Bar News

The JOURNAL of the NSW BAR ASSOCIATION Summer 2003/2004

Voluntary membership:

How national competition reform may harm the Bar Association

The Guantanamo Bay scandal

The trial of Amrozi

An interview with Chief Justice Gleeson

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Taliban and al-Qaeda detainees at Guantanamo Bay.
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Editor's note

On 12 November 2003, Bret Walker SC completed his two year term as President of the Bar Association, following an admirable period of service on the Council of the Bar Association, commencing in 1989 and continuing without interruption since 1992. When Walker addresses an audience, whether it be a court, the Law Council, the ABA or as recently occurred the English Bar, and when he advances the interests of his client or of any principled cause, his ability to speak with both clarity and passion without notes and seemingly without preparation, is remarkable. However, when it comes to even a bland report to Bar Association members on his own efforts and achievements on their behalf, he becomes shy and retiring. The purpose of this note is to record, in a brief and inadequate way, some of what he has done for the association and its members over the past two years.

A lot of Walker's time has been spent dealing with government at both federal and state levels, in an attempt to ameliorate or bring balance to proposed legislation or government policy. Much of this work has required a skillful mix of the three P's: politics, principles and persuasion. Much of it, to be effective, means that it cannot be publicly broadcast, certainly not in any great detail, for fear that the good work will be undone. This includes: representations to the state government and attorney general, which have resulted in a better outcome for the so-called reform of personal injury law and civil liability generally; dealing with the state authorities in respect to proposed changes to the *Legal Profession Act 1987*; dealing with the federal attorney-general in seeking to ameliorate proposed harsh security clearance requirements impacting upon barristers defending security suspects; and dealing with the ACCC in respect to its concerns about the alleged anti-competitive effect of the *New South Wales Barristers' Rules*. There is also Walker's work with the state attorney general, and as part of the Law Council review, in producing a model bill for the National Practice Project, which should produce a better outcome for barristers. In relations with the state government, Walker has continued the difficult process commenced by Ruth McColl SC during her time as president,of rebuilding the trust of the government after the bankrupt barristers scandals. (There is, however, no current truth to the rumour that the Premier has arranged for him to have a parking space in Parliament House).

There is another area of government interaction which may not directly benefit individual members but which is consistent with the broader role of the association in benefiting the community at large. This concerns the offering and providing of advice and of public comment on proposed legislation or government policy which impacts upon the legitimate rights of individuals in the community or generally upon the rule of law. Under Walker's presidency, the Bar Association has continued its valuable role of offering advice to all members of the state parliament, if they wish it, on these matters, and of making submisisions either directly, or in the federal sphere through the Law Council level, to governments or parliaments. Issues that come to mind include the strong statements and submissions made on the mandatory sentencing proposals that appear to endear themselves to both sides of state politics. Another example is the draconian ASIO and security legislation that is so attractive to the Commonwealth Government. To be effective in these areas means being open to communications with oppositions and cross benchers as well as governments, and again doing so on a basis where the detail of the communications must usually be private. The net effect is to the gain of the community, and to the credit of the Bar Association and its members.

On the local front, Walker has provided strong support for the consolidation of the continuing Professional Development Program which was instituted under McColl. Although some members were initially disgruntled by the program, the breadth, interest and relevance of the papers and seminars, as well as the flexibility now offered in meeting the CPD requirements, is, I venture to say, recognised by most members as a positive. On the issue of inadequate barristers fees, Walker has continued to argue the case with legal aid authorities. That issue is never easy.

Even further removed from public view is the generous way in which Walker has made his time and counsel available to members with problems, whether they be matters of ethics and professional conduct or personal or financial problems. It is said that to have a reprimand administered by Walker is a mix between a counselling session and an ethics dissertation. Many who have benefited from decisions of the Barristers' Benevolent Association can attest to his fairness and compassion. Staff of the Bar Association are also grateful for Walker defending them against the attacks and insults which come increasingly from disgruntled persons.

It must be said, however, that for all of the foregoing, the man clearly is not perfect. It is said that Walker's technique for changing nappies in his chambers leaves something to be desired. He did once lose his train of thought after an address lasting several hours in the High Court without notes, although you cannot detect the exact place from the internet transcript. His talkback radio technique, while good, has not yet earned him a prime time slot on drive time radio. More seriously, Walker would not consider every goal to have been achieved. The impact of tort law reform upon personal injury barristers and their practices and livelihoods has been of real concern to him. He would have wished to have been able to achieve more by way of assisting those barristers into new or related fields of work, or cushioning the blow, than has proved practicable to date.

When a president retires, it may be thought that his or her service of the association and its members comes to an exhausted end. Either the ex-president scurries off to the Bench or revels in the newly available time to conduct one's own practice and enjoy the other things of life. Walker, so far as we know, still has a few more nappies to change and is not immediately taking the former option. Nor is the latter course fully open to him. At one of his last meetings on the Bar Council, he was asked by the council and agreed to accept three further tasks for the benefit of the association: a substantial rewrite of the *New South Wales Barristers' Rules* to deal with issues arising out of the Chesterman Inquiry; the organising of a substantial international conference on statutory and general law interpretation; and a project to introduce national legislation to recognise and protect, to defensible extents, advocates immunity. In other words, he is still working for us and for this we are extremely grateful.

Justin Gleeson SC

Letters to the Editor

Dear Sir,

Bar News recorded a visit by Bar Council members and senior staff to the Parramatta Bar. Had the visitors travelled a block or so south, they would have come across St John's Church - a fine colonial Georgian building with a superb wooden ceiling.

The interior walls are covered with lavish memorials to various Macarthur-Onslows and Stanham-Macarthurs, most of which surely offend the sumptuary laws. Hidden amongst these is a modest but perhaps more significant memorial to one Gordon Champion, described as the first NSW public defender. There has long been a firm of solicitors at Parramatta called Kay-Davies and Champion, and I assume that Gordon Champion was from this family. Perhaps someone knows and can assist with the answer.

Yours sincerely,
Graeme Durie

Dear Sir,

Mr Andrew Bell's otherwise informative and entertaining article on Frank McAlary QC, 'The dancing man' (Winter 2003) contains one inaccuracy which needs correction. He wrote that 'Frank McAlary now retires as the senior member of the New South Wales Bar and as the last of the original occupants of the Wentworth / Selborne building having joined 11 Selborne in 1957'.

The latter part of this sentence is not correct. David Rofe QC remains in practice on 12th Floor Wentworth Chambers, he having come to that floor when the Wentworth Chambers building first opened in 1957.

Bob Rymer
Clerk
12th Floor Chambers

The challenges that lie ahead

By Ian Harrison SC

It is a daunting and challenging prospect to be elected President of the New South Wales Bar Association as the successor to Bret Walker. It is a bit like being called off the bench in a Bledisloe Cup match with 10 minutes to go when Australia is leading by 40 points. One could feel fairly confident that the game is in hand, that there is no need for panic and little cause for concern. Unfortunately, the tenacity of the opposition is so well known that it is not possible to assume anything and optimism cannot be permitted to overwhelm caution.

Bret Walker's presidency stands as a monument to intellectual strength and unyielding consistency in the application of right principle. The Bar has been assailed in recent years both in reasonably predictable and totally unforeseen ways. Bret Walker was a man for these times and the present health of the Bar is the direct result of his forceful stewardship. However, the damage to the Bar caused directly by the attitude of a small number of barristers to their taxation obligations cannot be under-estimated. There have been sufficient barristers who were, and are, unable to rely upon genuine medical problems or circumstance beyond their control to germinate an authentic but erroneous community concern that all barristers are arrogant and irresponsible. Continuing the fight to correct this false impression is my first task.

My second is to continue to deal with the problems confronting those members of the Bar whose practices have been, and will continue increasingly to be, affected adversely by the reduction in work by reason of the operation of the *Civil Liability Act 2002* and the closure of the Workers Compensation Court at the end of the year. At a recent Heads of Chambers meeting I sought to make the point that large numbers of barristers affected by these changes were, to my observation at least, in a state of denial. This was emphasised to me in the course of many conversations which tended to emphasise, somewhat optimistically and in a misguided way, that arbitration lists were not retracting as fast as had been expected or that there remained a long tail of matters in the District and Supreme courts which would continue to provide work for some unspecified time.

The difficulty with this analysis is that it fails to confront the reality that an end to this work will come soon and that it will, in fact, be the end. Attempts to convince ourselves that things are not, and will not be, as bad as they seem are misguided.

There will be floors of barristers which will be more severely affected than others. I anticipate several floors will disappear completely and new, but fewer, floors will replace them. There will be many barristers lost to the profession, which will cause hardship for them personally and diminish the strength of New South Wales as one of the largest of the independent referral Bars world wide.

There is abroad a feeling amongst many barristers, particularly those whose livelihood has been influenced by these changes, that the Bar Association failed them in its efforts to staunch the flow of legislative provisions which have led to the present situation. This perception fails to take account of the years of hard work by Bret Walker, and Ruth McColl before him, assisted in their efforts by the Common Law Committee and the tenacious interposition of Philip Selth, the Executive Director. It is important, where possible always to negotiate from a position of strength, a luxury which the Bar Association has never enjoyed in this context. The coming years will deliver our greatest challenge.

Thirdly, the time has long since passed when the issue of the representation of women at the New South Wales Bar is not only promoted, but more importantly, understood. It defies belief that in the third millennium there could be any view held by intelligent people other than that there should be as many women practising successfully at the New South Wales Bar as are qualified, and choose to do so. Some proponents of the interests of women barristers enthusiastically promote the differences at the expense of what I consider to be the far more important similarities between all who are called. Advocacy is at its purest an intellectual exercise where hormones and chromosomes have no relevance. I continue to be troubled by the notion that the fight to equalise the opportunities for women at the Bar so often starts with the proposition that they are a separate group. I consider that equalising levels of representation should be a goal which drives the debate. It is a matter of considerable satisfaction to me that this year's Bar Council, and its Executive, is over-represented by women having regard to the ratio that their numbers bear to members in total. It is significant as well, that the Senior Vice-President Michael Slattery has served with such distinction as the Chair of the Equal Opportunity Committee.

The final challenge for me is more personal. I have always been offended by perpetuation of the stereotype that barristers are the sons, and less happily the daughters, of wealthy families, with memberships of the best clubs and appropriate political connections. This perception is incorrect and has been for a very long time. The egalitarian nature of the New South Wales Bar is perhaps its greatest strength. Unfortunately, from time to time, some of us hold opinions of ourselves which the facts don't support. Some of our number treat clients and solicitors impolitely and often disrespectfully. Although we ourselves work under great pressure at most times, it is wise to remember that the legal system is unfamiliar to a large number of litigants who look to us for guidance and support at times of considerable upheaval in their lives. Every new brief is an opportunity to promote the Bar as a worthwhile institution. My fond hope is to continue to raise community awareness of our true role.

Mitchforce v Industrial Relations Commission

Commercial contracts and sec 106 of the Industrial Relations Act

By Ingmar Taylor

What is the Industrial Relations Commission going to do? Will it fall into line with the views of the Chief Justice and President of the Court of Appeal as to the commission's jurisdiction to deal with commercial matters under sec 106 of the *Industrial Relations Act 1996* (NSW) (and in so doing effectively overturn themselves).

Or will it decline to follow the decision of the Court of Appeal? After all, Spigelman CJ found that 'Parliament intended the Industrial Commission to be the sole judge of its jurisdiction', and Mason P held that (for the same reason) his disagreement with the commission's view of its jurisdiction was 'irrelevant in the circumstances'?

These questions arise following the Court of Appeal decision *Mitchforce v Industrial Relations Commission & Ors*[1] *('Mitchforce')*. A full bench of the commission (Wright J, President, Walton J, Vice-President and Boland J) is currently reserved on the question of whether, in light of *Mitchforce*, its earlier decision[2] to uphold the existence of jurisdiction was wrong.

The proceedings began before Hungerford J who held[3] that a commercial lease to operate a tavern was a contract 'whereby a person performs work in an industry' and so was within the jurisdiction of the commission under sec 106. Hungerford J made orders to compensate the operators of the tavern arising from unfairness in the lease.

