⁸ It was summed up in *Cole v Whitfield*³⁹ where the court made reference to

[T]he hazards of seeking certainty of operation of a constitutional guarantee through the medium of an artificial formula. Either the formula is consistently applied and subverts the substance of the guarantee or an attempt is made to achieve uniformly satisfactory outcomes and the formula becomes uncertain in its operation.

Therefore, during this period in many areas there was a rejection of formal criteria, a more open application of policy considerations, and, where appropriate, a deliberate balancing of conflicting social interests or values.

Another characteristic of this period was the use of rights and freedoms in the development of the common law, in statutory interpretation and administrative law.⁴⁰ In the case of constitutional law, apart from the few express provisions, rights and freedoms have arisen as incidents of institutions implied in the Constitution, namely, representative government and the separation of judicial power.⁴¹

It is not my purpose to discuss the nature of constitutional implications. An able and sophisticated description and analysis has been given by Dr Jeremy Kirk in two articles in the *Melbourne University Law Review*.⁴²

Also, I do not propose to discuss, generally, the place of rights and freedoms in High Court decisions. But two aspects of that subject are relevant to the general theme of constitutional interpretation. One concerns an attack on the court's methodology in 1996 by McHugh J. The other is an approach to constitutional interpretation in this area by Deane and Toohey JJ which even those who had expressly rejected the earlier legalism could not

Economic and practical effects and social policies were said to be irrelevant, although they would occasionally sneak in under cover of a heap of technical language.

accept.

As I have mentioned, the decision in *Australian Capital Television* that the Constitution required representative government and that this necessitated a degree of freedom of communication in respect of public affairs caused considerable criticism, exceeded perhaps only by outrage of some people by *Mabo (No 2)*⁴³ and *Wik*.⁴⁴

The reasoning of the majority was that various provisions of the Constitution such as secs 7 and 24 requiring senators and members of the House of Representatives to be directly chosen by the people, secs 62 and 64 requiring ministers to be members of parliament and advisers to the Governor-General, and sec 128, the amending provision, impliedly prescribed a system of representative government. That system required freedom of communication about governmental affairs.

This implied freedom was made applicable to the common law of defamation in *Theophanous v Herald and Weekly Times*⁴⁵ by the court declaring a new constitutional defence where political communication was involved. It was this decision which caused McHugh J, in a later case, to denounce the whole approach of the

majority in the implied freedom cases.⁴⁶ He accused them of departing from legitimate judicial reasoning, and not following recognised standards of interpretation. The court had, he said, gone outside the text and structure of the Constitution. The majority of judges had, contrary to the principle established in the *Engineers' Case*,⁴⁷ resorted to an external political theory, namely a free-standing concept of representative democracy, for the purpose of finding implications in the Constitution.

By then Sir Anthony Mason and Sir William Deane had retired and Gummow J appointed (to be followed shortly by Kirby J), with Sir Gerard Brennan as chief justice.

Gummow J had expressed some sympathy with McHugh J's criticism. Dawson J, who had thoroughly rejected the implied freedom, said in court during the hearing of another case in which the freedom was in issue,⁴⁸ that it appeared there were now four members of the court against the principle as stated in *Theophanous*. It was therefore challenged in another defamation case: *Lange v Australian Broadcasting Corporation*.⁴⁹

The result was what in constitutional law is always a minor miracle, namely a single unanimous judgment; but in this case it was a major miracle explicable only by divine interference with the forces of nature. Despite all the differences of opinion displayed in the previous implied freedom cases, and the strong views expressed in *McGinty*, all the judges accepted the principle that the Constitution embraced, in the federal sphere, a system of representative government requiring freedom of political communication.

While the judgment rejected the view in *Theophanous* that the Constitution could *directly* affect the rights and duties of private persons in their mutual relations, it was held that the common law had to conform to the Constitution. That seems to amount to the same thing. A new defence of qualified privilege was fashioned in the light of the implication.

It seems that the concerns of those who thought that the court had previously departed from the text and structure of the Constitution were satisfied by ensuring that after any reference

was made to representative government there were added words such as 'as provided by the Constitution'. As I have explained elsewhere,⁵⁰ the express provisions of the Constitution did not seem to add to, or qualify very much, the general concept. In any case the principle as stated in *Lange* does assume an external standard or theory, which has a place in interpreting the Constitution. The same, of course, was true in respect of the doctrine of the separation of powers⁵¹ and the concept of federalism in respect of inter-governmental immunities.

Although the court in *Lange* altered the formulation of the new defence as stated in *Theophanous*, in both cases it could be said that the defendant acquired a defence by virtue of the Constitution, and, in so far as that was the case, it could not be restricted by statute.

In the general area of rights and freedoms, however, Deane and Toohey JJ went beyond the methods employed by the rest of the court. They expounded doctrines which had less connexion with the text of the Constitution and which would have opened up a vast area of judicial power in respect of the formulation of entrenched individual rights. They put forward the principle that



1996 Cape York Aborigines & Thayorre v Queensland land case opened in Canberra 11 June 1996. Photo: Michael Jones / News Image Archive

federal power was limited by fundamental rights and freedoms recognised by the common law in 1900.⁵²

This seems to have been based on the view that the framers and the people assumed that common law rights would be preserved and, therefore, found them unnecessary to include in the Constitution. Accepting the validity of the assumption, it is not explained why that should not be regarded as the framers and people putting their trust in parliament and the political process to preserve those rights. Deane and Toohey JJ applied their principle in *Leeth v Commonwealth*⁵³ where, in a dissenting judgment, they held, on that and other grounds, that Commonwealth legislative powers were limited (in the absence of a contrary indication) by an underlying doctrine of the equality of the people of the Commonwealth, which, it was said, was a basic common law principle. (The common law's treatment of women was dismissed as a past anomaly.) The general doctrine would have, of course, the same effect as *Dr Bonham's Case*.⁵⁴ It would have transferred large powers to the judiciary, with little in the way of limiting criteria.

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This is brought out in a paper delivered by Toohey J, where he put forward a view analogous to a more orthodox principle for reaching the same result.⁵⁵ He suggested that the rule of statutory interpretation in protection of common law rights could be extended to the interpretation and application of the Constitution, including constitutional powers, so that all Commonwealth (and possibly state) powers would be subject to whatever it was decided was a fundamental common law right in the absence of a clear contrary intention. It would amount, Toohey J said, to an implied bill of rights the content of which would emerge only in the course of time. As he put it: ‘the courts would over time articulate the content of the limits on power arising from fundamental common law liberties.’

While the basis of Toohey J’s exposition looks as if it is within the area of conventional legal methodology — extension by way of analogy from a rule of statutory interpretation — its results would have changed in a fundamental way the nature of our Constitution.

No other judges followed the approach of Deane and Toohey JJ, but it might possibly have been a factor in the recent revival of ‘strict and complete legalism’ in judicial rhetoric and, to some degree, in action. To that I now turn.

By 1998 Justices Brennan, Dawson and Toohey JJ had left the bench. Justices Hayne and Callinan had been appointed and Justice Murray Gleeson was appointed Chief Justice. It is commonly accepted that the judgments of the court in many areas of law have become more difficult, technical and complicated. There may have been a return by some judges to the view that changes to the law, in other than exceptional circumstances, have to be generated from existing doctrine.

Sir Anthony Mason in a chapter entitled ‘The evolving role of the High Court’ published in 2000⁵⁶ wrote of the court’s methodology following Dixonian legalism:

[I]n more recent times the court has been more willing to examine policy issues and expose its reasoning on such matters rather than bury the reasoning beneath an overburden of authority and doctrine. There are signs that this approach may be waning. The court may be returning to a methodology that places great store by doctrinal discussion ostensibly little influenced by discussion of policy considerations. Here, again, impressions

may be largely subjective and more time is needed in which a clear pattern may develop.

Justice Paul Finn, of the Federal Court, at a conference in New Zealand last year, referred to the High Court distancing itself from the methodologies and orientations of the Mason era. He said that there was some level of retreat from an open consideration of values, a varying regard for consequentialist considerations and a renewed preoccupation with doctrinal scholarship. He added that some reasons for judgment were often more akin to extended scholarly explorations of doctrinal issues.⁵⁷

At the same conference the President of the Court of Appeal of New Zealand, Sir Ivor Richardson, pointed to the decrease of citation of Australian decisions in New Zealand from 12 per cent of total citations in 1990 to five per cent in 2000. He expressed surprise at this and said it was probably because of ‘the difficulty of dealing succinctly with High Court decisions’. However, he suggested that multiple judgments with judges taking different

approaches might be one reason for the difficulty.⁵⁸

An obvious exception to the impression Sir Anthony Mason and Justice Paul Finn have of the present court is Kirby J, whose judgments display a prominent reliance on policy factors. If otherwise the impression is correct, it is reinforced by a number of public pronouncements of Chief Justice Gleeson in which the concept of ‘legalism’ has once again been given a eulogistic flavour, and Sir Owen Dixon’s remarks have been resurrected as a model to be followed. It may be that what the Chief Justice has said represents the underlying approach of the present court.

He gave an address to the Australian Bar Association in New York on 2 July 2000 entitled ‘Judicial legitimacy’. He emphasised that the court’s decisions will be accepted only if judges observed the limits of judicial legitimacy, and that was the reason behind what he called Sir Owen Dixon’s ‘famous observation’.

The Chief Justice then asked, rhetorically, if the court did not resolve federal conflicts by a legalistic method, what other method was there? While lawyers might differ as to ‘the techniques appropriate to strict and complete legalism’, who would care to suggest an alternative? Judges had no other relevant expertise, and in any case they had no right ‘to throw off the constraints of legal methodology’.

I find this speech puzzling in view of the fact that other High Court judges and chief justices did indeed ‘care to suggest an alternative’ to strict and complete legalism. They did not, in my view, regard themselves as throwing off ‘the constraints of legal methodology’. But they found that that methodology was not confined to strict and complete legalism.

In his Boyer Lectures⁵⁹ Gleeson CJ again stated his view that members of the court were expected to limit themselves to strict and complete legalism. This time he adverted to criticism of it. It is, he said, sometimes argued that courts should be guided by considerations of policy, give effect to their own or community values, and should be more explicit in acknowledging choices open to them. He dismissed the criticism by saying that policy and values here must refer to the policy and values of the law, which are to be discovered through legal precedents.

He was there referring to the policies and values of the common law. As far as some aspects of constitutional law are concerned those policies and values may be important, particularly in areas related to judicial power, the relationship of the executive to parliament, trial by jury and so on. But it is difficult to see how the values and policies of the law would have been sufficient to determine the three constitutional cases argued by Sir Maurice Byers to which I have referred. Also, how do they help, for example, in determining the scope of the marriage power or the arbitration power, the existence and extent of the accrued jurisdiction of a federal court or whether, and when, the statutory destruction of a chose in action amounts to a law with respect to the acquisition of property?

I am in any case not sure that the distinction between values of the law and values external to the law is very helpful, although the distinction has often been made.⁶⁰ The values of the law presumably came from the society that it governs and reflects. Also the law takes on new values and sheds old ones as society changes, as is reflected in *Mabo (No 2)*,⁶¹ *The Queen v L* (the rape in marriage case),⁶² and *Cheatle v R*,⁶³ which held that jury qualifications in 1900, excluding unpropertied persons and women, would not comply with the requirement of trial by jury in sec 80 of the Constitution today.

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In launching the *Oxford Companion to the High Court of Australia* in February this year the Chief Justice persisted with his advocacy of legalism. This time he claimed the authority of Alfred Deakin in his great speech introducing the Judiciary Bill in 1902. Gleeson CJ said:

Deakin's speech contains one aphorism that deserves particular emphasis in the light of some of the entries in the *Oxford Companion*. He said: 'federation is legalism'. There is a tendency to refer to legalism as if it were invented by Sir Owen Dixon in the middle of the twentieth century. Doubts have been expressed about its meaning. There is not much doubt about what Deakin meant by legalism; and there is no doubt at all that he saw it as the key to the integrity of the court and the stability of the federal union.

I do not have any doubt about what Deakin meant by his aphorism; but, with respect, I do not believe that he was referring to a method of constitutional interpretation. In fact I doubt whether the word was used in 1902 in that sense.

It was Dicey (to whom Deakin refers from time to time in his speech) who in 1885 said that federalism meant 'weak government, conservatism and legalism'. However, he described legalism as the predominance of the judiciary in the Constitution and the prevalence of a spirit of legality among the people.⁶⁴ That, in my opinion, is what Deakin was referring to in his speech.

He had explained the past and recent extensions of law into new areas, including most recently, industrial conflict, and he indicated that otherwise purely political issues came within the province of law, and judicial determination, in a federal system. Federal government, he said, therefore demanded a law-abiding people. Then came the statement 'federation is legalism'. In the light of the context he was clearly using it in Dicey's sense. He was not there telling the future court how to go about interpreting the Constitution.⁶⁵

In fact much of the speech was addressed to the function of a national court in adapting the Constitution to 'the changeful necessities and circumstances of generation after generation'.⁶⁶ The Constitution, he said, would be interpreted in accordance with the needs of the time. Reading the speech as a whole I believe it gives no support to legalistic interpretation.

How, if at all, is this rhetoric reflected in the decisions? That is a more difficult question.

Re Wakim (the *Cross-Vesting Case*)⁶⁷ might be seen as a monument to legalism, even though Dennis Rose⁶⁸ has purported to show that it is a monumental legalistic error. However that may be, the only references to social effects or to the value of co-operative federalism in the majority judgments are made in the course of castigating counsel for mentioning them. Gummow and Hayne JJ drew a sharp distinction between social convenience on the one hand and 'legal analysis and the application of accepted constitutional doctrine' on the other.⁶⁹

Co-operative federalism was referred to as a slogan,⁷⁰ as was the avoidance of arid jurisdictional disputes⁷¹ and those who resorted to these concepts were described as doing so unthinkingly or as guilty of 'loose thinking'. The inconvenient

consequences of the result in that case were described by McHugh J as saying nothing from a constitutional point of view. The agreement of all governments and legislatures in Australia was referred to by the Chief Justice as irrelevant.⁷²

All that might have been accepted by everyone if the Constitution had plainly and clearly prohibited such schemes or if the cross-vesting scheme had conflicted with other important constitutional and legal values, such as those embodied in the separation of powers, the rule of law, basic common law rights or state rights and independence.

The decision and that of its successor, *Re Hughes*,⁷³ have thrown into doubt schemes, not involving judicial power, of the sort that have been created and applied throughout the life of the Commonwealth such as the Snowy Mountains Scheme, the marketing schemes of the mid-twentieth century, and co-operative schemes of the 1980s and 1990s relating to commercial matters, competition policy and national crime.

All this was apparently a compelling result of the text of the Constitution. It contrasted with the court's view in 1983 that Commonwealth-state co-operative schemes, providing for a pooling of powers, was an inevitable by-product of the federal system, requiring only that there be Commonwealth legislative authority for federal officers to exercise powers conferred by the states and vice versa.⁷⁴ In *R v Hughes* it was suggested that if the state law imposes a duty the Commonwealth cannot authorise its officers to carry it out unless the Commonwealth itself has power to impose the duty, which of course effectively denies a pooling of powers, unless the executive and incidental powers are regarded as sufficient, which seems doubtful.

The tendency in these cases is, therefore, to treat social and political practices and consequences as irrelevant, for the purpose of deciding whether the language of the Constitution is unambiguous, and how it should be interpreted.

Although this might be thought to epitomise the return to legalism of the Gleeson court there are other cases where the majority have adopted approaches which differ markedly from that in *Re Wakim*. For example, in *Abebe v Commonwealth*⁷⁵ the majority upheld legislation which limited the grounds on which certain migration decisions could be reviewed by the Federal Court but not by the High Court. The dissenting judges (Gaudron, Gummow and Hayne JJ) regarded the legislation as invalid because there was no final determination of all the legal rights and duties of the parties. It was not, therefore, in their view, an exercise of judicial power. In any case they thought the court was given jurisdiction in respect of only part of the 'matter' contrary to Chapter III.

The joint judgment of Gleeson CJ and McHugh J showed great concern for the consequences of invalidating the provisions. They said it would create immense practical problems which the makers of the Constitution could hardly have intended. It would mean, for example, that the Commonwealth could not create specialist courts. Unlike the attitude in *Wakim*, here undesirable social effects were taken to throw light on the meaning of the Constitution. They said that 'only the clearest constitutional language' could result in giving parliament such limited and impractical choices. They found nothing in the language that forced such choices.⁷⁶ Ironically, Kirby J relied in part on much of this language in his dissenting judgment in *Re Wakim*.

Similarly in *Sue v Hill*⁷⁷ it was held that a citizen of the United Kingdom owed allegiance to a foreign power and so was

If Chapter III is the source of constitutional implications it is also the subject of much doctrinal basket-weaving as illustrated by the Cross-Vesting Case and other cases.

disqualified under sec 44 of the Constitution from being chosen or of sitting as a member of the Commonwealth Parliament. The text of the Constitution contains much that could lead to the opposite conclusion (as one would expect having regard to the state of affairs in 1900). The court instead looked to the evolution of Australia's relations with the United Kingdom and the development of its sovereignty in international affairs since 1900. In other words the terms of the Constitution were downgraded in favour of modern political perceptions.

The reasoning in the latter two cases could be easily seen as representative of a policy oriented court of which Sir Anthony spoke. It is in contrast to *Wakim and Hughes*.

At the end of 1999 I expressed the view that the constitutional cases decided in the previous two years indicated no general pattern or direction. Varying approaches were taken to different cases, as indicated by the four cases to which I have referred. There have not been many significant cases since then.

The greatest source of litigation and speculation in constitutional law is at present Chapter III, part of which was the subject of last year's Byers Lecture given by McHugh J. He indicated that it was a potential mine of individual rights and of restrictions on legislative power.

As was the case with Sir Owen Dixon, legalism has not prevented judges making large inferences, once again from Chapter III. McHugh and Gummow JJ, for example, have declared that because sec 73 gives the High Court appellate jurisdiction in respect of the judgments of state supreme courts, the states cannot abolish those courts and so impair the national character of the High Court. McHugh J has gone further and said that the states cannot deprive the supreme courts of their jurisdiction to hear appeals or to review the orders of lower courts, because that would also impair the position of the High

Court in the national system.⁷⁸

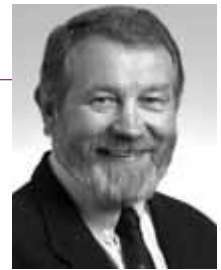
If Chapter III is the source of constitutional implications it is also the subject of much doctrinal basket-weaving as illustrated by the *Cross-Vesting Case* and other cases. There are many long and technical decisions in areas at the intersection of constitutional and administrative law, particularly in relation to sec 75(v) of the Constitution⁷⁹ or involving federal jurisdiction.⁸⁰

It is difficult to know clearly what effect the modern return to legalism will have in the area of constitutional law. The fact is that the terms of the Constitution remain largely of a broad and general nature. They continue to open up situations where judges must choose between equally rational conclusions that cannot be settled by doctrine or precedent alone. In an age of open government it is important that, whatever the new legalism means, judicial conclusions should not be seen as simply resting on different perceptions or impressions, but examined in the light of consequences and appropriate policies. This may come down to regarding law as a means of fulfilling social ends rather than as an end in itself.

It is not uncommon for those who emphasise precedent and doctrine as conclusive determinative factors to set up their opponents as persons desiring to replace legal principles by idiosyncratic decisions based on what the judge thinks is just and desirable. On this view the danger is that judges are seen as free-wheeling policy makers rather than as interpreters of the Constitution. No one doubts that certainty, consistency and coherence of the law and the legal system are important social and legal values. They are not achieved by ignoring the factors which the law (and particularly the Constitution, by reason of its indeterminacy and its longevity) invites, or rather compels, the courts to consider. This is not to argue that judicial policy-making is desirable; it is merely at times necessary.

- 1 I was informed of this by Father Frank Brennan.
- 2 Commonwealth v Tasmania (1983) 158 CLR 1.
- 3 (1992) 177 CLR 106.
- 4 (1996) 187 CLR 1.
- 5 (1997) 189 CLR 51.
- 6 Gibbs, 'The threat to federalism' in Samuel Griffith Society, Upholding the Australian Constitution, vol 2, 1993, pp 183-194.
- 7 (1988) 165 CLR 360.
- 8 Barwick, 'Parliamentary democracy in Australia' in Upholding the Australian Constitution, vol 5, 1995, 205-220.
- 9 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.
- 10 (1952) 85 CLR xi at xiv.
- 11 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 83.
- 12 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
- 13 *Parton v Milk Board* (1949) 80 CLR 229 at 260.
- 14 *Australian Communist Party v Commonwealth* (1951) 83 CLR at 193.
- 15 At p429.
- 16 Dixon, 'Concerning judicial method' in *Jesting Pilate*, pp 152-165.
- 17 *Attorney-General (Cth); ex parte McKinley v Commonwealth* (1975) 135 CLR 1 at 17.
- 18 *Uebergang v Australian Whate Board* (1980) 145 CLR 266.
- 19 *Ibid* at 294, 295.
- 20 *Western Australia v Commonwealth* (1975) 134 CLR 201.
- 21 *Queensland v Commonwealth* (1977) 139 CLR 585 at 603, 606.
- 22 Zines, *The High Court and the Constitution*, 4th edn, 1997, pp 467-469.
- 23 Mason, 'The role of a constitutional court in a federation: A comparison of the Australian and the United States experience' (1986) 16 FLRev 1 at 5.
- 24 Mason, 'The role of the courts at the turn of the century' (1993) 3 *Journal of Judicial Administration* 156 at 164.
- 25 (1986) 16 FLRev 1 at 5.
- 26 *Dietrich v The Queen* (1992) 177 CLR 292 at 329.
- 27 McHugh, 'The law-making function of the judicial process' (1988) 16 ALJ 15-31, 116-127; 'The judicial method' (1999) 73 ALJ 37.
- 28 Brennan, 'A critique of criticism' 19 Mon L R 213.
- 29 Saunders (ed), *Courts of Final Jurisdiction*, 1996, p10 at 13.
- 30 (1995) 183 CLR at xi.
- 31 (1994) 182 CLR 104 at 143.
- 32 At p 696.
- 33 *Bolton v Madsen* (1963) 110 CLR 264.
- 34 *Hughes and Vale Pty Ltd v NSW (No 1)* (1953) 87 CLR49 (HC), (1954) 93 CLR 1 (PC); *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1.
- 35 *Wragg v New South Wales* (1953) 88 CLR 353.
- 36 *Henry v Boehm* (1973) 128 CLR 482.
- 37 For example, in respect of sec 90 see *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 616-618 per Gibbs CJ. Mason J, before *Cole v Whitfield*, moved the construction of sec 92 away from its laissez-faire origins while using the same formal concepts; see, for example, *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 614-615.
- 38 Section 92: *Cole v Whitfield* (1988) 165 CLR 360; sec 90: *Hematite Petroleum Pty Ltd v Victoria* (1983) CLR 599; sec 117: *Street v Queensland Bar Association* (1989) 168 CLR 461.
- 39 At 402.
- 40 Saunders (ed) *Courts of final jurisdiction*, 1996.
- 41 Zines, *The High Court and the Constitution*, 4th edn, 1997, pp 202-212, 377-399. Williams, *Human rights under the Australian Constitution*, 1999, chs 7 and 8.
- 42 (2000) 24 MULR 645; (2001) 25 MULR 24.
- 43 (1992) 175 CLR 1.
- 44 (1996) 187 CLR 1.
- 45 (1994) 182 CLR 104.
- 46 *McGinty v Western Australia* (1996) 186 CLR 140 at 229-235.
- 47 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
- 48 *Levy v Victoria* (1997) 189CLR 579.
- 49 (1997) 189 CLR 520.
- 50 Zines, 'The present state of constitutional interpretation' in Stone and Williams, *The High Court at the crossroads*, p 224 at 226-227.
- 51 Despite the Privy Council's strange remark that the construction of the Constitution would have been the same 'had Locke and Montesquieu never lived nor the Constitution of the United States ever been framed': *Boilermakers' Case* (1957) 95 CLR 529 at 540.
- 52 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69.
- 53 (1992) 174 CLR 455.
- 54 (1610) 8 Co Rep 107a; 77 ER 646.
- 55 Toohey, 'A government of laws and not of men' (1993) 4 Public L R 158 at 170.
- 56 Opekin and Wheeler (eds) *The Australian Federal Judicial System*, p 119.
- 57 Bigwood (ed) *Legal Method in New Zealand*, pp 228-229.
- 58 *Ibid* p 265.
- 59 Gleeson, *The rule of law and the Constitution*, pp 85, 97-99.
- 60 Mason, 'Rights, values and legal institutions' (1997) *Australian Journal of International Law*, pp 1-16; McHugh J, 'The judicial method' (1999) 73 ALJ 37.
- 61 (1992) 175 CLR 1.
- 62 (1991) 174 CLR 379.
- 63 (1993) 177 CLR 541.
- 64 Dicey, *The law of the Constitution*, 10th edn, p 175.
- 65 *Commonwealth Parliamentary Debates*, Vol 8, 18 March 1902, p 10962 at pp 10989 et seq.
- 66 *Ibid* p 10967.
- 67 *Re Wakim; ex parte McNally* (1999) 198 CLR 511.
- 68 Rose, 'The bizarre destruction of cross-vesting' in Stone and Williams (eds) *The High Court at the crossroads*, 2000, ch 6.
- 69 At 582.
- 70 At 580 per McHugh J.
- 71 At 580 per Gummow and Hayne JJ.
- 72 At 540.
- 73 (2000) 202 CLR 535.
- 74 *R v Duncan; ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.
- 75 (1999) 197 CLR 510.
- 76 See Hill (1999) 27 F L Rev 547 at 573.
- 77 (1999) 199 CLR 462.
- 78 *Kable v DPP* (1997) 189 CLR 51 at 109-110, 137-139.
- 79 For example, *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82.
- 80 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559.

Norrish DCJ launches the SRACLS - Bar Association Pro Bono Scheme



His Honour Judge
Stephen Norrish QC

On 18 October 2002, the Sydney Regional Aboriginal Corporation Legal Service (SRACLS) - New South Wales Bar Association Pro Bono Scheme was launched by his Honour Judge Stephen Norrish QC of the District Court of New South Wales. Mr Michael Slattery QC spoke on behalf of the Bar and Mr Peter Bugnan spoke on behalf of SRACLS.

In a passionate speech marking the launch of the scheme, Norrish DCJ praised the efforts of the Bar and its members who have, as his Honour rightly observed, made a great contribution with respect to the provision of pro bono legal services in New South Wales. The full text of Judge Norrish's inspirational speech appears below.

We are here today to launch officially the commencement of the 'pro bono' scheme to be conducted on behalf of clients of the Sydney Regional Aboriginal Corporation Legal Services (which I will hereinafter refer to as the Sydney Aboriginal Legal Service, with no disrespect to other services) in conjunction with the NSW Bar Association. The scheme has been operating for approximately four months. I am informed there are 30 barristers who have made themselves available and of those, 15 have been briefed during that period of time. Those barristers who have placed themselves on the list are to be congratulated for their generosity and support, as is the Association. This scheme has been set up by staff of the Aboriginal Legal Service, with the cooperation of members and staff of the Bar Association. Particularly I should acknowledge Rachel Pepper, a member of the Association, and Peggy Dwyer of the Aboriginal Legal Service, both of whom have provided significant support consistent with their strong commitment to social justice issues.

The Sydney Aboriginal Legal Service is, as with all Aboriginal legal services throughout Australia, a federally funded organisation. It provides legal services in criminal matters to members of the indigenous population of the ATSIC Sydney region, which is greater Sydney with the addition of Wollongong, and has offices in Redfern, Blacktown, Liverpool and Wollongong. It employs 35 staff, including 25 legal and field staff and approximately 70 per cent of the funding it receives goes to salary costs.

The Aboriginal Legal Service has, for a number of years, briefed public defenders to conduct indictable criminal matters on behalf of its clients. I must say with some pride that I played a small role in relation to that arrangement when I was a Commissioner of the Legal Aid Commission. Unfortunately for many years there has been only a limited amount of money available to brief the private Bar, for matters that cannot be dealt with by in-house staff or by public defenders.

I am informed that with the increase in workload in recent years and a decrease in funding in real terms, the result has been that the service has not had the funds to brief competent counsel when the need has arisen. This pro bono scheme has been developed to provide the service with access to barristers, to

ensure a high standard of representation for its clients, with solicitors of the service doing the core work.

It is important to remember that the expression 'pro bono' is derived from the Latin expression *pro bono publico* which means 'for the public good'. The *Butterworth's Australian Legal Dictionary* defines the term 'pro bono' as:

Legal work performed for the public good or in the public interest on issues of broad community concern or with significant impact on disadvantaged or marginalised group. Legal work performed free or at a reduced fee

This pro bono work by the legal profession includes both the work proposed by members of the Association in this scheme and the work of those who will brief them. Pro bono work by the profession, formally or informally arranged, is not a new concept. Before any form of legal aid was available, many members of the profession provided their services free of charge or at a reduced rate in a range of ways to individuals and organisations. Since legal aid became generally available in the 1960s pro bono service by the legal profession has been continued. The history of the development of legal aid in NSW and elsewhere is set out extensively in the report of the National Legal Aid Advisory Committee published in 1990 in *Legal Aid for the Australian Community*. I need not expand upon that history here but the development of legal aid has been characterised by the generosity and cooperation of the legal profession.

In the context of the concept of work by lawyers 'in the public good', many members of the private profession, both solicitors and barristers, have supported legally aided clients by working for fees considerably less than might otherwise be obtained for the same type of work. Those who have worked in legal aid organisations, including the Aboriginal legal services and legal aid commissions, are fully aware of the fact that salaries may be less than might be obtained by working in the private profession and have thus made their own contribution in this respect.

Particularly, the Bar Association and its members have made a great contribution in this area in the past in many ways, including the introduction of formalised pro bono schemes organised by the Association in a number of jurisdictions over the years.

That people are willing to make themselves available for this scheme at this time follows in the tradition out of which Aboriginal legal services and community legal centres were born.

There is, however, a very considerable and sad irony that the Aboriginal Legal Service should foster this scheme at this time. The first Aboriginal legal service in Australia was created in Redfern in the very early 1970s, out of frustrations and anger at the way in which Aboriginal people were treated by police. Without a detailed account of that history at this time, in general terms, the reality was that Aboriginal people in conjunction with concerned lawyers and other concerned human rights activists banded together to set up a voluntary legal service to attempt to provide Aboriginal people with the protection of the law and legal

representation. Mention should be made at this time of Hal Wooten, later to be a Supreme Court judge and a commissioner for the Royal Commission into Aboriginal Deaths in Custody, Maurice Issacs, Gordon Samuels and Paul Landa, amongst others, as persons, within the legal profession, prepared to provide their assistance, legal and organisational skills to make this scheme work. The Empress Hotel was the epicentre of their operations. Of course many indigenous people made their contribution. There are too many of them to name now, however, at the risk of offending people I do not mention, I must acknowledge the role of people such as Bob, Kay and Sol Belleair, Paul Coe, the Munro family, Gary Williams, Cec Patten and Kevin Smith, amongst many others, in those events and the development of the infant organisation. These people were also aided by many country based Kooris including Keith Smith, Steve Gordon, Tombo Winters, George Rose, William Bates and Les and Agnes Coe in developing the concept of this first 'community based' free legal service in NSW. Out of this voluntary system developed the first Aboriginal Legal Service at Redfern. That concept quickly spread throughout the Commonwealth of Australia, taking on different forms

depending upon the demands of local conditions. These organisations began to receive federal government funding in 1971-1972 when William Wentworth was minister for Aboriginal affairs, but that funding expanded significantly with the election of the Whitlam government in early December 1972.

Speaking at this point about the NSW experience, the tradition of pro bono contribution to Aboriginal legal services by barristers and solicitors was maintained even after federal government funding was secured. In the last 30 years, however, funding has never been adequate to meet the demand or the needs of the services and without the contribution of both lawyers and indigenous people willing to work for the organisation for no reward, the various legal services that have existed over this period would not have survived. Further, but for the willingness of people to work long hours, for reduced salaries and on occasions without pay, the organisations would not have continued to exist. The stories of

people who have been employed by the Aboriginal legal services require separate telling, perhaps in a book not just a speech, at a later time. From Alan Cameron, Peter Hidden, Neil McKerras, Phil Segal, Mark Smith, Martin Sides, Sean Flood, Stephen Fitzpatrick, Bruce Miles through to Robert Tickner and Eric Wilson amongst many others, significant contributions were made by people who worked for Aboriginal legal services. Now is not the time to pay tribute in detail to their contribution to human rights in this state. I was honoured to know and work with many of these people and thus I was witness to the critical period of infancy of Aboriginal legal services in NSW between 1975 to 1980. This period included the 'drying up' of funds during the 'supply crisis' of October / November 1975 and the cutting off of funds for a period in early 1976 and no particular funds at all for payment of barristers in 1977-1979.

It is in this context of my experience I particularly wish to pay tribute at this time to members of the Bar Association who provided the support which enabled the Aboriginal Legal Service,

not just based in Redfern, but also Western Aboriginal Legal Service and the South Coast Aboriginal Legal Service, to exist and provide service 'in the public good'. Those truly great people include (in no particular order) Greg James, Ken Horler, the late Mervyn Rutherford and Trevor Martin, Malcolm Ramage, Ken Shadbolt, Peter Hidden, Jane Mathews, Rod Madgwick, Bob St John, Dean Letcher, Pat O'Shane, Jeff Miles, Malcolm McGregor, Michael Green and Lloyd McDermott to name some. All of those people were, and remain, my heroes for their selflessness at that time. As an eyewitness to the work they did for nothing, or for very little, work which included trials in the Supreme Court and the District Court, appeals to the Court of Criminal Appeal and the High Court, District Court appeals and Local Court matters, I can attest to their many sacrifices. The work performed in Sydney and much further afield was done in a committed, professional way, not just upholding the highest standards of legal skill and integrity in an environment of considerable hostility from many members of the judiciary, other members of the profession and the police. These people provided respectability to the development of what is now called 'human rights law' in Australia, long before such work was fashionable, without regard to financial gain, or even compensation in many instances.

It is not surprising, in the year 2002, looking back across the years to the identities that I have mentioned, that they have become senior judges, leaders of the profession. All great contributors to our jurisprudence and our nation. These people not only sought to ensure that justice was in fact done, but help lay a foundation for concern and respect for the interests and rights of Indigenous Australians which is reflected in the national debate on reconciliation and native title.

When I reflect upon my involvement in the law, particularly my involvement with the Aboriginal Legal Service and my relationship with these people, the words of Sir Issac Newton in his letter to Robert Hooke seem appropriate; 'If I have seen further it is by standing on the shoulders of giants'.

I appreciate this is true of everyone in the law, one way or the other, but I feel especially privileged to have been inspired by people whose work 'in the public good' sustained Aboriginal legal services many years ago.

The proceedings tonight are however, as I earlier mentioned, cause for some sadness. Back in 1980, when I left the Aboriginal Legal Service, I believed and expected that in the years to come Aboriginal legal services would be properly funded to the extent that they would not have to rely upon the generosity of the profession to provide the standard of legal representation that Indigenous people deserve in all areas of the law. That we are here today, that this scheme is required, demonstrates that my expectation have not been met, as is the fact that the Sydney service can only provide legal assistance in criminal matters with its current funding.

To my mind, that the scheme that I am launching today is required is a disgrace and an embarrassment for those responsible for funding the service and that claim that they have the interests of indigenous people at heart. I am not in a position to ascribe blame for this state of affairs. Finger pointing in this respect is really beside the point.

It is not a disgrace that people such as Peggy Dwyer, Rachel Pepper and members of this association are trying to make the scheme work. But it is an indictment of the level of funding for legal services for Indigenous people that they and others have to

To my mind, that the scheme that I am launching today is required is a disgrace and an embarrassment for those responsible for funding the service.

create and sustain such a scheme to ensure that basic human rights of Indigenous Australians can continue to be protected. In the 1970s few people knew any better, publicly funded legal assistance was a new concept (even in the wider community) and the community had given little thought at that time to protect the rights of Aboriginal Australians. But there are no excuses now, particularly after the recommendations of the Royal Commission in Aboriginal Deaths in Custody published in 1991.

Of course, the funding scandal which gives cause for tonight's events is not necessarily confined to the funding of Aboriginal legal services. Legal aid commissions and community legal services around Australia have been affected by real reductions in funding over a number of years. The most high profile human rights issue that is being discussed at the moment, at least publicly in the media, the circumstances of refugees, is itself marked by a diminution of government financial support for those, including lawyers, seeking to protect the legal rights of refugees. This corresponds, it would seem, with a diminution of redress or relief in the courts.

In a perfect world, of course, everybody who lives in

Australia ought have equal protection and equal opportunity to protect their rights, under Australian law. Ironically, many Australians have the same difficulties in gaining legal advice and representation as detainees in Department of Immigration facilities. Be this as it may, the protection of the rights of Indigenous people in Australia ought be paramount in our national concern. There is no group of people within Australia who have been so systematically abused and discriminated against than Indigenous Australians since 1788. In my view the obligations cast upon Australia to ensure that does not continue, and will never occur again, is a very heavy one indeed. If we cannot deliver justice, which must include unfettered 'access to justice', to Indigenous Australians, we have no right to call this country a fair and just society and we should as a result hold our heads in shame. Our future international reputation is at stake, on this issue, more so than our treatment of refugees or asylum seekers.

It is said that 'virtue is its own reward'. I hope that the 'virtuous 30' or so members of this Association (and the others who will join in due

course), as well as the 'virtuous' people who continue to work to advance the interest of indigenous people throughout Australia, will be rewarded, not only by the satisfaction of their contribution, but in due course in the way that people such as Peter Hidden, Hal Wootten, Rod Madgwick, Greg James and others have ultimately been 'rewarded' for their contribution in years past. In decades to come those who participate in this scheme may be the giants upon whose shoulders others will stand to see further.

About the SRACLS – Bar Association scheme

The Sydney Regional Aboriginal Corporation Legal Service (SRACLS) – New South Wales Bar Association Pro Bono Scheme, which was conceived pursuant to an article published in the December 2001 issue of *Bar Brief*, has been in operation since May of this year. It was born out of a pragmatic realisation that the present level of available resources is simply insufficient to meet the needs of SRACLS's clients, many of whom belong to the most marginalised and disenfranchised communities in Australian society.

After the collapse of the original Aboriginal Legal Service in 1996, the Aboriginal and Torres Strait Islander Commission (ATSIC) established SRACLS. Funded by ATSIC, SRACLS provides legal services to the indigenous population of the greater Sydney region, including Wollongong. The service maintains offices in Redfern, Blacktown, Liverpool and Wollongong and currently employs around 20-25 legal officers. That the organisation is operating at full capacity or beyond is at best an understatement. The Redfern office alone services seven local and three children's courts, in addition to representing clients in the District and Supreme Court and in the Court of Criminal Appeal.

The scheme consists of approximately 30 barristers who provide services on a pro bono basis in a range of criminal matters. These include, for example, appeals to the Court of Criminal Appeal, Parole Board hearings, Coroner's Court and Children's Court matters. Those who volunteer are placed on a register and contacted by SRACLS when the need arises, usually no more than once or twice a year.