On appeal, the full bench of the commission confirmed that the lease was within jurisdiction, stating that the law in that respect was 'well settled'[4] and finding that as the first instance decision was consistent with established law and principle leave to appeal should be refused (something the Bench may now regret - if the bench had instead granted leave and dismissed the appeal it would not now be in the position of having to reconsider the case).

The landlord sought prerogative relief in the Court of Appeal, pursuant to that court's supervisory jurisdiction[5]. Spigelman CJ and Mason P found (Handley JA dissenting) that the commission did not have jurisdiction under sec 106 to consider a commercial lease of the type in question. However, the Court of Appeal did not quash the decision because of the court's view as to its powers to review decisions of the commission. The Court of Appeal instead invited the commission to reconsider its *interlocutory* decision to refuse leave to appeal.

On 22 August 2003 the same full bench that refused leave to appeal on the ground that the law was 'well settled' heard argument as to why it should now, in light of the decision in *Mitchforce*, grant leave to appeal and set aside the decision of Hungerford J. The full bench has reserved its decision.

Pre-Mitchforce - Commercial contracts and sec 106

As far back as 1988 the former Industrial Commission identified that the jurisdiction conferred by sec 88F had become:

> A major commercial jurisdiction exercised in circumstances frequently having little to do with the industrial arbitration and similar litigation normally encountered by industrial tribunals[6].

Since that time the relevant legislation has been re-enacted twice[7] and amended[8] without any attempt to remove the 'commercial jurisdiction', something not referred to in *Mitchforce*.

Types of matters where jurisdiction has previously been found to exist include:

- agreements for the purchase of equipment with associated right to work (eg truck with work)[9];
- partnership agreements[10];
- agency agreements[11];
- a license to use and operate a service station[12];
- a franchise agreement to operate a service station[13];
- dealership agreements[14];
- lease contracts, at least where they contain terms requiring work to be done (eg to keep a retail shop in a shopping centre open during certain hours)[15] (these decisions however must now be read subject to the decision in *Mitchforce*[16]); and
- even finance agreements, provided they form part of an overall arrangement under which work is performed in an industry[17].

However the decision of the Court of Appeal in *Mitchforce* suggests the previous readiness to find jurisdiction in respect of 'commercial contracts', in particular leases, may have been misplaced.

Mitchforce v Industrial Relations Commission

The contract in question in *Mitchforce* was a lease of property. Mitchforce had constructed a 'purpose-built' facility and obtained a liquor license, so that a tavern could be operated on the site. The Starkeys, who had experience operating hotels, entered into a 10 year lease to operate the tavern. Both parties actively contemplated that the Starkeys would operate a tavern from the facility. Pursuant to the lease, the rent increased above CPI, and when business did not grow as expected the rent became uneconomic. There was no express term in the lease that required the Starkeys to operate the premises as a tavern, although the Starkeys did have an obligation to do work maintaining the premises.

Spigelman CJ noted that Sheldon J in *Davies case*[18] (a seminal case on the jurisdiction) found that the basic purpose of the provision was industrial, and that in order to have the 'requisite industrial colour and flavour' the contract must itself 'directly envisage' the work and have a 'recognisable impact on the conditions of employment'.

At [49] Spigelman CJ noted that both parties to the lease contemplated that work would be done by the Starkeys as a consequence of the lease, but it could not be said that was a *purpose* of the lease. Spigelman CJ found that the purpose was merely to provide one part of the means to run a business, akin to an agreement to purchase equipment which will be used to run a business.

Spigelman CJ concluded at [58] as follows:

> There is not, in my opinion, anything which provides an 'industrial flavour or colour' to the arrangement presently under consideration. Nor is there anything which has a 'recognisable impact on the conditions of ... work', to use the formulation of Jacobs JA in *VG Haulage*. Nor is the 'purpose' of the transaction that work be performed, to use the formulation of Mahoney JA in *Production Spray Painting*. The sole purpose of the agreement is the occupation of premises. It does not lead directly to the performance of work in an industry.

Mason P concurred with the reasoning of Spigelman CJ. Mason P said [at 140]:

> this seems to be one of those situations not unknown to the law in which it is difficult to draw a precise descriptive line, but not so difficult to know whether it has been crossed in the particular case.

Mason P also made some robust comments about the commission doing work more properly done by the Supreme Court[19]. At [147] he said he was 'profoundly troubled by the march of the commission's jurisdiction into the heartland of commercial contracts . . . This is a significant inroad into the effective and efficient exercise of the Supreme Court's jurisdiction in commercial causes'. Mason P went on to say at [147] that 'the matter is also troubling because it must frankly be stated that the members of the commission do not generally have the experience of the judges of the Equity Division in such matters and because, on the same hypothesis, the commission lacks the ongoing assistance of appellate and other supervision by the Court of Appeal or the High Court in such matters'.

Ultimately, however, the views of Spigelman CJ and Mason P as to whether the lease in question was within jurisdiction were, as Mason P said, 'irrelevant in the circumstances'. This is because their Honours found that, unless it was constitutionally invalid, sec 179 of the *Industrial Relations Act 1996* protected the decision from review by the Court of Appeal. Section 179 is a privative clause drafted in extremely wide terms, which amongst other matters, protects a 'purported decision' from being 'reviewed, quashed or called into question'. Spigelman CJ and Mason P decided not to determine whether sec 179 was constitutionally valid. They instead noted that, as the full bench had refused leave, the decision of the full bench was only interlocutory and the full bench could review its own decision (in light of the findings of the Court of Appeal). The Court of Appeal accordingly stood the matter over for further argument, pending further determination by the commission (if any).

If sec 179 is constitutionally valid, the Court of Appeal could not overturn the full bench decision. Yet the Court of Appeal may achieve the same result in this case by making extensive *obiter* comment, and suggesting the commission revisit the matter and determine it again. (Presumably the Court of Appeal did not consider that its decision called into question the decision of the commission, contrary to sec 179.) Of course, if the commission full bench does not overturn itself, and dismisses the appeal from the decision of Hungerford J, then the Court of Appeal will be forced to determine the constitutional validity of sec 179. If sec 179 were found to be valid, then subject to the High Court taking a different view, the commission's view as to its jurisdiction will prevail, at least in respect of matters heard by the commission.

There is a recent trend for respondents to a sec 106 Summons to commence proceedings in another jurisdiction and then apply to cross-vest all the proceedings, including the sec 106 proceedings, to the Supreme Court[20]. That gives rise to the potential for conflicting approaches to the jurisdiction depending on where the matter is determined[21]. This is particularly so given that Supreme Court Judges are for the first time applying a power that has traditionally been seen to be at odds with established common law principles, being closer to arbitration than judicial determination. Sheldon J in Davies Case famously described it as a 'radical law' which 'plays havoc with classic principles of contract law', permitting a judge to remake contracts, including by adding new terms: 'destruction, dilution, renovation and patching are all weapons in the section's arsenal'[22].

Can commercial contracts still be litigated under sec 106?

While the Chief Justice spoke critically about the commission travelling 'a long way from an "industrial" context' and the President spoke critically about the commission involving itself in commercial matters, there is no doubt that sec 106 is not limited to employment contracts and contracts for service. The majority in *Mitchforce* did not call into question the Privy Council decision in *Caltex Oil (Australia) Pty Ltd v Feenan*[23] or the Court of Appeal decision in *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd*[24], both decisions in respect of agreements that would be considered, at least to some degree, 'commercial' agreements.

As Barwick CJ said in *Stevenson v Barham*[25]:

> Notwithstanding the wide language of sec 88F, I have found difficulty in becoming convinced that it was within the contemplation of the legislature that agreements for business ventures, of which the present may be a specimen, freely

entered into by parties in equal bargaining positions, should be so far placed within the discretion of the Industrial Commission as to be liable to be declared void. However, I have come to the conclusion that the language of sec 88F of the Act is intractable and must be given effect according to its width and generality.

And so notwithstanding the decision in *Mitchforce* it cannot be doubted that 'commercial' agreements *will* fall within the jurisdiction conferred by sec 106 where by their terms they lead directly to the performance of work in an industry[26] (or to use the words of Mason P in *Mitchforce*; where their 'direct effect' is 'to require the performance of work in an industry'[27]).

The ability to attack contracts that might be described as 'arms-length commercial contracts' has always been seen to be an important part of the role of sec 106, given its purpose to pierce through stratagems designed to avoid fair industrial conditions.

Possible legislative change

Whether 'commercial' cases continue to be heard in the commission, and whether sec 179 is constitutionally valid are questions that may be rendered moot by legislative amendment. It has been reported that the Attorney General is considering changes including 'allowing appeals to be made to the [Court of Appeal]' and 'clarifying the extent to which the commission should handle commercial law cases that otherwise would go to the NSW Supreme Court'[28].

It is unclear whether the mooted amendments are to limit the jurisdiction of sec 106, or simply remove some sec 106 cases to the Supreme Court. It would not be easy to amend sec 106 to exclude 'commercial' cases whilst maintaining the original purpose of the section of protecting the arbitration system. Many of the early cases were about contracts to purchase a truck with a promise of work[29]. On one view such contracts were 'commercial' agreements to purchase a small business. Another example is provided by the long-running litigation involving Wilson Parking and the Federated Miscellaneous Workers Union[30], which involved car parking attendants being encouraged to form partnerships and successfully tender for the right to supply 'management services' in what was described as a commercial arrangement. Under that arrangement each attendant received a profit distribution that equated to an hourly rate below that set by an award for employees doing the same work, something the commission ultimately found to be unfair. Anyone drafting amendments to sec 106 to exclude 'commercial cases' would hopefully want to ensure cases such as those could still be taken.

Certainly it is hard to envisage how a tribunal can be given full power to cut through legal artifice without permitting scrutiny of some agreements capable of being characterised as 'commercial agreements'.

1 [2003] NSWCA 151, 16 December 2003, Spigelman CJ, Mason P and Handley JA

2 *Mitchforce Pty Ltd v Starkey* (2002) 117 IR 122

3 *Starkey v Mitchforce Pty Ltd* (2000) 101 IR 177

4 *Mitchforce Pty Ltd v Starkey* (2002) 117 IR 122 at 135

5 *Supreme Court Act* 1970 (NSW), sec 48(1)(ii)

6 *Rolles v Donald Scott Surgicals Pty Ltd* (unreported, Fisher P, Cahill VP and Bauer J, 19 February 1988) a passage quoted in *Symes v Bennett* (1990) 35 IR 171 at 176 and *TNT v Thomas* (1990) 34 IR 378 at 392, this being a matter identified by Holmes QC in his 1995 article, '*An historical analysis of the jurisdiction conferred on the Industrial Court by sec 275 of the Industrial Relations Act 1991 (NSW)* (1995) 69 ALJ 49 at 49-50'

7 Re-enacted in 1991 as sec 275 of the *Industrial Relations Act 1991* and then again in 1996 as sec 106

8 It has been amended twice, in 1998 and 2002

9 *Agius v Arrow Freightways Pty Ltd* [1965] AR 77 (which was the first case ever determined under sec 88F); *Ex parte VG Haulage Services Pty Ltd; Re Industrial Commission* [1972] 2 NSWLR 81

10 *Stevenson v Barham* (1977) 136 CLR 190; *Wilson Parking v Federated Miscellaneous Workers' Union* [1981] 2 NSWLR 824

11 *Re Becker and Harry M Miller Attractions Pty Ltd* (1972) AR (NSW) 298

12 *Caltex Oil (Australia) Pty Ltd v Feenan* [1981] 1 NSWLR 169

13 *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd* (1992) 28 NSWLR 443

14 *Chrysler Jeep Automotive Distributors Australia Pty Ltd v Canberra Star Motors Pty Ltd* (1997) 79 IR 452 at 459; *Gough & Gilmour Holdings Pty Ltd v Caterpillar of Australia Ltd (No.11)* [2002] NSWIRComm 354