The benefits of the scheme to SRACLS and to its Indigenous clients are obvious. The benefits to those barristers who participate in the scheme, though less tangible, are no less rewarding. Any person who is interested in volunteering for the scheme should contact:

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ph: (02) 9235 2157
e-mail: pepper@12thfloor.com.au

There is no group
of people within
Australia who
have been so
systematically
abused and
discriminated
against than
Indigenous
Australians
since 1788.

Working part-time at the Bar¹

By Ingmar Taylor



The author

'When I grow up, I want to be a client': said by a six year old son to his mother, an American litigator²

There are a significant number of barristers who work part-time. Not that you would know.

'Who told you I work part-time? I don't work part-time' was the initial reaction of many I contacted.

My interest in the subject commenced about 18 months ago when a senior solicitor asked: 'If I came to the Bar, could I work part-time?'

I thought the answer was 'yes', but other barristers, who had not worked part-time themselves, were not so sure.

Then I worked part-time myself for four months, looking after our 11 month-old twins, when my wife returned to work. That led me to find others who are, or have been, at the Bar part-time because they are looking after children.

What became clear is that, contrary to solicitor expectations and peer pressure, one can successfully work part-time at the Bar.

As the President of the Bar Association, Bret Walker SC, noted, 'You can't have a full-time practice if you are part-time, but you can have a very successful part-time practice if that's your preference'.

That is not to say that it is easy. As anyone who has done it knows, to do any professional job part-time while balancing primary childcare responsibilities is hard, and being at the Bar has unique difficulties.

Keeping it secret

The first of those difficulties is dealing with the perception that one cannot be a part-time barrister and be successful.

Almost all of the barristers interviewed expressed concern about solicitors knowing that they worked part-time and/or that they had young children. For that reason more than half would speak to me only on condition of anonymity.

For example, my phone call with a senior junior at the criminal Bar with young children and works usually four days a week commenced as follows: 'Who told you I worked part-time? I don't work part-time. I work flexible hours. However, to the outside world I am a full-time barrister. I wouldn't want the outside world to know that I was not working full-time at the Bar.'

Most thought solicitors would brief them less if the solicitors knew they worked part-time. A senior junior working in commercial and equity who works three days a week told me, 'If people think you work part-time they may not take you as seriously because you are not there full-time, even if you are in court as much as other barristers.'

Another barrister who is new to the Bar explained why she did not want her name published: 'I don't want people to perceive that I am not really committed to the Bar', she said. 'I haven't had

experience of any negative reaction, but I wouldn't want people who don't know me and my ability to assume that because I have other responsibilities I can't manage what I have to manage.'

Is the perception that a barrister will lose work if he or she is working part-time at the Bar accurate?

Margaret Sneddon, of Ground Floor Wentworth Chambers, has a commercial and building law practice. She is now full-time, but for about two and a half years worked four days a week, being home to look after her son on Thursdays.

She did not tell solicitors that she did not work on Thursdays, because she thought she would be overlooked for briefs if they knew. Sneddon thought this was 'understandable'. 'If I was a solicitor I would have overlooked someone who was not available one day a week'.

Sneddon told me that a solicitor had once said to her that he would 'never brief a barrister not available five days a week'. Ironically, she had that conversation on the one day that she had arranged Dial-an-Angel as a last resort to look after her son Tom so that she could get in on what was normally her day at home. 'I hadn't told the solicitor that I had any difficulty attending that day and he had no idea that I was in fact part-time myself.'

Another barrister with a predominantly criminal practice who did not wish to be named told *Bar News* that she had definitely lost some work as a result of having a young child.

'Some clients don't care at all. Funnily enough private law firms with solicitors who themselves have had children are the worst. One law firm which had briefed me consistently before I had my first child stopped briefing me thereafter', she said. 'That was a firm where predominantly women with children were the decision-makers. Overall I am fine because I have picked up other work and I am very busy.'

'Funnily enough men are less likely to be concerned about the fact that I have a child and work part-time than women', she continued. 'That is partly because men don't ask about your private life and women are more likely to be aware of the amount of time and work involved in having a young child. Many are simply less interested. They just want to know whether you can do the work or not.'

Louise Clegg, of Denman Chambers, commenced at the Bar with two young children, initially working five days a week, but during her first year she stopped practising briefly, before starting again on a part-time basis.

Before she started at the Bar, Clegg had heard a senior barrister say that he did not understand why more women with childcare responsibilities did not take advantage of the flexibility of the Bar.

'I thought his comments about flexibility at the Bar were wrong. My attitude, as a solicitor, was that a part-time barrister was a 'pretend' barrister. In hindsight I think he was right', Clegg said. 'You just have to be confident enough to say "no" to some work that comes in the door. The way I look at it is that I have got

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20 years to do my time at the Bar. I do not need to prove myself to anyone in my first year or two.'

Clegg has also found she is briefed predominantly by men rather than women. When discussing the fact that she works part-time, she has found it is not so much a problem for men, but it is for women.

'I can't blame them. If I was a solicitor and I was tossing up between a male and female counsel with equal reputations, both of whom I did not know, and I knew the woman had young children, I'd go for the man instead.'

Clegg has since taken more time off from the Bar to have her third child, and plans to return to the Bar in a full-time capacity next year. However she says that does not undermine what she previously said about working part-time.

'I plan to fully exploit the opportunities that the Bar offers to work more flexibly around hearings and to take additional holidays than I would be entitled to if I were a salaried employee. But that – and indeed working part-time – is no different to what many male barristers do. That is the beauty of the Bar.'

Sophie York, of Sir James Martin Chambers, commenced at the Bar full-time because she thought that was the only way to do it. 'I didn't think there were any other options. They were the expectations that others had. It is funny how over time you abandon other people's expectations.'

York moved to a flexible part-time hour arrangement after about 18 months at the Bar. While she has some regrets about not starting on a part-time basis York said she did not think she could have started at the Bar part-time. 'I had to leap into it. I was relatively young coming to the Bar (28 years) which was 10 years younger than the average age of those in my Bar practice course. I had little prior litigation experience and no reputation as a litigator.'

While 'part-time' York makes herself available any day of the week as necessary, while trying to keep Mondays free if possible. This 'flexible' part-time arrangement was the preferred choice of a number I interviewed, being those who had a

nanny or family members who were able to cover for the extra day(s) when needed.

For many, the issue was as much that they were primary care givers as the fact that they were working part-time was because they had young children.

'Society still censures people who have family commitments which affect the amount of time they can work' said York. 'Others, like a silk I know, have no qualms about disappearing at short notice to go trout fishing. Solicitors aren't told that of course. The clerk will simply say "he is jammed".'

'Others will say that they sail on Wednesday afternoons and so are not available', York said. 'They probably don't mind solicitors knowing that they are not available on Wednesday afternoons for that reason because sailing is probably seen as a mark of their success. But those same solicitors would no doubt have a different opinion if the barrister said he was looking after his kids on Wednesday afternoons.'

Of course attempting to maintain the perception of a full-time practice while working part-time can be difficult. It makes it hard to say no to work that falls on your 'day off'.

Margaret Sneddon recalls: 'If I had to come in on a Thursday for a short matter like a directions hearing I would bring Tom in with me and the very understanding secretaries would take him for milkshakes and toast while I was in court. If I had full-day matters I had to arrange some other child-care, but my options were limited. I would also do things like come in late on a Thursday afternoon for a conference starting at 5.30pm I wouldn't tell people I was coming in from home, I would just say that I had other commitments up to that time. Wednesday nights would be very tense if I was trying to arrange care for the full day.'

'One of the difficulties in having Thursdays off is that anything that was required to be done on Friday needs to be prepared on Thursday' Sneddon said. 'I decided I couldn't tell people that I was working at home. Reception would take messages and tell people calling I was in court on Thursdays and that I was contactable on my mobile. I would then take the call at home on my mobile. The mobile phone is a saving grace of working part-time mothers. Of course it can be a problem if in the middle of the call the Bob the Builder video finishes and your child starts yelling 'play it again Mum!'. I locked myself in the bathroom more than once to shut out the sounds. I would say things like, 'I am at the District Court. I do wish people could control their children'.

While currently full-time, Sneddon said that now she is established at the Bar she would be more up-front about being part-time if she was to work part-time again. 'I would have the confidence to tell people that I am working part-time. But in the first three years at the Bar you need to build contacts and you need to put up an appearance of being always available. You need to put up an appearance of being very determined and not being distracted by any life outside the Bar otherwise people over look you no matter how good you are.'

Kylie Nomchong, of Denman Chambers, has not worked part-time, but has had two children since coming to the Bar. She agreed that there is a perception held by some that a mother with young children is not the best person to brief, particularly in relation to complicated matters.

'If those people only opened their eyes they would realise that the very *best* person to brief in a complicated matter is a mother. Mothers are excellent time managers and have great project management skills and logistical skills. If you have got four young children, a household and a career and you are managing all reasonably successfully, you are clearly a very capable person.'

Sophie York echoed these thoughts, saying: 'Clients should recognise that mothers are extremely good people to brief. Logistics become your way of life. An interstate trip with young children is more complex than the moon landing.'

Is it feasible to work part-time at the Bar?

The President of the New South Wales Bar Association, Bret Walker SC, believes the Bar should be the ideal place to work part-time. 'By part-time work I mean a person who works less than 60 hours a week, six to seven days a week', says Walker SC. 'However that theory tends to fall to pieces under the excessive burdens laid by barristers on themselves. Barristers tend to define success by how constantly busy they are. That is a superficial measure of success' he said. 'People who are forever busy have failed to properly schedule and do the work in a way that is civilised.'

'If you are successful at the Bar the most obvious side of that success is that people want to brief you all the time', Walker SC said. 'I have never heard of anyone who can so finely calibrate

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their practice such that no one wants to brief them for more or less hours than they have available to do work. So if you are successful you will always be saying no to work. They would have you working 24 hours a day, 365 days a year, and one more day every fourth year, if you kept saying yes. Some people fall into the trap by thinking that the only limit to how much work they can take on is the biological need for sleep.'

'The second difficulty in working part-time', Walker SC continued, 'is that cases that go for more than a few days are set down on consecutive dates. This is because of the convenience and social benefit of consecutive dates. It is unthinkable, more or less, to arrange dates to suit those who are working on a part-time basis. Cases can't run that way.'

As a result, Walker SC said, if you want to be part-time you can't do long cases.

'But that may be acceptable to those who work part-time', Walker SC said. 'They can, like many of us do, decline to take cases that run more than a certain length because of the impact on their life. They are quite entitled to do that. So one can simply say you are 'not available' for the cases that last, say, more than two days. And in my opinion, in any event, cases that are less than two days are the best ones to run.'

A fundamental difficulty that must be faced by those who work part-time at the Bar is the fact that the 'norm' for barristers is to work long hours and 'success' is defined as being very busy, such that those who want to work part-time must battle with the perception that because they are working less than 60 hours a week they are unsuccessful.

A number of the barristers said that while they had initially thought that they had to work all the hours in the day in order to 'succeed' they now thought it was less important how many hours you worked, but rather whether the work you do is good.

'I used to be a workaholic', recalled one senior junior. 'I used to think it was important how many hours one worked. Now I think the amount of hours you work doesn't matter. What is important is whether you get the work done well or not.'

'I have managed to use the flexibility of the Bar to my advantage. I think it takes guts to walk out of chambers at 4.00pm. But in my book it doesn't matter when you walk out as long as you get the work done. The Bar is an ideal career to work part-time in' she said. 'Having said that, I think others

still judge one on whether you are in chambers or not. That needs to change if people are going to be viewed as successful at the Bar and still have childcare responsibilities.'

Others spoke of being forced to be more efficient now they are part-time. One said, 'In my view full-time barristers spend time just hanging around chambers. I don't do that. I might be in chambers for less time, but I am not sure I am much less productive.'

Better than being a solicitor

A number of those I interviewed had worked part-time as a solicitor in private practice. All said how much easier it was to work part-time as a barrister than as an employed solicitor in a private law firm.

Walker SC believes that the system of rewarding success at

the Bar consistent with part-time work is better than for any other professional work. 'The Bar is suited better for part-time practice than being a solicitor because one has no obligations to partners, employees or clients who expect you to be always available. Because work at the Bar comes in discrete units, provided you pace it out, it can be readily done. Until we realise that fact, child bearing at the Bar will be less pleasant than it should be.'

One junior of three years standing said, 'I have found it far better than when I was a solicitor. As a solicitor I had no control over my arrival and departure times. I came to the Bar for more flexibility and I have not been disappointed from that point of view. I have had no suggestion that people think less of me because I work reduced hours. If I have work and I do it to their satisfaction then it is really my choice as to where and when I do it provided I am at court when required and at conferences when required. The Bar suits me far better as a person and suits my family responsibilities better than as a solicitor. I have independence.'

Margaret Sneddon has similar views. 'The Bar is the best place to be part-time because you are your own boss. You don't need to tell people where you are. As long as you get the work done and you are contactable at all times it doesn't matter. I couldn't have worked part-time as a solicitor', she said.

I should note that the comparisons made by those I interviewed with employed solicitors in private practice. Partners in a law firm, or those employed as an in-house solicitors might well point to real benefits

in their work situation over that of the Bar, such as a steady income, and greater control over their hours of work (which would suit those with limited flexibility with childcare).

Judicial attitudes

For those I interviewed, it went without saying that if you work part-time you either do not take on cases that go multiple days, or you have a back-up system of child-care that allows you to switch to full-time for the period of a proceeding.

One senior junior said, 'A lot of people are unavailable for various reasons on various days. It is no different for me to say that I am not available at certain times because I have child-care responsibilities.'

Barristers with child-care responsibilities however have more limited flexibility when courts decide to change the usual sitting hours.

Kylie Nomchong has had mainly positive experiences with the judiciary, which in her experience has been very accommodating for those who have childcare responsibilities. 'The Australian Industrial Relations Commission once agreed to start a half hour early and finish a half hour early so that I could get away to a school orientation day'.

Nomchong said she was aware of a barrister who obtained leave from the Supreme Court to have breaks during the day to

His Honour asked whether a certain date was available. I told him that that particular date was not suitable as on that date I expected to be in labour at the King George Hospital.



Louise Clegg

allow her to express milk.

Nomchong has also had experience in having to change a court date due to child-rearing responsibilities. 'I appeared before Justice Hungerford in a matter that was part heard and a further hearing date had to be set. His Honour asked whether a certain date was available. I told him that that particular date was not suitable as on that date I expected to be in labour at the King George Hospital. His Honour appeared a little embarrassed but took it in good humour and an alternative suitable date was set.'

One barrister told me of the difficulties that arise when you do not want to reveal to the court that child-care issues make it difficult to meet changed court sitting times. She was in an eight day matter and it appeared towards the end of the hearing that in order to complete the matter on the eighth day the court would have to sit extended hours to avoid the matter going over part heard. 'The presiding member looked at me and asked whether there was any problem starting at 8.30am rather than the usual 10.00am I said nothing. I didn't want them to know. I just said 'yes, that's fine'. I didn't say the truth which is that most childcare facilities only open at 8.00am and that in order to get to court by

8.30am I would need to leave my child in someone's care by 7.00am and it is pretty hard to get a baby sitter at 7.00 a.m. for an hour or two before the childcare commences.'

Margaret Sneddon had a more positive experience before Garling J in the District Court. 'His Honour suggested that we might sit a little later that day to finish a matter. I said that I had commitments and that if I didn't pick up my child he would be put out on the street. His Honour took it in good humour and said that was fine and we finished at the usual time.'

Attitude of the Bar

Some barristers who work part-time found it took time for their floor members to accept their hours of work.

One junior who does commercial work said, 'On my floor no one said anything to me about the fact that I was working part-time although I think it

took them quite some time to get their heads around it. I set my own agenda and I ignored the expectations or what hours I should work.'

While most of those I interviewed said that in general other members of the Bar had been positive or at least neutral on the subject of working part-time, most had at least some negative experiences with other (usually senior male) members of the Bar with respect to them working part-time in order to care for children.

Margaret Sneddon said, 'I have had positive responses from some at the Bar who actively encouraged me to work part-time and who appear to be giving me work because I was working part-time. They would set conferences knowing that I was not available on Thursdays. On the other hand there were some negative responses particularly from the 'older' members of the Bar.'

Sophie York had a couple of revealing experiences. 'A male silk once told me that in his opinion a female barrister who was a mother 'does the Bar as a bit of a hobby''. Sneddon said she had to put up with similar comments on occasion.

And when York went from full-time to part-time (or as she terms it, 'flexible') practice at the Bar a female barrister said to

her: 'Oh, you have effectively left the Bar'. 'I found that comment very disappointing' York said, 'because I had thought she would be supportive of me'. 'She had decided that in order to be a proper barrister you have to be at the Bar full-time.' York is still very positive overall about attitudinal change being merely a function of time and said her own floor colleagues are supportive.

Difficulties with working part-time

For those who work at the Bar part-time because of child-care responsibilities, flexible child-care can be a major issue.

One senior junior who does commercial work said, 'Being at the Bar is one of those professions where you simply have to be there. That is, in court. In almost any other profession you can run late, or in emergencies cancel. That means for barristers childcare is a big issue. If your child is ill you need some emergency back-up system so that you can still go to work.'

For those with older children at school, the current court hours make it hard to drop off or pick up children. Sophie York has written on the subject of flexible hours for barristers.³ She proposed a 'twin session' court system. She explained it this way: 'Under current court hours if you are working a normal day with conferences before and after court you miss out on the time required to drop off and pick up your children from school. If court hours were staggered, say from 10.00 a.m. to 12.50pm and the next session starting at 1.00pm to 4.00pm, with cases scheduled to be heard either in the morning or the afternoon (but not both), then that would allow you to have time to complete the day's work and still pick up the children.'

Other than child-care, the second major difficulty in choosing to work part-time is that overheads are fixed on the assumption that you work full-time. The practising certificate fee, professional indemnity insurance rates, electronic library access fees, law books, and (for most) floor fees are not capable of being paid on a pro rata basis for those who work less than full-time. Similarly, except for a rare few who share a room, room license fees or mortgage repayments are the same whether you work full-time or part-time. As a result there is a strong financial incentive for barristers to work full-time.

Another issue for some is the increasing scale of practising certificate fees based on years of experience. For those that work part-time and then take time off to have children, the increasing fee based on years of experience fails to take into account of situations where a person has in fact had less experience than a mere count of the number of years since their start date. The result, says Sophie York, is 'you return [from maternity leave] usually with reduced or limited work which takes time to build up again yet at the same time paying a practising certificate as if there had been no interruption in your career'⁴

Finally there is the issue of career advancement. Most barristers stated they understood that while they were working part-time their career would not move forward, or at least not as quickly as if they were full-time. Louise Clegg said that being at the Bar is, in part, about putting the runs on the board. The more experience you have on your feet, she said, the better barrister you become. 'And working part-time will slow that advancement although presumably it will not stop one getting there. Having said that, there are many male barristers who combine their practices with other commitments such as teaching or other business interests – no one refers to them as working part-time. Only the Mummies get that tag.'

Of course being part-time one cannot take on the headline-

'A male silk once told me that in his opinion a female barrister who was a mother 'does the Bar as a bit of a hobby'.

grabbing long-running cases, Royal Commissions and the like. Also one is less likely to do urgent interlocutory work with its tendency to require extended hours at unexpected times.

While accepting that being part-time affects one's career, many nevertheless pointed to the fact that, unlike as a solicitor, at least one can choose the type of work one does. You do not get shunted into updating precedents, as happens to some solicitors. And one can work part-time and still establish a strong reputation.

So, can it be done?

Is it feasible to work part-time at the Bar? Compromises must be made. You cannot take on the long-running cases (although if you are like our President, Walker SC, you will not find that a disadvantage). You must carry fixed overheads with a reduced income. You will probably need flexible child-care. You may well need, at least initially, a spouse contributing a regular income. And you must suffer the slings and arrows of negative assumptions about your ability (or undergo the charade of pretending to be full-time).

Yet, while it might not suit everyone, it can be done, and done successfully. The flexibility of being your own boss, the per hour pay basis, and the fact that work at the Bar can (with will-power) be accepted only in bite-size pieces, makes the Bar ideal for many who wish to work part-time so they can take on other responsibilities. Of course, that is not to say it is easy to juggle working part-time work with child-care responsibilities (Margaret Sneddon concluded our conversation saying 'I hope one thing you get across in your article is that it is not easy but it can be done, and more easily than as a solicitor.')

Consistent with the trend in society, one might expect more and more barristers to choose to work part-time. At the judicial level there are already part-time members sitting in the Administrative Appeals Tribunal and the Local Court.

The aim of this article was not so much to find out why more

do not choose to work part-time at the Bar, but to find out whether it is done at all, and if so how. Accordingly I did not set out to find out what barriers exist that prevent more working part-time.

I am conscious of the fact that I only interviewed those who had worked successfully part-time at the Bar. Perhaps a more complete picture would be obtained by speaking to those who have considered working part-time, but found it impossible in their circumstances. Certainly those I did speak to identified significant issues that might well have led others to decide not to work part-time at the Bar, such as the need to have flexible child care, and the perception that one cannot be successful working less than 60 hours per week. There are no doubt other factors I did not investigate, like the need for many, particularly those who are the household's primary income source, to have a regular income.

To a large extent those disincentives are bound up in the requirement that every barrister be a sole practitioner.

Questions of what can be done to make it easier to work part-time have perhaps not traditionally been important to the Bar, made up as it is overwhelmingly by full-time, primary income earning, men. However an examination of the various structural and other factors that prevent more working part-time might well be something the Bar will need to consider in the future if more women are to come to the Bar.

- 1 I would like to acknowledge all those who participated in the interviews, and who gave me useful feedback on the first draft of this article. I would also like to thank Dr John Buchanan, Deputy Director of the Australian Centre for Industrial Relations Research and Training, who was kind enough to review a first draft and provide very insightful comments.
- 2 Lisa Brennan, 'Women having it all: They're mothers and partners in New York: You got a problem with that?', *Nat'l. L. J.*, Aug 17, 1998, as quoted in the American Bar Association publication *'Balanced lives, changing the culture of legal practice'*, September 2001.
- 3 'Court hours – can they be modified or made more flexible?', *Stop Press*, No. 69, December 1999, p.4
- 4 The Bar Council does have the discretion to reduce a practicing certificate fee in circumstances where a barrister has not worked for the full year, for example where the barrister has taken maternity leave, taken time off for study purposes or had an incapacitating illness. It does not allow for a reduction in fee for those who are working part time.

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DELORAIN, NORTHERN TASMANIA



The Parramatta Bar – definitely not the lost tribe

By Chris Winslow

Parramatta barristers are a contented lot. Rena Sofroniou and I were recently dispatched by the Editor of *Bar News* to the geographic and demographic heart of Sydney to see what life is like for the members of a Bar that is technically ‘regional’ yet thoroughly urban.

On a warm October afternoon David Carter, Paul O'Donnell, James Viney, John Wilson, and others gathered in John Wilson's room in Lachlan Macquarie Chambers – formerly owned by Norm Delaney (now Judge Delaney), overlooking the Parramatta District Court building. The welcome was hearty and we would have recorded this as an interview except that everyone was talking over everyone else in their enthusiasm. Cynics might suggest that the lost tribe of Parramatta was pleased to have attracted some otherwise elusive attention of Phillip Street and the Sydney CBD. They would be mistaken. Rather, what clearly emerged from our chat was a picture of flourishing suburban barristers who have elected to practice in Sydney's west, not because they have been forced to the fringe by economic pressures, but in order to enjoy the undoubted quality of life such practice affords.

Western Sydney's regional Bar

In the early 1990s, *Washington Post* journalist Joel Garreau wrote about the profound social and economic changes brought about by the growth of ‘edge cities’ in the United States. ‘Edge cities’ referred to major suburban retail and business districts that had developed into commercial centres in their own right, complete with their own suburbs, known as ‘exburbs’. Transport statistics and recent census data show that Sydney has developed along much the same lines. Far more people live and commute between ‘edge cities’ like Penrith, Liverpool and Parramatta than from any of them to Sydney CBD.

We imagine that none of this would surprise the barristers of Parramatta. The fifty or so members of the Parramatta Bar, together with their clients and briefing solicitors, live and work in locations across the sprawling suburbs and edge cities around Sydney. Barristers who have chambers in Parramatta live in suburbs as scattered as Blue Mountains in the west, Kenthurst in the north west and Newport in the north. They may, however, be briefed to appear in matters before the District Court in Campbelltown, the Family Court in Parramatta or Wollongong or the Local Court in Penrith or Gosford.

‘One of the big differences between a practice here in Parramatta and one in the city is that we spend more time in our car, often driving to and from court sittings’, said David Carter.

Urban decentralisation initiatives by state and federal governments, combined with the westward shift of Sydney's demographic centre have resulted in the central business district of Parramatta becoming a vibrant legal precinct. Although the NSW Supreme Court no longer sits in Parramatta, several Family Court judges and two federal magistrates are located in the imposing Commonwealth Law Courts Building. Local and District Courts, the Tenancy Tribunal and the Workers Compensation Commission and Court are housed in the vicinity. This concentration of courts and tribunals is something that will probably be reinforced in the next couple of

years when the Police headquarters are relocated from Sydney's Surry Hills to a new complex located adjacent to Parramatta railway station and by the possible construction of a new specialist Children's Court complex to replace such ageing facilities as that currently located at Cobham.

Family law is the mainstay of the Parramatta Bar, followed by criminal law and personal injury litigation. In contrast to Phillip Street and the Sydney CBD, the Parramatta barristers report that their respective practices tend not to involve any substantial amount of equity work. Perhaps as compensation for this, they enjoy instead practices featuring a number of comparatively interesting and worthwhile jurisdictions such as RSPCA and other animal protection work, child protection matters, mental health advocacy and Defence Act cases.



Parramatta city by the river. Photo: Stephen Cooper / News Image Archive

Barristers at Parramatta appear to be briefed mainly by solicitors whose offices are located in the greater western suburbs. Briefs do flow west from the city, but mainly in family law. Of course, there will be occasions when Parramatta barristers will be appearing in court in the city or will be led by a silk. For that reason, it is usual for them to build relationships with chambers in the city – such as Frederick Jordan Chambers – from which they can select silk to lead them from time to time.

A legal precinct with a village atmosphere

Although we have observed that Parramatta is the geographic and demographic heart of Sydney, its members are convinced that it actually possesses the most desirable qualities of a regional Bar. Many of the more senior members of the Parramatta Bar, including the late Peter Sheldon, John Shaw, Peter Naughtin and Rob O'Neill began practising in the Sydney CBD, but decided to make the move out west. That said, Parramatta bares little resemblance to the arguably defensive escapism (until further reasoning proves otherwise) of a ‘sea-change’ destination like Lismore. Nor do the Parramatta barristers conduct a ‘country practice’.

Perhaps it is a ‘Goldilocks Bar’: not too big, not too small: but ‘just right’. The Parramatta Bar is comprised of around 40 members in two principal chambers: Lachlan Macquarie

Chambers, which has 26 barristers, and Arthur Phillip Chambers, with 15. In combination with the nearby courts and solicitors' offices, they form a distinct legal precinct, but one which has an informal atmosphere. David Carter likens it to a village.

'I read David Marr's book about Garfield Barwick, and he describes Phillip Street in the 1930s. That is what it is like here', said Carter. 'If you walk up and down the street you see judges and they come up and talk to you. All our solicitors are here buying their lunch. It's still a wonderful city.' John Wilson agrees, 'You have to say it's more relaxed out here. By the time you have been here a year, you know every other barrister, magistrate and judge pretty well.'

The barristers at Parramatta have a social circle all of their own and have replicated many of the traditions and ceremonies of the Sydney CBD, albeit on a smaller and more personal scale. A service is held at one of the three major churches in the area, Leigh Uniting Church, St Patrick's Cathedral, or St John's Anglican Cathedral, to mark the beginning of the law term. There is a regional Bench and Bar Dinner each year and, of course, there is a Melbourne Cup lunch. Interestingly, outside of work hours,

there is less socializing: the geographic dispersal means that they tend not to bump into each other at their children's school sporting days!

Members of the local judiciary are regularly entertained in chambers and when a Parramatta barrister is elevated to the Bench, colleagues hold a small and informal gathering for dinner or drinks. Some commented that these functions were the way 15 bobbles were intended to be. It is not surprising therefore, that a good professional rapport exists between Bench and Bar.

In a speech delivered at the ceremony to mark the swearing-in of Mark Le Poer Trench as a judge of the Family Court, Harrison SC noted another, more poignant reason for the camaraderie of the Parramatta Bar. They are, he said, 'a tightly

knit group of practitioners. That closeness was historically forged, at least in part out of the violent and tragic events involving, or at least directed at, some members of [the Family Court] in the early 1980s'.

By now, the obvious question being asked by every Phillip Street practitioner is: 'This is all well and good, but *how* precisely can they possibly reproduce the old world charm and ambience of the Bar Common Room?' One respondent laughed and shot back a reply, 'That stumped us for a while, but now we just pull down the blinds and turn off the air conditioning'.

'And we each bring in the worst paintings we can find,' added someone else.

'Nobody's struggling'

The barristers in Parramatta may have elected not to join the high fee, high-pressure environment of Sydney, but how do they fare, both in terms of fees and quality of their surroundings? Are there any financial benefits to practising in Parramatta, in terms of their costs and what do they get for their money?

The Parramatta Bar is perhaps distinct in one respect. Both Lachlan Macquarie Chambers and Arthur Phillip Chambers own their own free-standing buildings. Lachlan Macquarie Chambers occupy a squat, 1920s art deco structure, adjacent to the District Court building, which was once a branch of the Rural Bank (later State Bank). Arthur Phillip Chambers purchased and renovated the

former Public Trust Office building. Lachlan Macquarie now own their building outright. The interviewees were rather coy about the financial advantages that this affords, but they do believe it makes it one of the cheapest chambers in Sydney in which to practice.

However modest their costs in comparison to their city based counterparts, it was clear that Parramatta barristers enjoy spacious surrounds. Rena was certain that the readers room at Lachlan Macquarie, which was spacious and included a window, violated a long standing tradition of broom-closet style accommodation. She was equally incredulous at the sight of a garden terrace adjoining David Carter's chambers and is feverishly scrutinizing the *New South Wales Barristers' Rules* for possible breaches with respect to 'unwarranted comfort and amenity'.

So it's comfy - but is there enough work to go around? The state government's drive for so-called 'tort law reform' in personal injury, medical indemnity and workers compensation litigation seems to have washed over the Parramatta Bar with little effect. To the best of their knowledge, those we spoke to could think of only one barrister who practised solely in workers compensation and personal injury.



Old Government House in Parramatta Park. Photo: Bob Baker / News Image Archive

Nor does the issue of direct access and competition with the solicitor branch of the profession seem to cause any consternation. Direct access is determined largely by the type of brief. For example: the structure of family law cases, the mainstay of the Parramatta Bar, is such that they are rarely done through direct access. Conversely, a drug case from Cabramatta, for example, may be.

'The reality is you can make a good quid at a regional Bar and still enjoy a good lifestyle', said James Viney. 'We don't know anybody who's struggling.'

Both Lachlan Macquarie and Arthur Phillip Chambers are currently without a reader. David Maddox, Head of Arthur Phillip Chambers, was keen to point out that a reader who would do 'mentions, motions and devilling' would be most welcome.

A junior Bar

In April 1788 Governor Phillip selected a site for the development of Parramatta, and in November of that year the first settlement began at what is now Rose Hill. Parramatta has staked its claim to being the country's oldest city, and boasts more heritage listed buildings and historically significant sites than even the Rocks district at Circular Quay. Included among these are the nation's first cemetery (at St John's Cathedral) and the first surveyed street (George Street). Old Government House, in the

'The reality is you can make a good quid at a regional Bar and still enjoy a good lifestyle.'

centre of Parramatta Park is the oldest public building in Australia. Elizabeth Farm, built for John Macarthur in 1793 is the oldest private building in the country and Lancer Barracks is our oldest existing military establishment.

It therefore comes as something of a surprise to learn that, despite its historic surrounds, the Parramatta Bar is a comparatively new institution. Rob O'Neill, believes that it was not until 1961, when Russ Cox founded a private practice based mainly on criminal law, that counsel began practising specifically in Parramatta.

Attempts to account for the comparatively recent advent of a fully-fledged regional Bar are made difficult by the fact that published historical material has been quite limited. Dr J M Bennett's *History of the New South Wales Bar*, published in 1969, has only a single, passing reference to Parramatta. This situation was partly remedied by Geoff Lindsay's recently published book on the NSW Bar¹, in which Rob O'Neill wrote a section about the history of the Parramatta Bar.

David Carter thinks the explanation lies in the nature of the work available there prior to the formation of the Family Court. The Supreme Court has not sat in Parramatta for more than twenty years, but when it did, most of its work was in the form of murder trials, which were conducted mostly by crown prosecutors and public defenders.

Despite its 'youth' the Parramatta Bar does not lack pedigree and has started to produce its fair share of appointments to the Bench. *Inter alia*, Norm Delaney was appointed to the District Court (1998), Bob Manser to the Compensation Court and to the Family Court Bench have gone Ian Coleman (1991), David Collier (1999) and Mark Le Poer Trench (2001).

Despite the obvious talent that resides in the Parramatta Bar, it has been able to count only a handful of its own among the ranks of senior counsel. Russ Cox, the 'founding father' of the Parramatta Bar, took silk in 1978, but died not long after in 1985. Happily, when *Bar News* paid a visit to Lachlan Macquarie Chambers, a celebration was imminent following the inclusion of Robert Harding in the list of 2002 silks. Although he is now in Culwulla Chambers in Castlereagh Street, Harding built up his family law practice at Arthur Phillip Chambers in Parramatta.

So why are there no practising silks at Parramatta? We expected to tap into a well-spring of discontent towards Phillip Street. Instead, the equanimity of John Wilson's response was typical.

'If anybody had the pretensions to become silk they would go into the city and try and achieve it', he said. 'More to the point, there simply isn't the market for a silk to be out here all the time. If you take the Family Court as an example, most of the cases we have are what we call 'house and garden cases'. The main asset is the house, so its only \$300,000 that has to be divided between the parties. That doesn't make a silk. When there is a case involving \$10 million, which happens five or ten times a year, then a silk would be brought in.'

Aha! We hear you cry, but what about the percentage of women? We discovered that there are five women barristers practising in Lachlan Macquarie and Arthur Phillip Chambers; approximately the same proportion as it is for the NSW Bar as a whole.

Tyrannies of traffic, if not distance

There is a perception held by some of those with whom we spoke that, despite being less than 40km from Phillip Street, the

practical difficulties associated with attending committee meetings and social functions in town are enough to prevent them from being more closely involved in the social and 'political' life of the Bar.

'At one time I was on the ADR committee and I think I got into one meeting. It's almost impossible to make it into town by 5.00pm. It's just not going to happen', said Peter Dooley.

To this situation has been added the requirements of mandatory continuing professional development. The Parramatta Bar has responded enthusiastically to CPD and was well represented at the first conference held in the Hunter Valley in April of this year. On 24 October a CPD mini-conference was held at Parramatta. Those who spoke to *Bar News* were generally pleased with the arrangements made by the Bar Association to bring CPD to regions, such as distribution of video recordings of CPD seminars and mini-conferences. When videotaped CPD conferences are played at a gathering in chambers, where issues are discussed and questions are sent to the presenter, attendees will earn CPD points. Yet for the members of the Parramatta Bar, this situation may still be problematic. As mentioned before, the geographic dispersal of their home and practice across the suburbs may mean that they do not return to chambers in the evening following a court appearance in Campbelltown or Penrith. Thus, there was a feeling among those we spoke to that they will only be 'getting across the line' and little more.

'The best life in the world'

At one point in our conversation the enthusiasm on the part of the local barristers to convey to us the benefits of practising in Parramatta was slightly tempered by the concern that they should not be too encouraging. The fear was that too many people may come to enjoy Parramatta as well. They are convinced that being a barrister at their Bar is still the best life in the world. 'When you are not in court you can enjoy lunch at one of the fine restaurants on Church street', said David Carter. John Wilson summed up the mood in a way that would appeal to those who believe in reincarnation: 'It's the best life I've had so far'.

¹ Geoff Lindsay and Carol Webster (eds), *No mere mouthpiece: Servants of all yet of none* (Sydney, Butterworths, 2002)

New Part II Division 5C of the Legal Profession Act 1987

Expanded duties of barristers in damages cases*

By Bret Walker SC, President of the New South Wales Bar Association

The enactment of the *Civil Liability Act 2002* amended the *Legal Profession Act 1987* in a very important way for barristers in New South Wales. The insertion of the new Division 5C into Part 11, comprising secs 198J-198N, expressly imposes on barristers duties in relation to cases in which damages are claimed. Those duties involve both positive and negative obligations, disciplinary sanctions and the possibility of personal costs orders.

These provisions do not apply only in personal injuries litigation. They apply across the board in all civil litigation where the remedies sought include what are called damages.

Every barrister practising in New South Wales must be familiar with these provisions. There is no substitute for the careful reading and re-reading of the statutory text.

The comments which follow are my attempt to interpret these critical provisions for everyday practice, including consideration of some questions and perceived problems which have been raised with me already by members of the Bar. I am grateful for the assistance of those who have spoken with me or corresponded with me and the Association about these provisions and their application in practice. Discussion, debate and criticism are vital to the profession understanding them. In due course, after experience has been gained in practice, that process may well enable improvements to be made to the present legislation. It follows that my comments are really provisional, so as to promote and advance the necessary debate.

Political background

The mischief addressed by parliament, to be gathered from Hansard and the public and political discussions which preceded preparation of the Bill, was the institution and continuation of claims for damages which were speculative in the sense that essential facts were unknown to the plaintiff. During the debate, truly hopeless contentions of law were

added to the vices under scrutiny. Finally, the maintenance of defences devoid of factual support or without merit as a matter of law was added as another evil to be remedied.

No-one with knowledge of legal practice in this state, and experienced in civil litigation, and who is concerned to be fair, would ever have described the state of affairs in such pessimistic terms. It should go without saying that the suggestion that this is typical of personal injuries litigation in New South Wales would be ludicrous. However, legislation does not have to be confined to remedying states of affairs which are endemic or usual.

The experience of most barristers, especially in the debt-collecting and personal injuries areas, would be that occasionally cases happen where one side or the other has precious little to go on. The Bar should be open to the political view, whether individual barristers accept it or not, that litigation without a modicum of factual

support for one's case is a bad thing socially.

What these background matters indicate is that the new law is intended to make a difference but that the difference is material only in a relatively very small number of marginal cases.

Assumed features of litigation

These amendments were inserted into a statute regulating the conduct of the legal profession in New South Wales. Some important features of the administration of justice in New South Wales must be assumed by a reader of these new provisions. Certainly, they would make very little sense if these assumed features of litigation were not taken as matters regarded as real and proper by parliament when it enacted them. The first and cardinal feature is that the power of adjudication in our system is judicial, and resides with the judges (and juries on matters of fact in certain cases). It is not exercised to any degree by the parties to litigation, let alone those parties' lawyers.

This is not a charter for lawyers' professional irresponsibility – rather, it is the setting in which barristers' disinterested role is crucial. The autonomy of parties (ie clients) is vital if individual liberties are valued. The balance is attempted to be struck in eg Rules 16, 17 and 18 (noting the extended and restrictive definition of *'forensic judgements'* in Rule 15) in the *New South Wales Barristers' Rules*.

The second feature is the basically adversarial nature of litigation: by and large remedies are not granted unless the party seeking them persuades the court to do so, and the other party is entitled to a reasonable opportunity to resist that exercise. A vital ancillary element of the adversarial feature is that the parties are expected to frame the issues which are in dispute between them, and to marshal the evidence and arguments in support of their own cases and against their opponents' cases.