15 *Mitchforce v Starkey and Anor* [2002] NSWIRComm 85; *Jennings v Auto Plaza Ltd* (1993) 46 IR 413; *Booth v Kritikos Developments Pty Limited* (1995) 59 IR 298; *Kostakis v New World Oil & Developments Limited* (unreported, Schmidt J , CT 1157 of 1996, 25 July 1997) and *Australian Institute of Music Limited v L M Investment Management Pty Ltd* [2000] NSWIRComm 201

16 [2003] NSWCA 151, in particular Spigelman CJ at [53]-[55]

17 *Mitchell v Darby* (1983) 4 IR 72; *State Bank v Grover* (1996) 64 IR 451

18 [1967] AR (NSW) 371

19 Industrial practitioners might call it a demarcation dispute

20 See for example *Resarata Pty Ltd v Finemore* [2002] NSWCA 250, 24 July 2002

21 And the potential conflict is not limited what types of contracts can be contracts 'whereby a person performs work'. In *Mitchforce* at [93] Spigelman CJ specifically left open the question of whether a contract can be found to be unfair because of conduct that is in *breach* of contract, a question about which different views were expressed in the commission, before it was authoritatively determined by a five member Bench in *Reich v Client Server Professionals of Australia Pty Ltd* (2000) 49 NSWLR 551

22 *Davies v General Transport Development Pty Ltd* [1967] AR 371 at 372-373

23 [1981] 1 NSWLR 169

24 (1992) 28 NSWLR 443

25 (1977) 136 CLR 190 at 192

26 *Stevenson v Barham* (1977) 136 CLR 190 at 200

27 At [151]

28 *Sydney Morning Herald*, 18 November 2003

29 *Davies' Case* is an example

30 *Federated Miscellaneous Workers Union of Australia (NSW Branch) v Wilson Parking (NSW) Pty Ltd* [1978] 1 NSWLR 563; *Wilson Parking (NSW) Pty Ltd v Industrial Relations Commission of New South Wales* [1979]1 NSWLR 396; *Federated Miscellaneous Workers Union of Australia (NSW Branch) v Wilson Parking (NSW) Pty Ltd* [1980] AR (NSW) 365; and *Wilson Parking (NSW) Pty Ltd v Federated Miscellaneous Workers Union of Australia (NSW Branch)* [1981] 2 NSWLR 817

Recent developments in family law

By Michael Kearney

The area of family law remains one of the most active in terms of changes and developments to both the relevant law and practice. It is an aspect of the law that most will require at least a passing acquaintance with, whether on a professional or personal basis. The purpose of this note is to outline a number of developments of importance for the 'non-specialist' in the family law area as follows:

- the *Property (Relationships) Act 1984*;
- superannuation;
- appeal procedures; and,
- changes to the *Family Law Rules*.

Property (Relationships) Act

The issue of jurisdiction in the area of de facto relationships has been very much alive since the demise of the cross-vesting legislation, and has been a topic regularly on the agenda of meetings of the attorneys-general. New South Wales has now enacted legislation to refer power to the Commonwealth in this area.

On 23 October 2003 the *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) received assent. The effect of the Act is to refer power concerning the alteration of property interests between de facto partners from NSW to the Commonwealth. The legislation refers power in relation to all de facto relationships (including same sex relationships). At this time it is not known whether the Commonwealth will accept all of the powers referred.

Superannuation

As most are now aware, sweeping amendments to the *Family Law Act 1975* on 28 December 2002 introduced provisions to enable superannuation interests to be treated as property capable of division upon breakdown of a marriage and to empower a court to bind trustees of superannuation funds in certain respects.

The Lionel Bowen Building. Photo: Fiona-Lee Quimby / News Image Library.

'The issue of jurisdiction in the area of de facto relationships has been very much alive since the demise of the cross-vesting legislation, and has been a topic regularly on the agenda of meetings of the attorneys-general.'

The amendments raise many new issues for consideration which are gradually being determined by the courts. Of particular importance for practice is the decision of the full court of the Family Court of Australia in *Hickey* (2003) 30 Fam LR 355. In determining a stated case, the court ruled that *inter alia:*

- in contested proceedings where neither party seeks an order in relation to a superannuation interest, it is not necessary for parties to adduce valuation evidence as to the superannuation interest. Parties may agree on the value to be adopted by the court;
- merely seeking that a superannuation interest be taken into account in making an adjustment to other property interests is not to seek an order in relation to a superannuation interest; and
- where orders are sought by consent, do not involve an order in relation to a superannuation interest and both parties are represented, the court will not usually require a valuation of any superannuation interest.

When valuing a superannuation interest, there needs to be awareness of the increasing number of superannuation funds that are obtaining approval from the minister for the use of 'fund specific' valuation factors. That is, whilst the Regulations provide a valuation formula of general application, there are a growing number of funds to which that formula no longer applies. Most recently and by way of example, UniSuper, RACV Super, Ford Super, QSuper and Super SA have all received approval for 'fund specific' alterations to the formula.

The superannuation information provided by each fund pursuant to the Regulations should set out the information necessary for a valuation to be conducted. It is important to note, however, that many such statements may have been issued prior to the approval of different valuation factors and hence be no longer correct.

Appeal procedures

The rules governing the conduct of appeals in the Family Court have been significantly amended. The relevant rules are contained in Orders 32, 32A, 32B, 32C and 32D. The most significant of the new procedures can be summarised as follows:

- The time limit for the filing of a notice of appeal has been reduced from one month to 28 days. There is no provision for the filing of a 'holding appeal'. Many of the other procedural time limits have been altered and these should be checked. Notices of appeal may not be amended after the first return date without leave.
- Within 14 days of filing of the notice of appeal, a 'pre-argument' statement must be filed. Until filing of this statement, the appeal will not progress and is liable to be struck out.
- Case management of appeals will now be conducted by judges who will settle the appeal books and make directions for the further conduct of the matter.
- On the first return date of the appeal the judge may conduct a settlement conference. Whether to do so or not is a matter for the discretion of the court.

Changes to the Family Law Rules

The Family Court, in consultation with the legal profession and other interested parties, is conducting a major overhaul of the *Family Law Rules*. The two areas of primary interest for the profession are the proposals in relation to expert evidence and costs.

The exposure draft released by the court proposes a regime for expert evidence entirely different to that which presently exists in the jurisdiction. It is intended by the court that there be restrictions on both the calling and engaging of experts by parties, mandatory exchange of experts' reports, provision for costs orders against experts and the imposition of civil penalties for failure to attend or non-compliance.

The draft rules also propose the introduction of penalties for non-compliance with the rules by lawyers and others, including fines of up to $27,500 for each offence.

Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd

[2003] 201 ALR 1 (5 September 2003)

By Christopher O'Donnell

Introduction

The vexed question of what the applicable standard of proof is in customs and excise prosecutions has finally been settled by the High Court in this decision. The applicable standard is the criminal standard, requiring proof beyond reasonable doubt. Prior to the decision the question was unsettled due to conflicting authorities.

In *Evans v Lynch* [1984] 3 NSWLR 567 at 570 and *Evans v Button* (1988) 13 NSWLR 57 at 73 the New South Wales Court of Appeal held that customs prosecutions were civil by nature. Carruthers J, at first instance in *Button v Evans* [1984] 2 NSWLR 338 at 353 held that the applicable standard of proof was the civil standard. In *Moore v Jack Brabham Holdings Pty Limited* (1986) 7 NSWLR 470 at 482 Hunt J took a different view, stating that the true nature of customs prosecutions was criminal. As Chief Justice at Common Law he reached the same conclusion in *Comptroller-General of Customs v D'Aquino Bros Pty Limited* (1996) 135 ALR 649 at 661. The Queensland Court of Appeal held that the criminal standard was the applicable standard in the decision that was the subject of this appeal to the High Court: *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2001) 188 ALR 493.

Despite holding that the criminal standard of proof applies to customs and excise prosecutions the High Court's decision in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* has re-affirmed the hybrid nature of these prosecutions, which retain civil procedural aspects.

Although the decision arose from prosecutions conducted in Queensland, it is contended, for the reasons outlined below, that it has application in New South Wales, and requires proof beyond reasonable doubt where customs and excise prosecutions are conducted in this state.

Background to the appeal

The appeal arose out of proceedings brought by the appellant against the respondent in the Supreme Court of Queensland. The respondent was alleged to have moved goods without

authorisation and evaded customs and excise duty contrary to secs 33 and 234(1)(a) of the *Customs Act 1901* (Cth) and secs 61 and 120(1)(iv) of the *Excise Act 1901* (Cth). These are customs prosecutions and excise prosecutions as defined by sec 244 of the Customs Act and sec 133 of the Excise Act respectively. Similar provisions in the two Acts state that such prosecutions may be 'commenced, prosecuted and proceeded with in accordance with any rules of practice and procedure established by the court for Crown suits in revenue matters or in accordance with the usual practice and procedure of the court in civil cases or in accordance with the directions of the court or a judge': Customs Act sec 247; Excise Act sec 136.

The standard of proof question

Hayne J, with whom Gleeson CJ and McHugh J agreed, emphasised that the classification of proceedings as 'civil' or 'criminal' was not determinative of the standard of proof. Such classifications ignore the fact that some proceedings have both civil and criminal characteristics. Hayne J held that the standard of proof to be applied in customs and excise prosecutions was not a matter of 'practice and procedure' within Customs Act sec 247 and Excise Act sec 136. Since neither Act provided for the standard of proof applicable to such prosecutions the operation of the *Judiciary Act 1903* (Cth) had to be considered. Section 79 of the Judiciary Act picks up and applies state laws of procedure, evidence and the competency of witnesses to state courts exercising federal jurisdiction. Hayne J considered this to have no operation because there was no Queensland law that provides for the applicable standard of proof in customs and excise prosecutions.

Accordingly, Hayne J found that sec 80 of the Judiciary Act applied. Where a state court is exercising federal jurisdiction in civil and criminal matters, sec 80 operates to pick up and apply in those proceedings the common law in Australia as modified by the Constitution and state law. Hayne J held that the penalties that may be recovered in customs and excise prosecutions were not merely financial but extended to conviction of the defendant. For this reason the common law, as picked up by sec 80, required proof beyond reasonable doubt before a conviction could be entered. In this regard customs and excise prosecutions differ from proceedings for civil penalties under, for example, the *Corporations Act 2001* (Cth) and the *Trade Practices Act 1974* (Cth). Civil penalty proceedings, although sometimes having severe penal consequences (in the form of punitive damages), do not result in conviction of the defendant. Hayne J reaffirmed in *obiter dicta* that the applicable standard of proof in civil penalty proceedings is the civil standard.

Gummow J held that sec 4 of the *Crimes Act 1914* (Cth) applied to customs and excise prosecutions. Although now repealed, it applied at the relevant time and provided that common law principles of criminal liability applied to offences against the laws of the Commonwealth. Gummow J held that customs and excise prosecutions were proceedings for offences against the laws of the Commonwealth. Gummow J noted that the introduction of sec 5AA of the Customs Act from 15 December 2001, which applies parts of the Commonwealth Criminal Code to Customs Act offences, but not Part 2.6 which deals with the criminal standard of proof, may mean that the repeal of sec 4 of the Crimes Act was only partial. In other words, sec 4 may still apply the criminal standard of proof to customs and excise prosecutions.

'Despite holding that the criminal standard of proof applies to customs and excise prosecutions the High Court's decision in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* has re-affirmed the hybrid nature of these prosecutions, which retain civil procedural aspects.'

Kirby J adopted a broader approach than the other justices, but reached the same conclusion on the standard of proof. Kirby J found that in the absence of a clear statutory intention in the words of sec 247 of the Customs Act and sec 136 of the Excise Act the legislature could not be presumed to have intended to abrogate the basic entitlement that a person should not be 'convicted' of an 'offence', with the serious consequences that entailed, unless the offence was proved beyond reasonable doubt.

The Queensland Evidence Act question

The High Court also decided the question of whether customs and excise prosecutions are 'criminal proceedings' for the purposes of the *Evidence Act 1977* (Qld). The question arose because the appellant wished to rely upon sec 92 of the Queensland Evidence Act. This provides for the admissibility of documentary evidence as to facts in issue in civil proceedings only. Section 93 of the Queensland Evidence Act provides for the admissibility of documentary evidence as to facts in issue in criminal proceedings.

The High Court held unanimously that sec 92 of the Queensland Evidence Act was the applicable provision in customs and excise prosecutions. This was not because those proceedings were 'civil' proceedings for the purposes of the Queensland Evidence Act but because sec 247 of the Customs Act and sec 136 of the Excise Act require the Supreme Court of Queensland to apply its usual practice and procedure in civil cases to customs and excise prosecutions. The admissibility of documents being a procedural question, sec 92, not sec 93 of the Queensland Evidence Act is the applicable provision.

The hybrid nature of customs and excise prosecutions is highlighted by the application to them of both the criminal standard of proof and civil rules about the admissibility of evidence.

Conclusion: the position under the Uniform Evidence Law

As the Uniform Evidence Law applicable in New South Wales and federally has not been adopted in Queensland, it is necessary to consider separately the effect of the High Court's decision in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* upon customs and excise prosecutions in Uniform Evidence Law jurisdictions.

An application of the prevailing reasoning of Hayne J to the situation of a customs or excise prosecution in the New South Wales Supreme Court raises some interesting questions.

'An application of the prevailing reasoning of Hayne J to the situation of a customs or excise prosecution in the New South Wales Supreme Court raises some interesting questions.'

The *Evidence Act 1977* (Qld) is silent on the standard of proof in civil or criminal proceedings. By contrast, the *Evidence Act 1995* (NSW) provides that the standard of proof for a civil proceeding is proof on the balance of probabilities: sec 140. A civil proceeding is defined in the dictionary as a proceeding other than a criminal proceeding. The standard of proof for a criminal proceeding is proof beyond reasonable doubt: sec 141. A criminal proceeding is defined as 'a prosecution for an offence' and includes committal, bail and sentence hearings. These provisions are mirrored in the *Evidence Act 1995* (Cth).

It could be argued that the reasoning of Hayne J means that sec 247 of the Customs Act and sec 136 of the Excise Act will operate to pick up those parts of the *Evidence Act 1995* that apply in civil proceedings, including sec 140, when a customs or excise prosecution is conducted in New South Wales.

However, it is submitted that this conclusion does not follow from the High Court's judgment for the following reasons:

1. The better view is that sec 247 of the Customs Act and sec 136 of the Excise Act do not operate to pick up sec 140 of the *Evidence Act 1995* because it is not a procedural provision, despite being included in the *Evidence Act 1995*;
2. If sec 140 of the *Evidence Act 1995* was picked up by sec 247 of the Customs Act and sec 136 of the Excise Act this would lead to different standards of proof applying to customs and excise prosecutions, depending on which state or territory the proceedings were commenced in;
3. For the purpose of determining the applicable standard of proof the reasoning of Hayne J characterises customs and excise prosecutions as criminal prosecutions. For this purpose they are 'prosecutions for an offence' within the meaning of 'criminal proceeding' under the meaning of the *Evidence Act 1995*. Therefore, sec 79 of the Judiciary Act will pick up the New South Wales law of evidence governing the standard of proof in criminal prosecutions. This is sec 141 of the *Evidence Act 1995*, which applies the criminal standard of proof; and
4. If the approach outlined in paragraph 3 above is not correct, and customs and excise prosecutions, because of their hybrid nature, are neither civil proceedings or criminal proceedings within the meaning of those terms under the *Evidence Act 1995*, then there is no New South Wales law that provides for the applicable standard of proof in customs and excise prosecutions. If this is the case, sec 80 of the Judiciary Act will pick up the common law, which, according to the reasoning of Hayne J, requires proof beyond reasonable doubt in a customs or excise prosecution.

For these reasons it is submitted that the better view is that the applicable standard of proof in customs and excise prosecutions conducted in New South Wales is the criminal standard.

Although Tasmania has adopted much of the Uniform Evidence Law in the *Evidence Act 2001* (Tas), that Act does not include provisions equivalent to sec 140 and sec 141 of the *Evidence Act 1995* (NSW). The Tasmanian Act is silent on the standard of proof in civil and criminal proceedings. The position in Tasmania is, therefore, identical to the position in Queensland and the applicable standard of proof for customs and excise prosecutions conducted in Tasmania is the criminal standard.

'Marine adventure'

Gibbs v Mercantile Mutual Insurance (Australia) Ltd [2003] HCA 39 and the scope of the Marine Insurance Act 1909 (Cth)

*By the Hon Justice James Allsop**

The ALRC has recently published Report 91 being a review of the Marine Insurance Act. Marine insurance is governed by the *Marine Insurance Act 1906* (Cth) (the MIA). It is not covered by the *Insurance Contracts Act* 1984 (Cth) (the ICA). This paper is only a brief introduction to the topic†.

The MIA came into effect on 1 July 1910 and, with minor differences, was a replica of the United Kingdom parent legislation drafted famously by Chalmers. The MIA has been amended only twice since then. One such amendment was to reflect the introduction of decimal currency. The MIA was said to have codified the law of marine insurance when enacted. However sec 4 specifically preserves the rules of the common law 'including the law merchant'.

In many places the MIA preserves the parties' ability to agree on terms other than those set out in the legislation. Schedule 2 to the MIA contains the Lloyds SG Policy which by the terms of sec 36 effectively becomes a body of rules for the construction of marine insurance policies.

Sections 7 to 9 identify the limits of marine insurance. Section 7 defines a contract of marine insurance as a contract:

> Whereby the insurer undertakes to indemnify the assured in manner and to the extent thereby agreed, against marine losses, that is to say the losses incident to marine adventure.

A 'marine adventure' is defined in subsec 9(2). The High Court in *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* [2003] HCA 39 recently dealt with the definition of marine insurance.

The 'marine adventure' as dealt with by sec 9 refers to the exposure to risk of insured property, of money which may be earned from that property, of money which may be earned from that property or the adventure and to liability that may arise to a third party if that property is lost or damaged. An essential element is the notion of 'maritime perils' which are defined as perils:

> Consequent on, or incidental to, the navigation of the sea, that is to say, that perils of the sea, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils either of the like kind, or which may be designated by the policy.

Thus, a contract of marine insurance may deal with some land risks and may be extended under sec 8 to protect the assured against losses on inland waters or on any land risk 'which may be incidental to any sea voyage':

One of the essential differences between the ICA and the MIA relates to questions of the utmost good faith, disclosure and misrepresentation, dealt with in secs 23 to 27 of the MIA. These matters were reformed substantially under the ICA for general insurance. This reform, which did away with the ability of an insurer to rely upon the notion of the prudent insurer as the test by reference to which it could avoid the policy does not extend to marine insurance. In marine insurance contracts, the law on good faith, subject to the possible issue as to the divergence of the law between the United Kingdom and Australia recently, is as it was unreconstructed prior to the ICA. This difference highlights the importance of an appreciation of the central concept of a 'marine adventure'.

In *Pan Atlantic Insurance Co Ltd v Pinetop Insurance Co Ltd* [1995] 1 AC 501, the House of Lords dealt with the question of non-disclosure. The House of Lords rejected the proposition that the only matters that need to be disclosed are those that if disclosed to the hypothetical prudent underwriter would have caused him to decline the risk or charge an increased premium. Rather it was held, what had to be disclosed was material which would have an effect on the mind of the prudent insurer (being a hypothetical person) in estimating the risk and it was not necessary that it should have a decisive effect on his acceptance of the risk or the amount of premium demanded. Also, the House of Lords engrafted on to the section a further requirement 'implied in the Act' that a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation (or non-disclosure) induced the making of the contract (using the word 'induced' in the sense in which it is used in the general law in contract).

Whether or not the views of the House of Lords are entirely conformable with existing Australian authority is a matter yet to be finally determined. In *Akedian Co Ltd v Royal Insurance Australia* (1997) 148 ALR 480 Byrne J considered that since *Pan Atlantic* the question of materiality should be addressed in these two stages. In Australia prior to the ICA, non-disclosure cases in general and marine insurance were run on the basis of the question of the prudent insurer and not by reference to the insurer in question: see generally *Mayne Nickless v Pegler* [1974] 1 NSWLR 228 and *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514.)

The importance of understanding when a policy is covered by the ICA and when by the MIA is reflected by the High Court's recent decision in *Gibbs*. After the events of the litigation in Gibbs the ICA was amended *(Insurance Laws Amendment Act 1998 (Cth)* s77) to provide in effect that the MIA does not apply to a contract of marine insurance made in respect of a pleasure craft defined as a ship which is used or intended to be

* This note is an adaptation of part a paper delivered by Justice James Allsop of the Federal Court to the New South Wales Bar on 24 September 2003. It highlights some of the significant differences between the *Marine Insurance Act 1909* (Cth) and the *Insurance Contracts Act 1984* (Cth) and discusses a recent High Court decision where those differences were critical to the outcome of the parties' dispute.

† Recourse should be had to basic and fundamental texts: ALRC Rep 91, Bennett *The Law of Marine Insurance*, Templeman on *Marine Insurance*, Arnould Law of *Marine Insurance and Average*, Parks *The Law and Practice of a Marine Insurance and Average*, Chalmers' *Marine Insurance Act 1906* (annotated).

used wholly for recreational activities, sporting activities for both and otherwise for reward and legally and beneficially owned by one or more individuals and not declared by the regulations to be exempt from the relevant subsection. It is likely that this amendment would not have applied to the facts in *Gibbs*.

Mr Gibbs and his company (the appellants) conducted a business offering paraflying or parasailing to the public. The corporate entity operated a 17 foot runabout ski boat powered by a 160 horse power sterndrive motor. When paraflying, the boat towed a person wearing a parachute who could ascend to the length of the tow rope while the boat made sufficient speed to generate enough lift under the canopy of the

The Narrows Bridge, spanning the Swan River.
Photo: John Chapman/AAP Image

parachute. Mrs Morrell went paraflying with the appellants in Perth on the Swan River near 'the Narrows Bridge'. She was injured hitting trees on an adjacent island after the party had gone downstream. Mrs Morell sued the appellants. The insurer denied them cover. The appellants sued the insurer. The appellant had arranged insurance for the vessel, its hull, motor and trailer together with equipment and third party legal liability cover. At the time of the injury the only aspect of the policy still on foot was the third party liability cover extended to include commercial paraflying.

The insurer contended that the insured had not disclosed matters that they were bound to and that they had made certain material misrepresentations. If the MIA applied the regime referred to above under the MIA would apply, not the ICA regime.

By majority the High Court found that the policy was covered by the MIA. Gleeson CJ said that, subject to the argument about whether the policy was one where liability to a third person by someone interested in or responsible for insurable property by reason of maritime perils, that is perils consequent on or incidental to, the navigation of the sea, the policy was plainly a marine policy. With the dropping of the hull and equipment cover the scope of the cover purchased was reduced, but the character of the policy was not transformed. The losses remained primarily losses arising out of events occurring in the course of the navigation of the vessel in question.

The appellants argued that neither the original policy nor the renewed policy was a contract of marine insurance because of the locality in which in the contemplation of the parties the vessel was to operate. The vessel was only to operate pursuant to the navigation warranties in it in 'protected WA waters as per permit'. The word 'permit' was a reference to the certificate of survey for the vessel required under the *Western Australian Marine Act 1982* which recorded that the geographical limits of operation of a vessel was 'smooth water only'. In fact, as was intended, the vessel's commercial paraflying activities were conducted in the Swan River area near the Narrows Bridge.

Gleeson CJ described the area of the Swan River in which the appellant operated their vessel as part of a broad expanse of water properly described as an estuary near the conjunction of the Swan River and the Indian Ocean. As one of the judges in the full court had said, an estuary is the interface between the ocean and a river in which salinity changes are found. The waters of the Swan River around South Perth where the activity was intended to take place were affected by tidal movements and were properly described as estuarine. An estuary of this kind where the tide ebbs and flows was found by the full court, and Gleeson CJ agreed, to be part of the sea, being estuarine and to be waters within the ebb and flow of the tide and falling within at least the definition of 'sea' in s3 of the *Admiralty Act 1988* and s6 of the *Navigation Act 1912* (Cth). Gleeson CJ said the word 'sea' is not limited to the open ocean.