The third feature is that the confidentiality of instructions and advice passing between clients and lawyers, producing legal professional privilege and client legal privilege, is a fundamental substantive right of people involved in litigation. The consequence is that no-one is entitled to read his or her opponent's brief, or to rifle through the other side's solicitor's files. Nor can barristers insist on sitting in on their opponents' conferences with parties or witnesses. The law regulates access to material held by the other side by means of the law concerning pleadings, particulars, discovery and the compulsory production of documents eg upon subpoena – in the pre-trial phrase. During the trial, of course, there is the compulsion for witnesses to answer questions in cross-examination. Importantly, legal professional privilege and client legal privilege are usually available to limit even those forms of disclosure. So barristers can never really know the sum of what the other side has.

The fourth feature is that much of the substantive law governing the outcome of litigation is case-law, or judicial interpretation of statutes. Especially in the area of the common law duty of care, its breach, its actionable consequences and the measure of damages in negligence, the pronouncements of even the highest authority are not

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to be seen as the last word – ie they are not ultimate even if they are the most recent. The law changes, or our understanding of the law changes (depending upon one's taste in fictions). It is not true that what the High Court has most recently said in an area of law cannot reasonably be argued to justify its reconsideration, or even contradiction, by the High Court in future. And the close reading of precedent authorities for what they really decided, and thus for what they do not decide, is an everyday exercise.

The fifth feature is that practically all final decisions in civil litigation are susceptible of appeal, with the notorious corollary that many first instance and intermediate appellate decisions are overturned, on the basis that they were wrong.

There is nothing in the Civil Liability Act, or its travaux préparatoire, to indicate the slightest encroachment was intended on any of these features. They are so fundamental that they must be considered as assumptions made by parliament about the system of litigation into which these new provisions were inserted.

These assumed features should be understood as basically undisturbed by these new provisions. That approach could have important results in the practical application of the provisions.

The task imposed

on us is not the

impossible and

invidious exercise

of predicting an

ultimate outcome.

Interpretation of Part 11 Division 5C

Prohibition of legal services without reasonable prospects of success

The scheme begins with a prohibition against providing legal services on a claim or a defence of a claim for damages unless the barrister reasonably believes that the claim or defence has reasonable prospects of success: sub-sec 198J(1). A claim for damages includes a claim for any form of monetary compensation: sec 3 of the Civil Liability Act.

Critically, the reasonable belief of reasonable prospects of success is to be on the basis of provable facts and a reasonably arguable view of the law: sub-sec 198J(1). In my view, it is these two components

which provide guidance for the principled and ethical practical application of these new provisions.

A fact is provable only if a barrister reasonably believes that the material then available provides a proper basis for alleging it: sub-sec 198J(2). The conceptual and verbal similarities between this provision and the terms of Rule 36 of the *New South Wales Barristers' Rules* are no coincidence. Emphasis is placed on the availability of material (as opposed to presently admissible evidence) and on the test of propriety to allege a matter (as opposed to sufficiency to prove a matter).

Given that we do not know everything in our opponents' briefs, let alone how witnesses will perform on the day, and only in our wildest dreams how all the evidence will ultimately impress an as-yet unknown judge during a future hearing, it would be ridiculous to suppose parliament intended that barristers must be able to predict a win before they can even start the process of trying to achieve one.

As it happens, we know that the first exposure draft of the Bill was (unintentionally) phrased as if this impossible prediction was required of us – and the government very promptly withdrew that version as soon as the Bar pointed out its fatal defect.

So, the new law does not require us to guess the outcome of a future contested hearing on the factual merits.

As to reasonably arguable views of the law, it would be wrong to regard the new provisions as freezing the judicial development of doctrine. It is precisely by means of reasonably arguable (and ultimately persuasive) views of the law that the reasoning for

individual decisions by the courts alters an overall understanding of the law. Bluntly, the law as made by the judges changes with the success of arguments, many of which are novel even if only incrementally.

Once again, the task imposed on us is not the impossible and invidious exercise of predicting an ultimate outcome. For one thing, for most cases the ultimate stage is at first instance, for quite a few at the level of the Court of Appeal or some other intermediate court of appeal, and for a very few only after the decision of the High Court. One does not always know into which of these classes one's case falls, especially if the brief is difficult and the point of law a matter of serious debate. There is no sign that parliament has intended to put us at peril for failing to guess correctly about these matters.

In an area that may be comparable, the High Court has made it clear that nothing so crude as an opinion that a case will succeed is necessary in order to pass the related test against litigation being instituted 'without reasonable cause'. For example, Gibbs J held in *R v Moore; ex parte Federated Miscellaneous Workers Union of Australia* (1978) 140 CLR 470 at 473 that:

a party cannot be said to have commenced a proceeding 'without reasonable cause'... simply because his argument proves unsuccessful ... the argument presented ... was not unworthy of consideration and it found some support in ... two decisions of this Court ... The fact that those decisions have been distinguished, and that the argument has failed, is no justification for ordering costs

This passage was cited with approval by McHugh J in *Re Commonwealth; ex parte Marks* [2000] HCA 67 at [26], [27] (75 ALJR 470), who noted that notwithstanding advice to an applicant that intended arguments were unlikely to succeed, and that on one view it had only 'some chance of success (albeit minor)', that nonetheless:

Certainly the fact that an application fails does not mean that it was commenced without reasonable cause.

Another familiar context, viz the peremptory termination of proceedings by summary judgment or dismissal, or by striking out pleadings, or by permanent stays on various grounds, provides a useful analogy. For example, in rejecting an assessment of likely prospects as necessary or appropriate in relation to stays on the ground of *forum non conveniens*, Gaudron, McHugh, Gummow and Hayne JJ said in *Agar v Hyde* (2000) 201 CLR 552 at 576, [58]:

Are proceedings to be terminated upon a prediction (on what almost invariably will be less evidence and argument than would be available at trial) of the 'likely' or 'probable' outcome of the proceeding? That cannot be so. It would be wrong to deny a plaintiff resort to the ordinary processes of court on the basis of a prediction made at the outset of a proceeding if that prediction is to be made simply on a preponderance of probabilities.

Helpfully, if unnecessarily, the provision is to apply despite any so-called obligation that a barrister may have to act in accordance with the instructions or wishes of the client: subsec 198J(3). Of course, this is against the background of the well-known and undisturbed requirement of law that a barrister must never be a mere mouthpiece: Rules 18 and 19 of the *New South Wales Barristers' Rules*. And the classical statement of our traditional position is to be found in the judgment of Mason CJ in *Giannarelli v Wraith* (1988) 165 CLR 543 at 556 – 556, in the passage stressing counsel's exercise of:

an independent judgment in the interests of the court ... [with] an eye, not only to his client's success, but also to the speedy and efficient administration of justice.

In the same vein, Barwick CJ and McTiernan and Mason JJ stressed in *Richardson v R* (1974) 131 CLR 116 at 123 that:

It needs to be stated clearly and explicitly that counsel have a responsibility to the court not to use public time in the pursuit of submissions which are really unarguable.

In relation to defences, it is to be noted that reasonable prospects include simply leading to a reduction in the damages recovered: sub-sec 198J(4). This can only mean a reduction below the amount demanded, whether in a pleading, particulars or to be gathered from the evidence.

Preliminary legal work

These new provisions do not apply to legal services provided as a preliminary matter for the purposes of a proper and reasonable consideration of whether a claim or defence has reasonable prospects of success: sec 198K.

Of course, the nature of litigation in our system and of serious professional responsibility renders it ludicrous to suppose that this so-called preliminary matter occurs only once and only at the earliest stage in contentious proceedings. In my view, the notion of a matter being preliminary has to be read purposively, and the purpose of this new legislation certainly does not involve a restriction of professional responsibility to the time in a barrister's work on a brief when he or she is likely to know least about the matter viz at the very beginning. Rather, such consideration remains, in a sense, preliminary to the series of decisions from time to time to do things (such as alleging facts, denying facts, cross-examining, or arguing points) which depend on the propriety or cogency of the material available at that time to justify doing that thing.

There can be no real doubt that the expression '*reasonable prospects of success*' in sec 198K should receive a cognate interpretation with the express provisions of sub-sec 198J(5).

Accordingly, we do not have the absurdity of not being able to open our briefs for the first time (which would be so, otherwise, because no-one could know of prospects of success beforehand), or the equal absurdity of not being able to reconsider those prospects from time to time as facts or our mature reflexions alter.

Disciplinary sanctions

Breach of the new prohibition is not an offence, but is capable of being professional misconduct or unsatisfactory professional conduct: sub-sec 198L(1). Those pivotal concepts are addressed in sec 127.

This, at least for extreme cases, is far from new. Peter Clyne was struck off for breach of his professional obligation not to abuse the privilege granted counsel by making allegations of discreditable conduct without adequate material available to justify them being made: see *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 esp at 200-201; cf Rule 35 of the *New South*

Wales Barristers' Rules.

Certification

Originating process or a defence, on a claim for damages, now requires a certificate, in a form required by any relevant rules of court: sub-sec 198L(3). The certification which must accompany

such process is that '*required by this section*' viz sec 198L. That requirement is found in sub-sec 198L(2).

Clearly, in my view, sub-sec 198L(2) applies only where a lawyer is filing process. It therefore does not apply to litigants in person – which is obvious given the irrelevance of professional obligations in such cases.

More significantly for the Bar, in my view it equally clearly does not apply to barristers at all, given that barristers are forbidden ever to file any process: Rule 75(a) of the *New South Wales Barristers' Rules*. I understand some have argued that sub-sec 198L(2) should be read as if a barrister's certificate is required on a pleading notwithstanding the pleading is filed by a solicitor or even by a direct-access client. With respect, this lacks any textual support. The provision commences 'A solicitor or barrister cannot file...' and continues '*unless the solicitor or barrister certifies ...*': syntax and the use of the indefinite and then the definite article which make it obvious that it is the lawyer who files who must certify.

This is not to say that rules of court may not require barristers to sign, or certify, pleadings. It is not yet the custom in New South Wales. It is so in other jurisdictions in this country.

Costs sanctions against barristers

If it appears to a court that proceedings in it on a claim for damages have involved a barrister providing legal services without reasonable prospects of success (as defined in and by sec 198J), of its own motion or on a party's application, that court can order the barrister to repay to the client the whole or any part of costs the client has been ordered to pay to another party, and/or can order the barrister to indemnify a party other than the client against the whole or any part of the costs payable by that party: sub-sec 198M(1).

The Supreme Court may on a party's application make any such order, as well, whether or not it was the court in which the proceedings were taken: sub-sec 198M(2).

The barrister is not entitled to get back from the client any amount the barrister has been directed to indemnify under these provisions: sub-sec 198M(4).

Applications for orders under sec 198M cannot be made after a costs assessor has made a final determination: sub-sec 198M(3).

These provisions, as well, are scarcely revolutionary. For example, the provisions of Part 52A rule 43A of the *Supreme Court Rules* already provide (since January 2000) for barristers to be ordered to give up fees or pay costs when they have been '*incurred improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or default*'. The provisions of Part 1 rule 3, esp sub-rule 3(4), are also thus relevant, as they impose an obligation on barristers not, by their conduct, to cause their clients to be put in breach of parties' duty to assist the Court in facilitating '*the just, quick and cheap resolution of the real issues ...*'.

These provisions, with their companion amendments to the *New South Wales Barristers' Rules*, were circularised and explained in a Special Edition of *Bar Brief* for February 2000.

Reversed onus and waived privilege in cost claims

A presumption that legal services were provided without reasonable prospects of success (as defined) arises if the trial court finds that the facts established by the evidence do not form a basis for a reasonable belief that the claim or defence had reasonable prospects of success: sub-sec 198M(1). The Supreme Court, including in cases where it was not the trial court, can also create the same presumption by its satisfaction to the same effect, either from a trial court finding or otherwise on the basis of the trial court's judgment: sub-sec 198M(2).

This presumption arises in circumstances which plainly do

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not mirror the obligations imposed by sec 198J. It arises by something found in or inferred from the conclusions of the trial court – thus, on the basis of the outcome of the contested evidentiary hearing, a matter which was by definition unknowable by the barrister at any time when he or she was actually providing the legal services in question.

This does not mean that we barristers somehow have to guess at factual outcomes at peril of costs sanctions in the event of adverse outcomes. What it does mean is that the trial court does not have to, itself, engage in the impossible and invidious task of speculating as to the quality of the instructions held by counsel in a case where the result suggests a real lack of merit in that counsel's client's position.

In my opinion, it would be an error of law, and a seriously disruptive one for the efficient administration of justice, if judges were simply to equate any defeat with the conditions sufficient to create this presumption. Something more is needed, viz such a rejection of the defeated case's factual foundation as to suggest – if nothing else were to emerge – that there never was a proper factual foundation for it. Whether or not my opinion in this regard is correct, the Bar now has to deal with this new presumption.

To meet that situation, the presumption is rebuttable, the onus being to establish that at the time the legal services were provided there were provable facts providing a basis for a reasonable belief that the claim or defence had reasonable prospects of success (all as defined in sec 198J): sub-sec 198N(3). In this way, the issue returns to the obligation as imposed by sec 198J – and not to the idea of predicted success – for the purposes of considering a personal costs order against a barrister.

A barrister may produce information or a document for the purpose of rebutting that presumption, notwithstanding any duty of confidentiality between the barrister and the client, so long as the client is the one to whom the legal services were provided, or the client consents, or the court is satisfied that it is necessary in order to rebut the presumption: sub-sec 198N(4). As the foundation of legal professional privilege or client legal privilege is confidentiality, in my opinion a purposive reading has this provision prevailing over those privileges. It would be monstrously unfair to barristers were this not so.

Defendants putting plaintiffs to proof

A position which some have argued has been transformed by these new provisions is that of a defendant who simply puts the plaintiff to proof, presumably by a non-admission or denial, without any positive allegations of fact to answer the plaintiff's claim for damages. I wonder whether this position is much altered from the pre-existing law, whether the new provisions raise any difficulty in their application, and whether it all really matters much at all.

First, long ago eg in the Supreme Court it was forbidden to plead the general issue: Part 15 rule 27 of the *Supreme Court Rules*. Certain specific matters have long had to be pleaded in a defence, so as to allege a matter making the claim not maintainable, so as to avoid surprise, and so as to raise new matters of fact: Part 15 sub-rule 13(2). A traverse of an allegation in proceedings by a pleaded denial or non-admission (Part 15 sub-rule 20(2)) may involve quite specific statements as to available material where verification is required: Part 15 sub-rule 23(4).

Second, since January 2000 the important provisions of Part 15A of the *Supreme Court Rules* have forbidden putting an allegation of fact in issue unless it is reasonable to do so in light of steps taken by the party to ascertain whether there is a reasonable basis for doing so. By the eventual application of Part 1 rule 3 and Part 52A rule 43A,

the sanctions on barristers responsible for their clients breaching these provisions include the possibility of personal costs orders.

Third, if the only point in issue is the suffering of damage or the amount of damages, a general plea will suffice: Part 15 sub-rule 20(3). The policy of the judges as rule-makers, by way of delegated legislation under the supervision of the houses of parliament, is firmly to leave the onus of proof on such matters where the general law places it, viz on the plaintiff – without any special responsibility for the defendant to specify why the defendant puts the plaintiff to proof of the suffering of damage or the quantum of damages.

Fourth, in practice there are very few cases where reasonable investigation on behalf of a defendant reveals no matter of fact or argument of law which justify resistance against the plaintiff's claim, and the defendant chooses nonetheless neither to admit the claim nor let the court or the plaintiff into the secret of how it is proposed to resist the claim at the final hearing.

It seems to me that a matter which should not be overlooked in the terms of sec 198J, and in its practical application to these rare cases of defendants who are more or less simply hoping something might turn up, is that the obligations imposed on barristers with respect to matters of fact have to do with those things which are proper to allege. A defendant who is simply relying on the requirement for the plaintiff to prove its case, or its loss and quantum, does not have to allege anything. It may well follow that the '*basis of provable facts*' upon which sec 198J pivots has no substantive application in such cases.

Certainly, if the approach to pleadings and case-management of which I have given examples in the Supreme Court were intended by parliament to have been swept aside by the provisions of sec 198J, one could have expected a lot more explicit indication of that intention than the statutory text contains. Nor is there anything in *Hansard* to this effect.

Overall, however, I doubt whether the plight of defendants who have no positive case and simply wish to adopt the stance of *Micawber* is so affecting or critical to the administration of justice as to be a major problem in understanding and applying these new provisions. Experience shows that some defendants are not above stonewall defences which simply use the inevitable delays of a court list to bring unmeritorious financial pressure on plaintiffs. I for one will not regret their position becoming less easy.

Explanation to clients

We have probably all experienced the puzzlement of some clients when they learn that their barrister is not just a gun for hire. One of our skills should be the polite, informative and practical explanation to clients of why there are some things we cannot do for them – whether it is allowing a judge to proceed in ignorance of the law, or failing to correct an error of certain kinds.

The independence and disinterestedness of the advocate's position are traditional, and are currently referred to in eg Rules 16, 18, 19, 20, 22 and 23 of the *New South Wales Barristers' Rules*. The new provisions are so important, however, that it will be prudent to advise clients about them whenever work to be done comes close to the permissible line.

Indemnity insurance

Whether the policies individual barristers have against professional liability will cover the costs of resisting claims for costs orders under secs 198M and 198N, and the costs which may be awarded under those provisions, will probably depend on the same question in relation to the court's long-standing inherent jurisdiction

and more recent provisions such as Part 52A rule 43A of the *Supreme Court Rules*.

It would be a good idea to check one's own policy wording in order to understand whether these liabilities are likely to be covered or not.

Professional courtesy

As I understand it, it is still the case that before a barrister advises that an application should be brought to strike out the other side's pleading, the barrister should advise that fair notice be given to the other side so as to provide an opportunity for matters to be rectified without the need for argument in court. I hope my understanding remains correct as to what the practice should universally be.

What about the phenomenon I understand to have sprung up like mushrooms after rain, of solicitors writing letters to each other threatening dire consequences under secs 198M and 198N if the obligation imposed by sec 198J has not been observed? I think it represents an unpleasant attitude, in any case where there is not already a fair inference that the other side has been reckless in their pleading or other allegations. It surely cannot be enough that one's own client is indignant that a claim has been made against them or that their own claim has not been admitted in full.

I trust the Bar will not participate in the degeneration of dealings among colleagues, all of which should start with the assumption that

colleagues are professional. I have not observed barristers officiously and aggressively reminding each other of ethical requirements, let alone of the disciplinary consequences which may follow upon their breach. It would be a sad development were these new provisions to give rise to equally unacceptable incivility between counsel.

Barristers should not lend themselves to the threatening of each other, or of solicitor colleagues, with consequences under Part 11 Division 5C of the Legal Profession Act. In cases where there is substantial ground for an inference that costs or other detrimental effects on the administration of justice are being incurred by a colleague's failure to observe its provisions, there should always be a civil dialogue before anything in the nature of a threat is contemplated: and in any event threats are quite inappropriate between colleagues.

Conclusion

There is no doubt these new provisions do add important aspects to our duties as barristers. There is much to be said for the view that the additions are in line with tradition and pre-existing requirements. They should not be allowed to stifle argumentative creativity, forensic boldness or professional civility.

* This article was originally printed as a special edition of *Bar Brief*, No.97 (September 2002). Another review of these provisions can be found in Nicholas Beaumont, 'What are "reasonable prospects of success"?', *Law Society Journal*, August 2002, p.42.

Liability of public officers*

By Alan Robertson SC

Public officers referred to in the title are those exercising statutory and non-statutory governmental powers. I leave aside legislators and those who exercise judicial power. It may be seen that I have already begged a number of questions:

- What are governmental powers?
- Where does executive power shade into judicial power?
- Are all statutory powers governmental?

But what I am speaking about is, broadly, 'When may a public servant be sued in tort?'

I put it this way rather than 'When is a public servant liable to pay damages?' because the administrative law remedies do not, of themselves, give rise to a claim in damages.² It may of course be necessary to have administrative action or an administrative decision set aside on the way to a claim for damages but this is because, outside negligent acts or omissions, there is no claim for damages in respect of a lawful administrative action. 'There can be no tortious liability for an act or omission which is done or made in valid exercise of a power.'³ I take this to mean that there is no such thing as a negligent/actionable exercise of a discretionary power where the exercise of the power is valid.

I should spend a minute or two on this point because it is sometimes overlooked. It is one thing to have a decision set aside when it is the justification for a positive act. For example, where you are being sued for a sum of money by a government agency and there is an administrative decision imposing the liability, you can defend yourself by attacking the validity of the administrative

decision and, if successful, the agency's action founded on debt may disappear.⁴ Similarly, where a statute is relied upon by a defendant government in an action for trespass to goods, if the statute is invalid then the claim for damages for trespass may succeed.⁵ A revocation of a licence, if invalid, would sustain a similar analysis. So may detention, if invalid, give rise to an action for false imprisonment.

But the result would not follow where a positive grant or licence is fundamental to the plaintiff's cause of action, the activity being otherwise prohibited. This is because invalidating a decision not to grant would leave a causal gap: the plaintiff would still not have the necessary grant or licence unless and until the matter were remitted and a positive decision in favour of the plaintiff were made. To give an example, the absence of a licence or approval may mean that a person is denied the opportunity to conduct a business. But where the positive grant of a licence is, by legislation, a prerequisite to conducting the business, then the mere setting aside of the decision to refuse to grant would not found an action for damages. The lack of legal justification removes a shield, but does not provide a sword.⁶

Now that the action on the case exemplified by *Beauesert Shire Council v Smith*⁷ has gone the way of nominate torts,⁸ there are only two torts which merit detailed consideration and as to one of them, misfeasance in public office, I will be encouraging you to look past its current fashionability to see that success in such a claim would be rare. This leaves the tort of negligence as it impacts on public officials and those dealing with them. For administrative lawyers this means, largely, the negligent exercise of a discretionary power.

Misfeasance in public office

The High Court has twice looked at this tort in recent times,

*This is a revised version of a paper given at a meeting of the New South Wales Chapter of the Australian Institute of Administrative Law on 30 May 2002.

once in *Northern Territory of Australia v Mengel*⁹ and again in *Sanders v Snell*.¹⁰ In neither case did the High Court delineate the most elusive element of the tort, which is the state of mind of the official.

Sanders v Snell concerned a direction by the Norfolk Island Minister for Tourism to the members of the Government Tourist Bureau to terminate the employment of the Bureau's executive officer. Procedural fairness was not given. Gleeson CJ, Gaudron, Kirby and Hayne JJ, in considering the tort of misfeasance in public office, said:¹¹

Again it must be accepted that the precise limits of this tort are still undefined [*Mengel* at 345]. It is an intentional tort. As was said in *Mengel* [at 345]:

... the weight of authority here and in the United Kingdom is clearly to the effect that it is a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power. (Footnotes omitted)

Their Honours had earlier said at 344 - 345 [38]:

For present purposes it may be accepted that the tort of misfeasance in public office extends to acts by public officers that are beyond power, including acts that are invalid for want of procedural fairness [*Mengel* at 356 - 357]. But to establish that tort, it is not enough to show the knowing commission of an act beyond power and resulting damage. As the majority said in *Mengel* [at 347]:

The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability should be more closely confined. So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability.¹² And principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton* [[1897] 2 QB 57], or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach.¹³

For the purposes of deciding *Mengel*, the majority considered it sufficient to proceed on the basis that the tort requires an act which the public official knows is beyond power and which involves a foreseeable risk of harm but noted also that there seems much to be said for the view that misfeasance extends to the situation of a public official recklessly disregarding the means of ascertaining the extent of his or her power [at 347].¹³

In *Three Rivers District Council v Governor and Co of the Bank of England*,¹⁴ the House of Lords considered the scope of the tort of misfeasance in public office and followed *Northern Territory v Mengel*. Their Lordships held that the tort involved an element of bad faith and arose when a public officer exercised his power specifically intending to injure the plaintiff, or when he acted in the knowledge of, or with reckless indifference to, the illegality of his act and in the knowledge of, or with reckless indifference to, the

probability of causing injury to the plaintiff or persons of a class of which the plaintiff was a member; and that subjective recklessness in the sense of not caring whether the act was illegal or whether the consequences happened was sufficient.

Lord Steyn, with the agreement of Lord Hope and Lord Millett said (at pages 1231 and 1269):

The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, ie conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.

The official concerned must be shown not to have had an honest belief that he was acting lawfully; this is sometimes referred to as not having acted in good faith. In the *Mengel* case,¹⁵ the expression honest attempt is used. Another way of putting it is that he must be shown either to have known that he was acting unlawfully or to have wilfully disregarded the risk that his act was unlawful. This requirement is therefore one which applies to the state of mind of the official concerning the lawfulness of his act and covers both a conscious and a subjectively reckless state of mind, either of which could be described as bad faith or dishonest.

Why success in such a claim is rare is illustrated by the recent judgment of von Doussa J in *Chapman v Luminis Pty Ltd* (No 5) (2002) ATPR (Digest) 46-214; [2001] FCA 1106, one of the decisions concerning the bridge to Hindmarsh Island. Having set out the law, his Honour needed to say little more than:

In the present case I consider the claims based on the tort of misfeasance in public office must fail if for no other reason because the applicants have not established bad faith. On the contrary I consider that both Professor Saunders and Mr Tickner held honest beliefs that they were acting lawfully at all times.

In *Tahche v Abboud* [2002] VSC 42, Tahche had been convicted of rape and his conviction quashed on appeal. In a subsequent civil action brought by Tahche, one defendant was a solicitor employed by the DPP and another defendant was a member of the independent Bar, who had been retained to prosecute at the original rape trial. The plaintiff had sued them, amongst others, claiming damages for misfeasance in a public office, the allegation being founded on their alleged non-disclosure of information relative to the trial of that accused. On the trial of separate questions, Smith J summarised the basic elements of the tort as follows:

- 1 the defendant must hold a public office;
- 2 there must be an invalid exercise of power or purported exercise of power;
- 3 the defendant must be shown to have had acted with the necessary intent;
- 4 the plaintiff must suffer damage as a consequence of the exercise of power or purported exercise of power.

The second requirement, the invalid exercise of power, includes an absence of power and acts invalid for want of procedural fairness. *Northern Territory of Australia v Mengel* (1995) 185 CLR 307 per Brennan J, at 356-357 approved in *Sanders v Snell* (1998) 196 CLR 329 at 344. It includes the exercise of a power for an improper purpose, including the purpose of a specific intent to cause injury. It arguably includes an exercise of power for irrelevant considerations or for considerations that were manifestly unreasonable.

It may also include abuse of non-statutory powers.¹⁶

Also of interest for present purposes is the first of these elements, the requirement that the defendant must hold a public office. Smith J, at [101], held that these defendants, a solicitor and counsel, were at the relevant time holders of a public office for the purpose of the tort of misfeasance in a public office in that they were holding specific positions with defined and specialised roles;

- 1 for which they were remunerated from public funds;
- 2 in which they were performing public services, public services of great importance; and
- 3 in which they owed a duty to both the community and to the accused, to disclose information of assistance to the accused.

Smith J also held that any immunity from suit did not apply to the tort as pleaded.

However on appeal by the solicitor and counsel, the Court of Appeal reversed Smith J: *Cannon v Tahche* [2002] VSCA 84. That court held that one necessary component of the tort was the misuse or abuse by the holder of a public office of a relevant power which is an incident of the office but that a prosecutorial function did not carry with it any relevant power so that it could not be said of a prosecutor appearing at a trial that he or she occupies a public office for the purposes of the tort. A prosecutor's obligation to act fairly, one aspect of which is the prosecutor's duty of disclosure, does not spring from any statutorily given power but from practices established by the judges over the years which have been designed to ensure that an accused person receives a fair trial. When briefed to prosecute at the plaintiff's trial counsel did not thereby assume any office and did not acquire any relevant power as prosecutor. The same applied even more strongly to the solicitor who was a Crown servant. No relevant power attached to her position. Her obligations could rise no higher than those imposed on prosecuting counsel. Further, whatever the nature and extent of a prosecutor's duty, it is a duty owed to the court and not a duty enforceable at law at the instance of the accused.

In *Edwards v Olsen* [2000] SASC 438, Perry J summarised the law relating to the mental element¹⁷ as follows. The case concerned claims for some tens of millions of dollars based upon alleged maladministration of the various fisheries Acts in their application to the South Australian abalone fishery. The plaintiffs had carried on business as commercial abalone divers. Perry J said, at [398]-[404]:

In the early cases, it was said that malice was essential to the action.¹⁸ Modern cases recognise that proof of 'targeted malice', as it has come to be called, that is, conduct specifically intended to cause injury to the plaintiff, is not the only means by which the mental element may be satisfied. It is now accepted that the requirement of proof of the necessary state of mind of the defendant may be satisfied if the public officer is shown to have acted with actual knowledge "... that he has no power to do the act complained of and that the act will probably injure the plaintiff".¹⁹

Where there is targeted malice, the purported exercise of power, even though ostensibly within power, is invalid as the public officer has acted for an improper or ulterior motive.

Both cases, that is, where there is targeted malice or where there is conduct accompanied by actual knowledge that there is no power to engage in that conduct, involve bad faith. In the first instance the act is in bad faith as it is committed for an improper or ulterior motive. In the second case it involves bad faith in that the public officer lacks an honest belief that his or her act is lawful.

So that for this element of the tort to be satisfied, there must be bad faith in one or other of the two senses which I have explained.

There is a further refinement.

In cases involving bad faith of the second kind which I have described, it has sometimes been argued that the knowledge of the public officer that the act is beyond power may be constructive knowledge, or to put it in the language of the pleader, it is sufficient to prove that the public officer either 'knew or ought to have known' of the absence of power. While the argument that the test could be satisfied in that way was expressly rejected by the High Court in *Northern Territory v Mengel*,²⁰ both the High Court in that case and the House of Lords in their decision in the Three Rivers case accepted that, absent actual knowledge of the absence of power, the requisite state of mind might be proved if it could be shown that the public officer was "recklessly indifferent as to the existence of the power to engage in the conduct which caused the plaintiff's loss".²¹

So that, to put the matter comprehensively, the element of bad faith which is essential to proof of the requisite state of mind, may be satisfied by evidence amounting to targeted malice in the sense which I have explained that expression, or lack of an honest belief that the act is lawful. Lack of an honest belief that the act is lawful may be demonstrated either by actual knowledge of the lack of power or reckless indifference as to the availability of the power.'

Negligence

I move now from intentional wrongdoing to negligence in relation to administrative acts or decisions. Because the threshold for establishing liability is far lower, the tort of negligence is in practice far more important than misfeasance in public office as a source of compensatory damages. But because the elements of the tort are well known and because it is not usual to consider this tort as going to the liability of an officer,²² I shall limit myself to a few observations.

Invalidity without more does not constitute the tort. But in the context of personal injury or damage to property it is not to be thought that a governmental body cannot be found to have acted negligently merely because what it did was 'valid'. Indeed, McHugh J has said²³ that:

On the current state of the authorities, the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires. In *Heyman*, Mason J rejected the view that mandamus could be "regarded as a foundation for imposing ... a duty of care on the public authority in relation to the exercise of [a] power. Mandamus will compel proper consideration by the authority of its discretion, but that is all."²⁴

The concerns regarding the decision-making and exercise of power by statutory authorities can be met otherwise than by directly incorporating public law tests into negligence. Mr John Doyle QC (as he then was) has argued,²⁵ correctly in my opinion, that there "is no reason why a valid decision cannot be subject to a duty of care, and no reason why an invalid decision should more readily attract a duty of care".

It is useful to go back to *Mengel's case* and to consider it in a little more detail.

The facts of *Mengel* were that the Mengels purchased a property in the Northern Territory Banka Banka for approximately \$3 million, financing its purchase with a bank loan. They intended to repay \$1 million of that loan from the sale of cattle by the end of the 1988 season. However, they were not able to fully realize their selling plans and suffered loss because two inspectors of the Northern Territory Department of Primary Industry and Fisheries had said, following tests for brucellosis, the cattle could only be moved to an abattoir for immediate slaughter. By the time the matter reached the

The Centenary Bench & Bar Dinner

On 31 May 2002 the Centenary Bench & Bar Dinner was held at the Westin Sydney.

The Guest of Honour was the Hon Murray Gleeson AC, the Chief Justice of Australia. David Jackson QC was ‘Mr

Senior’ and Andrew Bell was ‘Mr Junior’.

More than 880 members and guests, a record for the annual event, were treated to fine food and memorable speeches.



The Hon Justice John Bryson and Tom Bathurst QC



Kate Eastman, Roger Marshall, Catherine Parry, Stuart Donaldson SC



Chief Justice Gleeson AC



Andrew Bell



Bret Walker SC



David Jackson QC



The Hon. Justice Michael Kirby AC CMG and Babette Smith



Catherine Parry, Peter Callahan SC and Margaret Sneddon



Heather Irish, Ian Hemmings, Angela Pearman, Peter Newton



The Hon Justice Keith Mason



Chris Ronalds, Michael Slattery QC and his Hon Judge Kevin O'Connor



Michael McHugh and Marie Cinque



Sir Laurence Street AC KCMG KStJ

High Court it was clear that there was no statutory or other authority for the acts of the inspectors notwithstanding that they were furthering the aims of a government-sponsored campaign to eradicate bovine brucellosis and tuberculosis. The Mengels' claims failed.

In the context of the claim for misfeasance in public office, the joint judgment contains the following passage, at 348:

If it were the case that governments and public officers were not liable in negligence, or that they were not subject to the same general principles that apply to individuals, there would be something to be said for extending misfeasance in public office to cover acts which a public officer ought to know are beyond his or her power and which involve a foreseeable risk of harm. But in this country governments and public officers are liable in negligence according to the same general principles that apply to individuals.

More directly for the present question, their Honours also said at 352-353:

Governments and public officers are liable for their negligent acts in accordance with the same general principles that apply to private individuals and, *thus, there may be circumstances, perhaps very many circumstances, where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power.*²⁶ (Emphasis added)

Deane J²⁷ referred more obliquely to the possibility that the inspectors were in breach of a duty of care owed to the Mengels in failing to appreciate that their actions were unauthorised. His Honour would have given the Mengels the opportunity of applying for a further order which would have allowed them to apply to the Court of Appeal for leave to seek to reformulate their case as an action in negligence.

Brennan J said, at 358:

Different considerations apply when a tort other than misfeasance in public office is relied on as a source of liability. Public officers, like all other subjects, are liable for conduct that amounts to a tort unless their conduct is authorized, justified or excused by statute. A statute is not construed as authorizing, justifying or excusing tortious conduct unless it so provides expressly or by necessary intendment. In particular, a statute which confers a power is not construed as authorizing negligence in the exercise of the power. Thus liability may be imposed on a public officer under the ordinary principles of negligence where, by reason of negligence in the officer's attempted exercise of a power, statutory immunity that would otherwise protect the officer is lost [*Benning v Wong* (1969) 122 CLR 249 at 256; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 458, 484].

But Brennan J²⁸ went on to say that where the sole irregularity consists of an error as to the extent of the power available to support the action:

liability depends upon the officer's having one of the states of mind that is an element in the tort of misfeasance in public office. That element defines the legal balance between the officer's duty to ascertain the functions of the office which it is his or her duty to perform and the freedom of the individual from unauthorised interference with interests which the law protects. The balance that is struck is not to be undermined by applying a different standard of liability - namely, liability in negligence - where a plaintiff's loss is purely economic and the loss is attributable solely to a public officer's failure to appreciate the absence of power required to authorise the act or omission which caused the loss.²⁹

The key, in my opinion, is in the emphasised part of the joint judgment.³⁰ In cases of potential claims for the negligent exercise of discretionary powers those advising a plaintiff, or a defendant,

should closely consider whether it may be alleged that the government has failed to take steps to ensure that its officers and employees know and observe the limits of their power. It would also be as well to consider whether or not the *officer* had a duty to ascertain the limits of his or her power and had failed to do so.

The approach I have described is more likely to bear fruit than more common ways of alleging negligence in the context of discretionary governmental powers. It is more likely to strike the appropriate chord with a finder of fact because it is consistent with what governments do or are perceived to do and see themselves as doing. Of course it would still be necessary for the plaintiff to establish causation and the other elements of the tort of negligence.

For example, outside safety legislation, a claim for breach of statutory duty would have limited prospects since a necessary first step is a conclusion that the legislation confers on the plaintiff a cause of action for the recovery of damages for breach by the defendant of duties imposed upon it by the legislation. It is necessary to find a relevant statutory duty attended by a sanction for non-performance. Secondly, 'there is no action for breach of statutory duty unless the legislation confers a right on the injured person to have the duty performed' and, if no right is conferred, the general rule is that there is no liability in damages.³¹ The legislation will rarely yield the necessary implication positively giving a civil remedy.³²

I am of course considering cases where the negligence is said to be in the exercise of a discretionary power in the sense that there is a choice as to whether and to what extent and how the power is to be exercised, perhaps involving matters of policy. But is there a line between the application of a public law approach and private law concepts seen most clearly in personal injury cases where a government is a defendant? And if there is a line, how and where may it be found? Put differently, is there a resolution of the apparent conflict between the dicta of Brennan J in *Mengel*³³ and of McHugh J in *Crimmins*.³⁴

One preliminary but important issue is whether the alleged tortious act is properly to be characterised as done in the exercise of statutory functions. If not, then the common law duty and breach of that duty should be approached without reference to issues arising from the exercise of statutory duty.³⁵

This leads to a further consideration and that is the legal source of the alleged duty. If that source is the common law, as it would be in most personal injury cases, then issues arising from the exercise of statutory powers are unlikely to be relevant. It is otherwise where the statutory powers are relied on as the source of the alleged duty or as affecting the content of that duty.

The crucial consideration would appear to be whether the action involves the exercise of a discretionary power. If it does not, then the notion of *ultra vires* is not determinative because it may be assumed, as a matter of construction, that the tortious action was not authorised by the statute. The duty which is breached has its source in the common law and, as Brennan J said, a statute is not construed as authorizing authorising, justifying or excusing tortious conduct unless it so provides expressly or by necessary intendment.³⁶

If however the action does involve the exercise of a discretionary power then it is likely that one is in the realms of decision-making where public law remedies are paramount. This is so absent any common law right of action where invalidity exposes the officer to a liability in tort, such as trespass, in that the officer's defence depends on the validity of the warrant for the trespass. The alignment, at the level of duty, would not seem to be with whether the plaintiff's loss is purely economic rather than involving personal injury or damage to property. The clearer approach seems to be by resort to ideas which underlay the now questionable distinction

between operational and policy decisions or by reference to the related notion explored at length by Lord Browne-Wilkinson that a failure in the exercise of a statutory duty may not give rise to any claim for damages in private law because the regulatory system is to be treated as intended for the benefit of society in general rather than for the benefit of individuals, except where the statutory duty is very specific. On that analysis, a claim could succeed if it were based on a free standing common law cause of action but there would be no common law duty of care to the plaintiff in a matter of policy.³⁷ In that light it could be said that, subject to *Mengel*, there is not a common law duty owed by a public officer to an individual to make a valid decision and, therefore: ‘The validity of a decision and whether the harmful consequences of that decision are actionable are two entirely different questions.’³⁸

Negligent misstatement, in the context of liability for pure economic loss, appears to have escaped these difficulties. The reason is, perhaps, that an alleged tortious act is not properly to be characterised as done in the exercise of statutory functions.³⁹ Subject to statutory defences, it does not seem to be more difficult to succeed in an action for negligent misstatement against a government official than any other person. Indeed at the factual level it may be easier since, reflecting the passage I emphasised from the joint judgment in *Mengel*, Miles CJ in a recent case concerning negligent advice given to a naval officer about retirement options said:

In this respect the Commonwealth is hardly to be compared with an inexperienced litigant or potential litigant who may not recognise a problem as one of a legal nature, who does not know where to turn for advice of a legal nature and who may have difficulty in affording such advice or indeed difficulty in understanding the advice when given. Whether the Authority had a legal officer on its staff or any officer with legal qualifications with the capacity to express a view on the merit of the interpretation of the Act that the appellant was urging does not appear to be answered in the evidence before the Magistrate. However if the Authority did not have a legal officer on its staff, the Commonwealth should have had in place arrangements, as was once common with Commonwealth instrumentalities, for the Authority to be able to consult with and receive advice from the Attorney-General’s Department or the Australian Government Solicitor.⁴⁰

Conclusion

Should not each jurisdiction, better still all jurisdictions together, consider a standard test to apply when the liability of an officer is in issue? It is, I suggest, the mental element which should be the key to statutory defences. The citizen is not well served by the variety of statutory defences⁴¹ ranging from acts done honestly or in good faith or in pursuance of the execution or intended execution of any Act or public duty or authority⁴² and in circumstances where good faith sometimes requires only subjective honesty or absence of malice and sometimes objective diligence.⁴³ I do not suggest the appropriate formulation would be easy since what is involved is a balance between ‘the freedom of the individual from unauthorised interference with interests which the law protects’⁴⁴, on the one hand and, on the other hand, efficient but reasonably competent public administration involving, as a minimum, an officer’s duty to ascertain the functions of the office it is his or her duty to perform.

- 1 I do not consider criminal liability or liability under legislation such as the *Independent Commission Against Corruption Act 1988* (NSW). Neither do I consider liability for breach of contract, where only rarely would the official be the contracting party in his or her own right, nor breach of a fiduciary duty either to the Crown or to the public. Breach of fiduciary duty by a public officer is discussed by Tina Cockburn in ‘Personal liability of government officers in tort and equity’ at pages 374–389 in Chapter 9 of Bryan Horrigan (ed) *Government law and policy – Commercial aspects*, The Federation Press 1998.
- 2 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 45; *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708 at 724, 731; *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 645. There have been many suggestions for reform: see for example Rossana Panetta’s article ‘Damages for wrongful administrative decisions’ (1999) 6(4) A J Admin L 163.
- 3 *Northern Territory of Australia v Mengel* (1995) 185 CLR 307 per Brennan J at 356.
- 4 *Federal Airports Corporation v Aerolineas Argentinas* (1995) 63 FCR 100; (1997) 76 FCR 582.
- 5 *James v Commonwealth* (1939) 62 CLR 339.
- 6 P W Hogg *Liability of the Crown* (2nd ed 1989) page 110.
- 7 (1966) 120 CLR 145.
- 8 *Northern Territory of Australia v Mengel* (1995) 185 CLR 307.
- 9 (1995) 185 CLR 307.
- 10 (1998) 196 CLR 329.
- 11 (1998) 196 CLR 329 at 346[42].
- 12 The issue of vicarious liability is considered by Weinberg J in *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409 [250]–[257].
- 13 Note that when the matter was re-heard by Beaumont CJ, who had not considered the allegations of misfeasance in public office at the first trial, his Honour held this was a case of ‘targeted malice’ in that the defendant actually intended to cause harm to the plaintiff by peremptorily and unlawfully removing him from office. Damages of \$83,000 with costs, including the costs of the first trial, were awarded including exemplary damages of \$10,000: *Snell v Sanders* [2000] NFSC 5 (24 November 2000).
- 14 [2000] 2 WLR 1220. Reference should also be made to Dr Sadler’s article ‘Intentional abuse of public authority: A tale of three rivers’ (2001) 21 *Aust. Bar Review* 151.
- 15 (1995) 185 CLR 307 at 357 per Brennan J.
- 16 *Tampoun v Anderson* [1973] VR 715 at 720; *Mengel* per Brennan J at 355: ‘The tort is not limited to an abuse of office by exercise of a statutory power.’ His Honour referred to *Henly v Mayor of Lyme* (1828) 5 Bing 91 at 107–108 [130 ER 995 at 1001] and to *R v Boston* (1923) 33 CLR 386 at 412.
- 17 Considered also in *Northern Territory of Australia v Mengel* (1995) 185 CLR 307 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ at 347, Brennan J at 359, Deane J at 370–371, *Sanders v Snell* (1998) 196 CLR 329 at 345, *Garratt v AG* [1997] 2 NZLR 332; *Three Rivers District Council v Bank of England* [2000] 2 WLR 1220 at 1231–1233, 1236, 1266–7, 1269–70, 1273–5. In *Tahche v Aboud* [2002] VSC 42 at [19], Smith J said ‘What is involved is an abuse of power, and it is the absence of an honest attempt to perform the functions of the office which is at the heart of the tort.’
- 18 See, for example, *Ashby v White* (1703) 2 Ld Raym 938; 3 Ld Raym 320 [92 ER 126; 710] cited by Brennan J in *Northern Territory v Mengel*, 185 CLR at 356.
- 19 See *Three Rivers District Council and Ors v Governor and Co of the Bank of England* [2000] 2 WLR 1220 per Lord Steyn at 1231.
- 20 See 185 CLR at 348.
- 21 *Northern Territory v Mengel* per Brennan J 185 CLR at 359. See also per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ at 347.
- 22 The government would be the natural defendant but the officer would also be liable. For New South Wales see section 8 of the *Law Reform (Vicarious Liability) Act 1983*. For Federal Police see sec 64B of the *Australian Federal Police Act 1979*.
- 23 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [82]–[83].
- 24 (1985) 157 CLR 424 at 465.
- 25 JJ Doyle QC, ‘Tort liability for the exercise of statutory powers’, in Finn (ed), *Essays on torts* (1989) 203, 235–6.
- 26 This approach had been argued in *Dunlop v Woollahra Municipal Council* (No. 2) [1982] AC 158, where it was doubted by the Privy Council, and in *Rowling v Takaro Properties Ltd* [1988] AC 473 where policy factors were discussed but, since it was held that there was no breach of duty (there being no particular reason why the minister should have taken legal advice), it was unnecessary to resolve the issue.
- 27 (1995) 185 CLR 307 at 373.
- 28 (1995) 185 CLR 307 at 359.
- 29 cf *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 esp at 68; but see *Rowling v Takaro Properties Ltd* [1988] AC 473 at 511–512.
- 30 As indicated, Brennan J did not agree with this statement of the majority.
- 31 *Mengel* at 343–344.
- 32 *O’Connor v SP Bray Ltd* (1937) 56 CLR 464 at 477–478; see also *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 per Gummow J at [157]. See also *Bhagat v Global Custodians Ltd & Ors* [2000] NSWSC 321 per Young CJ in Eq.
- 33 Above n 3.
- 34 Above n 23.
- 35 *Australian National Airlines Commission v Newman* (1987) 162 CLR 466. See also *Puntoriero v Water Administration Ministerial Corp* (1999) 199 CLR 575.
- 36 *Mengel* (1995) 185 CLR 307 at 358.
- 37 *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 730–740; see also *Sullivan v Moody* (2001) 183 ALR 404 at 417 [59]–[60] (HC) where the Court found there was no duty to the plaintiff because it would be inconsistent with the proper and effective discharge of the defendants’ statutory responsibilities that they should be subjected to a legal duty, breach of which would sound in damages. See also *Tame v New South Wales* (2002) 191 ALR 449 (HC) and *New South Wales v Paige* [2002] NSWCA 235 at 263. In *Chapman v Luminis Pty Limited* (No. 5) [2001] FCA 1106 Von Doussa J held that there was no duty of care owed by the Minister because to impose a private law duty upon him in the exercise of a legislative power to make a declaration under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 would be to distort the focus of the Act in favour of individual interests of a few members of the community.
- 38 See Aronson and Whitmore *Public Torts and Contracts* LBC 1982 page 103.
- 39 Nevertheless, in the case of an authority exercising statutory powers it is necessary to view the particular circumstances with an appreciation of that legislation: *Tepko Pty Limited v Water Board* (2001) 206 CLR 1.
- 40 *Glass v Commonwealth of Australia* [2002] ACTSC 30 at [12].
- 41 See *Little v Commonwealth* (1947) 75 CLR 94 and, more recently, *Webster v Lampard* (1993) 177 CLR 598 where the Police Act test was ‘unless there is direct proof of corruption or malice’ and the *Limitation Act* test was ‘done in pursuance or execution or intended execution of any Act, or of any public duty or authority.’
- 42 Or ‘in the bona fide exercise of such powers’: see, eg, *Board of Fire Commissioners of New South Wales v Ardouin* (1961) 109 CLR 105.
- 43 See *Chief Commissioner for Business Franchise Licences (Tobacco) v Century Impact Pty Ltd* (1996) 40 NSWLR 511 which concerned good faith in sec 27 of the *Business Franchise Licences (Tobacco) Act 1987* (NSW) and compare *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290. In the former case the defence was made out although the officer was quite wrong in law in doing what he did and his belief that he was acting reasonably was itself unreasonable. The Court of Appeal said the critical point was that there was no finding and no suggestion that the officer was aware that he was acting unreasonably. In the latter case the Full Court held that the defence in sec 149(6) of the *Environment Planning and Assessment Act 1979* (NSW): ‘(6) A council shall not incur any liability in respect of any advice provided in good faith pursuant to subsection (5), was not made out by ‘honest ineptitude’. The Court said that the statutory concept of ‘good faith’ with which the legislation was concerned called for more than honest ineptitude. ‘There must be a real attempt by the authority to answer the request for information at least by recourse to the materials available to the authority.’
- 44 *Mengel* per Brennan J at 359.

The war against terrorism

National security and the Constitution



Hon Daryl Williams AM QC MP

On 3 October 2002 the Constitutional Law Section of the Bar Association hosted a series of lectures in the Banco Court on terrorism. The speakers included the Commonwealth Attorney-General, the Hon Daryl Williams AM QC MP and Dr James Renwick, whose addresses appear below.

Hon Daryl Williams AM QC MP

Introduction

Before I examine the nature of the terrorist threat to Australia and our response, let me first say a few words about the concept of 'national security'.

National security encompasses a broad range of matters, and has an international and a domestic focus. Protecting the community from terrorism is just one aspect of national security. Other aspects include the work conducted by the various intelligence and law enforcement agencies, including ASIO, the protection of classified information, and protection against espionage, to name a few.

National security is something that the government takes very seriously. In my time as Attorney-General, there have been many changes, both legislative and administrative, in the way we approach our national security. These changes reflect the changing nature of the issues that governments and the various agencies face. An obvious example is the counter-terrorism legislative package enacted by the federal parliament in June this year as part of the government's response to the events of September 11. Another is the espionage Bill, currently before the Senate, which updates the offence of 'espionage' in response to the Jean Philippe Wispelaere case.

National security is a very important part of the 'national interest'; that is, attempting to secure the best outcome for Australia and its people at all times. Like the national interest, national security is not set in stone. It will change from time to time according to varying domestic and international pressures.

Since September 11, of course, the greatest pressure upon our national security comes from the threat posed by terrorists.

We must look carefully at the changed environment, at what has changed and is changing,

and whether our response is appropriate.

Nature of the terrorist threat to Australia.

Australians have traditionally viewed themselves as removed from the conflicts that occur in other parts of the world. This is no longer the case. Our profile as a terrorist target has risen and we have been on a heightened security alert since September 11.

On Christmas Eve last year, our threat level was upgraded still further as a result of information suggesting a potential terrorist threat within Australia, possibly to United States or United Kingdom

interests.

Our position as a potential target for terrorists seems clear. Osama bin Laden has twice mentioned Australia since the events of September 11, including a reference to our troops in East Timor as part of a 'crusader force'.

Our High Commission in Singapore has been the target of a foiled terrorist plot. And it was a particular terrorist threat that saw our Dili embassy close for two weeks around the anniversary of September 11 this year. On the actual anniversary, Australian, UK and US embassy operations in many countries were scaled down as a sensible precaution.

ASIO is aware that some terrorist groups with global reach have a small number of supporters in Australia and a small number of Australians have trained in Afghanistan and Pakistan. Not all the latter are in US military custody. It is likely that other Australians, who are not known to us, have trained in Afghanistan or Pakistan.

ASIO's unclassified annual report tells us that there are sympathisers of extremist organisations in Australia. Perhaps the most worrying of organisations for Australia in the post-September 11 environment is Jemaah Islamiyah.

Jemaah Islamiyah has the stated ambition of an independent Islamic state encompassing Indonesia, Malaysia and the Muslim islands of the southern Philippines. FBI Director Robert Mueller recently singled out this organisation as al Qaida's foremost South-East Asian collaborator¹.

On September 21, the Singapore government announced the arrest of 21 suspected members of Jemaah Islamiyah. It is alleged that they were plotting to attack several western embassies, including the Australian High Commission.

This is not the first time that Jemaah Islamiyah has included Australian interests among its targets. In December 2000, Philippine authorities found more than a ton of explosives and over a dozen M-16 rifles in Mindanao in the southern Philippines. These evidently were to be used by Jemaah Islamiyah associates to attack US, Australian, British and Israeli targets in Singapore².

And just recently, on 23 September, a grenade exploded near a US Embassy building in Jakarta, killing one of four would-be terrorists, another of whom was captured. It is not presently known if these individuals are affiliated with Jemaah Islamiyah.

If September 11 was a wake-up call for the world, these developments reveal the risk that our region could become a focal point for a new terrorist campaign.

Australia has been working hard to address local issues and develop a consistent regional approach to dealing with terrorism. In the last year, we have signed memorandums of understanding with Indonesia and Malaysia on cooperation to combat terror. Another such MOU is presently being negotiated with Thailand. We are also active in various multi-lateral forums to achieve further regional harmony in counter-terrorist arrangements.

Australia's preparedness for the terrorist threat

Of course, the most important measures to combat the terrorist threat to Australians are those we undertake at home. Following September 11, we immediately reviewed our counter-terrorism arrangements.

In response to needs clearly identified in this review, the government immediately allocated increased resources for agencies

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such as ASIO, the Protective Security Coordination Centre and the Australian Federal Police, which had to meet much greater operational demands than before.

We also consolidated some activities to achieve a better-coordinated government response. For example, the Australian Protective Service was merged with the AFP and Emergency Management Australia was transferred to my Department.

The government also put in place a number of practical longer-term measures to upgrade air security and more effectively screen people and goods. And we reviewed our national counter-terrorist plan.

Counter-terrorism legislation

A key response was the development of a comprehensive package of legislation to strengthen Australia's ability to combat terrorism. With the exception of a Bill to enhance ASIO's ability to gather intelligence about possible terrorist attacks, this legislation has been passed by parliament and become law. The ASIO Bill was passed by the House of Representatives last week and is currently awaiting debate in the Senate.

It is this new legislation which has been addressed by Dr Renwick in his paper.

Dr Renwick provides an overview of the major changes that these new laws bring to the counter-terrorism environment in Australia: the new treason offence, the new terrorism offences, the listing of terrorist organisations and the ASIO Bill. I will not revisit this material other than to note his acknowledgment that the government has adopted the majority of recommendations made by the parliamentary committees that have reviewed the legislation. It is unfortunate that not all commentators are willing to acknowledge this fact.

Before I address some of the issues raised by these laws, it is worth examining the process of their enactment. It is not an understatement to say that this is one of the most controversial packages of legislation to come before the federal parliament.

All the legislation was referred to the Senate Legal and Constitutional Legislation Committee. The ASIO Bill was also referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD. The two committees received hundreds of written submissions and spoke to numerous witnesses at hearings in Sydney, Melbourne and Canberra. The legislation was also debated fiercely in the media.

By the time the committees handed down their respective reports in the middle of this year, every contentious aspect of the security legislation package had been well and truly scrutinised. A number of recommendations were made by the committees and the government accepted most of these. Where we were unable to accept

recommendations because they would prevent the effective operation of the legislation, we provided a clear explanation and put forward alternative ways to address the concerns raised.

The intense parliamentary and public scrutiny to which this legislation has been subjected has resulted in better law and policy that is in tune with the needs of the Australian community.

The Opposition has indicated the ASIO Bill will be referred to yet another Senate committee. This is yet to occur. The Opposition is yet to engage with us on their specific concerns with the Bill, despite our repeated attempts to do so, and despite the support it has received from senior ranks within the Opposition. Given that

three parliamentary committees already have considered the Bill, one has to question their motives. But this is perhaps not the forum to debate the divisions within the Labor party that has led them to stall taking a final position on this Bill.

Constitutional issues

The question of the constitutionality of the counter-terrorist legislation, including the ASIO Bill, has been raised by a number of commentators. Some have focussed on the adequacy of the existing constitutional powers which serve as the basis for the new laws, while others have questioned whether particular powers created by the legislation are constitutionally valid.

Adequacy of constitutional powers

On the first issue, the new counter-terrorist laws rest upon a number of constitutional powers. These include powers relating directly to criminals (sec 51(xxviii), sec 119); to Commonwealth places (sec 52(ii)) and territories (sec 122); other express powers (including those dealing with foreign, trading or financial corporations – sec 51(xx), electronic, postal and other like services – sec 51(v), and external affairs powers – sec 51(xxix)), in addition to the implied power to protect the Commonwealth or its authorities.

The powers of investigation and detention proposed in the ASIO Bill can generally be supported by the constitutional powers supporting the creation of the offences to which the ASIO powers relate, together with the Commonwealth's incidental power (sec 51(xxxix)).

While there is a sound constitutional basis for the counter-terrorist legislation we have already enacted, it is impossible to rule out unforeseen gaps in the coverage offered by offences based on existing powers. For example, investigation and prosecution of offences in relation to coordinated terrorist action on 'state' land perpetrated by Australian citizens with no direct overseas links, using weapons that are not the subject of international treaties. While these gaps may be considered to pose a small risk, any such gaps may become a focus for litigation about the effectiveness of the laws.

At a summit in April this year, the Prime Minister and state and territory leaders agreed on the importance of comprehensive, national coverage of terrorism offences.

In particular, they agreed that the states would remove any lingering constitutional uncertainty by means of constitutional 'references' to the Commonwealth Parliament in accordance with sec 51(xxxvii) of the Commonwealth Constitution. It is worth noting that we have seen similar considerations justify the recent state references in support of the new Commonwealth corporations legislation.

The leaders agreed, among other things, that the states would refer power to support the federal terrorism offences. They also agreed that the state references would refer the 'text' of the offences, together with a power to amend them once enacted, along the lines of the corporations law references.

The referred text will include provisions dealing with consultation and agreement with the states and territories on future amendment of the federal offences; and 'roll-back' of the federal offences to prevent any unintended displacement of state or territory laws. These are to be identified by the states and territories.

The leaders agreed that the target date for commencement of the new federal offences would be 31 October 2002. While that date is ambitious, we are currently working with the states and territories with a view to implementing the agreement as soon as possible.

ASIO Bill

An example of specific provisions that have been questioned on the basis of constitutional validity are the proposed detention

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provisions of the ASIO Bill. Based on advice I have received, I am confident that the ASIO Bill is constitutionally sound.

Professor George Williams, of the Faculty of Law of the University of New South Wales, and the Law Council of Australia, have both asserted that the detention provisions are constitutionally suspect³.

Briefly, the argument is that the power to detain for punitive purposes exists only as an incident of the judicial function of adjudging and punishing guilt and can not be vested in the Executive.

Whether detention is punitive is a matter of substance and not form.⁴ The express purpose of the ASIO Bill and the process of detention it creates demonstrate that the detention is for a legitimate non-punitive purpose. The express purpose is to gather intelligence regarding serious terrorism offences⁵, not to punish those detained.

In addition, there are a number of safeguards with respect to detention which further establish the non-punitive character of the detention. These include:

- limits on the initial period of detention, as well as the total period of detention⁶;
- the need to obtain further warrants for further periods of detention⁷- this includes the need to obtain a warrant from a federal judge if the period of detention is to exceed 96 hours⁸;
- rights and protections accorded to detained persons, such as the requirement for humane treatment⁹ and access to a security-cleared lawyer;
- video recording of the procedures before the prescribed authority¹⁰; and
- the obligation to desist action under a warrant when the grounds on which it was issued have ceased to exist¹¹.

In my view, which is based on legal advice, it is clear that the detention is of a non-punitive character and I am confident that the Bill is constitutionally valid.

It is clear that the detention is designed to deal with particular types of serious threats. While there is no known specific threat to Australia, our profile as a terrorist target has risen and we remain on a heightened security alert. Our interests abroad also face a higher level of terrorist threat. Australia needs to be well-placed to respond to this new environment in terms of our operational capabilities, infrastructure and legislative framework.

While ASIO is empowered to seek search warrants, computer access warrants, tracking device warrants, telecommunications interception warrants and to inspect postal articles, ASIO is not currently empowered to obtain a warrant to question a person.

In developing this legislation, the government has been conscious of the need to protect the community from the threat of terrorism without unfairly or unnecessarily encroaching on individual rights and liberties that underpin our democratic system. Consequently, strict safeguards have been included in the Bill to ensure that the new powers are properly exercised.

A person may only be detained for 48 hours under each

warrant. Subsequent warrants may be issued in relation to the same person. But if the issue of a subsequent warrant would result in a person being detained for more than 96 hours, it can only be issued by a federal judge. The maximum period for which a person can be detained will be seven days (168 consecutive hours). People will not be able to be detained indefinitely.

In addition, all persons detained under a warrant will have the right to contact a security-cleared lawyer. Access to a security-cleared lawyer may be delayed for up to 48 hours, but only in exceptional circumstances. In order to delay access to a lawyer, the attorney-general must be satisfied that it is likely that a terrorism offence is being or is about to be committed. Access to a lawyer may alert those involved in the terrorism offence to the investigation or delay action to prevent the terrorism before it occurs. I note also that access to a lawyer may only be delayed in relation to adults. After 48 hours all persons have the absolute right to contact a security-cleared lawyer.

These and the other significant safeguards in the Bill will ensure that the powers under the Bill are properly exercised and that the rights of individuals will not be unnecessarily impeded.

To add teeth to the safeguards, offences have been included in



Nur Hakim (right) sits next to his wife Michico and his family giving account of an ASIO raid at their Brookvale home. Photo: Jeff Darmanin / News Image Archive

the Bill for officials who contravene the safeguards. An official who fails to comply with a direction of the prescribed authority, or fails to afford a person his or her rights under the Bill will be punished by a maximum of two years imprisonment.

A number of commentators have criticised the Bill. Public consideration and debate on important legislation is essential to our democratic system.

However, it is disappointing that some commentators have not presented an accurate picture of the legislation. A number of commentators have ignored or misrepresented the safeguards that were built into the Bill as introduced. Of even more concern, some have chosen to ignore the additional safeguards that were included in the Bill by way of government amendments in the House of Representatives.

The government has worked hard to ensure that the Bill accommodates many of the concerns expressed by parliament and the community. It would assist further debate on the Bill if commentators acknowledged the changes that have been made, rather than restating their original comments, many of which are no longer relevant.

Conclusion

Australia's security environment has changed forever. The events of September 11 were a chilling reminder that there are forces in the world that are determined to attack and undermine the very basis of our civilised society.

The government has responded to these threats quickly and decisively. But we have not let the magnitude and the urgency of the situation cloud our judgment. The additional security measures and the new counter-terrorism legislation have been developed with two very clear and straightforward objectives. They have been developed to protect our national security. And they have been developed to give our security agencies the tools they need to identify, and where possible, prevent terrorist attacks.

I acknowledge that the new counter-terrorism laws rely upon a number of constitutional powers. Despite this I am confident that the constitutional validity of the legislation is sound. This is reinforced by the agreement by the states to refer powers to the Commonwealth.

In relation to the ASIO Bill, we must remember that the underlying aim is to protect the community. We can not afford to sit back and wait for a terrorist attack to occur, for the harm to be done, before we take action. I am confident that the non-punitive detention of persons in order to protect the community is something that is supported by law and the Constitution.

The protection of Australia's national security is something that this government takes very seriously. We need to respond to terrorism in an effective and authoritative way. But this response must respect and work within the constitutional framework that has served us well for over a century. I believe our approach has achieved this.

Dr James Renwick¹

In the second of the addresses, Dr Renwick provides an overview of Australia's legal responses to the war against terrorism. In the course of doing this, he considers some of the constitutional and legal policy issues which have confronted, or might confront, Australia.

Introduction

There has been a considerable legislative response by Australia to the events of September 11, 2001. The response has attracted controversy. This is not surprising. The vexed policy conundrum faced by our law-makers was lucidly stated over 200 years ago by Alexander Hamilton in *The federalist papers* when he wrote:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.²

This tension between a general desire to be safe from danger, but free from too much government interference, is at the heart of the policy debate that much of the western world has been having for over a year now.

Definitions

Of the three aspects of the topic, two, at least, defy easy definition or familiar categorisation. In some ways, the constitutional component is the easiest to come to grips with.

In contrast, 'national security', although a familiar phrase, is hard to define much beyond the deceptively simple notion that it involves the safety of a country and its people, particularly from, but not only from, foreign domination.³ As will be seen, the law – whether statutory or judge-made – rarely defines national security much beyond this point.

And finally, the war against terrorism altogether defies familiar categorisation.

The Constitution

There are a number of constitutional provisions which deal explicitly with defence and security:

- There is the defence power itself in sec 51 (vi), which I will consider shortly;
- There is the somewhat dated power to legislate for Commonwealth control of railways for naval and military transport in sec 51(xxxii);
- sec 68 confers command in chief of the naval and military forces on the Governor-General – although this role is 'essentially a titular one';⁴
- By sec 114, the states may not raise or maintain any naval or military force without the consent of the Commonwealth Parliament and, finally;
- By sec 119, the Commonwealth 'shall protect every state against invasion' and, on the application of the executive government of a state, from domestic violence. (The protection of states against domestic violence is often known as 'aid to the civil power'. I do not propose to deal with this topic here beyond noting that it was the subject of well publicised legislation prior to the Sydney Olympics. My views on this legislation appear in an earlier edition of *Bar News*.)

¹ <http://www.edi.org/terrorism/ji-pr.cfm>

² Center for Defence Information, <http://www.edi.org/terrorism/ji-pr.cfm>

³ Submission of Professor George Williams, University of New South Wales to the Parliamentary Joint Committee on ASIO, ASIS and DSD inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, 30 April 2002, and Submission of the Law Council of Australia to the Parliamentary Joint Committee on ASIO, ASIS and DSD and to the Senate Legal and Constitutional Legislation Committee inquiries into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, 29 April 2002.

⁴ 'In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form.' Per Brennan, Deane And Dawson JJ. *Chu Kheng Lim And Others V. The Minister For Immigration, Local Government And Ethnic Affairs And Another* (1992) 176 CLR 1 FC 92/051 at 23.

⁵ secs 34C(3) and 34D(1)(b), Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (ASIO Bill).

⁶ secs 34D(1)(c) and 34F(4)(a) and (aa), ASIO Bill.

⁷ secs 34C and 34D; sec 34F(7), ASIO Bill.

⁸ sec 34C(5), ASIO Bill.

⁹ sec 34J, ASIO Bill.

¹⁰ sec 34K, ASIO Bill.

¹¹ sec 34R, ASIO Bill.

But there are also a number of other heads of power of real importance in this field.

Presuming that terrorists will often be agents of a foreign state or organisation, the Commonwealth Parliament's capacity to make laws, variously, with respect to 'aliens',⁵ 'immigration',⁴ and the 'influx of criminals',⁷ are all of potential utility.

The external affairs power⁸ is a crucial power in this context, not only because of the many anti-terrorist treaties to which Australia is a party,⁹ but also because of the positive obligations imposed on 'all states' – including Australia – by a number of UN Security Council resolutions passed since September 11, 2001.¹⁰

The centrepiece of the international community's response to the events of September 11 was UN Security Council Resolution 1373, which was adopted unanimously by that Council under Chapter VII of the Charter of the United Nations on 28th September 2001.¹¹ The theme of the resolution was the prevention of terrorism, the suppression of the financing of terrorist acts, and the denial of safe havens for terrorists. The resolution imposed a binding obligation on 'all states' to act to achieve these ends.¹²

There has been a considerable legislative response by Australia to the events of September 11. I will consider aspects of the response shortly. In the course of scrutinising that response, various Commonwealth parliamentary committees have brought to attention the *Charter of the United Nations Act 1945* (Cth) which I suspect had been overlooked by many people. Perhaps this was because it was wrongly assumed to have remained unchanged since 1945. In fact it was significantly amended in 1993¹³ to allow for UN sanctions to be applied more easily by regulations made under a single Act rather than by separate regulations made under many Acts. This was done following the experience of imposing sanctions on Iraq in 1990-91.

In any event, this statute, relying on the external affairs power, permits regulations to be made to give effect to decisions of the UN Security Council under Chapter VII of the UN Charter, in so far as those decisions require Australia to apply measures *not* involving the use of armed force.¹⁴ Measures involving the use of armed force will be taken under the executive power of the Commonwealth in sec 61 of the Constitution, as part of the prerogative to wage 'war', albeit as regulated by defence legislation.

Regulations were passed under this Act after September 11 freezing suspected terrorist assets and imposing sanctions against the Taliban.¹⁵ In substance, these provisions are now found in the *Suppression of the Financing of Terrorism Act 2002* (Cth).

Australia's legislative response

Acting to fulfil Australia's obligations flowing from UN Resolution 1373, the parliament has enacted the following statutes. Their titles give some flavour of their contents:

- The *Security Legislation Amendment (Terrorism) Act (No. 2) 2002*;
- The *Suppression of the Financing of Terrorism Act 2002*;¹⁶
- The *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*;¹⁷
- The *Border Security Legislation Amendment Act 2002*;¹⁸
- The *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002*;¹⁹

- The *Telecommunications Interception Legislation Amendment Act 2002*.²⁰

The parliament has yet to enact the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*.²¹

The ASIO Bill has already been considered by the Parliamentary Joint Committee on ASIO, ASIS and DSD. The others were principally considered by the Senate Legal and Constitutional Legislation Committee. Both committees produced detailed reports containing a number of recommendations, most of which were accepted by the government. The ASIO Bill has not yet been passed. The others, as amended, have been. It is of course not possible tonight to consider these statutes in detail. I therefore commend the parliamentary reports to you.

Tonight, I wish only to consider four aspects of these statutes, namely:

- A wider definition of treason;
- The new criminal offences involving terrorist acts;
- Proscription of terrorist organisations; and
- The ASIO Bill.

1. A wider definition of treason

The Criminal Code now contains a new definition of treason. Formerly, a person committed treason by, for example, levying war against the Commonwealth, or assisting an enemy proclaimed to be at war with the Commonwealth.

As the Attorney-General said in his second reading speech on 13 March 2002, 'the realities of modern conflict ... do not necessarily involve a declared war against a proclaimed enemy that is a nation state.' If I may say so, that is precisely correct and it is a reason why we should not be calling the current fight or armed conflict against terrorists a 'war'.

Be that as it may, the offence of treason now includes conduct where a person engages in an armed conflict that is intended to assist, and does assist, another country, or an organisation that is engaged in armed hostilities against the Australian Defence Force. So now, for example, an Australian who fights against our forces on foreign soil will fall within the terms of the offence.

2. An offence of terrorism

The Senate Legal and Constitutional Legislation Committee received many submissions opposing the enactment of specific terrorism offences. The submissions often argued that the bill was not demonstrably necessary, and that existing criminal offences such as murder, grievous bodily harm, criminal damage, arson, conspiracy and attempt, were adequate to address terrorist acts.²²

There is a respectable argument that preventing and deterring terrorism does not require a specific new crime and that it is better to deal with terrorists under normal criminal provisions. There are three reasons why I do not think the argument is correct.

First, there is the international law obligation on Australia derived from UN Resolution 1373 requiring that terrorist acts 'be established as serious criminal offences in domestic laws'. It is arguably implicit in that Resolution that anti-terrorist offences be established in their own right.

Secondly, we do enact criminal laws using international language covering acts which can fairly be described as murder, grievous bodily harm etc. The *Geneva Conventions Act 1957* (Cth) is one example. Another is the *International Criminal Court (Consequential Amendments) Act 2002* (Cth), which created offences in Australian law for such acts as 'genocide' and 'crimes against humanity'.

Finally, in my view, the new terrorism offences, as defined in the

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Criminal Code, are different in nature to the general criminal offences to which I have earlier referred. This may become clearer when the elements of the offence are considered.

I note that there are different schools of thought about what constitutes terrorism. There are presently attempts to define it for example in a Comprehensive Terrorism Convention in the UN.²³ My paper is limited to the definition which is now part of Australian law.

A 'terrorist act' (the name of the new offence) is the subject of a complex definition, both because terrorist activities are protean in nature, and because the Commonwealth Parliament has no general legislative power to make laws with respect to criminal acts (although there is a current proposal that power to make laws with respect to national security be referred by the states to the Commonwealth under sec 51 (xxxvii) of the Constitution).

The essence of the definition of 'terrorist act' is fourfold.

First, there must be action which causes, for example,;

- death or serious physical harm,
- serious damage to property, or
- serious risk to the health and safety of the public (or a section of the public)

• and in each case the action must have been intended to have had those consequences.

Second, the action must *not* comprise advocacy, protest, dissent or industrial action.

Third, the act must be done 'with the intention of advancing a political, religious or ideological cause'.

Finally, the act must be done either with the intention of coercing, or influencing by intimidation, an Australian or foreign government; or with the intention of intimidating the public or a section of the public.

In my view, to kill people for ideological purposes with an intent to coerce or intimidate governments, or the populace generally, is to commit a criminal act which is different in nature to, for example, murder. Accordingly, creation of a separate offence was justified.

Proscription of terrorist organisations

Division 102 of the Criminal Code now deals with what are called 'terrorist organisations'. Division 102 creates offences for those who, variously:

- direct the activities of a terrorist organisation,
- are knowingly members of terrorist organisations,
- recruit for terrorist organisations,
- raise funds for such organisations, or
- provide support to them.

A crucial matter which concerned the Senate committee considering the Bill for this Act was how a terrorist organisation should be defined. For some witnesses before the committee, the Bill echoed the *Communist Party Dissolution Act 1950*.

Originally, there was to be a ministerial power simply to declare an organisation to be a terrorist organisation.

The final definition arrived at provides that a terrorist organisation is either:

- an organisation which a court has found to be directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not that act occurs; or, alternatively;

- is an organisation so specified in the regulations made under the Act following identification of the organisation by the UN Security Council as a terrorist body *and* ministerial satisfaction that the organisation has terrorist links.²⁴ (Such regulations are of course, disallowable and under the Criminal Code there is a sunset provision which means a regulation ceases to operate after two years, although it can be remade.)

The ASIO Bill

This Bill, quite correctly, has received a great deal of attention. It has been the subject of one advisory report by a parliamentary committee, and looks likely to be the subject of scrutiny by another committee when the amended Bill – the government having largely accepted the amendments proposed by the first parliamentary committee – is brought before the Senate.

This Bill proposes to expand ASIO's investigative powers in a significant way by permitting ASIO, with the concurrence of the Attorney-General, to seek a warrant for apprehension of a person suspected of having information about a terrorist offence. The person named in the warrant can then be interrogated in private before a prescribed authority and required to answer questions on pain of committing an offence.

The original Bill permitted the person to be held incommunicado, and without access to a lawyer.

As to the general proposal, there is much force in what Bret Walker SC wrote on 6 March this year in a newspaper article, albeit before the Bill was introduced. He wrote:

from what we know of it so far, this is the genuine emergency case where detention is authorised for the purpose of questioning a person who may not be a criminal suspect, but is thought to have information which could avert death and destruction. With appropriate safeguards, this intrusion into our usual freedom to be left alone and to not be required to answer questions from the government can easily be justified. The devil is in the details of any safeguards.

He went on to say:

these [safeguards] must surely include an absolute guarantee that nothing revealed by a person under compulsory questioning can ever be used to prove that person's guilt of any other offence. Otherwise, we should stop beating around the bush and start devising regulated torture.

In fact there are many safeguards built into the Bill.

The Attorney-General has recently announced significant amendments. The original Bill would have permitted:

- the person issuing the warrant to preclude access to a lawyer,
- children as young as 12 to be detained,
- the warrant to be extended for a considerable period, and
- the responses given by the person to be able to be used in evidence against them.

The amendments the government now proposes will:

- permit interrogation only of persons aged 14 or more – 14 being the age of general criminal responsibility in Australia;
- provide a use immunity on the evidence given by the person during questioning, so that their answers cannot be used against them in prosecution for a terrorism offence;
- will, except in special circumstances, give the person detained access to a lawyer. The Attorney's press release states: 'All detained persons [are] to have access to a security cleared lawyer unless specific grounds exist for denying that right for the first 48 hours of detention.'

A panel of security cleared lawyers in private practice, who hold

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themselves out for this purpose, is to be established.

But the benefits of access to a lawyer are significantly confined. When the person the subject of the warrant contacts their lawyer ‘the contact must be made in a way that can be monitored by a person exercising authority under the warrant’ – that is, as the government’s commentary on the amendments states ‘Contact must be carried out in the hearing of’²⁵ the warrant holder, usually, an ASIO officer. So it appears that there will be no guarantee of giving confidential advice.²⁶

I don’t wish to say more at this stage about this Bill – which, I am sure, will be the subject of lively debate during question time – except to note a possible role for Federal (and Family) Court judges.

Under the former Bill, the persons issuing the warrant had either to be a federal magistrate or an officer of the Administrative Appeals Tribunal. The Federal Court was not mentioned.

The parliamentary committee and indeed many persons who made submissions to the committee, felt strongly that AAT members, who generally only have fairly short, though renewable terms of office, lacked the necessary appearance of independence to be suitable to perform the function of issuing these warrants. They considered magistrates should perform the role. Furthermore, the parliamentary committee recommended that where a warrant was issued in circumstances where detention exceeded 96 hours (out of a maximum possible 168 hours), it was preferable for a Federal Court judge to issue the warrant. The new amendments will so provide. The question of course is whether any Federal Court judges will accept that role.

The parliamentary committee noted that in 1997, the judges of the Federal Court had advised the government that they would no longer be involved in issuing *Telecommunications (Interception) Act* (Cth) warrants, first, because they considered issuing warrants was an administrative not a judicial function, secondly because there was a significant additional workload involved and thirdly, because they increasingly found themselves as respondents to judicial review applications in their own courts.

An additional factor is that although the current state of High Court authority as for example set out in *Grollo v Palmer*²⁷ is that Chapter III judges, acting in their personal capacity, can issue telephone interception warrants consistently with the terms of the Constitution, it remains the subject to judicial and academic criticism.

It will be interesting to see whether any Federal Court judges acting *persona designata*, are prepared to issue warrants under the ASIO Bill, if it is enacted.

I accept that there is an important question of principle involved as to whether the judges should, even if they constitutionally can, undertake what is an administrative function, but is also an important role requiring manifestly independent persons, such as federal judges. After all, many state supreme court judges perform similar roles.