Hayne and Callinan JJ formed the balance of the majority. They were of the view that the careless operation of the craft causing injury to the person being towed was a peril of a kind properly described as a peril 'consequent on, or incidental to, the navigation of the sea'. It was not determinative that this did not occur at *sea*. What was determinative was the nature of the risk, not where the event happened. Under the contract of insurance the insurer undertook to indemnify the appellants against marine losses, that is losses incident to marine adventure.

McHugh J and Kirby J dissented.

Relief against forfeiture

Tanwar Enterprises Pty Ltd v Cauchi [2003] HCA 57
Romanos v Pentagold Investments Pty Ltd [2003] HCA 58

By Andrew S Bell

On 7 October 2003, the High Court handed down two important decisions (*Tanwar* and *Romanos*) concerning the doctrine of relief against forfeiture. In each case, joint judgments were delivered by Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ with separate but concurring judgments by Kirby J and Callinan J. The unanimous nature of these decisions stands in marked contrast to the High Court's earlier decision in *Stern v McArthur* (1988) 165 CLR 489 in which the court had split 3 - 2 in deciding to afford relief against forfeiture of a purchaser's interest in land in circumstances where the purchaser had built a house on the land, the land had risen in value and there was a relatively modest default in the meeting of an essential instalment obligation.

The decisions' principal importance lies in the guidance they give to practitioners as to the circumstances where the exercise of legal rights to terminate a contract for the sale of land by reason of the purchaser's failure to make timely payment of a settlement sum or an instalment amount will be unconscientious. Such cases will tend to occur in a rising property market and, whilst the facts of no two cases will ever be precisely alike, both decisions emphasise that 'equity does not intervene to reshape contractual relations in a form the court thinks more reasonable or fair where subsequent events have rendered the situation of one side more favourable than that of the other side. Rather, one asks whether the conduct of the vendors caused or contributed to a circumstance rendering it unconscientious for them to insist upon their legal rights to terminate the contract.' The decision in *Tanwar* also resolves an important difference in principle and approach to questions concerning the availability of relief against forfeiture that had emerged in *Stern v McArthur* in the judgments of Mason CJ and Gaudron J. This is considered further below.

In *Tanwar*, three contracts for the sale of land were terminated by the vendors on 26 June 2001 consequent upon a failure to complete by 4.00 pm on 25 June 2001. (Earlier notices of termination in respect of an earlier nominated settlement date had been withdrawn). At the settlement conference fixed for 25 June 2001, the solicitor for the proposed second mortgagee reported that funds which were to be used in financing the purchase had yet to be transferred from Singapore by reason of various regulatory checks by Singaporean authorities. The funds were received the following morning. The court held that this circumstance did not render the issue of the notice of termination unconscientious, it being said that the vendors had withdrawn the earlier Notices in return for the assumption by Tanwar of an obligation to complete in unqualified terms (i.e. not 'subject to finance') and the fact that there could be a failure by a third party to provide finance was reasonably within the contemplation of Tanwar.

As noted above, in reaching this conclusion, the court highlighted the difference in *Stern v McArthur* between the approach of Gaudron J, one of the members of the majority in that case, and that of Mason CJ, in the minority. In his judgment, Mason CJ had emphasised that, for there to be a relevant case of unconscientious conduct, the vendor must have in some way caused or contributed to the breach by the purchaser (as had occurred in *Legione v Hately* (1983) 152 CLR 406) whereas Gaudron J considered that unconscientiousness could exist in the absence of any contributing conduct by a vendor in circumstances where a house had been built on the land, the land had increased in value and the default was relatively insignificant, with monthly instalment payments being resumed after the breach and purported termination. Her Honour had focused on the absence of prejudice to the vendors in circumstances where an order for specific performance would have secured all that the vendors had contracted for.

'The decision in *Tanwar*, in particular, contains important observations in respect of the phrase 'unconscionable conduct'. The joint judgment described it as a phrase which was apt to mislead in several respects.'

In *Tanwar*, the court stated that the approach that had been articulated by Mason CJ in *Stern* should be accepted. 'At least where accident and mistake are not involved', said the court, 'it will be necessary to point to the conduct of the vendor as having in some *significant* respect caused or contributed to the breach of the essential time stipulation' (emphasis added). One consequence of this clear statement is that, where a purchaser has entered into possession and constructed or commenced to construct a building prior to completion, in the absence of any significant act on the vendor's part occasioning or contributing to the breach, the fact that a vendor may receive a windfall gain will not render an act of termination unconscientious. Improvements to property unconnected with any act of inducement or representation by a vendor (or a genuine case of 'accident' or 'surprise' - discussed below) will be 'at risk of operation of the contractual provisions for termination'.

The decision in *Tanwar*, in particular, contains important observations in respect of the phrase 'unconscionable conduct'. The joint judgment described it as a phrase which was apt to mislead in several respects:

First, it encourages the false notions that (i) there is a distinct cause of action, akin to an equitable tort, wherever a plaintiff points to conduct which merits the epithet 'unconscionable'; and (ii) there is an equitable defence to the assertion of any legal right, whether by action to recover a debt or damages in tort or for breach of contract, where in the circumstances it has become unconscionable for the plaintiff to rely on that legal right.

Secondly, and conversely, to speak of 'unconscionable *conduct*' as if it were all that need be shown may suggest that it is all that can be shown and so covers the field of equitable interest and concern. Yet legal rights may be acquired by conduct which pricks no conscience at the time. A misrepresentation may be wholly innocent. However, at the time of attempted enforcement, it then may be unconscientious to rely upon the legal rights so acquired. To insist upon a contract obtained by a misrepresentation now known to be false is, as Sir George Jessel MR put it in *Redgrave v Hurd* (1881) 20 Ch D 1 at 12-13, 'a moral delinquency' in a court of equity.

'It was concluded that equity would not relieve where 'the possibility of the accident might fairly be considered to have been within the contemplation of the contracting parties'.'

Thirdly, as a corollary to the first proposition, to speak of 'unconscionable conduct' may, wrongly, suggest that sufficient foundation for the existence of the necessary 'equity' to interfere in relationships established by, for example, the law of contract, is supplied by an element of hardship or unfairness in the terms of the transaction in question, or in the manner of its performance. The vendors contend that the thrust of the submissions by Tanwar reveals this weakness in its case.

It also emerges from the joint judgment in Tanwar that the mere consideration of the series of 'subsidiary questions' identified in the joint judgment of Mason and Deane JJ in *Legione v Hately* (1983) 152 CLR 406 at 449 as of particular importance for the purposes of analysing a claim for relief against forfeiture will not be determinative. After *Tanwar*, an affirmative answer to the first of these questions - 'Did the conduct of the vendor contribute to the purchaser's breach?' - should now be seen as a necessary but not sufficient condition for the grant of relief against forfeiture.

As a subsidiary aspect of its argument, the appellant in *Tanwar* appealed to the doctrine of 'accident' as another basis for providing relief against forfeiture. The question was posed in the joint judgment as to what remained of the subject matter of the doctrine of 'accident' in modern equity. It was concluded that equity would not relieve where 'the possibility of the accident might fairly be considered to have been within the contemplation of the contracting parties'. On the facts of *Tanwar*, as has been seen, the court held that the fact that there might be a failure by a third party to provide finance was reasonably within the contemplation of Tanwar. It was bluntly stated that 'equity does not intervene to prevent the effect of exercise of a vendor's right to terminate their contract'.

In *Romanos*, it was stated that inadvertence with respect of the time for payment 'without more' would not justify relief by reason of the doctrine of 'accident'. Similarly, the court reiterated that a 'windfall' as a result of the rise in the value of land, improvements to it or the securing, as in *Romanos*, of certain development approvals in respect of it, will not alone warrant relief. For a court of equity to interfere through the grant of relief on this basis would amount to the illegitimate rewriting of the contract based on idiosyncratic notions of fairness.

From the periphery to the centre

A new role for Indigenous rights

*By Professor Larissa Behrendt **

On 18 November 2003, the Chief Minister of the Australian Capital Territory will announce that they will be enacting a human rights Act. This legislation will be the first Bill of Rights in Australia and with this modest Act, that leaves the power to define, balance and override rights to the parliament, the ACT is seeking to bring a standard of rights protection into decision making within its jurisdiction.

I sat on the ACT Bill of Rights Consultative Committee which undertook a consultation process within the community to canvas views about whether there should be a Bill of Rights, what form it should take, and what rights it should include. The consultations revealed a scepticism, one might almost say a fear, about the recognition and protection of the rights of minorities. Feedback from those consultations included comments such as 'if a Bill of Rights includes the protection of Indigenous people, it will not be for the benefit of all Canberrans' and 'if a Bill of Rights mentions Indigenous rights and the rights of other minorities it will have no legitimacy.'

What is noticeable in these responses is a meanness of spirit about the protections that a democratic society can offer. It is shaped by a mentality which protectively guards the rights and benefits that are enjoyed by many citizens within a community and seems to assume if those rights are extended to the poor, the culturally distinct and the historically marginalised that they - middle-class, Anglo-Celtic, Christian - will be worse off. This world view sees the recognition and protection of the rights of the disadvantaged and culturally distinct as being in direct competition with their own position. It is this 'us' and 'them' mentality, this ability to psychologically divide parts of our community off as different and threatening, that is finding its way too often into law making and policy making. The effect of this psychological divide is to leave some sectors of the community - usually the most vulnerable, culturally distinct and the historically marginalised - less protected from rights violations than others...

The framers of our Constitution believed that the decision-making about rights protections - which ones we recognise and the extent to which we protect them - were matters for the parliament. They discussed the inclusion of rights within the Constitution itself and rejected this option, preferring instead to leave our founding document silent on these matters. It was also a document framed within the prejudices of a different era - of its own kind of xenophobia, sexism and racism.

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'The inequities perpetuated by the silences in the Constitution have given Australians cause to reflect upon our foundation document in the past. The feeling that this canonical document did not reflect the values of contemporary Australian society gave momentum to the 1967 referendum.'

The 1997 High Court case of *Kruger v The Commonwealth*[2] assists in making this point. This was the first case to be heard in the High Court that considered the legality of the formal government assimilation-based policy of removing Indigenous children from their families. In *Kruger*, the plaintiffs had brought their case on the grounds of the violation of various rights by the effects of the Northern Territory Ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs had claimed a series of human rights violations including the implied rights to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion contained in sec 116 of the Constitution. They were unsuccessful on each count, a result that highlighted the general lack of rights protection in our system of governance and the ways in which, through policies like child removal, there was a disproportionately high impact on Indigenous people as a result of those silences.

The inequities perpetuated by the silences in the Constitution have given Australians cause to reflect upon our foundation document in the past. The feeling that this canonical document did not reflect the values of contemporary Australian society gave momentum to the 1967 referendum. The result of that Constitutional change though is often misunderstood. It has been held out as the moment at which Indigenous people became citizens or Aboriginal people attained the right to vote. It did neither. In reality, the 1967 referendum did two things:

- It allowed for Indigenous people to be included in the census, and
- It allowed the federal parliament the power to make laws in relation to Indigenous people.

Marilyn Lake, in her biography of Faith Bandler,[3] goes some way towards explaining why those who advocated so hard for the constitutional change thought it went further than it did. The notion of including Indigenous people in the census was, for those who advocated a 'yes' vote, more than just a body-counting exercise. It was thought that the inclusion of Indigenous people in this way would create an imagined community and as such it would be a nation-building exercise, a symbolic coming together. It was hoped that this inclusive nation-building would overcome an 'us' and 'them' mentality.

Sadly, this anticipated result has not been achieved. One only

need look at the native title debate to see how the psychological divide has been maintained and used to produce results where Indigenous peoples rights are treated as different and given less protection. One of the fundamental vulnerabilities of the native title regime, as it currently exists, is that the interests of the native title holder(s) are treated as secondary to the property interests of all other Australians. The rhetoric of those antagonistic to native title interests often evokes the nationalistic myths of white men struggling against the land to help reaffirm three principles in the public consciousness:

- that when Aboriginal people lose a property right, it does not have a human aspect to it. The thought of farmers losing their land can evoke an emotive response but Aboriginal people can not;
- that when Aboriginal people gain recognition of a right, they are seen as getting something for nothing rather than getting protection of something that already exists. They are seen as 'special rights'; and
- that when Aboriginal people have a right recognised, it is seen as threatening the interests of non-Aboriginal property owners in a way that means that the two interests cannot co-exist. In this context, native title is often portrayed as being 'unAustralian'.