The only additional matter I would add is that in the United States, for example, federal judges perform these types of functions. The *Foreign Intelligence Surveillance Act* (US) allows warrants to be issued to permit foreign intelligence suspects to have their phone tapped, their mail opened and their premises searched. There are 11 federal judges who constitute the Foreign Intelligence Surveillance Court. They are appointed to this court for a limited, non-renewable term. They hold this appointment under an additional commission. They hear *ex parte* applications on behalf of the US Government, and issue warrants.²⁸

National security

To the lawyer, the term ‘national security’ is an exotic animal, perhaps familiar in theory, but rarely encountered in practice. I now

give a few examples of the species, most of which are concerned with protecting secret information affecting national security.

First, a document the disclosure of which would, or could reasonably be expected to, cause damage to the security or defence of the Commonwealth is an exempt document under the *Freedom of Information Act 1982* (Cth).²⁹

Similarly, material concerning ‘defence secrets and the nation’s diplomatic relations with foreign governments... are archetypes’ of public interest immunity privilege claims.

Such claims, if made out, prevent the information to which the privilege attaches being produced under compulsory process whether in oral evidence or through production of documents: see also sec 130 of the *Evidence Act 1995*.³⁰

Next, where the government seeks the intervention of equity to restrain publication of its confidential information, the court, to use the words of Mason J in *Commonwealth of Australia v. John Fairfax & Sons Ltd*³¹

will look at the matter through different spectacles and will not generally restrain publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action [His Honour continued] ... If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained.

The little known provisions of sec 85B of the *Crimes Act* (Cth)³² permit a federal or territory court, or a court exercising federal jurisdiction, if satisfied ‘that such a course is expedient in the interest of the defence of the Commonwealth’, to:

- exclude some or all of the public from the hearing,
- prohibit publication of a report of the proceedings, and
- prevent access to any documents on the court file.

Section 50 of the *Federal Court of Australia Act 1976* (Cth) is to similar effect.³³

Consistently with international law, and under the *Migration Act 1958* (Cth), a refugee may be expelled from Australia ‘on grounds of national security’ provided the relevant Minister personally decides that, because of the seriousness of the circumstances giving rise to the making of that decision, that this is in the national interest’.³⁴

Yet, in none of the examples just given, is national security really defined. This is not unusual in common law countries. For example, in *Secretary of State For The Home Department v. Rehman*³⁵ a case decided in October last year, the House of Lords considered a statutory provision which specified ‘the interests of national security’ as a ground on which the Home Secretary of State could consider deportation to be conducive to the public good, and so order deportation. In his speech, Lord Hoffman said: ‘there is no difficulty about what ‘national security’ means. It is the security of the United Kingdom and its people.’³⁶

One example of ‘security’, although, for reasons I will explain, not ‘national security’, being defined, is sec 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth). The Act prescribes the Organisation’s functions, one of which is ‘to obtain, correlate and evaluate intelligence relevant to security’; and another of which is ‘to advise ministers and authorities of the Commonwealth in respect of matters relating to security’.³⁷

Security is defined in the Act to mean the protection of the Commonwealth, the states, the territories and *their people* (a phrase not often found on our statute books) from

- espionage;
- sabotage;
- politically motivated violence;

- promotion of communal violence, and
- attacks on Australia's defence system or acts of foreign interference;
- whether in any case these are directed from, or committed within, Australia or not; and – an important 'and' – 'the carrying out of Australia's responsibilities to any foreign country in relation to any of these matters'.

That is, security as defined, includes the security of Australia directly, and corresponding obligations to our allies. Presumably that is why the term '*national security*' is not used.³⁸

The war against terrorism

As I mentioned in the introduction, the war against terrorism altogether defies easy categorisation. The fundamental reason for this is that it is not a war at all – as we understand wars.³⁹ I suggest that for a century or so, lawyers and laymen alike have thought of war as a state of (usually) open and declared, armed conflict between nation states.⁴⁰

This war, at least so far, has state actors on only one side of the ledger. And its duration and the location of the battlefield are seemingly at large. So, President Bush has said that 'Afghanistan is only the first step, the beginning of a long campaign to rid the world of terrorists'. And this is a war where, to quote Mr Bush again, terrorists 'view the entire world as a battlefield'.⁴¹

As far as the United States is concerned, there has been no formal declaration of war by the Congress – in which the power formally to declare war resides. In fact, there has been no such declaration by the Congress for 60 years. It is suggested by some that this congressional function is now a dead letter as it was necessary only for wars of aggression – a notion outlawed by the UN Charter.

In the case of Afghanistan, the United States has exercised its rights of self-defence, which are recognised in – but exist independently of – the United Nations Charter. And in fact there is strong congressional approval for the action in Afghanistan, evidenced for example by a supportive formal resolution of each chamber.

Nor has Australia declared war. In our system, declarations of war are classically the prerogative of the executive.⁴²

There are legislative definitions of war, for example in the *Defence Act 1903* (Cth) which defines war as 'any invasion or apprehended invasion of, or attack or apprehended attack on, Australia by an enemy or armed force.' This definition is relevant because, where there is a state of war so defined, a proclamation may be made by the Governor-General (which must be approved by *both* Houses of federal parliament within 90 days) and there can then be a compulsory call up of all persons aged between 18 and 60 to serve in the defence forces.

Rather than a war, there is an armed conflict, or as it was put in relation to Malaya in the 1950s, an 'emergency'.

The nature and intensity of the armed conflict has constitutional significance, particularly given the variable nature of the defence power under section 51(vi) of the Constitution. As Dixon J put it in *Australian Communist Party v Commonwealth*⁴³

what the defence power will enable the parliament to do at any given time depends upon on what the exigencies of the time may be considered to call for or warrant. The meaning of the power is of course fixed but as, according to that meaning, the fulfilment of the object of the power must depend on the ever changing course of events, the practical application of the power will vary accordingly.

So, when Australia is involved for example in a world war, the fulfilment of the object of the defence power permits legislation in

relation to a very wide range of activities.

What then of the detention of persons who might be threats to the nation, but have not been convicted of any crime? As Dixon J also said in the *Communist Party case*

I think that... it is futile to deny that when the country is heavily engaged in an armed conflict with a powerful and dangerous enemy the defence power will sustain a law conferring upon a minister power to order the detention of persons whom he believes to be disaffected or of hostile associations and whom he believes that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and the defence of the Commonwealth.⁴⁴

There is an unresolved question about the extent to which the courts can review parliament's claim of the necessity of legislation to the security and defence of the Commonwealth. The *Communist Party case* also stands for the proposition that the courts, while deferential to parliament's view, will not leave this field. It is obviously an important but fraught matter.

If I may give an example by way of an analogy. The International Covenant on Civil and Political Rights (the ICCPR) has a prohibition against arbitrary detention and arrest, but allows for that right to be derogated from 'in time of public emergency which threatens the life of the nation': see article 9.⁴⁵ There is a similar provision in the European Convention on Human Rights.

In December last year, the United Kingdom enacted a statute which provided, among other matters, for the detention of those persons whom the Secretary of State certified as threats to national security and who were suspected of being terrorists, where their removal was not possible for the time being. They may be held for an undefined period. That provision required a derogation, and thus a declaration that there was a public emergency threatening the life of the nation, that is, the United Kingdom. The declaration was made. The derogation will continue at least until March 2003, and possibly until 2006, under the current statute.⁴⁶

(The Law Council of Australia, in its submission to the Senate committee considering the Australian post-September 11 laws I have previously discussed, argued that there was no evidence of an emergency within the meaning of Clause 9 in relation to Australia.⁴⁷)

In the case of the United Kingdom, when the executive government concluded that there was a state of public emergency which would continue for at least 18 months, and that the derogation was a necessary and proportionate response to that emergency, parliament accepted the decision almost without demur. Because of the nature of this conflict, the decision and the prediction inherent in it had largely to be taken on trust. However, there is evidence that the level of acceptance of that judgment is diminishing.⁴⁸

There are obvious difficulties in decisions of this sort being assessed by a court or indeed the public. To take an example, what if the September 11 bombings in America had also occurred here? Could the Australian Parliament then have enacted detention legislation of the type to which Sir Owen Dixon referred?

We know from the government's defence white paper, published prior to September 11, 2001 that the least likely threats to Australia which are predicted are a full scale invasion of Australia or a major attack on Australia.⁴⁹ The threats to Australia are more likely to come from weapons of mass destruction or other terrorist activities of the type seen in America last year. These threats are often called 'asymmetric threats' because the damage which results is quite disproportionate to the risk involved to the perpetrators, compared with 'normal', if there is such a thing as normal, conflict on a battlefield.

There is an unresolved question as to the extent to which asymmetric threats or successful asymmetric attacks would fully enliven the defence power.

I should also note that it is not merely the defence power which may be relied upon by the Commonwealth. The incidental power is also said to support 'laws which are directed to the protection and maintenance of the legal and political organisations of the Commonwealth'.⁵⁰

May I conclude this address by referring to an important case now proceeding through the American courts. It is *Padilla v Bush*. You may recall that Jose Padilla, an American citizen, was overheard, when in Pakistan, plotting to set off a 'dirty bomb', that is to say a bomb with some radioactive components, in America. He was arrested when he returned to America under a 'material witness statute' whereby he was not charged with any crime. He was held for the maximum period of time, some weeks, permissible under this law. He was brought before a federal judge who indicated that the United States government should charge him or release him. It did neither. Instead, the government took him into military custody (in fact a naval brig in South Carolina), not in reliance on any statute permitting his detention, but rather based on the asserted authority of the President to detain Mr Padilla in military detention as an enemy combatant for the length of the combat – however long that is.⁵¹

This action highlights another difficulty with having an unconventional war of the type going on at present. It is entirely unclear what comprises victory, and so, when the conflict is to end. Be that as it may, it seems a fair prediction that *Padilla v Bush* will end up in the Supreme Court.

In conclusion, I suggest that, whether we are legislators, judges, lawyers or citizens, this case, and indeed tonight's topic, cast up two questions which demand our attention in these difficult times.

To paraphrase Alexander Hamilton:

- does the threat we face mean we are willing to run a *risk* – I emphasise, a risk – of being less free?, and
- will any diminution of our freedoms which occur in the name of this threat in fact make us safer?

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2 Alexander Hamilton, *The Federalist*, No 8. Hamilton was writing about the evils of war between the former colonies if there was no union. Nevertheless, the excerpt is apt in this context as well.

3 See generally, Norton-Moore, Tipson and Turner, *National Security Law*, Carolina Academic Press, 1990; and Norton-Moore, Roberts and Turner, *National Security Law Documents*, Carolina Academic Press, 1995; H P Lee, *Emergency powers*, Law Book Company, 1984; Commonwealth of Australia, Department of the Parliamentary Library, Research Papers 2002, *Terrorism and the Law in Australia: Supporting Materials, Terrorism and the Law in Australia: Legislation, Commentary and Constraints*.

4 *Coutts v Commonwealth* (1985) 157 CLR 91 at 109.

5 sec 51(xix)

6 sec 51(xxvii)

7 sec 51(xxviii)

8 sec 51(xxix)

9 See the Report of Australia to the Counter-Terrorism Committee of the United Nations Security Council pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001.

10 The external affairs power supports legislation to implement treaty obligations and matters of international concern: eg, *Commonwealth v Tasmania* (1983) 158 CLR 1 at 131-2, 171, 220, 258.

11 See www.un.org

12 It specifically required them to review and strengthen

- border security operations;
- banking practices;
- customs and immigration procedures;
- law enforcement and intelligence cooperation; and
- arms transfer controls.

All of these – except criminal law, of course – are principally or solely matters of Commonwealth concern.

13 By the *Charter Of The United Nations Amendment Act 1993*

14 Section 6. By operation of sec 9 of the Act (and, in relation to states, by operation of sec 109 of the *Constitution*) such regulations prevail over inconsistent Commonwealth Acts and state and territory laws. By sec 10, later Acts are not to be interpreted as overriding the regulations.

15 These included the *Charter of the United Nations (Anti Terrorism Measures) Regulations 2001*, and the *Charter of the United Nations (Sanctions – Afghanistan) Regulations 2001*. The former froze suspected terrorist assets contained on a list promulgated as an Executive Order by President Bush. The latter regulation imposed a sanctions regime on Afghanistan by restricting the supply of arms, or the use of Australian aircraft and ships, and prohibiting dealing with Taliban or Bin Ladin assets. The Attorney-General was able to seek injunctions to prevent current or proposed breaches of the regulations.

16 *The Suppression of the Financing of Terrorism Act 2002* amends the *Criminal Code Act 1995*, the *Extradition Act 1988*, the *Financial Transactions Reports Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987* and the *Charter of the United Nations Act 1945*. The Act implements obligations under United Nations Security Council Resolution 1373 and the *International Convention for the Suppression of the Financing of Terrorism*.

17 *The Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* amends the *Criminal Code Act 1995* to make it an offence to place bombs or other lethal devices in prescribed places with the intention of causing death or serious harm or causing extensive destruction which would cause major economic loss.

18 *The Border Security Legislation Amendment Act 2002* deals with border surveillance, the movement of people, the movement of goods and the controls Customs has in place to monitor this activity.

19 *The Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002* amends the *Criminal Code Act 1995* to insert new offences directed at the use of postal and similar services to perpetrate hoaxes, make threats and send dangerous articles.

20 *The Telecommunications Interception Legislation Amendment Act 2002* amends the *Telecommunications (Interception) Act 1979* to recognise offences involving terrorism as falling within the most serious class of offences for which interception warrants are available.

21 In addition, the government proposes to enact the *Criminal Code Amendment (Espionage And Related Offences) Bill 2002* which is relevant in this area, although its genesis is unrelated to the events of September 11. The genesis of this Bill was in fact the 'Wispelare affair'.

22 Senate Legal and Constitutional Legislation Committee Report, May 2002, paragraph 3.3

23 See Press Release 1/2993, UN Ad Hoc Committee on Assembly Resolution 51/210, Sixth Session, 26th Meeting (AM); <http://www.un.org/News/Press/docs/2002/12/993.doc.htm>

24 The actual definition is more complex than that.

25 Proposed sec 34U(2).

26 Proposed sec 34U(7).

27 (1995) 184 CLR 348

28 www.uscourts.gov/tth/june02tth/interview.html

29 Thirty-three documents affecting national security, defence or international relations

(I) A document is an exempt document if disclosure of the document under this Act:

(a) would, or could reasonably be expected to, cause damage to:

(i) the security of the Commonwealth;

(ii) the defence of the Commonwealth; or

(iii) the international relations of the Commonwealth...

30 '[Cabinet minutes] have often been coupled with defence secrets and with the nation's diplomatic relations with foreign governments as archetypes of Crown privilege.' *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ. See also the Evidence Act (Cth), in sec 130

31 (1980) 147 CLR 39 at 51.

32 These statutory powers, together with the availability of public interest immunity claims, may not provide adequate scope or flexibility in court proceedings. Take the case of an espionage prosecution where the defendant is familiar with highly classified material and seeks production of this material for deployment in his or her defence. The prosecutor always risks being forced to drop the case because the disclosure of material to the defence or the jury, even in camera, is thought to be an unacceptable security risk. And Public Interest Immunity Claims can be blunt instruments in the sense that they do not permit the judge to re-write a document to strike the right balance between the interests of security and a fair trial. In the United States the *Classified Information Procedures Act* (US) permits the Court to rewrite or 'redact' such material so as strike a better balance between the two.

33 The Court may, at any time during or after the hearing of a proceeding in the Court, make such order forbidding or restricting the publication of particular evidence, or the name of a party or witness, as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth.

34 Migration Act sec 502. In *Re Patterson; Ex parte Taylor* [2001] HCA 51, Kirby J, for example, considered that the national interest was not synonymous with 'the public interest'. Similarly, in *David Irving v Minister of State for Immigration, Local Government & Ethnic Affairs* (1996) 663 FCA 1, the Full Court of the Federal Court considered provisions of the Migration Act which deemed a person not to be of good character in the migration context where they had been excluded from another country because 'the authorities of that country considered the person to be a threat to the national security of the country.'

35 [2001] UKHL 47

36 [He went on] On the other hand, the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.'

37 ASIO Act sec 17.

38 *The National Security Act 1947* (US) which establishes, among other things, the Central Intelligence Agency, contains no definition of what it describes as 'the national security'. The definition used in the *Security Service Act 1989* (UK) is similar to the ASIO Act, although it goes on to provide that MI5's functions include protection against 'threats from espionage, terrorism and sabotage ... from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.'

39 This also leaves aside the notion that the UN Charter has abolished war, leaving only armed conflict.

40 In 'civil wars', the threshold for application of the Second Protocol to the Geneva Convention is that armed groups opposing the government both under responsible command, and that they control sufficient territory to be able to mount sustained attacks.

41 <http://www.whitehouse.gov/news/releases/2002/02/20020204-1.html> – 47.0KB

42 Renfree, *The executive power of the Commonwealth of Australia*, Legal Books Pty Ltd, 1984, pages 462-463

43 (1951) 83 CLR 1

44 Ibid. Three earlier decisions of the court are cited in support of that proposition. Neither *Lim* (176 CLR 1), nor *Kruger* (190 CLR 1) overturn this principle.

45 This states:

'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states Parties to the present Covenant may take measures derogating from their obligations under the present Covenant [with some limitations] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

46 *The Home Office's Anti-Terrorism, Crime & Security Act 2001: Summary* states:

'The provisions of Part 4 are intended to prevent terrorists from abusing our immigration and asylum procedures and the safe haven we offer refugees. Sections 21 to 32 ('Suspected international terrorists') allow the detention of those the Secretary of State has certified as threats to national security and who are suspected of being terrorists where their removal is not possible at the present time. Such detention would be subject to regular independent review by the Special Immigration Appeals Commission (SIAC). These provisions change the current law, which allows detention with a view to removal only where removal is a realistic option within a reasonable period of time. They require a limited derogation from Article 5 of the ECHR (right to liberty and security). Such derogation is permitted during a time of public emergency, but any derogation must be limited to the extent strictly necessary as a result of that emergency. The government has concluded that there is a state of public emergency, and the derogation is a necessary and proportionate response to that emergency. The detention provisions in section 21 to 23 will need to be reviewed by parliament in March 2003, and annually thereafter, otherwise they will lapse. These provisions will cease to apply in November 2006, if they have not lapsed by that date because they have not been used.'

47 Senate Legal and Constitutional Legislation Committee Report, May 2002, paragraph 3.24-3.

48 See <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmdefence/uc518-xi/uc51802.htm>,

49 Commonwealth of Australia, White Paper, *Australia's Defence Policy*, AGPS, 2001, page 23.

50 See generally Renfree pages 447-450

51 <http://news.findlaw.com/hdocs/docs/terrorism/padillabush82702grsp.pdf>

Crimes (Sentencing Procedure Amendment) Standard Minimum Sentencing Bill 2002

By Chrissa Loukas*

This article is current as at 19 November 2002.

The Bar Association and Law Society have opposed both the government consultation draft Bill and the opposition's even more draconian proposal.

On 23 October 2002 the government introduced with minor amendments the final form of the Bill into parliament in the Legislative Assembly. It is anticipated that the *Crimes (Sentencing Procedure Amendment) Standard Minimum Sentencing Act* will commence in January 2003.

In his second reading speech, the Attorney General stated that 'the scheme being introduced by the government today provides further guidance and structure to judicial discretion,'¹ not mandatory sentencing.

The government's Bill establishes a new sentencing scheme in the new Division 1A, Part 4, of the *Crimes (Sentencing Procedure) Act 1999*.

Standard non-parole periods

The main features of the Bill are:

1. Standard non-parole periods for a number of specified serious offences: new sec 54A²
2. A sentencing court is to set the designated standard non-parole period as the non-parole period for the specified offence, unless a sentencing court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period: new sec 54B.
3. Replacement of the existing sec 44 with a new section requiring a sentencing court to set a non-parole period for the sentence before setting the balance of the term of the sentence. The balance of the term must not exceed one-third of the non-parole period for the sentence unless the court decides there are 'special circumstances for it being more'. The current sec 44 requires the court to set the total sentence and then fix the non-parole period.
4. Establishment of a New South Wales Sentencing Council to advise the attorney general in relation to sentencing matters.

Section 3A - Purposes of sentencing

The Bill inserts a new sec 3A into the Act, which sets out the purposes for which a court may impose a sentence on an offender. These purposes are stated to be:

- to ensure that the offender is adequately punished for the offence;
- to prevent crime by deterring the offender and other persons from committing similar offences;

- to protect the community from the offender;
- to promote the rehabilitation of the offender;
- to make the offender accountable for his or her actions;
- to denounce the conduct of the offender; and
- to recognise the harm done to the victim of the crime and the community

Aggravating, mitigating and other factors in sentencing

The existing sec 21A is replaced by a new sec 21A. The new sec 21A sets out specific aggravating and mitigating factors, to be taken into account by sentencing courts in determining the appropriate sentence for an offence. The court is also required to take into account any other objective or subjective factor that affects the seriousness of the offence: new sec 21A(1)(c).

Some commentators have raised a question as to whether the words 'seriousness of the offence' may encourage a narrow construction. Such a construction would exclude for example such matters as possible effects of sentence on family and hardship of custody, matters that do not go to the 'seriousness of the offence,' but to the proper sentencing of the offender.

The new sec 21A(1) additionally provides that the sentencing court may take into account any other matters that it is required or permitted to take into account under any Act or rule of law.

It appears that if the new sec 21A is given a broad interpretation, it imports no change to the common law.

Of course, where there is uncertainty in the meaning and operation of a statutory provision which affects a person's liberty, one would argue that it is appropriate to adopt the construction of that provision which enhances the liberty of the subject³.

The new sec 21A(4) provides that a sentencing court is not to have regard to any aggravating or mitigating factor specified in the section if it would be contrary to any Act or rule of law to do so. This provision makes it clear, for example, that a rule of law such as that expressed in *The Queen v De Simoni*⁴ is not affected. In *De Simoni* the High Court held that a sentencing court may not take into account circumstances of aggravation that would have warranted a conviction for a more serious offence for which the offender was not charged. The *De Simoni* principle is further preserved by the operation of the concluding words of proposed new sec 21A(2).⁵

The requirement under new sec 21A for a court to take into account the aggravating and mitigating factors and other matters, applies in sentencing for all offences-not just to offences that are subject to a standard non-parole period.

Setting non-parole period and balance of term of sentence

The existing sec 44 is replaced with a new section. The new section requires the sentencing court to set a non-parole period for the sentence before setting the balance of the term of the sentence. This is known to criminal law practitioners as 'bottom up'

'The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country'

Winston Churchill, during a debate in the (UK) House of Commons in 1910

sentencing. At present sec 44 requires the court to set the total sentence and then fix the non-parole period-i.e. 'top down' sentencing. Under the new sec 44 the non-parole period is fixed first. The balance of the term of the sentence must not exceed one third of the non-parole period unless the court decides there are 'special circumstances for it being more'. The new sec 44 seeks to maintain the existing presumptive ratio between non-parole period and parole period.

The return to 'bottom up' sentencing suggests that appellate guidance will have to be re-configured across a wide range of sentences. Sentencing law is now already more than sufficiently complex.

By way of background, sec 5 of the now repealed *Sentencing Act 1989* was replaced by the current *Crimes (Sentencing Procedure) Act 1999*. The 1999 Act, in essence, reversed the way in which sentences were formulated with the requirement that the maximum term be set first. From the second reading speech relating to the introduction of the Act in 1999:

The Sentencing Act 1989 tried in sec 5(1) to change the way sentences of imprisonment were imposed by the courts. In theory, a court was required first to set a minimum term which must be served and then to add a period during which the prisoner could be released on parole. In practice, things were not quite so simple. The two-stage sentencing process has been described by the present Chief Justice of New South Wales as 'quite artificial'. The Law Reform Commission was similarly critical, noting:

The mere statement of a minimum term and additional term cannot effectively convey all the purposes of punishment. It is only once a head sentence has been set that the court can determine the minimum term, that is, the period which the offender must, in justice, serve in gaol (pages 179-180).

Clause 44 implements this part of the Law Reform Commission's recommendation'.

The government now seeks to revert to the 'quite artificial' manner of fixing sentences with the new sec 44

A regime of 'bottom up' sentencing existed between 1989 and 1999 in relation to sec 5, *Sentencing Act 1989* (Act now repealed). See *R v Hampton*⁶. The existing regime⁷ was reviewed by the Court of Criminal appeal in *R v Carrion*⁸ and *R v Simpson*⁹. The new provision is different again from both the 1989 'bottom up' and 1999 'top down' provisions, although it does revert to 'bottom up'.

At present, when sentence is fixed, the non-parole period may be reduced because of special circumstances. Some commentators have indicated that 'special circumstances' may no longer be capable of reducing the non-parole period under the new sec 44. This must await appellate clarification.

An arguable interpretation in relation to 'special circumstances' is that the reasoning in *Hampton* if applied to the new provisions may result in an interpretation leading to either an increase in total sentence or a reduction in the non-parole period. Again, whether that is correct is a matter that must await appellate clarification. Absent a broad interpretation, the effect of the wording of the new sec 44(2) may be that a finding of 'special circumstances' can only increase the total sentence.

It is difficult to imagine the Court of Criminal Appeal adopting an interpretation whereby the existence of 'special circumstances' would result in a longer overall sentence than if those circumstances did not exist at all.

It is to be borne in mind that several of the factors sustained by authority as representing special circumstances are of a nature

inherently beneficial to the offender. Factors such as youth, first time in prison and enhanced capacity for rehabilitation, may well represent an argument for a longer period on parole but should not, indeed, have not previously been the basis for arriving at an overall sentence otherwise disproportionate to the offence, its circumstances and that of the offender.

In *Simpson*, Spigelman CJ said:

The words 'special circumstances'...are words of indeterminate reference and will always take their colour from their surroundings. [T]he non-parole period is to be determined by what the sentencing judge concludes that all the circumstances of the case, including the need for rehabilitation, indicate ought [to] be the minimum period of actual incarceration.¹⁰

Standard non-parole periods

A new Division 1A (secs 54A - 54D) is inserted into Part 4 of the Act. The new Division provides for standard non-parole periods for a number of serious offences listed in a table. The table of minimum non-parole periods represents substantial increases to the existing mean for each offence.

Standard non-parole periods and the middle range

The new sec 54A provides that the standard non-parole period for an offence is the non-parole period set out opposite the offence in the table. The offences specified in that table include murder, wounding with intent to do bodily harm or resist arrest, certain assault offences involving injury to police officers, certain sexual assault offences, sexual intercourse with a child under 10 years of age, robbery with arms and wounding, certain break and enter offences, car-jacking, certain offences involving commercial quantities of prohibited drugs and unauthorised possession or use of firearms.

The Bill provides in new sec 54A(2) that the standard non-parole period for an offence represents the non-parole period for an offence in the middle of the range of objective seriousness for such an offence. The standard non-parole period provides a reference point or benchmark within the sentencing spectrum for offences that are above or below the middle of the range of objective seriousness for such an offence.¹¹

The section, however, gives no guidance to the judiciary as to the ascertaining of the middle range of offences.

In the second reading speech the Attorney General referred, in this context to a sentencing spectrum being well known to sentencing judges and criminal law practitioners. He further clarified the matter by referring to one end of the spectrum being the 'worst type of case falling within the relevant prohibition'¹² and the High Court's observations in *Veen No 2*¹³ that this does not mean that 'a lesser penalty must be imposed if it be possible to envisage a worse case...'. The Attorney then stated that 'at the other end of the sentencing spectrum lie cases which might be described as the least serious or trivial'¹⁴

The Attorney General referred to *Ibbs v The Queen*¹⁵, *Thorneloe v Filipowski*¹⁶, *R v White*¹⁷ and *R v Moon*¹⁸, as 'to the need for a sentencing judge to identify where in the spectrum of objective seriousness an offence lies'¹⁹.

Nevertheless, the fact remains that the setting of a specific middle range in this manner is hitherto unknown and unexplored in the criminal law in Australia.

One question raised by some commentators is to what extent new sec 21A(2) factors (aggravating factors) operate in the assessment of the standard minimum-i.e. are some incorporated or

presumed to exist?

Standard non-parole periods unless reasons

The new sec 54B provides that a court sentencing an offender to imprisonment for an offence set out in the table is to set the standard non-parole period as the non-parole period for that offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period. The reasons for which the court may increase or reduce the non-parole period are only matters referred to in proposed sec 21A: new sec 54B(3).

The New South Wales Bar Association stated in its submission to the Attorney General on the consultation draft that in relation to new sec 54B(2), whilst it provides that the sentencing court need not set 'the standard non-parole period as the non-parole period for the offence' where 'the court determines that there are reasons for increasing or reducing the standard non-parole period', it cannot be safely concluded that this gives an unfettered discretion to the sentencing court. Rather, sec 54B(2) is likely to be interpreted as a statutory presumption which significantly fetters the sentencing court's discretion.

The new sec 54B(2) is worded in a slightly different way from the consultation draft, nevertheless the possibility of a 'statutory fetter' interpretation remains valid.

A separate problem raised in relation to the new sec 54B(3) is that it appears to limit the 'reasons' to be taken into account in varying the standard non-parole period to 'only those referred to in sec 21A'. The question asked by some commentators in this regard is whether these 'reasons' are limited to the specified aggravating and mitigating circumstances or extend to the factors referred to in new sec 21A(1). There is currently a proposed amendment in the Legislative Council to remove the words 'are only' and insert 'include'.

New sec 54B(4) record of reasons

The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.

It is the observation of many commentators that the requirement for reasons to be given when making such determinations is hardly a novel concept in the criminal law.

In the second reading speech the Attorney General observed that the sentencing process remains one of synthesis of all the relevant factors in the circumstances of the case and that the requirement for a court to identify each factor that it takes into account does not require the court to assign a numerical value to such a factor, 'that is, proposed sec 54B does not require a court to adopt a mathematical or multi-staged approach to sentencing'²⁰

The failure of a court to comply with this section does not invalidate the sentence: new sec 54B(5).

New sec 54C record of reasons/non custodial sentence

The new sec 54C requires a court that imposes a non-custodial sentence for an offence set out in the table to make a record of its reasons for doing so. The court must identify in the record of its reasons each mitigating factor that it took into account: new sec 54C(1). The failure of a court to comply with this section does not invalidate the sentence: new sec 54C(2).

Exclusions new sec 54D

Standard non-parole periods do not apply to:

- imprisonment for life

- detention under the *Mental Health (Criminal Procedure) Act 1990*.
- offences for which the offender is sentenced is dealt with summarily²¹.

New South Wales Sentencing Council

The Sentencing Council is to have the following functions:

- (a) advising and consulting with the minister in relation to offences suitable for standard non-parole periods and their proposed length,
- (b) advising and consulting with the minister in relation to offences suitable for guideline judgments and the submissions to be made by the minister on an application for a guideline judgment,
- (c) monitoring, and reporting annually to the minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments,
- (d) at the request of the minister, preparing research papers or reports on particular subjects in connection with sentencing.

The Sentencing Council is to consist of 10 members appointed by the minister, of whom:

- (a) one is to be a retired judicial officer, and
- (b) one is to have expertise or experience in law enforcement, and
- (c) three are to have expertise or experience in criminal law or sentencing (including one person who has expertise or experience in the area of prosecution and one person who has expertise or experience in the area of defence) and
- (d) one is to be a person who has expertise or experience in Aboriginal justice matters, and
- (e) four are to be persons presenting the general community, of whom two are to have expertise or experience in matters associated with victims of crime.

Review

The new sec 106 requires the Attorney General to review the amendments relating to standard non-parole periods 'as soon as possible after the period of two years from the commencement': sec 106(3). A report on the outcome of the review is to be tabled in parliament with 12 months after the end of the period of two years sec 106(4).

Effect of failure to comply with Act

New sec 101A provides that a failure to comply with a provision of the principal Act may be considered by an appeal court in any appeal against sentence even if the Act declares that the failure to comply does not invalidate the sentence. The proposed section ensures that the courts are not relieved of the obligation to comply with the Act with respect to standard non-parole periods or other matters, but protects the validity of any sentence until such time as the matter is considered by an appeal court.

Guideline judgments

In the second reading speech the Attorney General said that 'it is proposed that the guideline judgments already promulgated by the Court of Criminal Appeal should continue to be used by the courts when sentencing for these offences. Guideline judgments will also continue to play an important role with respect to offences that are not part of the standard non-parole period

scheme²².

Guideline judgments have been delivered in respect of the following offences:

- Dangerous driving causing death or grievous bodily harm: *R v Jurisic* (1998) 45 NSWLR 209 and *R v Whyte* [2002] NSWCCA 343 (challenges to the constitutional validity of guideline were rejected in *Whyte*).
- Armed robbery: *R v Henry* (1999) 46 NSWLR 346.
- Break, enter and steal: AG Application (No 1) *R v Ponfield* [1999] NSWCCA 435.
- Guilty pleas: *R v Thomson* [2000] 48 NSWLR 383, *R v Sharma* [2002] 54 NSWLR 300 (Sharma is the reconsideration of *Thomson* in the light of reservations expressed by the High Court in relation to guideline judgments in *Wong v The Queen* (2001) 76 ALJR 79).

Consequential amendment re application

The standard non-parole period amendments will not apply to offences committed before the commencement of the amendment.

There is a proposed government amendment of the Bill in the Legislative Council, in relation to new sec 3A (Purposes of sentencing) and new sec 21A (Aggravating, mitigating and other factors in sentencing) to the effect that these particular provisions would apply to sentencing in relation to offences committed prior to the commencement date, in certain circumstances.

Progress of the Bill

At the time of writing, the Bill had been passed by the Legislative Assembly but had not been introduced into the Legislative Council. There is a further proposed government amendment in the Upper House, to add two extra offences to the table of minimum non-parole periods²³. Although one cannot predict with absolute certainty, it is not anticipated that there will be any other significant additional amendments to the legislation in the Legislative Council.

Conclusion

Both the Bar Association and the Public Defenders have stated that the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentences) Bill 2002* represents an unwarranted departure from fundamental concepts of judicial discretion. Independence of the judiciary has long been reflected in the dispassionate exercise of discretion, including that employed in sentencing, governed by the application of legal principles. Concerns have also been expressed that the legislation seeks to accommodate, rather than address, prevalent misconceptions as to the effectiveness and propriety of long-standing judicial practice in the area of sentencing.

The Chief Justice of NSW the Honourable JJ Spigelman AC stated in January of this year:

The sentencing of convicted criminals is one of the most important tasks performed by the judiciary. Sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do. The public attitude to the way judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice.

I am concerned that this confidence, and public respect for the judiciary, is diminished by reason of ignorance about what judges actually do in terms of the sentences that are imposed. Plainly there are occasions when a particular sentence attracts criticism and that criticism is reasonably based. What concerns me is that

such cases appear to be widely regarded as typical, when they are not.

The Chief Justice of Australia, the Honourable A M Gleeson, has recently summarised the result of public opinion polls about sentencing not just in Australia but also in the United Kingdom and North America:

...when people are asked whether they think the sentences imposed by judges are too lenient, or too severe, or just about right, most say that the sentences are too lenient. However, when they are then given the facts of individual cases, and asked what sentences they themselves would have imposed, a majority come up with sentences that are more lenient than sentences that were actually imposed by judges. The same results have shown up in similar surveys in other countries. When people are questioned in more depth, and are made to think more closely about an issue, their responses change.²⁴

The Public Defenders' submission to the Attorney General, opposed the Bill and commended to the government continued support of the present and effective modes of judicial supervision through the Court of Criminal Appeal and the guideline judgments, supplemented by such legislation as was most recently commenced on 15 April 2002 in the form of the amendments to sec 21A of the *Crimes (Sentencing Procedure) Act*. The amended section represented an effective and near exhaustive list of relevant factors to be considered on sentence. Such a provision, in combination with the guideline judgments, is beneficial and to be built upon in preference to the alternative approach represented by the *Crimes (Sentencing Procedure Amendment) Standard Minimum Sentence (Bill) 2002* which must unavoidably represent a concession to the most insupportable misconceptions as to the reality of the justice system. There is unarguably some disquiet in the community as to the integrity of sentencing processes and principles, often fanned by flawed media analysis disregarding or misrepresenting sound legal principles. An appropriate response is one of education and exposure of the truth of accountable sentencing discretion, as opposed to the prevailing myths of irresponsible sentencing caprice on the part of the courts. This is no easy task.

Neither the government's Bill nor the opposition's much more draconian proposal is the answer.

* Barrister, Public Defender, Judicial Member Administrative Decisions Tribunal (NSW)

1 Second reading speech, Legislative Assembly, 23 October 2002, Hansard.

2 I will be referring to new sections rather than clauses.

3 *Piper v Corrective Services Commission of NSW* (1986) 6 NSWLR 352.

4 (1981) 147 CLR 383.

5 Second reading speech, Legislative Assembly, 23 October 2002, Hansard.

6 (1998) 44 NSWLR 729 see also *R v GDR* (1994) 35 NSWLR 376.

7 Sec 44 *Crimes (Sentencing Procedure) Act 1999*

8 (2000) 49 NSWLR 149.

9 (2001) 53 NSWLR 704.

10 At [59]

11 Second Reading Speech, Legislative Assembly, 23 October 2002, Hansard.

12 *R v Tait and Bartley* (1979) 46 FLR 386.

13 *Veen v The Queen (No 2)* 164 CLR 465.

14 Second reading speech, Legislative Assembly, 23 October 2002, Hansard.

15 (1987) 163 CLR 447 at p 451 and 452.

16 (2001) 52 NSWLR 60 at page 69.

17 [2000] NSWCCA 343.

18 [2000] NSWCCA 534.

19 Second reading speech, Legislative Assembly, 23 October 2002, Hansard.

20 Second reading speech, Legislative Assembly, 23 October 2002, Hansard.

21 See also *R v Doan* (2000) 50 NSWLR 115

22 Second reading speech, Legislative Assembly, 23.10.02, Hansard.

23 Aggravated indecent assault sec 61M *Crimes Act 1900* (NSW). Intentionally causing a fire (bushfires) Sec 203E *Crimes Act 1900* (NSW).

24 Chief Justice Spigelman's Law Term Address, 30 January 2002. See also, The Honourable AM Gleeson AC, Chief Justice of Australia, 'Valuing courts', *Judicial officers' bulletin*, Volume 13 Number 7, August 2001.

Shoot the lawyers?

By Dr Helen Pringle, UNSW *

It is often claimed that Australia is following the US down a path of litigation madness. Soaring insurance premiums follow frivolous lawsuits by money-crazed lawyers. And as premiums rise, firms become afraid to innovate, doctors afraid to practise, councils afraid to provide playgrounds, restaurants afraid to serve coffee. As Bob Carr noted on 9 July in a speech to the Sydney Institute, 'The growth of this culture of litigation has gone far enough.... We must act now or we will soon be living with an American-style culture of litigation where someone always has to pay.'

At a Canberra meeting to address the insurance crisis on 23 April 2002, John Howard had argued on similar lines: 'I said some years ago when we brought in national gun-control laws that I didn't want Australia to go down the American path on guns. I also don't want Australia to go down the American path on litigation.... You can't have it both ways – you can't expect to sue at the drop of a hat and complain about public liability premiums going up.' And Howard's ministers have echoed his concerns.

Such warnings draw on a standard picture advanced by proponents of tort reform in the US. When he was governor of Texas, for example, George W. Bush led the charge against the culture of litigation. Supported by public-spirited corporations like Enron and corporation-funded bodies like Texans for Lawsuit Reform, Bush zapped tort law reform through the Texas legislature by declaring a 'legislative emergency' in 1995.

'The most important thing you and I can do to improve our economy and create jobs in Texas is to reform our civil justice system,' Bush said at the time. His reform program capped awards for punitive damages, limited who could file suits and where, and increased the bonds to be posted by plaintiffs. Bush also gave some professionals

blanket immunity to civil suits, and made it harder to recover damages where more than one defendant was involved.

Like his father, Dubya railed against 'sharp lawyers' in 'tasselled loafers', who were alleged to be 'running wild' and terrorising everyone from doctors to boy scout leaders with malpractice and negligence suits. Bush set the pace that has since 1995 seen more than 30 US states passing tort reform schemes.

So what happened after? What can we learn from the American experience of trying to curb the culture of litigation and blame? In Texas, the number of civil suits certainly fell – although part of that fall probably had something to do with predictions of case outcomes in the light of the stacking of the (elected) Texas Supreme Court with Bush supporters. Unfortunately, however, insurance premiums did not fall along with the number of suits – not in Texas and not in any of the other reforming US states. In fact, as the Center for Justice and Democracy notes in its report

Premium Deceit, 'States with little or no tort law restrictions have experienced approximately the same changes in insurance rates as those states that have enacted severe restrictions on victims' rights.'

In March 2002, the American Insurance Association (AIA), a major industry group, came out to say that contrary to many perceptions, 'the insurance industry never promised that tort reform would achieve specific premium savings'. The AIA position reiterates statements of the American Tort Reform Association that it too had never claimed that restrictions on litigation would bring insurance rates down.

The American experience seems to indicate that the standard picture of frivolous and outrageous litigation is not sustainable as the chief explanation for rising insurance premiums. In a *Wall Street Journal* report of 24 June 2002 on malpractice claims, Rachel Zimmerman and Christopher Oster noted that 'While malpractice litigation has a big effect on premiums, insurer's pricing and accounting practices have played an equally important role.' According to the *Journal* report, even the American College of Obstetricians and Gynecologists 'for the first time is conceding' that the business practices of insurance companies have contributed a great deal to the rising malpractice premiums of its members.

In other words, the US tells us a sobering story of corporate irresponsibility and lack of accountability, rather than a mad romance with litigation by citizens and their lawyers. In Ralph Nader's terms, 'tort reform' is more like 'tort deform'. In *No Contest: Corporate Lawyers and the Perversion of Justice in America* (1996), Nader and Wesley Smith write, 'The tort deform movement is a brazen effort by corporations and politicians beholden to corporate interests to pull off – under the guise of a 'common sense' reform – a nationwide perpetual bailout for polluters, swindlers, reckless health care providers, and makers of tobacco, defective vehicles, dangerous drugs, and many other hazardous consumer products.'

In both the US and Australia, there is certainly a rich folklore of horror stories featuring Robin Hood juries over-partial to plaintiffs who award outrageous payouts for minor injuries (like the McDonalds cup of coffee story, most recently mis-reported in the *Sydney Morning Herald* on 29 July 2002 by Caroline Overington). In an *Arizona Law Review* article in 1998, Wisconsin law professor Marc Galanter paints a lively picture of such 'legal legends'. Galanter argues that such legends portray the system as 'arbitrary, unpredictable, berserk, demented', one in which an explosion in litigation is 'unravelling the social fabric and undermining the economy'.

But there is scant hard evidence of any litigation 'explosion'. If anything, in cases of medical injury for example, there appears to be too little recourse to litigation in Australia. It seems more likely that Australia has taken off down the American direction of 'litigation beat-up' rather than that of 'litigation explosion'. Anecdote and legend do not however form a sound basis for public policy reform.

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Discovery before or after mediation?¹

By David Knoll

Among the factors that can affect the prospect of settlement at mediation is the timing of the mediation in the dispute resolution process. When counsel suggests that a dispute might be resolved cost effectively by way of mediation, parties often seek advice as to most propitious stage of the litigation process to entertain mediation. It is often apparent that whether or not discovery has been completed influences the chances of settling the dispute. This short note seeks to highlight a few of the criteria that counsel can utilise in advising clients about the appropriate timing of a mediation.

It is often apparent that whether or not discovery has been completed influences the chances of settling the dispute.

Better information leads to a more sensible approach to settlement, sometimes

Particularly in cases which are document intensive, the prospects of settlement can be improved when the parties are able to assess each other's evidence, and come to a more fully informed understanding of each other's interests than would be the case prior to discovery.

When solicitors conduct discovery on a co-operative and professional basis, without compromising their respective clients' interests, it often happens that they and the clients better understand the other party's position, and are more able to narrow the scope of the dispute. Some of the guesswork is taken out of the dispute resolution process, and the prospects for a successful mediation tend to be quite good.

The very process of discovery can contribute to reducing the overall cost of litigation by removing the need for an expensive trial. This of course is not always the reality of the pre-trial process. When solicitors 'take every point' discovery is an expensive process, and sometimes unnecessarily so. This can work both ways. The expense can act as a barrier to settlement. Just as often, the

concern to stem the tide of dollars can act as an incentive to settle.

A rational plaintiff will want the dispute resolved at a point where the probability of a generous settlement is maximised. They will want to appreciate whether the probability of achieving a generous settlement will improve by virtue of discovery of documents held by the defendant. Where the answer to that question is in the affirmative, the plaintiff will want to delay mediation until discovery happens.

A rational defendant usually will entertain mediation at the point where the defendant is confident that it can both obtain an inexpensive settlement, and cap the costs of the litigation. Counsel is sometimes called upon to help assess whether discovery will assist in that regard.

At a more objective level, discovery necessarily affects the assessment of the credibility of witnesses, including one's own. Discovery makes it harder for litigants to conceal the truth, and thus may assist settlement.

Embarrassment saved

In one recent case, discovery of a building report almost certainly ensured the payment of a claim that had been long rejected and hard fought by the insurer. The claim was in respect of defective building works. The insurers had commissioned an expert building report, and wrote a letter to the claimant rejecting the claim. The decision to reject relied upon the report. Upon receipt of that letter proceedings were commenced by the claimant.

In the course of discovery it turned out that the building report being relied upon had recommended to the insurer confidentially that the claim largely be paid. Needless to say, the insurer saved itself considerable embarrassment, and the case was settled.

The plaintiff did not expect that the insurer had lied about the content of the building report, and mediation before discovery may well not have led to settlement.

If oral evidence is critical, mediation before discovery is often to be preferred

In cases where oral evidence from witnesses is more important than production of documents, conducting mediation after discovery can be counter-productive. The cost of litigation will have risen, and parties will have become more entrenched in their positions. Settling on the basis that each party pays its own costs becomes more difficult. The costs will have become a barrier to successful mediation.

But too often, knowledge held by one-party – and uncertainty on the part of the other – result in a settlement that reflects the cost of dispute resolution at least as much as it does a sensible assessment of prospects on the merits. It can also result in a refusal to settle. A plaintiff may decide that a defendant will offer more once the defendant has incurred the pain and cost of discovery. A defendant may consider that it knows too little about the plaintiff's case to offer more than an amount that is just enough to avoid the nuisance and costs of litigation. Experienced counsel on both sides – and an effective mediator – can offer sound guidance in helping the parties make a better educated assessment of their respective cases. In the context of a mediation, it often happens that such experience and guidance helps to resolve the dispute, with considerable cost savings.

Even if the dispute does not settle at mediation, it sometimes happens that as pre-trial preparation goes into full swing, there is a renewed willingness to avoid uncertainty and settle, but not always. For example, this can occur when, after discovery, it becomes apparent that one of the parties' documents destroys the credit of one or other witness. A sensible assessment of credit issues at mediation can contribute to settlement.

Mediation is often successful because of the uncertainties of trial

Oral evidence is often the evidence that is considered the most uncertain. In a case in which oral evidence is

important, mediation is an environment where parties can face each other and confidentially assess the potential strengths and weaknesses of each party's likely oral evidence. When a serious assessment takes place, in the author's experience matters tend to settle, and tend to settle on a sensible commercial basis.

Even unsuccessful mediation can help reduce costs

In one recent matter concerning damages for lost opportunity, mediation was conducted before discovery. While the parties did not agree on dollars, they narrowed their differences as to the appropriate valuation method for what was a rather special business. Although the matter did not settle, the parties did agree to limit the scope of the issues

between them, and thus they both saved considerable pre-trial and trial costs.

The barrister's obligation

The issues raised above are only sampling of the myriad of timing issues that arise. In complying with Rule 17A of the *New South Wales Barristers' Rules*, it is arguable that the duty to inform the client or the instructing solicitor about the alternatives to fully contested adjudication should include advice about the timing of such alternative dispute resolution relative to the rest of the pre-trial process. This can only enhance the client's 'understanding of those alternatives' and assist 'the client to make decisions about the client's best interests in relation to the litigation.'

Every case has its own special

characteristics, and so there cannot be any rule as to when to mediate, before or after discovery. However, in setting a strategy for dispute resolution, counsel can give constructive guidance. Fulfilling that function is of course part of counsel's duty to the court.

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Recent amendments to the Legal Profession Act*

The notification provisions

This note is to provide an update as to developments since the article published in the Winter 2002 edition of *Bar News*.

Cameron v Bar Association of NSW

The decision of Simpson J in *Cameron v Bar Association of NSW* [2002] NSWSC 191 (20 March 2002) is the subject of as yet unfinalised appeal proceedings.

Robert Cameron filed a summons for leave to appeal against the decision of Justice Simpson. He also filed a notice of motion seeking an order that the appeal be expedited, that the appeal be heard with the application for leave to appeal and seeking an order for the issuing of a practising certificate pending the hearing of the summons for leave to appeal and determination of any appeal.

On 9 May 2002, the Court of Appeal (Justice Meagher and Justice Heydon) made orders that:

- 1 Leave is granted for the claimant to appeal the orders made by her Honour Justice Simpson on 20 March 2002 (22 March 2002);
- 2 Appeal to be expedited upon the undertaking that the claimant will not do anything to stand in the way of the hearing of the appeal being expedited;
- 3 Opponent is to issue a practising certificate to the claimant, pending the hearing of the appeal, or further order;
- 4 Costs of the summons to be costs in the appeal;

- 5 Liberty for both sides to apply on seven days notice.

On 11 September 2002 the Court of Appeal made the following orders and notations by consent:

- 1 Appeal allowed.
- 2 Orders 2 and 3 made on 25 March 2002 by Simpson J be set aside.
- 3 (a) No order as to the costs of the appeal.

(b) All previous costs orders including the order in favour of the respondent made on 12 December 2001 in proceedings No. 13646 of 2001 be vacated.
- 4 It is noted that:

The Appellant will take no point in the sec 38B appeal or in this court or in any other court or tribunal to the effect that the practising certificate issued to the Appellant pursuant to the order of this court on 9 May 2002, nor the practising certificate issued to the Appellant on 1 July 2002 were other than in lieu of a stay of the Bar Council's resolution of 1 November 2001 to cancel the Appellant's practising certificate and agrees that the Appellant's entitlement to a practising certificate will be determined on the merits in his sec 38B appeal and not by reference to any point as to the status of the certificate.

- 5 The respondent, subject to 4, agrees to the continuance of the present practising certificate until the determination of the sec 38B appeal or until further order.

* An article prepared by the Bar Association's Professional Conduct Department and members of the association. The Editor takes responsibility for its accuracy.

6 The parties agree that no estoppel arises either way from the decision of Simpson J.’

On 16 September 2002, two Notices of Motion filed in Robert Cameron’s sec 38B appeal were listed before Justice Greg James. By consent, a Notice of Motion filed by Robert Cameron seeking a separate trial of certain issues (including an issue relating to the status of a practising certificate issued to him on 1 July 2002) was dismissed. James J ordered Robert Cameron to pay the Bar Association’s costs of that motion.

On a Notice of Motion filed by the Bar Association, an order was made, by consent, that the sec 38B appeal be expedited.

Murphy v The Bar Association of New South Wales - The Court of Appeal heard the appeal of the Association from the decision of McClellan J in *Murphy v The Bar Association of New South Wales* [2001] NSWSC 1191 and delivered judgment on 11 July 2002. This is discussed further below.

The new *Legal Profession Regulation 2002* which commenced on 1 September 2002 has substantially the same provisions as the previous Regulation, albeit with significant renumbering. The obligations under the old and new numbers are noted below.

***New South Wales Bar Association v Murphy* [2002] NSWCA 138**

Giles JA delivered the leading judgment, with which Spigelman CJ & Ipp AJA agreed, although Spigelman CJ made some additional observations.

The court rejected the test of dishonesty applied by McClellan J as an inappropriate gloss on the text. Giles JA said:

[102] The short answer is that the test is that stated in sec 38FC(1)(b) the Act, namely, whether the act of bankruptcy ‘was committed in circumstances that show that the applicant or holder is not a fit and proper person to hold a practising certificate’.

[103] While an understanding of these words may be informed by decisions on the exercise of the inherent jurisdiction of the court to order that the name of a legal practitioner be removed from the roll, and on the exercise of the disciplinary powers under the *Legal Practitioners Act* and the Act, it must not be forgotten that Pt 1AA of the Act has effect as an adjunct to Pt 1A. The Parts together provide a scheme for giving and taking away annual practising certificates. As is evident from some of the circumstances for which provision is made for refusal, cancellation or suspension of practising certificates, the focus is not always on the fitness to practise of the legal practitioner, or even on the protection of the public.

[105] ... dishonesty even on a broad notion departs from the words of the Act, and I do not exclude that a legal practitioner who acted honestly according to an ample understanding of the word may be found to have committed an act of bankruptcy in circumstances showing that the legal practitioner is not a fit and proper person to hold a practising certificate. A council, and this court, must apply the

words of the Act, and not replace them by a possibility restrictive exegesis.

[107] The test of a fit and proper person to hold a practising certificate is stated as to each of act of bankruptcy, indictable offence and tax offence. But the fact of commission of an act of bankruptcy, an indictable offence or a tax offence is not what matters. The council, and the court, must look to the circumstances in which the act of bankruptcy, indictable offence or tax offence was committed. If no more than the fact of commission of an act of bankruptcy, an indictable offence or a tax offence is known, an opinion as to what the circumstances of the commission show can not be held. What matters is the circumstances in which the act of bankruptcy, indictable offence or tax offence was committed.

[108] The circumstances must show that the legal practitioner is not a fit and proper person to hold a practising certificate. The council must be persuaded. An even balance means that the circumstances do not show what must be shown. The contrast with sec 38FE(1)(b) is marked. That is appropriate when the refusal, cancellation or suspension is mandatory once the opinion has been formed.

[109] What the circumstances must show is not that the legal practitioner is not a fit and proper person to be a legal practitioner. By the addition to sec 127 of the Act in the 2001 amendments, conduct ‘involving an act or acts of bankruptcy’ or ‘that gave rise to a finding of guilt of the commission of an indictable offence or a tax offence’ is professional misconduct if it ‘would justify a finding that the legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners’. The different language in sec 38FC, also used in secs 37, 38FE and 38FH, may be explained by the subject matter of Parts 1A and 1AA, the giving and taking away of practising certificates, although sec 38A departs from that language. Even if not entitled to practise because without a practising certificate, the legal practitioner remains on the roll. The legal practitioner still has the status of a fit and proper person to be a legal practitioner but is not a fit and proper person to hold a practising certificate.

[110] Thus the effect on the legal practitioner is to an extent confined, although separate action may result in removal from the roll or a restriction on entitlement to practise through the exercise of the inherent jurisdiction or pursuant to the disciplinary provisions of the Act. The confined effect on a legal practitioner appears in another way. Practising certificates are annual. A refusal, cancellation or suspension affects only the one application for a practising certificate or the one existing practising certificate. ...

[112] It is necessary to find the circumstances in which the legal practitioner committed the act of bankruptcy, in order to ask whether the circumstances show that the legal practitioner is not a fit and proper person to hold a practising certificate. The answer will turn on the facts of each case, and it would be wrong to

paraphrase or embroider the words of the Act by other expressions of the kind used in the relation to the inherent jurisdiction of the court or in relation to the statutory regime under the Act for complaints and discipline of legal practitioners.

- [113] Some guidance, however, can be taken from the decisions in the areas last mentioned. Refusal, cancellation or suspension of a practising certificate upon determination of unfitness to hold a practising certificate is not punitive of the legal practitioner. It is protective of the public in the same manner as removal from the roll. ...

Having considered the matter afresh, Giles JA held that the circumstances as found do not reveal such deficiency in character or competence as a legal practitioner that the respondent is not fit to practise as a barrister. The appeal was dismissed with costs. .

As will have been seen from the extracts above, the court considered the inter-relationship between sec 38FC and sec 38FE, contrasting the Part 3 Division 1AA procedure with an application for removal of a practitioner from the roll in the inherent jurisdiction or pursuant to sec 171C (1) of the LPA.

Giles JA said that the purpose of the council giving notice under sec 38FC(2) must be to enable the barrister to put such materials before and submissions to the council as he or she may wish in relation to the formation of the opinion in sec 38FC(1)(b), subject to the guillotine of sec 38FH, noting that procedural fairness is not excluded by the provisions of Part 1AA. The court considered that sec 38E was intended to be a summary procedure, applicable where there is no sec 38FB statement provided; where the barrister has provided the statement but in the opinion of the council has failed to show in that statement that he or she is a fit and proper person to hold a practising certificate: Giles JA emphasised the words 'in that statement'; thirdly where the barrister is in default of his or her obligations in the council's investigation. The sec 38FE procedure was described as akin to a summary procedure, distinct from the informed procedure envisaged under sec 38FC. It was considered that in this case the council acted pursuant to sec 38FC, and that in substance, the opinion required by sec 38FC(1)(b) was within the resolution passed. Spigelman CJ would have gone further and held that it was not open to the council to act pursuant to sec 38FE.

Spigelman CJ added that Part 3, as it relates to practising certificates, should not be regarded as some kind of simpler alternative to the detailed provision for proceedings and hearings on issues of fitness and propriety in Pt 10. His Honour said 'sec 38FC is not an alternative to a thorough investigation leading to a finding of permanent unfitness. Any such investigation is more properly conducted under Pt 10 leading to an order under sec 171C (1) or in the inherent jurisdiction of the court.'

Legal Profession Regulation 2002

The continuing notification provisions are to be found in Part 13 of the Regulation. Part 2 deals with issue of practising certificates. The substance of the previous provisions has been repeated.

Applying for practising certificate

Clause 7 - cl 6 of the *Legal Profession Regulation 1994* - specifies the matters required to be notified in an application for a practising certificate. Particular attention should be paid to cl 7(1)(g) and (h). Clause 7(1)(g) requires the nature of any offence, other than an excluded offence of which the practitioner has been found guilty to be included in the application; and 7(1)(h) requires details of an act of bankruptcy committed by the practitioner to be included.

Excluded offence is defined in cl 3(1) - of the old and the new Regulation - at some length. In summary it excludes parking offences and offences under the road transport legislation *other than* specified traffic offences, e.g. negligent driving where the barrister was sentenced to imprisonment or fined not less than \$200, furious or reckless driving, failing to provide particulars, unlicensed driving, or driving a speed or in a manner dangerous to the public etc. It should be noted that offences of driving under the influence, or with more than the prescribed concentration of *alcohol* are required to be disclosed: cl 3(1)(a)(v) and (vii); as are *any* offences where the barrister is disqualified from holding a licence: cl 3(1)(a)(ix)

The definition of act of bankruptcy in sec 3(3) of the Act provides that a person is taken to have committed an 'act of bankruptcy' if the person:

- is bankrupt or the subject of a creditor's petition presented to the court under sec 43 *Bankruptcy Act 1966*;
- has presented, as a debtor, a declaration to the Official Receiver under sec 54A *Bankruptcy Act* of intention to present a debtor's petition, or has presented a debtor's petition under sec 55 *Bankruptcy Act*; or
- has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounding with creditors or making an assignment of remuneration for the benefit of creditors.

Offences

Clause 133(1) - cl 69D(1) of the former Regulation - imposes a *duty* to notify council of a finding of guilt of an offence other than an excluded offence (but including a tax offence, a defined: 133(5)), and to furnish other information required relating to the finding or commission of the offence. The notification must be made within seven days: cl 133(3).

Cl 133(4) provides that information previously disclosed in an application for a practicing certificate or under this clause does not have to be disclosed again.

Bankruptcy

Clause 134 - cl 69E of the former Regulation - imposes a *duty* to notify an act of bankruptcy, within seven days. Clause 134(3) provides that information previously

disclosed in an application for a practicing certificate or under this clause does not have to be disclosed again.

Show cause statements

Clause 135 - cl 69F of the former Regulation - provides that an sec 38FB statement must be provided to Council within 14 days of an application for a practicing certificate, or after the ‘appropriate date’, the date on which the relevant notifiable event occurred.

Show cause statements re failure to notify

Clause 136 - cl 69G of the former Regulation - provides that an sec 38FB(2) or (4) statement by an application for a practising certificate or a barrister who failed to notify a matter as required by the Regulation, must be provided to council within seven days of the ‘appropriate date’, being either the date of the actual notification or the date of the sec 38FC notice given by council.

Failure to notify declared to be professional misconduct

Clause 137 cl 69H(1) of the former Regulation - declares that each of the following failures to notify is *professional misconduct*:

- a failure to notify, without reasonable cause, information in relation to a finding of guilt of the commission of an indictable offence or a tax offence as required by cl 7(1)(g);
- a failure to notify, without reasonable cause, information in relation to an act of bankruptcy as required by cl 7(1)(g);
- a failure to notify, without reasonable cause, a finding of guilt of the commission of an indictable offence or a tax offence as required by cl 133 in the time and manner specified in that clause; and
- a failure to notify, without reasonable cause, an act of bankruptcy as required by cl 134 in the time and manner specified in that clause.

Any member in doubt about whether he or she has a notifiable event should immediately contact the Professional Conduct Department. Inquiries will be treated in strict confidence.

CPD points for Bar News articles

Contributors of articles published in *Bar News*, which meet the CPD criteria, will receive CPD points – one point per hour of preparation, up to a maximum of six points, as individual professional development activity.

Contributions of articles to the *Bar News* published in June 2002 have also accumulated individual professional development points for the practice year 2002/2003.

Karpal Singh

An interview by Chris O'Donnell

On 25 July 2002, Karpal Singh delivered an address on 'The Judiciary, Executive, Royalty and the Law in Malaysia' before a full house in the Bar Common Room.

A distinguished lawyer and former member of the Parliament in Malaysia, Karpal Singh spoke of worrying developments for human rights and the independence of the Judiciary in that country. Mr Singh discussed the introduction of legislation in the States of Terengganu and Kelantan, which is designed to implement Syariah (Islamic) law for a range of offences. He described the Bills as 'draconian' and 'pregnant with serious blows to the public and national interest and the judicial system' and questioned their validity, arguing that they were inconsistent with federal constitutional law.

Karpal Singh criticised some members of the Malaysian judiciary for not withstanding the 'overbearing influence of Dr Mahathir'. It is, he argued, 'important for a judiciary worth its name to be assertive in its defence of the rule of law and its own independence and integrity, so as to ensure there is no loss of confidence in an institution which is vital to any democracy'.

Mr Singh finished his address with a reference to the case of Anwar Ibrahim. He believes there is still recourse to clemency on the part of the King of Malaysia, who may decide a case on the grounds of public policy. A royal pardon, he argued, would 'restore public confidence in the Executive, the Judiciary and the law in Malaysia'.

Before his address, *Bar News* and *The Sydney Morning Herald* conducted an interview with Mr Singh.

Singh's early career

Bar News: Karpal Singh, it's an honour to have you here in Sydney and we are delighted you are willing to be interviewed by *Bar News*. Going back to your childhood, why did you decide to study law?

Karpal Singh: Well, my father actually wanted me to be a doctor, so I had to go against his wishes. I would have liked not to, but I had no alternative. I wanted to do something innovative.

Bar News: A bit more so than medicine?

Karpal Singh: Yes. It would be more of a certain thing and I would grow, like the practice I have back in Malaysia. On reflection, with the type of cases I have now, I took the right course in becoming a lawyer.

Bar News: Did your schooling take place in Penang?

Karpal Singh: Yes, in Penang at St Xavier Institution. I got a bit of discipline there with the Christian Brothers. I think they certainly taught me the right principles and the right path to take.

Bar News: Did they teach you some of the principles that you have carried through to your practice of law?

Karpal Singh: Oh yes, and I think discipline in the sense of being able to decide what you had to do and do it. If you think it is right, come what may.

Bar News: Moving forward to your study of law, you went to the University of Singapore?

Karpal Singh: Yes.

Bar News: Was there a particular reason you chose that university?

Karpal Singh: Well, the main reason was this: my father was not in a position to send me to London.

Bar News: You would have chosen Cambridge or Oxford or somewhere like that?

Karpal Singh: I would probably have gone to the Inns of Court which would have meant I would have got a diploma and come back to practice and get right into action.

Bar News: Has the focus of your practice principally been in the criminal law area?

Karpal Singh: Yes. I had some lucky breaks in the beginning. I started off in a very small town called Alor Star, which is about 60 miles from Penang. One of the reasons for that was I couldn't get a job in Penang, and somehow I ended up there



My father actually wanted me to be a doctor.

in Alor Star. There I had the opportunity to take on cases where I could test in court the rights of the ordinary citizen, which I would not have been able to do had I gone down to the capital for example, Kuala Lumpur.

Bar News: Why were you able to do that in a smaller town and not in the capital?

Karpal Singh: Being a young man and being a young practitioner it was not very easy to get a matter upon which to work. There, I could. One, because it was not that competitive and of course in point of money you could not get much. At the beginning I think it is very important to get cases, even small cases. In fact, the first case I had was ownership of a buffalo in a Magistrates Court.

Bar News: Were you successful in that case?

Karpal Singh: Yes, I won that case and ironically it went about this way. The prosecution had to prove that the buffalo belonged to the complainant. Of course that was a crucial element - ownership by the person who makes the complaint with regard to

theft. Buffalos have in their ear a number – they are registered in that way. So the buffalo was brought to court, tied to a tree outside, and I insisted that to prove ownership we go and have a look at what the number was that belonged to this man. Of course, I was in a black coat and tie, so was the magistrate, and the officer who prosecuted was a police officer who was in police uniform. I went towards this buffalo with the court staff and this buffalo snorted. The magistrate said they dare not go any nearer. I said ‘Look here, it has not been proven’. It was a good point and he was acquitted and discharged. But the upshot of it was this, my man said: ‘OK, since I paid you and I have been acquitted and discharged I should get the buffalo.’ I said: ‘Please, you should go away from here as fast as you can!’

Bar News: Were you in sole practice then?

Karpal Singh: No actually I was with someone. I took up a position as a legal assistant and then I was with him for about a year, but I got the opportunity to have good cases to get on with.

Bar News: At that time were you involved in any death penalty cases?

Karpal Singh: Yes. There were seven people who were charged with murder and I had three of them to defend. I was able to get them off. It was a jury trial then - we don't have jury trials any more. In fact, we have never had them for civil matters, it was only for criminal matters and those were taken away, the right to it was taken away nearly 10 years ago in all criminal matters.

Bar News: You regard that as a significantly retrograde step?

Karpal Singh: I would have thought so, because it was better to have a jury. The jury would be the one which would make findings of fact, and with the cross section of the community there, it would be better than a judge. I am sure you have been before judges who make up their minds very quickly.

Bar News: Going back to the history of your career, you moved back to Penang?

Karpal Singh: Yes, I was asked to stand for elections by my party in Alor Star in 1974. I managed to win the seat.

Bar News: Alor Star is the home of Dr Mahathir isn't it?

Karpal Singh: Yes, that's right.

Bar News: Did your paths cross at any stage?

Karpal Singh: Not at that point in time. He had lost his seat in Parliament in 1969. He was a minister at that point, but he lost his seat and I practically became his assembly man.

Bar News: 1969 was also the year of significant race riots in Malaysia.

Karpal Singh: Yes. I had not joined any party at that point in time.

Bar News: Was that a significant, formative event for you?

Karpal Singh: Yes, it was important. It was a cross-roads as far as Malaysian politics was concerned. I had to make a choice and I threw in my lot with the opposition and the Democratic Action Party.

Bar News: When did that party first come into existence?

Karpal Singh: That party was once the PAP - the People's Action Party in Singapore. Singapore joined Malaysia in 1963 but it got out a few years later. When Singapore left the federation, we had to change our name - although I wasn't with them in 1969 -

but it became the Democratic Action Party, or the DAP.

Bar News: You were with them for eight years until you were elected to parliament?

Karpal Singh: Yes, then I was elected in Penang. I moved on to my own home town and I stood for elections there.

Bar News: How did you set up practice in Penang?

Karpal Singh: After starting off in Alor Star, political considerations led me to Penang, and I settled in Penang itself. And from there, of course later on, I went to Kuala Lumpur and I have been there for quite some time.

Bar News: How did the practice of law in those early years in Penang fit in with your political activities? You obviously divided your time between the two?

Karpal Singh: It is not easy to have the two vocations, which are practically irreconcilable, because just one can require all the time you have. You have got to divide it. I managed to strike some balance and I have been able to carry on.

Drug trials / death penalty

Bar News: I thought I would ask you briefly about your role in Malaysian cases involving foreign drug offenders. One that was prominent of course is *Barlow & Chambers* in 1986. Can you tell us a bit about how you became involved in those cases and your feelings of them and perceptions about them?

Karpal Singh: OK, both Barlow and Chambers were represented by another lawyer at the beginning and it was later on that Mrs Barlow went down to Penang and asked that I take over the case from the other lawyer. I did not defend Chambers I actually only defended Barlow. The perception seemed to be I defended both, but I didn't, it was only Barlow.

The trial was conducted by the present Chief Justice of Malaysia, who was then a High Court judge in Penang. Unlike your system here, where the High Court is the highest, ours is the lowest of the superior courts, you get from there to the Court of Appeal and the Federal Court. Of course, I had a lot of problems in that case. Firstly, I think the lawyer for Chambers was quite wrong in having relied on confidential information, which in fact was not true from the instructions that I had and that was very crucial to the case.

Now, what happened was this: both of them were arrested at the airport. Barlow was carrying the bag in which the stuff was found. But when he was asked to open it he said, ‘Look here, it is not my bag, I don't have the key’. In fact, it was a combination lock. It was Chambers who then opened it, and I would have thought then that Barlow could have got off. But unfortunately Chambers' lawyer brought in this element of Barlow having tried to bribe the arresting officer, which was not true. Barlow assured me to the end that he did not do that.

Bar News: It was a cut-throat defence?

Karpal Singh: Yes, which I thought was wrong, especially when this man was the lawyer for both at one point in time. I asked for his disqualification: this man ought to have been disqualified for having breached professional ethics. It was wrong for him to do that. In any event, Barlow told me that he never did that. That complicated the position.

Bar News: Was there any scope to go for a re-trial?

Karpal Singh: I tried to do that at the appellate level but some of our opposition just did not agree. And I had problems at the appellate level with another lawyer whom the family appointed - Mr Galbally. I had a lot of trouble.

Karpal Singh: After we lost the case in the High Court the

Possession of
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family asked if I would mind if an Australian lawyer came, and I said: 'Not at all, in fact we need all the help we can get'. And Frank Galbally was asked to go, which he did.

Bar News: Were you appearing as his junior counsel or co-counsel?

Karpal Singh: No, no. Mr Galbally could not appear in Malaysia. He went there for the purpose of assisting me.

Bar News: At that time, the Malaysian Government had decided to take a very hardline approach against drug offenders.

Karpal Singh: Oh yes, in fact the penalty before April 1983 when it came to drug trafficking was either life imprisonment or death. There was an option given to the judge. The death penalty was made mandatory in April 1983.

Bar News: For small quantities?

Karpal Singh: Yes. The minimum cut off point was 15 grams for heroin and for cannabis, 200 grams. Any amount above that attracted the mandatory death penalty.

Bar News: Was there a reduction in penalty for personal use above those quantities?

Karpal Singh: Yes, if you could establish that. Of course if it was about 600 or 700 grams, it is difficult to prove that it is for your own consumption, especially for heroin. But I had one case that concerning a mother and son from New Zealand: the case of Lorraine and Aaron Cohen. They were both charged with drug trafficking.

I showed the judge the needle marks on Lorraine Cohen's arms to prove that she was an addict and that the heroin was for her personal use. The judge nevertheless found her guilty and sentenced her to death. However, this point was upheld by the Supreme Court on appeal and the charge was reduced to possession of the drug and she was sentenced to life imprisonment. Her son who had been sentenced to life imprisonment for possession by the High Court had the sentence confirmed by the Supreme Court.

On Malaysia's Internal Security Act

Bar News: Could we discuss the origins of Malaysia's Internal Security Act? I understand that it began with laws introduced by the British to combat the communist insurgency?

Karpal Singh: That's right. It was brought about at the height of the communist insurgency when there were a lot of assassinations. The Communist Party was not accepted by the government and went to the jungle to conduct armed revolution. But they were not as draconian as some of the laws that later came about, for example, the *Essential (Security Cases) Regulations* in 1975.

The 1949 regulations enacted by the British were then rehashed and made into the *Internal Security Act 1960*, which is still in force. It was never intended for use against political opponents and in fact when the Bill was passed, the prime minister on the floor of parliament assured us that it would never be used against political opponents. But they started using it against us.

Bar News: When did that first happen?

Karpal Singh: That happened first in 1963 or 1964. They

started detaining people who were in the Socialist Front at that time. There was one very strong opposition party, the Labour Party.

Bar News: Is the power that is most used under that Act the one of arbitrary arrest and detention?

Karpal Singh: That is one aspect of it. The Internal Security Act, provides for the mandatory death penalty for any person in possession of a firearm in a 'Security Area'. But the whole country was declared a security area in 1969 after the 13 May disturbances and that remains the position up to now. Possession of even part of a firearm or just a single bullet attracts the mandatory death penalty.

There was a case I had back in 1977, which went on to appeal in the Privy Council, which Malaysia still had at that time. A man was charged for possession of firearms, but he was tried under the regulations, which were promulgated by the King in 1975 pursuant to emergency powers conferred on the King in 1969. My argument was this, when parliament met in 1971, the regulation making power came to an end. So the King could not promulgate regulations in that form in 1975.

I took the case to the High Court and the Federal Court but



A forceful speaker

lost and ultimately I took it to England to the Privy Council and there the Privy Council ruled the regulations were in fact unconstitutional.

Bar News: Was that recognised in Malaysia?

Karpal Singh: That is the point. That was in 1978 in December when the Privy Council declared the regulations void. It was reported in the *Appeal Cases [Teh Cheng Poh (alias Char Mea) v Public Prosecutor, Malaysia 1980 [AC] 458]*

Now in January 1979 parliament immediately met in an emergency session. They brought in the *Emergency Essential Powers Act 1979*, similar to the law which had been declared null and void by the Privy Council and they made the regulations retrospective.

The Privy Council agreed with me that the regulations were void. They set aside the death sentence but they remitted the case to the Federal Court for it to decide whether or not to order a retrial, after ruling that the trial was a nullity because the

The retrial of the matter went back to the High Court but by that time appeals to the Privy Council had been abolished and my client was ultimately hanged, along with 25 others who were affected by the Privy Council ruling.

regulations were null and void. You can't order a retrial of a nullity, but the Privy Council did that, which I have never been able to understand.

Then in January, when they moved the Bill in parliament - and I was in parliament then - and the Federal Court had not yet decided whether or not to order a retrial, parliament was already proceeding to declare the regulations valid. I thought they were wrong. In fact I filed an action to stop parliament from debating the bill, which I think was not quite right, but I thought I must, I could find no other course. And of course the speaker would not accept the writ and the matter came to parliament as a protest nothing worse. The retrial of the matter went back to the High Court but by that time appeals to the Privy Council had been abolished and my client was ultimately hanged, along with 25 others who were affected by the Privy Council ruling when the Federal Court upheld the decision of the High Court on retrial.

Bar News: What can Malaysia's experience with the Internal Security Act provide in the way of a warning to Western democracies about governments passing powerful anti-terrorist Acts and Regulations?

Karpal Singh: The Internal Security Act has been abused by the government in that it has been applied to even common criminal and political opponents when it was intended to act as a weapon against subversion. I myself was detained under the Internal Security Act in October 1987 until January 1989 and was placed under oppressive restrictions and conditions until April, 1989. I was re-arrested on my way back home on the orders of the Prime Minister, Dr Mahathir Mohamad, who was then also home minister, despite being released via habeas corpus proceedings in which I represented myself on 9 March 1988 by the High Court. However, my detention was declared unconstitutional by the High Court on 16 November 2001, nearly fourteen years after my initial detention.

Although terrorism is now at its height, requiring extraordinary measures, western democracies should ensure there are built in checks and balances in laws and regulations providing for detention without trial. Such checks and balances are absent in the Malaysian Internal Security Act.ⁱ

Bar News: In Singapore it is commonplace for ministers to sue members of the opposition for defamation. Defamation laws have been used to effectively stifle debate and political opposition. Has the law of defamation been used to similar effect in Malaysia?

Karpal Singh: Unlike Singapore, members of the opposition in Malaysia have seldom been sued for defamation to stifle debate and political opposition. This appears to be a culture peculiar to Singapore. However, in Malaysia, like Singapore, the media is completely controlled by the government to effectively stifle debate and political opposition.

Bar News: As a lawyer trained in the common law, adversarial system, what are your views on the notion of 'Asian values'?

Karpal Singh: Well, Asian values have their parameters. The Malaysian Prime Minister is on record for saying the Westminster model is not suitable for Malaysia. Western liberalism, of course, is at the other end of the spectrum, although human rights are universal and cannot be alien to Asian culture. In the final analysis, it is humanity, of which we all components, which ought be given first priority. I think there can be a happy compromise between Asian and western values, particularly with globalisation.

On Anwar Ibrahim

SMH: Anwar Ibrahim has denounced Malaysia's highest court as a corrupt institution in Mahathir's government after it rejected an appeal against part of his 15 year sentence in what has been a discredited prosecution. How long do you think he will be in gaol?

Karpal Singh: As far as the corruption charges are concerned, he was sentenced to six years in prison and that was in 1999. At the subsequent sodomy trial he was sentenced to nine years that makes it fifteen. If he obtains a remission, he gets ten. It depends whether they allow that or not. He has another seven years to go.

SMH: Are there hopes of an acquittal once Mahathir goes?

Karpal Singh: Well I don't think Anwar Ibrahim should be written off, never. Whether Mahathir goes, or does not go I don't think is the issue. When I go to prison to see my other clients I make it a point to visit him and I find that he has still got that resilience that I think will get him through at the end of it all. You know when the appeal was dismissed by the Federal Court on 10 July. Anwar asked the court for permission to address it and they allowed it. They did not know what he was going to say, but he did make quite a lengthy statement in which he criticised the judiciary.

SMH: Do you think it will be another seven years, or do you think he will get a chance to get out before then?

Karpal Singh: Well, it depends on the turn of events. In Malaysia anything can happen. Even our Prime Minister, Dr Mahathir himself, was expelled from his own party in 1970 for rocking the boat, completely expelled, the very first prime minister ever to be expelled.

SMH: For how long?

Karpal Singh: He was out in the cold for maybe two years, if I am not mistaken.

Bar News: And his UMNO party's registration was actually ruled invalid by the court, wasn't it?

Karpal Singh: That's right, in 1987. And somehow he managed to come back. So anything can happen.

On sedition charges

SMH: Sedition charges were laid against you as a result of the Anwar trial, weren't they?

Karpal Singh: What happened was this, which is ridiculous actually, you don't charge a lawyer for sedition for what he says in submissions in a court of law. It is like immunity in parliament.