'The statistics of increased Indigenous incarceration alone show that there continue to be inequalities in the way that seemingly neutral laws - particularly those in the area of criminal justice - impact on different sectors of the community.'

The other lesson that can be learnt from the 1967 referendum is that the federal parliament cannot be relied upon to act in a way that is beneficial to Indigenous people. It was thought by those who advocated for a 'yes' vote that the change to section 51(xxvi) (the 'races power') of the Constitution to allow the federal government to make laws for Indigenous people was going to herald in an era of non-discrimination for Indigenous people. There was an expectation that the granting of additional powers to the federal government to make laws for Indigenous people would see that power be used benevolently. This has, however, not been the case and we can see just one example of this failure in the passing of the *Native Title Amendment Act 1998* (Cth), legislation that prevented the *Racial Discrimination Act 1975* (Cth) from applying to certain sections of the *Native Title Act 1993* (Cth)[4].

When analysing the failure of the amendment of the races power to ensure benevolent and protective legislation as its proponents envisaged, one is reminded of the original intent of the framers to leave decisions about the rights to the legislature. History provides us with many examples of where the legislature has overridden recognised human rights or has passed legislation that protects rights only to override them when there is political motivation to do so.

At the hand-over of the final report by the Council for Aboriginal Reconciliation, the Prime Minister announced that his government rejected the recommendation of a treaty - the centrepiece of a rights agenda - with Indigenous peoples preferring instead to concentrate on the concept of 'practical reconciliation.' It is a policy that targets, only through policy, socio-economic areas such as health, education, housing and employment.[5] To this end, the federal government boasts of the amount it spends on 'Indigenous-specific programs' - over $2 billion. It is less vocal about detailing that those 'Indigenous specific programs' include funding for defending the stolen generations case brought by Peter Gunner and Lorna Cubillo in the Northern Territory[6] and the $16.3 million plus a year that is spent by various areas of the government that are actively trying to defeat native title claims.

'Practical reconciliation' targets problems as they emerge and find favour with the broader community. It does not seek to attack the systemic and institutionalised aspects of the impediments to socio-economic development and will not create the infrastructure and capacity needed to reduce the occurrence and perpetuation of social and economic problems.

The biggest casualty in the rise of 'practical reconciliation' as a policy has been the rights agenda. The rights agenda has not only been marginalized, it has been increasingly seen as irrelevant. It is a compelling rhetorical claim too, that esoteric talk of constitutional change does not put food on the table or end high levels of violence in the community. It is easy, when placed in that light, to dismiss the focus on the human rights agenda as the privilege of the elite. This is especially so when we see articles published every day noting the increase in incarceration rates, the high levels of violence within Indigenous communities and the continuing poor levels of health and access to education.

But we should not keep focusing only on the federal sphere. The statistics of increased Indigenous incarceration alone show that there continue to be inequalities in the way that seemingly neutral laws - particularly those in the area of criminal justice - impact on different sectors of the community. One of the key obstacles in finding solutions in this realm is that the populist law and order agenda is always going to be at odds with the recommendations for flexible, innovative and alternative methods of sentencing and dealing with offending behaviour. The tough on crime laws are impacting on many people who are poor and marginalised, convicted not of serious offences but for crimes against property or driving offences. For example, when changes were made last year to the Bail Act, it was foreseeable, and pointed out to government, that the changes to the legislation were going to disproportionately impact on Indigenous people. The main mechanism put in

place to counter this was to employ more Indigenous bail officers. This is an example of the episodic, piecemeal and ad hoc way in which the disproportionate impact on Indigenous people is dealt with in the criminal justice system. It is an approach that seeks to tinker around the margins with impacts on Indigenous people rather than taking an approach that seeks to address the structural and institutional problems that have been identified as contributing to the overrepresentation of Indigenous people - particularly women and children - in the criminal justice system.

In rejecting the notion that only the rights framework or only policy initiatives offer the way forward, we should be careful not to interpret calls for one as a rejection of the other or we will continue with our inability to link targeted policy and long-term solutions. Instead, we should see the relationship between the two as a trajectory with policy initiatives at one end and structural changes on the other. Policies will only help to achieve long-term change if they work towards a broader and systemic vision of change at the same time as they target inequality and identify problems in the short term. Similarly, long-term strategies are ineffective unless the strategy for achieving them includes considered and targeted policy...

The challenge for those who believe in the importance of equality in society and value the integrity of institutions is to link the law reform needed with a 'hearts and minds' change amongst middle Australia. This is a challenge for Aboriginal and non-Aboriginal Australia alike. And our roles are quite different at this point in our country's history.

For Black Australia, the challenges are primarily the clear articulation of the political, social and cultural agenda. We need to be able to explain to all Australians what our view of a reconciled Australia should be. We need to be able to better communicate our vision of the sort of lives we want for our families, our community and our descendants. In order to achieve change, the end goal must be clearly articulated and there is common ground about what this vision is. When Aboriginal representatives are set up against each other - Noel Pearson against Geoff Clark; Aden Ridgeway against Michael Mansell - there is greater difference in the strategy to achieve the vision than in the vision itself.

This vision can be seen in attempts to map out the right to self-determination by Indigenous people. It can be seen in various reports, in community expressions such as the Barunga Statement and in the speeches of our leaders and representatives. It includes the right not to be discriminated against, the rights to enjoy language, culture and heritage, our rights to land, seas, waters and natural resources, the right to be educated and to work, the right to be economic self sufficient, the right to be involved in decision-making processes that impact upon our lives and the right to govern and manage our own affairs and our own communities.

We need to return focus to this agenda, articulate it clearly and discuss it with the rest of Australia. We have a responsibility to do this because we need to be able to clearly answer the question so often asked of us by those in the community who do want to see the disparity between Indigenous and non-Indigenous Australians remedied. They ask: 'What do you want?' and we need to have an answer to that question. As I have already said, when we look at the different ways in which visions of the long term goals are for how we as Indigenous people will live our lives, how our culture will be protected and the opportunities that will be available for our children, there is much shared vision. We need to acknowledge that shared vision, even if we continue to disagree over the best way to achieve it. We need to have the right leaders and representatives to sell that message and we must not attack them the moment they step up to advocate on our behalf.

I believe that the long term agenda as I have explained it briefly above - and I expand upon it in my book, *Achieving social justice* - is not divisive. It is calling for co-existence within the Australian state rather than separation from it. It seeks the recognition and protection of rights that are in the most part enjoyed unquestioningly by all other Australians. It is an agenda that is just, fair and achievable.

For White Australia, the current challenges are even greater as there is more division about the vision of what kind of Australia we should be living in from the non-Indigenous side of the equation. This split is evidence of an identity crisis and finds its current form in the 'culture wars', the fierce debates about the telling of history, the squabbling about numbers killed on the frontier and the debates over the proper legal definition of 'genocide'. These 'culture wars' are not about Aboriginal history because our experience and perspectives remain unchanged by semantic and numerical debates by academics. They are, instead, a battle about white history and, more importantly, white identity.

'The challenge for those who believe in the importance of equality in society and value the integrity of institutions is to link the law reform needed with a 'hearts and minds' change amongst middle Australia.'

It is within this 'war' that White Australians have the most at stake and it is within this 'war' that they cannot afford to remain silent. It is a debate whose results will have a profound influence on the values of our society for years to come and will determine whether we move towards tolerance, acceptance, co-existence and diversity or whether we continue to move towards intolerance, suspicion, fear and conformity. It is because the stakes are so high that it has been waged through so many of our cultural institutions, including the

Australian Broadcasting Commission and the National Museum of Australia.

If this 'war' is lost to those who take an insular, xenophobic and exclusionary view, White Australia will not have the generosity of spirit and the necessary civic responsibility in its heart to be the type of society that can treat all of its members - regardless of race, socio-economic background and religious belief - equally, justly and fairly. And non-Indigenous Australia will be unable to take a place beside Aboriginal Australia. It will be unable to look us in the eye while it refuses to acknowledge our past and current experiences. An inability to acknowledge and respect will be a continuing barrier to the creation of an honest and trusting relationship.

It is worth remembering at times like these something that Martin Luther King once said, 'In the end, we will remember not the words of our enemies, but the silence of our friends.' In a similar vein he commented, 'Our lives begin to end the day we become silent about things that matter.'

In his book, *Against paranoid nationalism*, Ghassan Hage describes the difference between a caring society and a defensive one. He writes:

> The caring society is essentially an embracing society that generates hope among its citizens and induces them to care for it. The defensive society, such as the one we have in Australia today suffers from a scarcity of hope and creates citizens who see threats everywhere. It generates worrying citizens and a paranoid nationalism[7].

If we are to have a society that values fairness, equality and justice, we must strive towards the vision of a caring society. In order to do that, we need to move from an 'us' and 'them' mentality and realise that we are, as Indigenous and non-Indigenous people, bound to each other's fate. As a colonised people, we have long understood that we are beholden to the fate of non-Indigenous Australia. But we do not as often enter into the consciousness of Australia's dominant culture the way that we should.

Far from being the special and separate sector of the Australian community, we are its benchmark. The way to measure the effectiveness and fairness of our laws is to test them against the way in which they work for the poor, the marginalised and the culturally distinct. It is not enough that they work well for the rich, well-educated and culturally dominant. This measure of fairness and equity rejects an 'us' and 'them' mentality and holds that our fate and our worth as a society are measured best by how the most disadvantaged within our community fare. By valuing laws, policies and practices that work best because they achieve an equality of outcome, society begins to understand that extending the protections of a democratic society to those who are marginalised does not disadvantage another sector; it actually makes everyone better off.

Indigenous people are the best measure of the fairness of Australia's laws and institutions. As an historically marginalised, culturally distinct and socioeconomically disadvantaged sector of the Australian community, our treatment within Australian society is its success or its condemnation. Viewing Indigenous well-being in this way moves us from the periphery of society's consciousness to its centre. Not only does this erode the 'us' and 'them' mentality, it also moves to a mind-set that sees the transmission of the benefits of a democratic society to the disadvantaged as a transaction that will enrich society as a whole.

This is a huge challenge at this time in our history. Indigenous experience currently illustrates that the recognition and protection of rights is still vulnerable to the whims of the legislature and at the moment it is a parliament that is most influenced by the ebb and flow of the tide of public opinion.

'The way to measure the effectiveness and fairness of our laws is to test them against the way in which they work for the poor, the marginalised and the culturally distinct.'

But there are at least two ways that the NSW jurisdiction could begin to make that shift. The first is a small but simple way. When the NSW parliamentary inquiry rejected a Bill of Rights for this jurisdiction, it recommended that a parliamentary committee be established to scrutinise Bills as they came before parliament to advise on the extent to which legislation will breach human rights. To this end, the Legislation Review Committee has already been established and it is mandated to report on whether Bills trespass on 'personal rights and liberties.' Like similar committees in other jurisdictions, the work of the committee is not guided by reference to a document of accepted and agreed rights and is not required to pay particular attention to the impact on Indigenous people. It is within the work of such committees that the principle of using the impact on Indigenous people as the litmus test of fairness could be implemented.

The second example would require more commitment. The Aboriginal Justice Advisory Council has been running a trial in Nowra of circle sentencing, an alternative approach to dealing with juvenile offenders. The results of the trial to date have been encouraging and pilots are being undertaken in other parts of New South Wales. This is a classic example of an innovative mechanism that has been explored to assist with the problem of the disproportionate number of Indigenous youth who have contact with the criminal justice system. It offers a way of dealing with offending behaviour that is focused on building a sense of personal responsibility and strengthening strong community ties. Part of the failure of pilot programs to provide long-term solutions even when they are successful in

their initial stages is that they often fail to attract long-term or broad political and economic support. Circle sentencing should not just be viewed as a mechanism that benefits Indigenous people. The fact that it reduces recidivism and contact with the criminal justice system for Indigenous children should see its extension across Indigenous communities in New South Wales and across the broader community as well. If the process is working for Indigenous children, who are often socio-economically disadvantaged and living in a culturally distinct community, there must be benefits of such a process for non-Indigenous children. It is a process that should be attracting the same level of commitment that can see the construction of four new prisons.