What I said was this: on 9 September 1999 in the afternoon, it was after 4.00pm, the court had adjourned. Anwar called me and said 'I want to speak to you, I have a problem'. He said that he had his urine taken secretly and sent to Melbourne and the report showed he had 77 times more than the normal level of arsenic in his body. This was very serious. I asked him what he wanted me to do.

He said: "Can you do something about it?" I said first things first, I think we have got to get you to the hospital, and I'll make the application in the morning. Which I did the next morning and in the course of his submission, what I said was this - it could well



'I don't think Anwar Ibrahim should be written off, never.'

Photo: Jimin Lai / News Image Archive

be that someone out there wishes to get rid of him even to the extent of murder. I suspect - if you look at the words - I suspect people in high places are responsible for this. I did say that, I have never denied that. And so there it was. I didn't think very much of it then, because I said much more than that previously in court and you know nothing happened then, and I never thought anything would happen.

In January 2000 the police said, "we are going to arrest you". I said I don't understand. They said I had committed sedition. I was charged in court and pleaded not guilty. In the meanwhile of course the international pressure came in. Quite a bit from Australia, Britain, Canada, New Zealand and surprisingly even the Federation of Japanese lawyers. Really much more than I thought.

I was charged and the trial went ahead. But down the line the government got worried because they knew what they had done was quite wrong. Then feelers were put out to me, "you apologise" and I said over my dead body. You put me through all this. The president of the Bar Council took me aside and said, "The Attorney General has spoken to me and if you apologise, the charges will be dropped". I said 'As the president it is the last thing you should ask any member to do'.

The matter came up on 14 January this year. I had no inkling that they were going to withdraw. Queen's counsel had come from British Columbia, Australia as well as a few other people. I stood up and told the court that I wished them to be given observer status. The judge said: "No, it is an open court they can come and go as they please". That was wrong, these people came all the way to Malaysia and should be given an opportunity to participate. It was a very important trial, not only for me, but for every lawyer in the Commonwealth, because this was a test case for lawyers

SMH: Was it the international pressure that swayed the Court?

Karpal Singh: Oh yes. The Attorney General said it himself in court, that in view of the representations made internationally by the legal bodies, he did concede that the charge should be withdrawn. The judge then referred me to the disciplinary board for misconduct. I was accused of unprofessional conduct for saying the judge who tried me ought to have been tribunalised for having acted more as a prosecutor in Anwar Ibrahim's corruption trial than as a judge.

I was asked to reply, which I did. I put forward my defence as to why I made the remarks. Then the judge was given my reply to comment upon it. However, he wrote a judgment in which he attacks me, which he sent to the Board, but didn't give me a copy of it. The Board sent me a copy. I thought this was not right and sent the judgment for publishing in the journals. When it came out in the

journals, the judge wrote to the Board and said he wanted to know how his judgment got reported when it was only meant for the Board and nobody else. It was not even meant for me, which I think is the highest form of misconduct for a judge to use his position this way. To get the Board to go for me without even supplying me with a copy of the judgment!

Bar News: How typical is conduct like that of the Malaysian

judiciary?

Karpal Singh: Not all judges are like that. There are of course black sheep in any profession.

Bar News: How would you describe the state of the Malaysian judiciary at present?

Karpal Singh: Weak, I would say weak.

Bar News: Are there judges that you would describe as good?

Karpal Singh: Yes, yes. I must say that there are good judges, on the other hand the judiciary has not been strong enough and I think the executive has been able to cow them, which is wrong.

Bar News: Did the events of 1988 highlight a weakness in the Malaysian Constitution?

Karpal Singh: The events of 1988 related to the assault on the judiciary by the executive, leading to the removal of the head of the judiciary Tun Salleh Abas and two senior Federal Court judges. It showed the might of the government. The Constitution provides for the prime minister to initiate proceedings to remove judges with the setting up of a tribunal for the purpose. Clearly, this impinges on the doctrine of separation of powers and the



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independence of the judiciary. The executive should never be clothed with such power, which has far reaching consequences and implications. In my view the Malaysian Constitution should be amended to take away such power from the prime minister. It should be parliament which should decide on the removal of judges from office, to ensure their independence and security of tenure. The removal should be after the verdict of a two-thirds majority in parliament and after a reasonable opportunity to be heard on the part of the judge concerned.

Recent cases

SMH: Earlier this year you found yourself at the centre of another politically contentious case. You represented the parents of some Muslim girls who were prevented by the Singapore school system from wearing a Muslim headscarf. What happened since then?

Karpal Singh: The ruling was enforced in the school which they attended that they could not attend unless they took off their

The Constitution provides for the prime minister to initiate proceedings to remove judges with the setting up of a tribunal for the purpose. Clearly, this impinges on the doctrine of separation of powers and the independence of the judiciary.

scarves. It is known as the Tudung

SMH: How does Islamic law effect the common law framework in which you practice?

Karpal Singh: Well I don't think there is a question of religion at all here in the sense that the girls have a constitutional right: freedom of religion. The Government of Singapore may say it is not religion, that it is an issue of culture. Let it be. Even if it is culture, it has been there all the time.

SMH: The Singapore Constitution does recognise their religion?

Karpal Singh: But of course the argument would be, it is not religion. What is important to note is that it could amount to discrimination because Sikh boys in Singapore are allowed to put on the turban. And Singapore's response in the case of the Sikh boys has been that when the British were there they were allowed to wear turbans. My answer to that is very simple when the British were there they allowed the Tudung too. And in England Muslim girls are allowed to put on the Tudung. In England a Sikh boy was prohibited from putting on the turban in school, he took his case right up to the House of Lords and they decided that he had the right to put on a turban at school. In Canada, a Canadian Mountie who was a Sikh put on a turban but he was requested by his superiors to remove the turban when on duty, which he refused. He took the matter to a court, which held that he had the right, and nobody could stop him from doing that.

SMH: So why is the government pursuing this case when it has become very high profile?

Karpal Singh: It possibly has something to do with September 11, but I do not know. If that were the reason, then it would be wrong.

SMH: Also earlier this month Dr Mahathir urged Muslim nations to empower themselves with modern knowledge and to develop weapons to defend themselves. I understand he faces a big political challenge from a fundamentalist party that wants to declare a hardline Islamic state and to impose harsh laws on the country's population including non-Muslim minorities, that would punish adultery and slaying and death with amputation. What are your views?

Karpal Singh: The Islamic party is saying, and has always said that if they come into power they are going to declare Malaysia an Islamic state and also set up an Islamic government. Our

Constitution is very clear. Article 3 of the federal Constitution makes Malaysia a secular state. It says Islam is a religion of the Federation, but all other religions can be practiced in peace and harmony in the Federation. But Islam is the most widely practised religion in the country. There was a supreme court case which held in effect that Malaysia is a secular state.

If there is anyone to blame it is Mahathir for the predicament that is being caused in the country. On 29 September last year he said: "Malaysia is already an Islamic state". A few months ago he said "It is not really an Islamic state, it is a fundamentalist Islamic state". It is the only occasion I have seen a Prime Minister declaring the country to be something which the constitution says otherwise. Now what is happening is, this Islamic party is saying this, OK if it is already an Islamic state then there should be Islamic law, why are they complaining! See if at all it is the Prime

Minister to blame for having made that statement.

Bar News: Has his position on that changed since September last year? That is when he made that statement?

Karpal Singh: His position has not changed. In fact, he has made his statements well after September 11.

Bar News: Didn't those comments coincide with a by-election in Terengganu?

Karpal Singh: No, no. There was a by-election, in fact the President of the Islamic party passed away about two months ago. So there was a by-election, in fact two by-elections, because he was holding two seats, a federal and a state seat in the State of Kedah which happens to be the Prime Minister's home state. In fact, the results were just announced last week. The Islamic party won one of the seats, the state seat. The government won the other one but just by 283 votes, it was very close for a by-election.

SMH: Are you a practising Muslim?

Karpal Singh: No, no, I am a Sikh.

SMH: Can you talk a bit about what sort of impact September 11 has had at all on the Muslim community in general.

Karpal Singh: Of course the ruling party is exploiting that. It



All questions firmly dispatched to the boundary.

is the fear element and I think that to a certain extent is being used for the purpose of galvanising support for the ruling party, which to me is wrong and most unfortunate.

The Bar in Malaysia

Bar News: Is there a distinction between solicitors and advocates in Malaysia?

Karpal Singh: We are known as advocates and solicitors. So there is the option to sort of do both. It is a fused profession.

Bar News: Has your role always been as an advocate?

Karpal Singh: Principally that of an advocate, yes.

Bar News: Can foreigners, principally Australians, practice law in Malaysia?

Karpal Singh: Foreign lawyers, including those from Australia, cannot practice in Malaysia unless they acquire

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citizenship or permanent residence and have been called to the Malaysian Bar. However, eminent Queen's counsel or senior practitioners can apply for ad hoc admission to the High Court to represent clients in a particular case. The Court has discretion to allow such applications. However, such applications are allowed only in exceptional cases.

Bar News: Are Australian judgments viewed as being authoritative in Malaysia? If so, are there any areas of law that are particularly well respected in Malaysia?

Karpal Singh: Australian judgments, particularly in land law, are useful in Malaysia in view of the Torrens System, which is used in both countries. They are of significant persuasive value and are well respected in Malaysian courts.

Bar News: Can I ask you about the Bar in Malaysia. I read in one of your papers there is a proposal to introduce something described as the Academy of Law.

Karpal Singh: That is right. I think the idea is to of course dilute the powers of the Bar Council because the government finds the Bar Council is a thorn in its side.

Bar News: Can you explain briefly what the proposal is and how you perceive it to be a threat to the independence of the Bar in Malaysia?

Karpal Singh: For the moment I think it is only for academic purposes and so forth. It will be a body which will not only be confined to practicing lawyers, but includes lecturers and others.

Bar News: Is it a proposal that you will have to be a member of that to be a practicing lawyer?

Karpal Singh: Later on yes.

Bar News: And who will control membership, the government?

Karpal Singh: The Bar Council is represented on it but its powers will be diluted to a great extent as membership will be open to others. The government obviously does not want to have a strong Bar. The government has never like the Bar in Malaysia.

Bar News: Is there a widespread feeling amongst the Bar in Malaysia that that is a threat to their independence as far as you are aware?

Karpal Singh: Yes.²

Bar News: What are some of the other means by which the Government and the judges 'silence' the legal profession?

Karpal Singh: Principally, it has been a resort to contempt proceedings or the threat of it, that has been used to silence the legal profession. But there are other ways. In 1977, when I embarked upon a campaign against the draconian Essential Security Cases Regulations, the government amended the law to prohibit for state assemblymen and members of parliament from holding office in the Bar Council. I was then a state assemblyman and found myself legislated out of the Bar Council of which I was an elected member!

Bar News: The other topic I wanted to ask you about is the independence of prosecutors from the government. Who prosecutes criminal offenders in Malaysia?

Karpal Singh: The Attorney General is also the public prosecutor and also the legal adviser to the government. So the prosecution is not independent from the government. The government's influence in terms of prosecutions is, therefore, obvious, although under the Constitution the public prosecution is vested with the discretion of whether or not to initiate or discontinue a trial.

Bar News: But there is no independent director of public

prosecutions?

Karpal Singh: There isn't.

The cost of his commitment

Bar News: How has your family coped with your commitment to human rights?

Karpal Singh: My family has been a source of strength in my commitment to human rights. It has certainly taken a toll on them, particularly during my detention under the Internal Security Act. Perhaps, the experience is the cause of four of my children taking up law and joining me in practice with the youngest, in all likelihood, also following suit. My wife, of course, must take the lion's share of the credit for having stuck by me through the turbulence in trying times. Many a time, I had to order my family to put on their seat belts!

Bar News: It's interesting you should mention your children entering the legal profession. Given that there are occasionally perils associated with the practice of law in Malaysia, did you ever consider telling them to become engineers or doctors instead?

Karpal Singh: I have left the option of profession to my children although I did encourage my daughter to take up law instead of Arts. The perils surrounding legal practice, although daunting, give the challenge added significance and meaning. There is nothing like taking on a case with an element of challenge in it.

Bar News: Finally, will you be writing your memoirs?

Karpal Singh: I hope to write my memoirs one day, time permitting. Mr Tim Donoghue of New Zealand has prepared the manuscript of a book on my life and is thinking of an appropriate title to the book, which should be out next year.

1 Since conducting the interview, the Federal Court of Malaysia, on 6 September, held that police arrest upon which ministerial detention of some political activists was based was unlawful. Despite this, the Court refused to make a consequential order that the continuing detention was unlawful and releases of those affected were in order.

2 Since the time of the interview, the Academy of Law Bill has been shelved

Justice R P Meagher

An interview by Justin Gleeson SC

Bar News: Thank you for agreeing to talk with *Bar News* Justice Meagher.

Justice Meagher: Pleasure.

Background to the law

Bar News: You are well-known to all of our members as an eminent lawyer, as a fine barrister for many years, as a president of the Bar Association between 1979 and 1981, a Court of Appeal judge and as an occasional visitor to controversy. I wonder first if you could cast your mind back and tell us how you came to the law?

Justice Meagher: I think so. I contemplated being an academic and really the more I thought of it, the more I felt it was full of quarrels and Levantine controversies. I didn't want to go into that, thank you. And then I couldn't think of anything else I wanted to do or was possible to do, so I did law.

Bar News: You had come through with a classical education?

Justice Meagher: Classical education in those days meant doing Latin and Greek and in the process of doing that one did allied subjects such as archaeology, theology and ancient history. So the subjects were fairly broad, they were extremely good too. In Greek there was a first class professor, Professor Trendall, and in Latin a first class scholar, Professor R E Smith. The two professors hated each other, but they both conducted very good departments.

Bar News: How was it you came into the area of roman law?

Justice Meagher: Looking back, I think I taught myself. I thought it was worth knowing so I taught myself. I certainly never did it in arts. In law I did it nominally but it was just a joke. So I bought a few books and taught myself. There are lots of very good books on roman law. Anybody can teach himself very easily.

Bar News: You went on to teach students at Sydney University?

Justice Meagher: Yes, and enjoyed it very much.

Bar News: You have retained many of your interests in that area and I understand that last year you were planning to visit Libya to inspect a few ruins. What happened there?

Justice Meagher: September 11 stopped me. It wasn't made any easier because the Department of Foreign Affairs seemed to imagine that Libya was situated in the Middle East, but I am making another attempt to see Libya next January.

Bar News: What are the particular places in Libya that are of interest to you?

Justice Meagher: The old classical ruins in the west, Tripoli and Leptis Magna which between them are probably the greatest collection of Roman ruins in the world. And in the east you have got Cyrene and other sites, which are very important Greek ruins.

Bar News: Have you cleared your travel plans with the United States?

Justice Meagher: No, no, no. Nor with the Arab fundamentalists.

Chambers

Bar News: We wish you luck and hope that world developments don't get in the way. Turning to when you first came to the Bar could you tell us about the chambers you moved into and the head of chambers?

Justice Meagher: Yes. When I came to the Bar in 1960 Selborne Chambers hadn't been built, although Wentworth chambers had just been. As a law student I purchased a set of chambers in Wentworth Chambers. At that stage the people creating Wentworth Chambers couldn't find enough applicants and they asked law students to buy. Only three law students did, of whom I was one. The price was a thousand pounds and one paid ten shillings a month and no interest until the building was complete. The floor I went on to was mainly workers comp law then. The head



Meagher and his Louis XIV library lecturn.

of chambers was Norman Jenkins and about the only non-workers comp barrister was Jack Kenny, later QC. When Selborne Chambers was built in 1962 or 1963, half of our floor moved across to 8 Selborne, when Jack Kenny became the leader of that floor. That was a much more balanced floor.

Bar News: How was life on the 8th floor?

Justice Meagher: It was very congenial. As far as work was concerned there was essentially somebody on the floor who was a specialist in each field you like to nominate. At various stages there was an income tax barrister, there was an admiralty chap, a couple of equity barristers, workers comp fellows; so any field of law that you were likely to practice there was some expert there. You could wander into his room and get a bit of instruction. As far as the social

The Department of Foreign Affairs seemed to imagine that Libya was situated in the Middle East, but I am making another attempt to see Libya next January.

life was concerned it was all extremely congenial. Every afternoon at five o'clock we sat in Jack Kenny's room and had a drink.

If he didn't like that we told him, go and conduct your practice somewhere else.

Bar News: When you came to the Bar were the divisions between the common law and the equity side of practice strong?

Justice Meagher: Yes they were strong. Jack Kenny for example on our floor was equally happy in either jurisdiction. But mostly, barristers were either equity practitioners or common law practitioners.

That text book

Bar News: Students for many years at university have tried to come to terms with the Meagher, Gummow and Lehane equity book. How was it you came to write that originally with your co-authors?

Justice Meagher: Because I lectured on the subject for years. I had an enormous sheaf of lecture notes which I used in order to give lectures which were making my room more untidy and Butterworth's suggested that I write a book. I said I would write a book on equity using my lecture notes to start with. Then as the magnitude of the task became more and more apparent I asked Bill Gummow would he help out and he was very happy to. We decided to do half each, then he said there was far too much for two people why not get John Lehane involved? At that stage I had never heard of John Lehane but Bill Gummow assured me of his fine qualities and he was certainly correct about that. And so the three of us did it.

Bar News: I gather that the fourth edition is about to be issued with your new co-authors being Justice Heydon and Mark Leeming.

Justice Meagher: Yes that should be on the market by Christmas, I hope.

Bar News: And should we expect scandalous comments in the preface will be as prevalent as ever before.

Justice Meagher: I hope so. My co-authors may veto them though.

Bar News: Have you found any more pop groups that need a birching in the fourth edition?

Justice Meagher: No, no I have moved away from pop groups.

Donations of art works

Bar News: How did the tradition develop of barristers buying paintings for the Association?

Justice Meagher: The person who started that was Tom Reynolds. He and I got together and put in certain money each and we bought a painting by Keith Looby which I think is still there, and gave it to the Bar. It seemed to cause a sensation. We thereafter bought other paintings paying half each, except if they got fairly big we sought contributions from other people. Usually, we didn't buy anything for more than a thousand dollars and then we would seek contributions of a hundred dollars from other members of the profession. I must say that other barristers were extremely generous in forking up a hundred dollars. In the annual report of the Bar Association the donors of each piece of art should be recorded.

Meagher art collection

Bar News: Could I ask you about some of the art works here in the chambers which we have been fortunate to photograph for this issue?

Justice Meagher: Yes, that painted wooden statue of a head is Spanish, central Spain about early 19th century I should think. It is one of the twelve apostles. It has the mark XII on the back; I am not quite certain who the 12th apostle was, but anyhow that's him. He would have worn robes when he was carried in procession and you can see that the painting of the flesh ends just below the neck. It is rather a pity that he is taken away from his brethren but there he is.

Behind him is a lectern from the age of Louis XIV that comes from a chateau in the Loire. It is not what people imagine it to be, namely an ecclesiastical lectern. It is a library lectern from the library of the chateau, it is really a very noble and very fine thing. The odd thing about it I think is it seems to be so tall, I don't think the average Frenchman of those days would be tall enough to read a book from that lectern, however there it is.

Bar News: And the mask?

Justice Meagher: Yes that is a rather fine mask from west



Meagher inspects the French west African mask.

Africa, from one of the French nations of west Africa. Period about nineteen hundred. It was a period which of course excited Picasso enormously in paintings like *Les Femmes d'Alger*. They are not very easy to come by now.

Bar News: Could you tell us about the book that you have published about your late wife's art?

Justice Meagher: Yes it is a book which I published this year for private circulation, there were 250 copies of it, each of them numbered. There are about 60 or 70 paintings in it. I have distributed it to relatives and friends. It has been very well received by the donees of it. It demonstrates that while she was not a first class painter, she was a very good painter and there are some extremely estimable paintings in it. The colour reproduction is fairly good. No colour reproduction is ever entirely true but it is as true as we can hope for in this vale of tears. For such a thin work it took a surprisingly long time. It is a very complicated business to produce an art book. You have to consider the paper, photographs, what items to include and what items not to include, what if any commentary to make and so on. However it eventually got produced and I might say due rather to my own sloth it took an enormously long time to do it. She had been dead six or seven years by the time the thing was produced.

Bar News: It sounds like a very fine piece.

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Justice Meagher: I think it is.

That painting

Bar News: Before leaving art, I should ask you about a letter which like some of your letters is brief, it is dated 8 February 1994, apparently delivered by hand to Mr Tobias QC who was president of the NSW Bar Association. It reads as follows: 'I hereby resign from New South Wales Bar Association.' How did that come about?

Justice Meagher: It came about because Mr Tobias for reasons I still can't get at tried to give away a painting by Geoffrey Proud which I had been responsible for giving to the Bar Association. Fortunately he failed in that respect. It came back. I think it went from the premises in the Bar Association to Robin Gibson Art Gallery, but it was returned by that Art Gallery to the NSW Bar Association. I still only partially understand why he did it. The apparent reason why he did it, is he was under pressure from the feminist lobby, which for some extraordinary reason regarded the painting as being sexist, merely because it was a painting of a nude female. In that case, there are an enormous number of sexist paintings in the world. The sad thing about it all is that whilst it did come back to the Bar Association the Bar Council no longer put it on public display. Quite where it is at the moment I am not certain.

Bar News: What was your opinion of the work?

Justice Meagher: I think the work was actually a very good work. It is an airbrush painting of a nude female of a rather chocolate boxie popular type. It is extremely good. Sir Edward McTiernan when he first saw it said he thought it was as good as Renoir, but that is pitching it a bit high.

Bar News: It is obvious that Mr Hughes QC agreed with you at least in 1975 when he wrote to you on 8 September stating that the Council thanked you most sincerely for a painting in the Boardroom which we have all come to admire and appreciate.

Justice Meagher: Just so.

Memorable cases

Bar News: Returning to your career at the Bar as a silk, what were some of the memorable cases?

Justice Meagher: There are a few. There was one *Golden Lights*¹ case where we won in the High Court. I think it was the most complicated case I ever did. The parties were both in the tobacco industry and there was a question of grabbing a name *Golden Lights*, and we won that eventually in the High Court. That was certainly the case which I found hardest to do.

Bar News: Others that spring to mind?

Justice Meagher: Yes, *FAI v Winneke*² which held that the courts were entitled to go behind decisions of the Executive Council and set them aside if they had reason to do so. Another one was an income tax case, *Chamberlain v the Deputy Commissioner of Taxation* where a taxpayer, who happened to be a Canberra solicitor, received a income tax assessment for some amount, I think it was \$200. The Tax Commissioner said it should have been \$200,000 and that it was only by some sort of mechanical mistake that the wrong figure appeared in the assessment. Well, we won that in the High Court, to the immense displeasure of the Commissioner of Taxation. I remember in the application for special leave, Mr Handley QC as he then was assured the High Court that the Australian Taxation Office had so organised its affairs that no such mistake would ever again occur. But a year or two later he told me that a similar mistake had

occurred and to his own income tax assessment!

Bar News: Who were your toughest opponents at the bar in the first half of the 1980s?

Justice Meagher: Oh without question the present Chief Justice of Australia I should have thought, he was by far the toughest. Handley QC is probably the second.

Bar News: Did you have any juniors of assistance or were they slothful as ever?

Justice Meagher: No, no I had some splendid juniors, marvellous juniors. I had Peter Hely, Dyson Heydon, Bill Gummow and a host of others, they are all judges now.

Appointment to the Bench

Bar News: How then did you come to take an appointment to the Bench?

Justice Meagher: I was offered it, I didn't think I would ever get an offer, not that I was yearning for one, but when it came I grabbed it with alacrity. I had heard that both the NSW and the Commonwealth attorney general had together promised each other that I would never be offered any appointment. But then there was a



Meagher with the 12th apostle looking on.

change of government in NSW and the new attorney general decided to make such an offer. The reason why I accepted it with some alacrity is twofold, I had got extremely tired, deeply tired as a barrister. I don't think the ordinary man in the street realises the tremendous stress that a busy barrister lives under. Stress coming from two different directions, there is the stress coming from solicitors who are always making importunate demands on one, and also stress coming from one's clients who continually expect one to do the impossible, and accumulation of both sets of stress really comes very close to wearing one out. So the attraction of a life devoid of either stream of stress was very attractive indeed.

Equity jurisprudence

Bar News: From your time on the Court of Appeal, how do you see the state of equity jurisprudence in New South Wales and Australia generally at the moment?

Justice Meagher: It seems to me moderately healthy. The great danger is that we are all going to be swamped by the English notion of unconscionability which these days has a sort of become a buzz word for dislike of something. If you say that you have no reason in principle to castigate somebody's cock-up as improper or illegal, then you simply say it is unconscionable. That is a grave danger and it seems to have infected the whole of the law of equity.

Bar News: Do you find that many equity cases have merged

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with commercial cases, perhaps more so than in the past?

Justice Meagher: I do. Certainly to the first part of the question, yes they have merged. The second part of the question, no I don't think more than in the past.

Bar News: Yet there do seem to be some areas of equity work, traditional staples of the equity barrister, which are now not seen so often?

Justice Meagher: Yes amazing, I have often wondered what has happened to the construction of wills. You know when I was a barrister every Friday the whole of the equity Bar used to troop off to the Equity Court and there were always several will construction cases. As a matter of regular course. What's happened to that jurisdiction I don't know, because I suppose some construction of some wills must be debated still, but if so it never comes to the Court of Appeal.

Common law jurisprudence and juries

Bar News: In the area of common law and personal injuries area there has been much public debate in the last year or so about the desirability of changes. What is your impression, having seen many such cases at least at appellate level?

Justice Meagher: I think there is good reason for change, at least in some circumstances. Exactly what those changes should be I am not so clear. I think a lot of appellate decisions on medical practitioners are suspect if not downright wrong. I think the courts have tended to impose liability on doctors in circumstances where they never should do so. The source of the error is almost always at the High Court level and legislation would be required to negate the High Court judgments. Beyond that I don't know what one can do. If one abolished the jury system in personal injury cases, one would I think get a reduction in the average verdict, but it is a terrible price to pay. I don't know what intermediate course should be recommended. One change which I think would probably be sensible, is if the ruling of the High Court in the *Abalos* case² were reversed, and intermediate appellant courts had greater rights to reverse primary findings of facts, even though they may be based on questions of credibility.

Bar News: You mentioned the jury trial a moment ago. What are your views on the continued desirability of juries playing a part in the civil system?

Justice Meagher: I don't know. Until fairly recently I was a great advocate of the retention of the jury system, although as a barrister I almost never appeared before juries. Because it seemed to me that basically juries are very sound. As Sir Garfield Barwick said in a rather different context, you can never trust the judges, whereas jurors could be trusted. Jurors have more commonsense than judges have, but I must say recent experiences have caused me to doubt that a little. The decisions the juries make for example in sec 7A trials under the Defamation Act seem to be so startlingly wrong that something must be done. So there are pluses and minuses. On the whole, except for the anomalous sec 7A defamation cases, I think there is a lot to be said for the retention of jurors still.

Criminal sentencing

Bar News: Moving then to the criminal area, the topic of sentencing has been one that has attracted some public comments in recent times. What are your impressions on sentencing?

Justice Meagher: Well I think this is an area in which the judges have let the public down very badly. Because the way in which the judges approach sentencing is simply to ask what is the current range, so if an appellant comes before the court and says that the trial judge has given a sentence which is a little bit more severe than the average sentence given up to that point in time, it is assumed that the appellant must win. I can't for the life of me see why, because the only result of such a course would be that sentencing will become more and more charitable. The sentences that would be imposed will be lighter, lighter and lighter, no matter what the parliament says is the desirable sentence. If things continue in that way it seems to me that there can only be one reaction, one result and that is a violent reaction by parliament to make sentences mandatory. This is of course entirely undesirable.

Bar News: How do you see the sentence guidelines operating?

Justice Meagher: I rather think that the guidelines have broken down, given a push by the High Court. The fallacy about any guideline is that it assumes that all crimes of a similar description are of similar merit, but that is just not so. One murder is not the same as another murder, one break and entry is not the same as another break and entry, and it seems to me one cannot standardise things by an assumption, expressed or implied, that every crime of a particular description deserves the same sentence as another crime of the same description.

Concluding matters

Bar News: Two final questions Justice Meagher. First off are you a supporter of the continued system of silk?

Justice Meagher: Yes, yes I am. I think it does a power of good, the courts are very much dependent on silk and they expect assistance from silk and they get assistance from silk. It is very important I think that the system does continue, as much as all politicians of any description seem determined that it will not.

Bar News: Finally, is there any truth in the rumour that when you come up for retirement in 2004 you are planning on a new career as an arbitrator/mediator?

Justice Meagher: No certainly there is not.. Certainly not.

Bar News: And will you have mastered Hebrew by 2004?

Justice Meagher: No, but I wish I could.

Bar News: Thank you Justice Meagher.



Meagher enjoying a good CLR.

1 *Moorgate Tobacco Co Ltd v Phillip Morris Ltd & Anor*, (1987-1988) 164 CLR 502

2 *Abalos v Australian Postal Commission*, (1990) 171 CLR 167

3 [15] CLR 342.

Justice Kishor Govind OBE

By Luigi Lamprati

Human rights lawyers and New South Wales Barristers, particularly those practising in criminal law, have been gratified at the recent appointment of Kishor Govind OBE to the High Court of Fiji. His Lordship took up his appointment on 31 July of this year. The appointment was in effect a resumption of his Lordship's previous tenure, which ceased in the aftermath of the 1987 coup.

His Lordship's career to date has been one marked by distinguished and courageous service to the law and the cause of human rights, combined with an extraordinarily diverse contribution to public and community affairs in his native Fiji.

After graduating in law from Victoria University (Wellington) in New Zealand, Kishor was admitted in 1961 as a barrister and solicitor in New Zealand and Fiji.

He established his own firm which, in time, became one of the largest law firms in Fiji. Kishor specialised as a barrister, practising mainly in criminal law and family law. He appeared as counsel in several high profile murder trials. He also assisted many who were unable to afford legal expense by performing much pro bono work. He played a central role in the drafting of

the *Agricultural, Landlord and Tenant Act* which figured importantly in the life of Fiji as the legal basis of land tenure for non-ethnic Fijians. Between 1977 and 1981 he was president of the Law Society of Fiji.

Apart from his legal practice, Kishor involved himself in a variety of other areas. In the field of public affairs, he was mayor of his home town of Ba for 12 years and a member of the Fiji Parliament for five years. He was president of the Fiji Local Government Association for four years and, in 1980, was awarded an OBE for services to local government.

A keen sport lover, he was, in turn, president of the Ba Soccer Association and manager of Fiji Soccer. He became vice-president of the Fiji Sports Council.

He has been and remains very active in the field of human rights. He is a member

of the Lawasia Human Rights Committee, having formerly been vice-president of LawAsia and chairman of its Human Rights Committee. Kishor has presented numerous papers on human rights and legal aid at various law conferences.

It came as no surprise when Kishor, with such a distinguished record of service to the law and human rights and the wider community, was appointed as a judge of the Supreme Court of Fiji in 1985. His Lordship served as a judge until 1987, when Colonel Sitiveni Rabuka staged a coup.

The judges declared that the coup notwithstanding, they intended to function according to their oaths of office. The relationship between the government and the judiciary deteriorated rapidly. The army arrogated to itself control and purported to abolish the 1970 Constitution. In August of that year, in opening the Supreme Court criminal sessions, his Lordship spoke out strongly against the position of the army which saw itself as supreme arbiter of the law and the rights of citizens. In forthright terms, he declared that the judiciary could not supinely acquiesce in what was happening, pointing out that no one was above the rule of law. He condemned the practice of arbitrary detention, declaring it to be 'odious', anathema to democracy and contrary to the Constitution. He reminded lawyers, and members of the Bar in particular, of their duty to stand fast and speak out against the evil of arbitrary detention.

These public comments of his Lordship, which became front page news in Fiji, scarcely endeared him to the military. Within a short period, he himself was detained.

In September, the army took full control. His Lordship was arrested at his home and taken to the prison in Suva where he was held for three nights in the maximum security wing. Whilst being held in prison, death threats were made against his family.

Meanwhile, all the judges of the Supreme Court resigned, rather than serve under the new regime. It became too dangerous for Kishor and his family to remain in Fiji and the hard decision to leave was made. He came to Australia.

Kishor was admitted to the New South Wales Bar in 1987. He worked for a time in the Office of the Commonwealth Director of Public Prosecutions and then moved to the NSW Office of the Director of Public Prosecutions. In 1989 he was appointed as

a crown prosecutor. He prosecuted at many trials, mainly in the western districts of Sydney and was well respected as a knowledgeable and competent counsel in the field of criminal law. His engaging personality and dry sense of humour made him a popular figure. In Sydney, he was able to indulge his love of sport, especially cricket. Colleagues also noticed the development of an enviable talent for the selection of winners in the sport of kings! His interest in human rights continued, and from time to time he gave addresses on the subject. He is a gifted after dinner speaker.

In 2001, Kishor resigned as a crown prosecutor. He later worked in New Zealand assisting in the repatriation of Fijian Indians. He was then invited to return to Fiji, where constitutional order is now very much improved, and to take



Justice Kishor Govind OBE

up again his position as a judge of the (now renamed) High Court. Poetic (and real) justice!

His return to judicial life in Fiji was greeted with enthusiasm by his numerous friends and former colleagues. At his swearing in, the spokesman for the Bar bluntly told his Lordship: 'The country needs more judges such as you'. It was a particular source of pleasure to his Lordship that many of those attending had been without access to convenient transport but, nevertheless, were determined to be present and had gone to great lengths to be there.

His Lordship assumed his position in Fiji with the best wishes of both branches of the profession in New South Wales and his many friends in Sydney. With family members now settled here, it is expected that his Lordship will visit regularly.

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The Hon Justice Peter Jacobson

Justice Peter Jacobson, the last QC ever appointed in New South Wales, was both a distinguished and immensely well-liked member of the inner Bar who gave generously of his time and energy to the corporate life of the Bar in a host of different capacities. His appointment to the Federal Court was marked by a heavily attended ceremonial sitting at which Walker SC observed that:

Your Honour brings to the Bench qualities you showed at the Bar in a way which will require less transformation than most member of the Bar who are translated to the Bench. The Bar is notoriously adversarial. In trade off the Bar seeks to inculcate etiquette



Jacobson J and Conti J

and civilisation between its members in order to mollify what would otherwise be the conflict between professionals as well as between parties. Your Honour was famous for never allowing those matters of conflict between parties to intrude between professionals. It was a dangerous matter ever to regard Peter Jacobson at the junior Bar if you were a junior opponent of his as somebody whose position in a case would be as easy to handle as you were personally in our dealings at interlocutory levels or at trial. The fact was the velvet covering covered a particularly obdurate material inside what was never really shaped as a fist.

In replying, Justice Jacobson, with typical modesty and self-effacement, said:

I doubt that anyone could replace Justice John Lehane whom I am replacing, such was his learning and contribution to the Court. Nevertheless I will do my best to attain the high standards which he and the other judges of the court have met. I'm sure that I

made a number of errors during the three weeks in which I've sat as a judge. I'm not sure whether Mr Walker referred to some of them or not. However, I do hope that before too long my judicial handicap will be better than my golf handicap of 27 and I won't score too many eights on easy par threes. ... I did learn at least three things during the three weeks that I have sat. First, judicial life is very challenging and I'll have to work extremely hard if I'm to produce consistently high quality judgments in a speedy fashion. Second, and I suppose I knew this before I came to the court, my colleagues are a congenial group even though some of them didn't come from the seventh or the tenth floors of Selborne Chambers and I'm fortunate to have been able to join them on the bench. Third, the work load of the court is heavy. It can't be measured solely by sitting time and must take account also of administrative duties, committee work and of course time necessary to write judgments.

Reflecting on his time at Bar, his Honour made the observation that 'if a case is difficult enough to warrant silk then provided the party can afford it there's no reason why a junior counsel ought not to be retained as well; in my experience each had something to contribute to the preparation and conduct of the case.'

The Hon Justice Garry Downes AM

Few members of the New South Wales Bar can have pursued such a range of professional and charitable interests for the good of the greater community, both domestically and internationally, as Justice Garry Downes AM whose appointment to the Federal Court and as President of the Administrative Appeals Tribunal earlier this year was marked by a heavily attended ceremonial sitting earlier this year. Hughes QC, speaking for the Commonwealth Attorney, engaged in the following reminiscence:

I remember that your Honour and I once worked on an arbitration in Paris about a seaborne oil rig anchored off the north-west shelf. It didn't work. The client was an insurance company that dabbled in oil exploration. It was then well-known for reasons other than those for which it is now well-known. This was no hardship brief. We were housed in reasonable comfort at the Hôtel Plaza Athénée in the Avenue Montaigne. It was the summer of 1983. In those days your Honour and I were each convinced of the therapeutic value of jogging. We spent early mornings tracking

through the avenues and streets of the city. There was another counsel in the team, but his views on that form of exercise coincided with those attributed to Mr Justice Meagher of the Court of Appeal, to whom all forms of athletic exercise are repugnant.

Walker SC referred to Justice Downes's: service, quite unparalleled in depth, longevity and importance to the expert groups of the Law Council of Australia. Then one adds being Procurator of the Presbyterian Church of Australia, first in New South Wales and then nationally, with all of the importance for federal difficulties that that will lend to your present position. When one adds the National Trust Historic Buildings Committee, the Law Extension Committee, membership of the Faculty of Law at the University of Sydney, it is not surprising that your membership in the Order of Australia came, as Mr Hughes said, for such a distinguished combination of qualities. ... Your Honour, your appointment brings to an array of skill, talent and experience already on this Bench something very special in relation to the internationalism that your Honour has practised so assiduously and with such success.

Replying, Justice Downes remarked on the importance of three years spent as associate to Sir Garfield Barwick, stating that 'he had, and continues to have, the greatest influence on me professionally and in many ways personally as well. It would be difficult to exaggerate the influence he has had on me. He taught me the law, he taught me how to practice it. Although he was 40 years my senior, and at the height of his intellect, he had time to share with me. We travelled together a lot because the High Court still sat regularly in every State at that time. Indeed, it was he who gave me the travel bug.'

His Honour concluded his remarks by observing that he has 'joined what I consider to be one of the great courts of the common law world. The Federal Court has served the people of Australia with distinction for more than 25 years and one can refer now to its eminence with confidence. I hope I can live up to the court's reputation.'

The Hon Justice Phillip Powell AM

On 8 November 2002 the Supreme Court held a ceremonial sitting to mark the retirement from the Court, after more than

twenty-five years of public service to the administration of justice, of the Hon Justice Phillip Powell AM. His Honour was appointed as a judge in the Equity Division of the Court in April 1977 and as a judge of appeal in October 1993.

In his speech the Chief Justice noted that his Honour decided many cases of considerable public interest and significance. None more so than the *Spycatcher* trial in which his Honour's judgment (*Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Limited* (1987) 8 NSWLR 341) was affirmed twice on appeal and made a significant contribution to the law on confidential information, although, in the subsequent television series, his Honour's survey of the law in this regard remained on the cutting room floor.

In *Perpetual Trustee Co Limited v Groth* (1985) 2 NSWLR 278, his Honour affirmed the validity of the Archibald Prize as a charitable trust, his judgment containing a comprehensive survey of the case law relating to trusts of general public utility in relation to the arts and education.

His Honour also charted a course through the quagmire of artistic temperament, when he admitted to probate the will of the artist Bret Whitely in the form of a document which could not be found after his death, had been witnessed by only one person and had last been seen fixed with sticky tape to the underside of a kitchen drawer. Day after day the people of New South Wales were entertained by the intricacies of sec 18A of the Wills Act and the endless possibilities of informality in will making.

Of course as with all judges, his Honour's views on the law have not always prevailed. For example his Honour's campaign to extirpate the heresy of the Mareva injunction did not succeed. (See *Ex Parte BP Exploration Co (Libya) Limited; Re Hunt* [1979] 2 NSWLR 406).

His Honour served for a long period as the judge in the protective jurisdiction of the court and then as the probate judge of the court. In both spheres His Honour's judgments, many unreported, decisively developed the law. Further, his administration of the lists ensured that the court's procedures operated with as much expedition as justice would allow.

The requirements of the protective jurisdiction include expertise with psychiatry and a personal touch for the disabled. Under the category of mental health, the *Australian Digest* sets out sixty

judgments of this court from its inception in 1824. Twenty of those judgments – ie one third – are his Honour's.

His Honour's command of the English language is legend. Whilst the length of his Honour's sentences, often with numerous subordinate clauses, would sometimes leave a reader breathless, the journey was always assisted by the deployment of punctuation with precision and in abundance. These sentences were and are a pleasure to read, but not always so by the litigants and practitioners referred to in them. The Chief Justice selected the following samples of his Honour's art for special mention:

- In *H v G* (unreported) 24 August 1990, in an extempore judgment, his Honour commenced the judgment with the following:

At long last, after a delay of the better part of five months, which has been brought about by what I can only describe as blundering incompetence on the part of the plaintiff's advisers, this application is in a condition in which it can finally be disposed of.

Notwithstanding the delay, and the incompetence, which have marked the application's stumbling and erratic progress to this stage, the plaintiff's counsel submits that the plaintiff should have an order that the whole of his costs of the application should be paid out of the defendant's estate.

- Words, words, mere words ...' said Troilus (*Troilus and Cressida* V. iii. 109), a sentiment which I am disposed to echo after having spent many hours considering the numerous, and, at times, conflicting, and thoroughly confusing, authorities on the question of whether or not the duties of a director of a limited liability company are, or are not, the same as, or similar to, or analogous to, those of a trustee ... Although – and, once more, I plagiarise the Bard of Avon – I regard the debate as '... weary, stale, flat and unprofitable ...' (*Hamlet* I. ii. 129), I believe that the true position is that, while directors are not, properly speaking, trustees, but fiduciary agents, the range of duties and obligations to which they are subject, or which are imposed upon them, include duties or obligations which place them, in relation to moneys or property which are in their possession, or over which they have control, in a position analogous to, although not identical with, that of trustees.' (*Mulkana*

Corporation NL (In Liq) v Bank of New South Wales (unreported) 9 September 1983.)

- The litigants in a partnership dispute over a pharmacy were greeted with the following opening sentence in *Taylor v Johnston* (unreported), 14 February 1984:

After listening, for the whole of the morning, to the evidence, and arguments of counsel, in this matter, I am reminded of nothing so much as the learned gentleman whom Gulliver met on his voyage to Laputa, and who had spent eight years upon a project for extracting sunbeams out of cucumbers which were to be put into phials hermetically sealed, and let out to warm the air in raw inclement summers: I am amazed that, in this proceeding, so much time, money, and intellectual effort has been expended upon a question which has so little relationship to reality.'

The sentence contained eleven commas and one colon.

- Similarly, the litigants in a landlord and tenant case (*Todbern Pty Ltd v Taormina International Pty Ltd* (unreported) 13 June 1990, were greeted with the following opening:

Despite the fact that the amount which the plaintiff, even if it be successful in these proceedings, might recover is not much more than could have been recovered in proceedings regularly commenced in the Local Court at Kogarah, and is not such as would have entitled the plaintiff, if the proceedings had been commenced in the District Court, or, in the Common Law Division of this court, to recover full party and party costs, what one can only categorise as a total failure, on the part of the plaintiff's legal advisers, to understand some basic principles of the law and of practice and procedure has led to these proceedings being commenced by an inappropriate procedure, and in an inappropriate division of an inappropriate court.'

Once again eleven commas but no colon.

The clarity of his Honour's expression will mean that the judgments he delivered in his long period of service on this court will stand the test of time.

Policy and Pragmatism in the Conflict of Laws

By Michael J Whincop
and Mary Keyes
Dartmouth Publishing Company,
Aldershot, 2001, 228pp

With the 'pragmatism' of the title and a foreword by Richard A. Posner, the authors of this book have firmly nailed their sails to the mast. Chief Judge Posner, a former University of Chicago law professor and continuing part-time lecturer there, is a Reagan appointee to the US Federal Court and the leading exponent of the application of economic, essentially economic rationalist, theory to the analysis of law as well as an authority on anti-trust law. More recently he has added the notion of 'pragmatism' to his theoretical analysis.

(Posner also wrote *Affair of state: The investigation, impeachment, and trial of President Clinton*, which he advanced as an application of his theoretical approach. It was favourably reviewed in the *New York Times Book Review* but savaged in the *New York Review of Books* by the liberal law academic Ronald Dworkin, both for its legal reasoning and as a descent into partisan politics by a senior judge, Posner by then being Chief Judge of the Seventh Circuit Court of Appeals.)

Both Posner's judicial and extrajudicial writings have been cited at the highest level in Australian courts: see, eg, *Perre v Arpand Pty Limited* (1999) 198 CLR 180 per McHugh J at 226-227 and *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 per Gummow J at 275, 277-278. ('Posnerian' has also slipped into Australian jurisprudence: see *Union Shipping New Zealand Ltd v Morgan* [2002] NSWCA 124 at par 107 per Heydon JA.)

Of the present book, Posner suggests in his foreword that it will be the first place that judges and other lawyers interested in a fresh, pragmatic approach to conflict of laws, and in the utility of economics as a tool for reforming the doctrines of conflict of laws, will turn for guidance.

The authors are academics at Griffith University and the book draws on papers previously published by them.

It argues the case for an approach to the analysis of conflicts problems rather than seeking to be a general exposition of conflicts law but it nevertheless presents a lucid discussion of areas of the law addressed in so far as this has not already been superseded by recent cases. The book is an impressive work of scholarship and its case is cogently argued. The work is likely to be of particular interest in areas where the law is unsettled or on questions subject to appeal where the rationale for a rule and considerations of policy may be under scrutiny as well as to those otherwise concerned with theoretical and policy questions in the area.

The authors argue that in an age of globalisation the policies underlying private law areas generally should also inform private international law rules. In line with this there should be an emphasis on the 'private' in private international law, with a corresponding de-emphasis on the interests of sovereign states. Thirdly, a 'transactional' approach to private international law is advocated. In this, a choice indicated by parties, such as to the governing law of a contract, will be paramount. Overall, there is an emphasis on economic considerations.

One does not need to go all the way with Posner to be impressed by the arguments the authors advance for the reform and rationalisation of private international law. Much of what they say is not dissimilar to the types of argument advanced by the High Court itself in such recent cases as *John Pfeiffer v Rogerson* (2000) 203 CLR 503 and *Regie National des Usines Renault SA v Zhang* (2002) 187 ALR 1, where the rationale for pre-existing rules has been held up to analysis and notions of practical utility and convenience, the importance of predictability to simplify insurance arrangements and the like, have loomed large in the Court's reasoning. Although the book is published in the UK and its focus is not only Australia it is unfortunate that the timing of the publication meant a lack of the opportunity to fully consider *Pfeiffer* or take into account the *Renault v Zhang* litigation. The book was apparently about to go to press at the time of the *Pfeiffer* decision on interstate torts and it is mentioned only very briefly. *Pfeiffer* involved an employee of an ACT firm

injured in NSW. The employee sued the employer in tort (the High Court rejecting a late attempt to also include a claim in contract).

The argument of Whincop and Keyes is that such cases, which they categorise as 'market torts', should be subject to the same legal regime whether the action is brought in contract or tort, with the contract law being determinative. Their argument is still of relevance in that the High Court has left the door open in relation to joint tort-contract claims, although in *Pfeiffer* the Court firmly held that the tort rights are determined by the *lex loci delicti*, which in the case of *Pfeiffer* was probably different from the proper law of the contract. The Whincop and Keyes solution could yet find favour with the High Court if *Pfeiffer* is confined to non-contract cases or at least, as occurred in *Pfeiffer* itself, where the case is not fought in contract.

The authors reject the majority judgment of the High Court in *Akai v People's Insurance Company* (1997) 188 CLR 418 to the effect that the Insurance Contracts Act applied even though the proper law was not Australian, as an unwarranted interference with the parties' contractual rights, and cite complications engendered by parallel litigation in England as a consequence.

They are bemused at the decision in *Wakim ex parte McNally* (1999) 198 CLR 511 and the literalist reading of the Constitution it reflected, given the practical success of the cross-vesting scheme as an example of co-operative federalism. The approach to anti-suit injunctions adopted in *CSR v Cigna* (1997) 188 CLR 418, where CSR was permitted to pursue Sherman Act remedies in the US, notwithstanding that Australian law was the proper law of the contract and the natural forum, is also criticised as facilitating forum shopping.

Conflicts law in Australia has in recent years undoubtedly come a long way from the England of *Phillips v Eyre* (1870) LR 6 QB 1, but on the analysis of Whincop and Keyes it still has a long way to go to Posner's Chicago.

Reviewed by John Kernick



No mere mouthpiece: Servants of all yet of none

**Edited by Geoff Lindsay
and Carol Webster
(Butterworths, 2002)**

The New South Wales Bar Association centenary essays, *No mere mouthpiece: Servants of all yet of none* was published to commemorate the centenary of the association. Its 17 essays contain something to entertain or inform anybody with any interest in the law, lawyers, the Bar or the history of this state's legal system.

The tone and content range from the analytical to the anecdotal, from detailed historical reconstruction to more personal reminiscences.

Chief Justice Gleeson's essay on the 'Bench and Bar', in his Honour's typically economical and direct style, discusses the establishment of the New South Wales court system and legal profession from colonial times, reflecting on the role of specialist advocates from whose ranks judges were almost exclusively recruited, to the present time when the Bar remains an important but no longer exclusive source of judicial appointments.

Captain W F Cook's 'Recollections' drawn from the 14 years during which he was the registrar of the Bar Association provide an interesting body of information about the work of the Association during that period. Readers will be interested to learn of the disgruntled litigant who was committed to a mental institution after advising during an examination of her mental state that she had recently had a cup of tea with Captain Cook. It also provides an excuse for the author to recount the occasion upon which he refused Sir Maurice Byers a lift on his little red motorbike with the line, 'Sorry, Sir Maurice, I wouldn't take a knight out on a bike like this!'

M G Sexton's essay on 'The role of the solicitor-general' and Mark Tedeschi's

essay on the 'History of the NSW crown prosecutors' are thoroughly researched and readable pieces on those offices.

Similarly, Roslyn Atherton's essay on 'Early women barristers in New South Wales' contains much interesting information, starting with a short biographical summary of the life and career of Ada Evans, who graduated from law in 1902, but was not admitted to practice until 1921, having to wait until the passage of the *Women's Legal Status Act 1918* and the inexcusable delays of those unsure how to cope with the momentous change having a female barrister admitted to practice seemed to represent. Unfortunately, as a result of poor health, family commitments and the long absence from the law, and despite evidence of briefs being offered, Evans was never able to practice. She, however, led the way for Sybil Morrison to become the first woman to practice as a barrister in New South Wales.

The essays on various chambers provides background information on Frederick Jordan Chambers, the history of the Bar at Parramatta (including Rumpole Chambers), Newcastle, Lismore and the Western Regional Bar.

No history of any aspect of law and society in New South Wales would be complete without mention of religion and there is an essay on 'Religion and the Bar' with something for almost everyone – John McCarthy writes of the St Thomas More Society, Richard Gee of the NSW Lawyers' Christian Fellowship and Graham Segal of the NSW Society of Jewish Jurists and Lawyers.

In 'Reminiscences', David Bennett tells of Mary Gaudron's 'Mr Junior' speech and debut as a High Court advocate of some two years' standing. Jane Needham writes in memory of her father, Denys Needham, disclosing that his Honour was in the practice of naming his cars after cases which enabled him to buy them – for example, a long gone Holden known as Hughie was a by-product of *Hughes v Vale* (1954) 93 CLR 1. His Honour's dislike of the phrase 'as he then was' is recalled through a stinging letter sent to the unfortunate editor of the *New South Wales Law Reports* who had inserted the delinquent phrase into the reasons for judgment without telling the author. The essay also discloses why his Honour's photograph on the boardroom wall of the Bar Association is the only one in evening dress.

The photos, reproductions of

documents and lists of presidents of the Bar, Bar councillors and a chronological roll of barristers admitted in the 18th century are fascinating. The photos include the presidents of the Bar Association, the last group of Queen's counsel and the first group of senior counsel, as well as ceremonial sittings held to celebrate the Supreme Court's 150th and 175th Anniversary. There is also a photograph taken on the latter occasion of the Prime Minister, John Howard, and former prime minister, Gough Whitlam QC. While the Prime Minister was formerly a solicitor and spoke on behalf of solicitors that day, it was decided that it could not be said that by so doing he was acting as or holding himself out as a solicitor. Accordingly, it was not necessary that he hold a practicing certificate. However, by wearing a wig and gown to represent the Bar, Whitlam QC might have been said to have been acting or holding himself out as entitled to act as a barrister. Accordingly, the Bar Association arranged \$1 million worth of professional indemnity insurance for him and he was duly issued with a practising certificate current for the day. According to the editors of the book, no claim on the insurance is known to have been made.

With the passing of time, many of the stories featuring the great characters in the history of the NSW Bar are in danger of being lost. Fewer of their colleagues remain to tell of their exploits. Books such as this contribute to the preservation of those memories, personalities and traditions. The Bar in New South Wales has a long and proud tradition and history. In its combination of research, breadth of subject matter and personal reminiscences, this collection of essays is a book, not only for the bookshelf, but one to be read and enjoyed.

Reviewed by Rodney Brender

Peter Edward Nygh (1933 – 2002)

**By David Bennett AO QC
Solicitor-General of Australia**

Peter Edward Nygh who died on 19 June 2002 after a short illness was a leading international lawyer and a great Australian.

Peter was born on 16 March 1933 in Hamburg, Germany, the first child of Eduvard and Käthe. His father was Dutch but working in Germany at the time. The family left Germany shortly after Peter's birth and moved to The Hague and then Rotterdam where they built a home in Kralingen. Peter attended the Gymnasium Erasmianum in Rotterdam. His brother, Evert (Philip) was born in 1938. Käthe died in 1941. In 1946 Eduvard remarried an Australian, Muriel Poole and had two daughters, Jane (1947) and Ann (1949). He died in 1949. Muriel brought the family to Australia in 1951.

Peter attended Sydney University Law School and did articles with William Arnott & Poole. After graduation he was called to the Bar. Soon after that he commenced an academic career as a lecturer at the University of Tasmania. He met Jill Griffin in 1957 and they married in 1961.

Peter travelled to the United States on a Fulbright Scholarship and obtained a doctorate (SJD) from the University of Michigan. He and Jill returned briefly to Tasmania before he took up a position at the University of Sydney where he was ultimately appointed as professor of law.

Peter and Jill had four children: Nicola (1965), Libby (1967), James (1968) and Anneke (1970). Libby died at the age of eight months and Anneke was killed in a car accident in 1999.

In 1971 Peter obtained a Von Humboldt scholarship and the family spent a year in Germany where he worked at the University of Köln. In November 1973 he was appointed as professor of law and founding head of Macquarie University Law School. Peter was a gifted teacher with a rare ability of being able to explain complex concepts in simple terms and of engaging his students. Over the years he taught a significant proportion of the current legal profession in Sydney either at Law School or in continuing legal education.

In 1979 he was appointed as a judge of the Family Court of Australia and he was appointed to the Appeal Division in 1983. It is common in Australia for the legal profession to be suspicious of academics who are appointed to the judiciary. Those people who retain that attitude are forced to concede that Peter was one of the most outstanding successes of any appointment to the Family Court. He was always fair and judicial; his courtroom manner was exemplary and his knowledge of the law was extensive. In a jurisdiction where emotion is often a major factor, it is a

measure of Peter's outstanding ability and empathy that the losing litigant always left his courtroom knowing that he or she had received a fair hearing.

In 1987 Peter was awarded a doctorate (LLD) from the University of Sydney for his published works and in particular *Conflict of laws*, the leading Australian textbook on private international law. The seventh edition of this work was published in 2002.

Jill died from melanoma in 1992. Peter retired from the Family Court in 1993 although it turned out to be anything but a retirement. He was Principal Member of the Refugee Review Tribunal for two terms, each of approximately twelve months from 1998-9 and 2000-2001. He was a visiting professor at Bond University and the University of New South Wales. He retained a practising certificate at the Bar and appeared in a number of important cases in the High Court. He was an active member of the International Law Association (Australian Branch) for many years and held various executive positions including President. He was also a member of the Executive Council of the International Law Association at its headquarters in London.

Most importantly of all, he represented Australia at the Hague Conference on Private International Law where he was one of the two *rapporteurs* to the Convention on Recognition and Enforcement of Foreign Judgments. He regularly attended meetings of this conference, representing Australia and sitting as a *rapporteur* without remuneration from either the Australian Government or the Hague Conference and without even the payment of his fares and other expenses. The work was onerous and the cost to him enormous but he continued it as a labour of love for his adopted country and for the institutions of private international law which he loved so dearly.

He was awarded the Order of Australia (AM) for his contribution to international and domestic law on Australia Day 2002. The induction ceremony on 10 May 2002 was his last public appearance. He was diagnosed with pancreatic cancer on 16 May and died 19 June at the home of his brother and sister-in-law Philip and Margaret surrounded by his family.

He had been invited to deliver the lectures for the General International Law course at the Academy of International Law in The Hague in 2002. He considered this to be the summit of his career and was deeply disappointed that his last illness prevented his delivering the lectures and making a final visit to The Netherlands. Everything that Peter did was executed to perfection, yet he never sought the overt accolades that he so richly deserved.

Peter is survived by his daughter Nicola and son James and his grandchildren Kerrin and Callum. He will be sadly missed not only by his family but also by the Australian legal profession, the Australian international law community and his many friends and admirers at The Hague Conference.

Charles Luland (1938 – 2002)

**By His Honour Judge
Stephen Norrish QC**

Charles Allan Luland QC, a senior judge of the District Court of NSW, died suddenly at his home on 16 May 2002. He had faithfully served the people of NSW as a judge, a prosecutor and defender of people charged with serious criminal offences for 30 years. Throughout his life he performed his professional responsibilities with equanimity, humility and honour. Very few lawyers have or have had his ability to prosecute and defend criminal matters with equal skill. Yet, although Charles rose to the highest echelons of the legal world, his origins held no portent of the successful career that he achieved.

He was born and raised in Botany, his father and other family working in the tannery industry for which the area was well known. The Luland family's presence in the area for a number of generations and its contribution to the local community is recognised by a local street named in honour of it. Appearing in murder trials or before the High Court as a senior member of the legal profession would have seemed to Charles and his family, at this point of his life, a distant, perhaps impossible, achievement.

Charles was educated at local public and state schools before leaving at 14 years of age to work in the tannery where his father was employed. He worked there for nine years. However, like many people of ambition and intelligence denied early educational opportunity, he studied for his matriculation at night. During this period in 1959 he married Beverley, to whom he remained devoted until his death. He matriculated at the age of 23, whilst he was working in the Commonwealth Police Force. During this service he progressed to the rank of sergeant first class. He was involved in criminal investigation and document examination, as well as lecturing at the Commonwealth Police College at North Head. He also successfully undertook and completed studies for the Barristers' Admission Board. It was during this period that his children, Karen, Mark and Scott, were born.

Whilst policing was a serious business for Charles, with the added responsibilities of family and studies, he was not without a sense of mischief. At the police college where he lectured, a dinner was held after the graduation ceremony one year, which was attended by the then commissioner of the Commonwealth Police. The commissioner of the time was very keen for plain-clothes Commonwealth Police to wear hats similar in style to those worn by Leonard Teale and his colleagues on the television show then popular called 'Homicide'. Late in the evening, after the

dinner, an impromptu 'Mexican hat dance' was conducted around such a hat, which had been left abandoned in the bar area. The finale to the dance involved Charles ceremonially jumping on the hat to irretrievably crush it. Charles's dramatic jump unfortunately coincided with the arrival of the commissioner back in the bar area to retrieve the hat, which he believed he had left there for safe keeping. Although the commissioner was not amused, the event was no impediment to Charles' career in policing.

He was admitted as a non-practising barrister in 1971 whilst still a serving police officer. With a young family to support, he took the courageous decision of leaving the Commonwealth Police and working for the clerk of the peace (the predecessor to the director of public prosecutions) instructing in criminal trials. He commenced his legal career in 1973 by entry to the private Bar. At that period of time for people without connections within the legal profession, direct admission to practise at the Bar without prior experience as a solicitor was unusual and fraught with the risk of failure.

However, instead of failing, Charles prospered. He took chambers at Chalfont Chambers in Phillip Street, not unnaturally, given his previous career, mixing with barristers largely specialising in the criminal law. Some such as Tony Bellanto QC and Bill Hosking QC, at various stages of their careers, were leaders of the NSW criminal Bar.

With his life's experience up until that time he had his feet firmly planted in the real world and used his knowledge of the everyday and his understanding of human foibles to great effect. He was a direct, plain speaking advocate, who practised without display of his emotions or theatrics. His background enabled him to have a good understanding of people, which allowed him to readily empathise with his clients and also understand clearly how to communicate with juries.

Although establishing himself at the private Bar in 1976 he was appointed one of the public defenders of NSW, led by Howard Purnell QC, co-author of the then definitive criminal law textbook *Watson and Purnell*, and who was in many respects father of the modern criminal Bar in NSW.

Charles held this appointment for over 13 years. There he worked in a competitive environment. He was joined by Bill Hosking (later to become a judge of the District Court). During his time as a public defender he worked with other leading criminal legal advocates many themselves to pursue eminent judicial careers, such as John Shields QC, Jeff Miles (formerly chief justice of the ACT Supreme Court), Reg Blanch QC (now Justice Blanch, Chief judge of the District Court), Peter Hidden QC (now Justice Hidden of the NSW Supreme Court), Michael Adams QC (now Justice Adams of the Supreme Court), Virginia Bell SC (now Justice Bell of the Supreme Court), Rod Howie QC (now Justice Howie of the Supreme Court),

Malcolm Gray QC (now Justice Gray of the ACT Supreme Court), Dr Greg Woods QC (now Judge Woods of the District Court), Martin Sides QC (now Judge Sides of the District Court), Paul Byrne SC (former law reform commissioner) and among many others who in various ways have influenced not only modern legal practice, but also the legislative development of the criminal law in this state over the past three decades.

In March 1984 he was appointed a deputy senior public defender, at which time he took silk. His work then largely involved Supreme Court trial work, which invariably meant conducting difficult and emotionally demanding murder trials. He was no stranger to the Court of Criminal Appeal and the High Court, but felt most comfortable pleading a case in the presence of a jury with whom, with his modest bearing and his clarity of expression, he developed great rapport. He undertook difficult cases without complaint, much work performed in country centres such as Albury, where he was later to return as a judge.

His career however took a significant and, at the time, unexpected turn subsequent to the appointment of Reg Blanch as the first director of public prosecutions. Notwithstanding over 15 years of conducting cases for the defence, the director understood that Charles's even temperament, his ability as a lawyer, his modesty and integrity, made him an ideal choice to conduct major criminal prosecutions.

Such was Charles' devotion to the higher ideals of justice that he had no difficulty accepting appointment as a deputy senior crown prosecutor and the change for him was seamless. He continued to conduct himself, as he had as a public defender, with exemplary fairness and objectivity. Within a short period of time he was appointed senior deputy director of public prosecutions, primarily advising the director in relation to the conduct of prosecutions and appeals. Although the work was demanding and the responsibility great, he enjoyed the opportunity of reflecting upon the principles involved in the application of the law away from the cut and thrust and the daily grind of a trial practice.

On 22 February 1993 his achievements in the law culminated with his appointment to the District Court, on which Bench he served with distinction until his death. As a judge he had a reputation, not surprising given his background of policeman, defence counsel and crown prosecutor, for being 'absolutely straight down the middle'. He brought to his office none of the worst aspects of past experience, such as bias or pre-judgment.

As a judge he was industrious and productive. He maintained an intense interest in legal developments and was widely recognised for his great grasp of the current law, particularly in criminal law and procedure. He enjoyed work at the 'coal face'. He brought to the Bench his ability to get to the point and, in a

jurisdiction which bears the brunt of adjudicating over the greater bulk of most serious crimes committed in this state, his ability to deal with his work quickly but fairly made him a great asset to the court and an honourable servant to the community.

Although his involvement in the law was great and time consuming, it did not match the great passion he had for family life and the interest he maintained in the achievements of his wife and children. He had much about which he was entitled to boast but he was a man of humble bearing who would rather talk about Beverley's skill as an artist, than any case in which he had been involved either as lawyer or judge. He was an accomplished golfer who lamented that his short game never quite matched the accuracy and reliability of his driver and long irons. Whilst he was proud of his rise from 'humble origins' to silk, he was equally proud of the two 'holes-in-one' he achieved. He enjoyed classical music, theatre and travel. He had a wide interest in the visual arts and was a great encouragement to his wife's interest in that area.

The last year of his life was blighted by a severe illness, the depth of which his colleagues and friends had little knowledge or understanding. As a person who rarely spoke of himself, seeking support outside his family was beyond him. The support of his family however remained strong throughout and always optimistic.

At the time of his death he was 64 years of age. His funeral service was attended by many representatives of the judiciary, court administration and a large number of members of the legal profession, including those associated with both the prosecution and the defence of criminal matters, his family and friends.

He is survived by his wife Beverley, his daughter Karen and her partner Michael, his sons Mark and Scott and his wife Joy, his grandchildren Jack, James and Emma and his brother Ron and sister Jean and their families.

Adrian Philpot (1946 – 2002)

By Jim Staples

***St Jeanne D'Arc Church, Dijon,
France, 8 August 2002***

The following account of the Mass, which was conducted in French and Latin by Abbe G Babinet, Fraternity of St Peter, was written by Jim Staples.

In the afternoon of Thursday 8 August 2002, a mass was celebrated in a chapel attached to the *Centre Hospitalier Universitaire de Dijon*, in which Adrian had been received for his illness and where, by all appearances, he was treated with all skill, care and concern, in optimism for his

recovery, and with compassion for his illness and suffering.

Present was the celebrant, a young priest courteous, intelligent, handsome, direct, respectful, quietly welcoming and sincere in his empathy with Beverley in her loss. He was assisted by a young man in casual street clothes, summer shirt and slacks, who by his knowledge of the mass showed himself to be a trainee for the priesthood, it seemed.

Present also were, of course, Beverley, Mary Gaudron, her husband John Fogarty, Mary's friend Sybil Davis, an Australian long-time resident in Tauxigny (near Loches and Tours), Jim Staples and Professor Phillip Camus, who had had charge of the case of Adrian, and Mrs Camus, his wife - also a doctor. The hospital is a University of Medicine teaching hospital. The day was warm, sultry, cloudy and calm.

The celebrant priest, who bore himself upright in a long white gown, greeted and spoke to us in the chapel, and received the requests for certain matters to be met in the course of the service (which were put to him by Mary at Beverley's nomination) with every grace and attention. Beverley was particularly concerned for the priest to know that Adrian was utterly given to the faith of the church, to its standing and meaning amongst Christians. She had asked for the mass to be celebrated in the Latin language on account not only of Adrian's mastery of that language but because it invoked for him the deep cultural significance of the church in the history of Europe, of catholicism and christianity. It would seem that the celebrant had been especially provided by the church authorities for his learning in the Latin liturgies. Indeed, a special permission was given for the mass to be said in Latin by reason of the rules adopted in such a matter at Vatican II.

The hearse, with Adrian's remains in his coffin, which had been closed in Beverley's presence and that of her party from Australia, was waiting outside the chapel. The celebrant asked us to leave the chapel with him, to go outside, where he spoke some words in explanation of what was to come, and he and we were to follow the coffin into the chapel. The coffin was laid on a stand in the aisle before the altar.

The small congregation (there were no strangers to Adrian present) sat on chairs on which were laid booklets in Latin and French of some 33 pages, entitled *Liturgie des Defunts* (for those who are departed, late, deceased). The text is a collation of Psalms, music for the songs of the church, text from the Gospel, especially the letters, Epistles of Paul and John, the invocations to the Lord due from the celebrant, traditional prayers due from the congregation to which there are known responses and confirmations when the prayers are offered up by the priest on its behalf.

The text is in two columns - on the left is the Latin, and on the right a rendering in modern French. On the last of the thirty

three pages of textual material there are final prayers offered by the celebrant to God to look benignly upon the soul of the deceased. This final imprecation comes not merely after a place is accorded for material drawn from the New Testament and from traditional hymns (both words and music), but at the end of an account, given in French by the editor(s), of the significance of the gestures of the celebrant, of his vestments, to be noted as the Mass proceeds - such matters as the tender of bread blessed by the priest and tendered by him to those of the congregation who seek communion with Jesus then and there - and the blessing by the priest of the blood of Christ, which he holds aloft and displays to the faithful. All this was faithfully pursued by the celebrant in the course of the Mass. And, as is foretold in the liturgical text distributed on each chair, there was to be and there was a final prayer thus: (according to the French translation)

Lord, we pray this of you: have pity on your servant. He submits in his heart to your will. Let him not be the object of your punishment, and having been part, here, amongst us, by his true faithfulness, of the devotion of the faithful, let him be above, by your grace, joined with the host of angels, by Christ, our Lord. Give him eternal repose, and let the light of heaven shine upon him without cease. Let him repose in peace. Let his soul, and the souls of all the departed, by the pity of the Lord, repose in peace.

[As that last series of prayers was given, and as is proposed in the text, it was heard amongst us - Amen - several times.]

Most of the mass was given by the priest, he facing the altar with his back to those in the congregation for the occasion, and voiced by the priest quietly, undoubtedly as a matter well-known to and understood by those familiar and faithful with such a Mass. The priest began by cladding himself with a shoulder-mounted drape hanging front and back mainly of black, over his white full-length wear, and richly marked with two broad full length wide strips in gold and regular decoration. This had been laid ready on a table to the left of the altar as we faced it. He then turned at the outset and addressed us in French explaining the significance of various gestures to be made by him in the course of his service. He told us that he would, from a special hand held fire in a pot of gold metal on a hand-held chain, seek to surround the coffin with smoke, as if this was washing/masking the departure of the deceased from earth into heaven. He told us that he would prepare holy water to be sprinkled by him upon the coffin and the flowers there laid, and that we would be able to follow him in this sprinkling, each of us, as we did in due course.

The priest then addressed some general remarks to the whole significance and importance to his church in France, to have the opportunity, the invitation, on behalf of Beverley, the wife of the deceased, especially, to be able to pray and intercede for one from Australia, so far from his home,

who had departed this life on French soil. He saw his Church as enriched by the recognition given to it by an Australian, in whose heart, he was told, France had a special and high rank. This was gesture not only to his church, to the faith, but to France - for which he was humbled. He argued that while the physical remains of the deceased, of Adrian, lay even then in our midst, his soul had already departed for the judgment of the Lord, and the mass was a prayer for pity to be accorded to him by the Lord when this judgment was given upon him. He argued that all life was a preparation for this moment, and he was assured that Adrian, by his faithfulness to the church in his lifetime, had prepared himself well for what was to come. He emphasised our right to be confident upon the point. He placed no small store on the point that the Church in France was able to offer Adrian's soul to *le seigneur* - the Lord.

It was after these introductory remarks that he turned to the altar, and commenced the formal procedures, pronouncements, and gestures, of a traditional Catholic mass, given on this occasion, unusually, in Latin. In the early preparatory moments, his lay assistant played from a recording music of an unaccompanied female or male choir.

It was not a short mass. At its end, we sprinkled the coffin, each of us, and then the priest led us to the outside where the coffin was placed in the hearse under the several large bouquets which had also been in the chapel.

Each of us then spoke with the Professor and his wife. We thanked them for their attendance, and received from them the assurance of their condolences, and of their disappointment that their efforts had failed, because life is ultimately beyond the mastery of men. The hearse was soon driven away, and the small party could do no more than depart for Dijon.

Tim Ostini-Fitzgerald (1952 – 2002)

By David Day.

**St. Brigit's Church, Sally's Flat NSW,
7 June 2002.**

There is no visible sunrise on this sad day. Cloud and rain cover the Central Tablelands. Low rain clouds drape the hills on either side of the Turon Valley as we approach our destination. It has rained all day making the unsealed roads run with small muddy streams and become dangerously slippery. Mercifully it is not cold with the temperature holding at 14 degrees.

Sally's Flat is a locality about forty five kilometres north of Bathurst, not far from Hill End, and about forty kilometres east from Ostini country, the Ophir- Mullion Creek area north of Orange. It is high fine wool grazing country and a long way from

Darlinghurst in all respects.

St Brigit is a patron saint of Ireland. Her church here is part of the parish of Kandos. Unexpectedly, it is a modern steel transportable structure, possibly a recycled portable classroom. The dates on the headstones in the churchyard in the 1870s suggest that there was once a former church of more flammable construction. Tim's father is buried in the churchyard.

A congregation of about fifty family, relatives and friends of all ages gathers out of the rain in the church. Apart from family, the relatives are the Ostini cousins. The church is almost full. The book of condolence is passed. It is already nearly full from the funeral.

Unlike the funeral, where the work of the Family Court at Sydney and Parramatta must have been delayed this morning, the legal profession is represented at the burial only by Lee Dalton, an Orange solicitor whose ancestors rubbed shoulders with the Ostinis at Mullion Creek, Warwick Gilbertson, a Bathurst solicitor, and me.

The rest of the family arrives, led by Mrs Fitzgerald, filling the church. There are no copies of *Country Life* for the mourners, but as arranged, a lone piper plays a lament to bring the casket into the church and the sheath of white flowers lies on the casket with Tim's hat. The Sydney Eulogy is read. Prayers are read by the parish priest, Father Peter Dresser. He blesses the remains. There is both sadness and smiling. There are no tears.

As the pall-bearers take up the casket to leave the church the rain begins to fall heavily. The congregation follows the casket out into the rain, but unlike the pall-bearers, Father Peter and the piper, we are sheltered by oilskins, parkas and umbrellas. The pall-bearers stand silently soaking on either side of the grave. A mob of about 200 sheep stands in an adjacent paddock watching the gathering through the rain. The hat is removed. Umbrellas are found for Father Peter and the piper, and held by mourners. The rain continues as another lament is played. The drones of the bagpipes peep sideways from under the piper's umbrella. Final prayers are

read. Rain trickles from the umbrella above Father Peter onto his book. The casket is lowered. The shower continues past the interment and until most of the mourners have returned to the church, which now doubles as the venue for a wake.

Inside the church are hot tea, coffee, cakes, and savouries and cold beer outside on the porch in an esky. Time to meet Mrs Fitzgerald. The altar serves as a useful place to put cups. Some bottles of well aged Lake's Folly on the serving table reminds us whose wake this is.

Father Peter wonders over a cup of tea 'was the downpour part of the plan?' In the background there is the sound of the excavator.

It is four thirty and the clouds have settled around Sally's Flat, as if heaven has descended. It is time to leave Tim and say 'Goodbye' to Mrs. Fitzgerald, then depart into the drizzle.

As Lee Dalton said when we arrived, it is a nice place to be buried.

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The Mixing Pot

In the early 1980s, when my flirtation with the Labor Party was still vaguely alive, I used lunch at The Mixing Pot fairly regularly with a group led by Dick Hall, the author of *Disorganised Crime* and many quasi-spy stories, formerly private secretary to Gough Whitlam.

Over the years I drifted away from the group and have been very irregularly an attendee at The Mixing Pot, probably visiting twice in the last seven years.

Recently I was asked if I would be interviewed by the biographer of Dr Margaret Mulvey, a close friend who was the first female Head of the Department of Obstetrics and Gynaecology at King George V Hospital. Geographically The Mixing Pot was convenient and so we went there.

I was greeted by name as if I had been in twice a week for the whole of the last decade. My guest was enthusiastically received likewise and helped on the stairs as she was obviously disabled. We were taken to an excellent table on the terrace, looking down over the garden-like atmosphere of the place and drinks and bread were brought in moments.

We ate firstly stuffed zucchini flowers, crispy-fried with a stuffing of soft Italian cheese, parsley and a lot of garlic. These were superb, succulent and crunchy. Next we shared fresh asparagus, steamed with butter and Parmesan which was likewise excellent.

The *piece de resistance* however was the slow-roasted baby goat, which we both had; the meat dark and gamey falling from the bones and served with a sauce of tomato, olives and the ubiquitous garlic and onion. Side dishes of Chat potatoes with rosemary and fresh green beans rounded out a superb meal.

We had beer to start, Peroni, and a glass of Bridgewater Mill Semillon each and a glass of Piper's Brook Pinot Noir each.

This was a superb meal and I strongly recommend The Mixing Pot as it now is to anyone who wants to get a little bit out of town to lunch.

The Mixing Pot 178 St John's Road, Glebe

Tel: (02) 9660 7449 or (02) 9692 9424.

Open for lunch: Mon to Friday.

Open for dinner: Mon to Saturday

Credit Cards: All

The Beach House Seafood Restaurant

Looking back, I realised that I have never given The Beach House Seafood Restaurant in Wollongong the review it richly deserves.

I recently spent a day travelling and preparing a Wollongong case, only to be marked 'Not reached' at 4.00pm the following day. This meant I had two meals in this top quality restaurant.

The décor is a little passé but the service and the food would attract attention anywhere in Australia.

On the first night, before I realised the size of the servings, I had an entrée of smoked salmon and (salmon roe) caviar on home made and puffy but delicious bread. There were four small rolls adorned with the smoked salmon and the caviar – two would have been plenty. I should have taken my wife!

For the main course I had barbequed green lobster with a garlic butter sauce, which was fabulous. I saw the lobster being taken from the tank and it turned up absolutely delicious served with mashed potato and a salad which, in view of what I am about to write, was superfluous. I ordered the garden salad which was quite the nicest salad I have had anywhere outside my own home. Red and green capsicum, carrot slivers, tomato, cucumber, Spanish onion and five different kinds of lettuce were served in a large soup-bowl like plate and topped with half an avocado, sliced for easy cutting but in one piece. It was dressed with balsamic vinegar, olive oil and garlic and it was superb.

The service was attentive and friendly and I was placed at a table with quite enough light to continue reading my book, which I did until I realised I was more absorbed in the meal!

The second night, wise to the size of the servings, I repeated the garden salad and simply had the Daily Special fish and chips. Five lovely small flathead fillets in a crisp and crunchy beer batter were served with chips and were piping hot.

Both evenings I washed the meal down with a Hill Smith Sauvignon Blanc which I had not tried before. It was fruity, crisp and delicious.

I know the Vietnamese restaurant in Wollongong has a strong following, but bookings have to be made almost three weeks ahead now and The Beach House has the merit of being but 30 metres from the door of the Novotel North Beach. The restaurant is, by country standards, not cheap but for meals of this quality you would pay a lot more in Sydney.

When next in Wollongong, give it a try.

The Beach House Seafood Restaurant

16 Cliff Road, North Wollongong.

Tel: (02) 4228 5590.

Open for lunch and dinner seven days a week.

Credit Cards: All