As someone who has felt the privileges of education and constant employment, who has never wanted for food or feared violence within my home, I have a responsibility to those in my community who do. The life I have now is the one that my father's generation fought for on Freedom Rides and at the Tent Embassy. When generations to come look back on this era and ask those hard questions about the way in which our laws treated people and the values they represented, I would at least like to be able to say - as my father and his peers can say when his generation is put under the same scrutiny - that I did not remain silent. It is my greatest wish that enough people feel the same civic responsibility to pass the privileges we take for granted on to those in our society who are different and who have less.

1 Michael Pusey. *The experience of middle Australia: The dark side of economic reform*. Port Melbourne, Cambridge University Press, 2003. At p.41

2 *Kruger v. The Commonwealth* (1997) 190 CLR 1

3 Marilyn Lake. *Faith: Faith Bandler, gentle activist*. Sydney: Allen & Unwin, 2002.

4 In addition, we have seen the High Court avoid the question of whether the races power can only be used to promote the rights of Indigenous people in *Kartinyeri v. Commonwealth (the Hindmarsh Island Bridge case)* (1998) 195 CLR 337.

5 John Howard. Address presented at the Presentation of the Final Report to Federal Parliament by the Council for Aboriginal Reconciliation, Canberra, 7 December 2000. http://www.pm.gov.au/news/speeches/2000/speech581.htm at 30 October 2001.

6 *Cubillo v Commonwealth* (2000) 103 FCR 1

7 Ghassan Hage, *Against paranoid nationalism: Searching for hope in a shrinking society*. Annandale, Pluto Press, 2003. At p.3.

The Guantanamo Bay scandal*

By Ian Barker QC

He who sacrifices freedom for security is neither free nor secure

Benjamin Franklin

For parts of this article I have drawn on papers delivered by two American lawyers at The Hague in August 2003. The occasion was the 17th Annual Conference of the International Society for the Reform of Criminal Law[1].

There has been a sustained indifference by Australian government politicians, in particular the former attorney-general, Darryl Williams AM QC, and the present Attorney – General Mr Ruddock, to the plight of two Australian citizens amongst those held by the US military in the infamous concentration camp established at Guantanamo Bay, Cuba. The manner of detention is in defiance of international and domestic US law, and the proposed 'trials' by military tribunals will pay no more than a passing nod and wink to accepted legal procedures in civilised countries, whether common law countries or otherwise.

'Violation of the 1949 Geneva Conventions and their additional protocols of 1977 is immediately apparent.'

The US Government, followed by our own government, seeks to justify the process by invoking President Bush's *Military Order* of 13 November 2001[2] by which any foreign national designated by the President as a suspected terrorist, or as aiding terrorists, can potentially be detained, tried, convicted and executed without a public trial or adequate access to counsel, without the presumption of innocence, without proof beyond reasonable doubt, without a judge or jury, without the protection of reasonable rules of evidence and without a right of appeal. Whether or not a person detained is tried, he can be held indefinitely, with no right under the law and customs of war, or the US Constitution, to meet with counsel or be told upon what charges he is held.

Violation of the 1949 Geneva Conventions and their additional protocols of 1977 is immediately apparent.[3] The Conventions provide rights to prisoners of war in armed conflict, including the right not to be secretly and indefinitely detained and the right not to be subject to excessive or inhumane interrogation. It is not possible for the public to know what methods of interrogation are employed upon prisoners in the US concentration camp. Secrecy is one of the obvious evils of the process.

Detention of prisoners of war, subject to protection against gross violations of human rights such as those inflicted on prisoners in World War II, is obviously justifiable, provided it is limited to the duration of the war. There is no such limitation on the detention of Hicks and Habib, or the others at Guantanamo Bay. The 'War on Terrorism' is incapable of definition or even conceptual boundary and is an expression so vague, and deliberately so, that it will mean whatever any Government wants it to mean from time to time. To quote

Al-Qaeda and Taliban detainees at Camp X-Ray, Guantanamo Bay, Cuba.
Photo: US Department of Defense / News Image Library

Cowdery QC, it seems to be a declaration of war against an abstract noun[4].

Prisoners of war are entitled by the Conventions to be defined as such by a competent tribunal. International law requires a clear definition of the enemy, its territory, and the duration of hostilities, after which detention becomes illegal. Article 9 of the Universal Declaration of Human Rights of 1948 proscribes arbitrary arrest detention or exile, and Principle 18 of the United Nations' *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment* requires access to legal counsel by those detained. The US Government ignores all this at Guantanamo Bay. The prisoners are held outside the USA, in a legal vacuum, upon the basis, so it is said, that they are not prisoners of war, but 'enemy combatants'. The expression 'enemy combatants' seems to be used interchangeably with 'unlawful enemy combatants' and is accepted without question by the Australian Government as a legal justification for the imprisonment of Hicks and Habib. The US Government claims that once a person is designated an 'enemy combatant' he can be detained indefinitely with none of the rights accorded by the Geneva Conventions, the Universal Declaration of Human Rights or the International Convention on Civil and Political Rights (which became effective in 1976) or the United Nations' *Body of Principles*. In their brief in *Padilla v Rumsfeld* pending in the USA in the Second Circuit, the attorneys for the US Government submitted 'the laws and customs of law recognise no right of enemy combatants to have access to counsel to challenge their wartime detention'[5].

Editor's note:

This article, and the following response by the Attorney-General, the Hon Philip Ruddock MP, was written before 25 November 2003, when it was announced that the Australian Government had 'reached an understanding with the US concerning procedures which would apply to possible military commission trials of the two Australians detained at Guantanamo Bay, David Hicks and Mamdouh Habib'.

David Hicks whilst fighting in Kosovo. Photo: News Image Library

The expression 'enemy combatant' as now used by the US Government seems to be a compound of 'lawful' and ' unlawful' combatants, deriving from a judgment of the US Supreme Court, in 1942, in *Ex parte Quirin* Et Al, 317 U.S. 1, 63 S.Ct 2 (1942). The case involved the legality of trial by a military tribunal of eight German saboteurs who were captured upon secretly entering the USA after the declaration of war between the USA and the German Reich. The men were German soldiers taken to America in two submarines. Their orders were to destroy war industries and war facilities in America. They were charged with specific offences against the *Articles of War*. The prisoners' contention was that the President's order requiring trial by military tribunal was unconstitutional and they were entitled to trial by jury. Relevant to present discourse is the court's holding (at p.30) that

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

The circumstances of *Quirin* are far removed from the present cases. Nothing in the judgment provides support for the creation of a class of prisoners captured on the battlefield outside America categorised as 'unlawful enemy combatants', nor any support for secret indefinite detention, without access to counsel, by those captive. The reasoning used to justify the incarceration of prisoners at Guantanamo Bay is that the invasion of Afghanistan was not an act of war against a nation. It was part of a wider 'war' against an undefined (and undefinable) enemy, apparently being a conflict outside the previously understood definition of war, and therefore no rules govern the treatment of prisoners.

In making the order the President claimed the authority of a joint resolution of Congress: *Authorization for Use of Military Force* Pub L. No. 107 – 40, 115 Stat 224 (Sept. 18, 2001). The Act was a response to the atrocity of 11 September 2001, its constitutional underpinning being US Constitution Article 1, section 8 and Article II, section 2.

'The great problem for Hicks and Habib is that those held at Guantanamo Bay are there for as long as the military chooses, regardless of the duration of the so-called war against terrorism (if it ever ends).'

On 8 January 2003 the US 4th Circuit Court of Appeals in *Hamdi v Rumsfeld* considered the position of an American citizen captured in Afghanistan and held by the military as an 'enemy combatant'. The court upheld Hamdi's right *as an American citizen* to require the government to justify his continued detention, then held that the government's evidence was sufficient. The court looked at *Quirin* and said, amongst other things, at page 13:

> Hamdi and the amici make much of the distinction between lawful and unlawful combatants, noting correctly that lawful combatants are not subject to punishment for their participation in a conflict. But for the purposes of this case, it is a distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case. It is true that unlawful combatants are entitled to a proceeding before a military tribunal before they may be punished for the acts which render their belligerency unlawful… But they are also subject to mere

detention in precisely the same way that lawful prisoners of war are.

But a lawful prisoner of war is entitled to the protection of international law. The great problem for Hicks and Habib is that those held at Guantanamo Bay are there for as long as the military chooses, regardless of the duration of the so-called war against terrorism (if it ever ends). In *Hamdi* the court (at page 19) noted the difficulty in attempting to adjudicate on the length of a war. But the war against terror (or terrorism) may well be a war without end, having the potential to become no more than a war of political opportunism, revived from time to time as it suits the government of the USA.

The President's intention is to hold prisoners who are not US nationals outside the USA so they are beyond the reach of the US judiciary; therefore, so the intention seems to be, they have no right to seek *habeas corpus*. They have been unilaterally categorised as 'unlawful combatants', therefore having no rights at all, notwithstanding that many of them were captured on the battlefield. No enquiry can be made as to their true position because the executive government of the USA has decreed to the contrary. This is made crystal clear by the US Ambassador who said in a letter on 14 February 2002 that 'the US has determined that the Taliban detainees being held at Guantanamo base do not fall within any of the categories of persons set forth in Article 4 of the Geneva Convention who qualify for prisoner of war (POW) treatment. Therefore neither the Taliban detainees nor the al-Qaeda detainees at Guantanamo are entitled to POW status'[6].

Mamdouh Ahmed Habib, wife Maha and two of their children - Photo: Supplied to News Image Library

The Australian Attorney-General accepted the US decision without demur. A senior adviser to the Attorney said in a letter on 6 May 2002 that under President Bush's order the US may hold foreigners detained fighting in Afghanistan for an indefinite period and that 'whether the detainees at the United States military base in Guantanamo Bay in Cuba are being held as prisoners of war is really a matter for the United States'[7].

The Australian government says it was concerned to see that Hicks and Habib were treated humanely. But what if they were not so treated? On the reasoning justifying their continued imprisonment, even if they were subject to daily torture, there is nothing they could do about it beyond asking their captors to desist. It is discomforting, to put it mildly, to find in the twenty-first century the world's greatest democratic nation subjecting its captives to a sort of outlawry, putting them beyond the reach of any legal assistance. This cannot be right.

'No reputable lawyer is likely to undertake the defence of a prisoner when confined by odious military restrictions as to the manner of the defence.'

If *Hamdi* is correctly decided, even if a prisoner could seek *habeas corpus*, all the government need show is that he was captured in battle with the US or its allies, whether or not he could be called an 'unlawful combatant'. If this is right, and it is questionable, the difference between lawful and unlawful combatants could, at Guantanamo Bay, be the difference between life and death. Yet there is not a single step a prisoner can take to have his status properly determined.

A number of US appellate courts have held that prisoners at Guantanamo Bay are outside their jurisdiction and not protected by the Constitution. For example, on 11 March 2003 the Court of Appeals for the District of Columbia held it had no jurisdiction to grant *habeas corpus* holding that the constitution did not entitle the detainees to due process[8]. On 10 November 2003 the Supreme Court agreed to hear argument about the issue of jurisdiction.

A consequence of the 'enemy combatant' or 'unlawful combatant' classification is that the military claims the further power to try the prisoners for special offences by special tribunals; such trials may result in the death penalty. The proposed tribunals, whatever minor alterations may be made to the process at the request of governments, will surely be instruments of mere farce. There is no guarantee of public trials. The prosecutor will be from the military. The tribunal

members will be from the military. Chief defence counsel will be from the military. Cases will be proved on evidence admissible by no recognisable rule of evidence but which the tribunal holds 'has probative value to a reasonable person'. Hearsay evidence, no matter how remote, may be admitted.

Prosecutors will not be required to establish any chain of custody of evidence, from creation to tender, and evidence deemed sensitive to security may be admitted by the tribunal but kept secret from the defendant. Communications between counsel and accused will not be confidential. Even if acquitted, a prisoner may continue in indefinite detention.

There will be no appeal, except to the Commander In Chief, to whom all the others are beholden (and he has already publicly proclaimed the prisoners to be 'bad men'). This is in marked contrast to the procedure governing the prosecution of service people before courts martial according to the US *Uniform Code of Military Justice*. A convicted person may appeal to the US Court of Military Appeals, consisting of five civilian judges and thence to the Supreme Court.

A person to be tried may, at his own expense, employ outside counsel. The prospect of any prisoner at Guantanamo Bay being able to afford outside counsel is doubtful. In any event, no reputable lawyer is likely to undertake the defence of a prisoner when confined by odious military restrictions as to the manner of the defence. The restrictions on defence counsel imposed by *Military Commission Instructions* raise profound questions of legal ethics. On 2 August 2003 the Ethics Advisory Committee of the National Association of Defense Lawyers of the USA determined (in part) as follows:

> …it is unethical for a criminal defense lawyer to represent a person before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. Defense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission[8]

The essential problem is that defence counsel will be required by *Military Commission Instructions* (MC1 – 5) to sign an agreement to comply with all applicable regulations or instructions for counsel including any rules of court for conduct during the course of the proceedings. Breach of the agreement could itself be a criminal offence. It includes the following acknowledgements on the part of defence counsel:

- counsel understands that communications with the client may be subject to monitoring or review by government officials *(confidentiality and client legal privilege are thereby extinguished, even though evidence derived from such eavesdropping cannot be used in proceedings against the accused)*;
- counsel shall reveal to the Chief Defense Counsel (a military judge advocate) and any other appropriate authorities, information relating to the representation of the client which counsel thinks is reasonably necessary to prevent the commission of a future criminal act likely to result in death or substantial bodily harm or significant impairment of national security *(counsel thus undertaking to inform on his or her own client)*;
- counsel waives the client's ability to test the constitutionality of the proceedings in a civilian court *(thereby abandoning one of the client's most fundamental rights and at the same time ensuring the proceedings remain concealed from judicial scrutiny)*;
- once proceedings have begun counsel will not leave the site of the proceedings without approval of the Appointing Authority or Presiding Officer *(thereby abandoning the lawyer's freedom of movement)*;
- counsel will make no public or private statements regarding closed sessions or about classified material *(not even to the client)*.

These are but some of the impediments erected by the government of the US in the way of the adequate defence of prisoners to be tried at Guantanamo Bay. And the brave lawyer who undertakes a defence subject to these preposterous restrictions will, if he or she does not abide by the agreement, be liable to criminal prosecution under U.S.C. : 1001.

The tribunals will consist of three to seven military officers, and will be able to convict on the verdicts of two thirds majorities (except where the death penalty is involved in which case unanimity of seven will be required). It is worth remembering that Australia attained trial by jury after a difficult fight. The first criminal tribunals were established in 1788 in New South Wales and consisted of a judge advocate and six military or naval officers who could convict by majority. The system changed in 1824 when the Supreme Court in criminal cases consisted of the chief justice and seven military or naval offices. The system was potentially corrupt, because the colony's governor could direct the attorney general to prosecute, yet was usually the commanding officer of most of the tribunal members. (On one memorable occasion in 1827 Governor Darling threatened retribution against army officers who declined to convict the lawyer Dr Wardell of seditious liable).[9] There was no appeal. On any view, the same sort of problems are apparent in the proposed US trials. It was not until 1839 that we acquired the unrestricted right of trial by jury in indictable criminal cases, and not until late in the nineteenth century that an accused person had the right to appeal. All this seems to be overlooked by our government in its consideration of the position of Hicks and Habib.

It is not easy to see how any rational person, particularly the Attorney-General of Australia, could accept as reasonable the conduct of the USA at Guantanamo Bay. The detention interrogation trial and sentence of prisoners remains entirely with the executive. The judicial arm of government is excluded. The great irony is that the USA holds itself out as a country in which the separation of powers between parliament, the executive and the judiciary is an all important guarantee of freedom. The present abuse of executive power by the President of the United States demonstrates the fragility of the whole concept.

To many, including me, it is a matter of profound embarrassment that the government of Australia is so ready to accept without serious question the gross violations of international and domestic law already committed, and proposed, in respect of two Australian citizens. Taking a wider view, if the US Government makes exceptions in favour of, say, Australian or British prisoners, the process becomes even more repugnant. I do not understand why the Australian Government has not protested at the very fundamentals of the whole process of detention and proposed trials.

Mr Howard now says he will not seek the repatriation of Hicks and Habib because they have not offended against Australian law. Presumably, if guilty of treason they would be welcomed back. The government continues to say it is unconcerned that the prisoners are kept in isolation and denied the rights of prisoners of war, and must be dealt with by American military tribunals. One only has to consider the composition and procedures of the proposed tribunals to see they are intended not to try but to convict. In such kangaroo courts the onus of proof and proof beyond reasonable doubt become meaningless concepts. It is sad that Australian nationality means so little to the Australian government.

1 Dr Saby Ghoshray 'Prosecution or Persecution: Analysing Defendant's Rights and Fairness of US Military Tribunals within the Framework of International Law', and John Wesley Hall Jr. who addressed on the 'Opinion of National Association of Criminal Defense Lawyers' 2/8/2003.

2 'Detention, treatment, and trial of certain non-citizens in the war against terrorism' (66 F. R. 57833).

3 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field of 12 August 1949, 75 U.N.T.S. (1950) 31: Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949, 75 U.N.T.S. (1950) 85; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. (1950) 135. Geneva Convention Relative to the Protection of civilian Persons in Time of War of August 12, 1949; 75 U.N.T.S. (1950) 287. There are 190 states party to the Geneva Conventions.

Protocol Additional to the Geneva conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, 1125 U.N.T.S. (1978).

Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts of 12 August 1949 and 8 June 1977, 1125 U.N.T.S. (1978) 609.

Article 118 of the Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (the Third Geneva Convention), provides that 'prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.'

4 A paper delivered at the conference of NT Criminal Lawyers Association Port Douglas in June 2003.

5 Mark Hamblett 'Government argues Jose Padilla has few rights' *NY Law Journal* 29/7/2003.

6 J Thomas Schieffer to Mrs JR Walters

7 Phoebe Dunn to Mary Walters

8 *Odah et al v USA* & *Ragul v Bush*

9 The committee went on to say that it would not condemn lawyers who undertook to represent persons accused before military commissions, because some might feel an obligation to do so, at the same time warning of the 'serious and unconscionable risk' involved in violating the required agreement.

10 *R v Wardell (No. 3)* 1827 Decisions of the Superior Courts (Macquarie University).

A response from the Commonwealth Attorney-General, the Hon Philip Ruddock MP

Far from the 'sustained indifference' which Mr Barker asserts the government has shown towards Mr Hicks and Mr Habib, the government has always been concerned that Australian detainees held in United States custody at Guantanamo Bay receive humane treatment and, if tried, receive a fair and transparent trial.

We continue to discuss the military commission process with US authorities and this matter has been raised at the highest political levels. The Prime Minister discussed the military commission process with President Bush during the President's October visit to Australia. The Prime Minister told the President that he would like to see the process of consultation between our two countries brought forward and accelerated.

The military commission rules have not been changed for Mr Hicks. Rather, the government has clarified, and continues to clarify, with the United States how the military commission process will be applied to the case of Mr Hicks. This has included seeking an assurance from the United States, which the US has granted, that he will receive no less-favourable treatment than any other non-US citizens who may be tried by military commission. If Mr Habib is nominated as eligible for trial, the government will do the same in his case.

'The United States has said that detainees will be released when they are no longer of law enforcement, intelligence or security interest. Several detainees have already been released on those grounds.'

The rules governing the military commissions provide fundamental protections and legal guarantees for accused persons. Contrary to Mr Barker's assertions, these include the right to representation by defence counsel, a presumption of innocence, a standard of proof beyond a reasonable doubt, the right to obtain witnesses and documents to be used in their defence, the right to cross examine prosecution witnesses and the right to remain silent with no adverse inference being drawn from the exercise of that right.

In addition to the fundamental procedural guarantees included in the military commission process, and as a result of the government's detailed discussions with the US, Mr Hicks will benefit from the following:

- The US will not seek the death penalty in his case.
- An Australian lawyer with appropriate security clearances may be retained as a consultant to Mr Hicks's legal team at his request, following approval of military commission charges. His direct contact with such a lawyer will be further discussed with US authorities.
- Conversations between Mr Hicks and his lawyers will not be monitored by the US, despite this being allowed in some circumstances by military commission rules.
- The prosecution in Mr Hicks's case does not intend to rely on evidence requiring closed proceedings from which the accused could be excluded.
- Subject to any necessary security restrictions, the trial will be open, the media will be present and Australian officials may observe proceedings.

Should Mr Hicks be tried and convicted, Australia and the US have agreed to work towards putting arrangements in place to transfer him to Australia to serve any penal sentence in Australia in accordance with Australian and US law.

Legal status

Australia and the US have different international legal obligations under the law of armed conflict. While both States are parties to the Geneva Conventions of 1949, Australia is a party to the 1977 Protocol I Additional to the Geneva Conventions, and the US is not. US compliance with its obligations under international law is primarily a matter for the United States.

The position of the United States is that the detainees are unlawful enemy combatants. The law of armed conflict recognises that only certain classes of people are permitted to take part in hostilities as lawful combatants.[1] The US has noted that persons not included in the recognised classes, and who take part in the hostilities, do so unlawfully. They are therefore regarded by the US as unlawful enemy combatants who are not entitled to prisoner of war status as set out in Article 4 of the third Geneva Convention 1949.

The detainees are within US custody. It is for the US to determine under applicable international law whether or not the detainees fall within the categories of persons entitled to prisoner of war status. In cases of doubt persons who have committed belligerent acts are to be treated as prisoners of war until an assessment can be made by a competent tribunal. In the case of the detainees, the United States, as the detaining power, has decided that there is no doubt. While Mr Barker may not agree with this assessment, it does not necessarily follow that a violation of the law of armed conflict is 'immediately apparent'.

Mr Barker says that the United States' war on terror is incapable of definition. He claims this means that detainees will be held indefinitely. The United States Congress has authorised the President to use 'force against those nations, organisations, or persons' that were involved in the terrorist attacks of 11 September 2001 in order 'to prevent future actions of international terrorism against the United States.' The United States has said that detainees will be released when they are no longer of law enforcement, intelligence or security

interest. Several detainees have already been released on those grounds. There is no reason to assume that the United States will hold detainees indefinitely.

Military commissions

Although the use of military commissions is rare, it is not unprecedented. Military commissions are a recognised way of trying persons who may have committed offences against the laws of war. In the United States, military commissions have a long history of use. They were used extensively during the Mexican American War and the American Civil War. They were also used more recently during World War II. In fact, the jurisdiction of military commissions continues to be saved by a provision in the United States Uniform Code of Military Justice.[2]

The rules and procedures governing the military commission process are not the same as those that apply in civil criminal trials. However, fundamental guarantees are included in those rules and procedures. Contrary to Mr Barker's claims, cases must be proved beyond a reasonable doubt. The accused is presumed to be innocent until proven guilty.[3]

The accused will be represented at all times by military defence counsel who have been ordered to provide a 'zealous' defence and who have expertise in military law.[4] An accused may also retain civilian defence counsel. To assume that military defence counsel will act other than in the best interests of their client has no basis in fact.

The rules of evidence applicable in Australian criminal proceedings do not apply to trial before US military commission. Those rules of evidence also do not apply before international tribunals. For example, the rule against hearsay does not apply in trials before the International Criminal Tribunal for the Former Yugoslavia (ICTY). Similarly, the rule against hearsay does not apply in many states with highly developed legal systems which are based on the civil law tradition.

Although certain rules of evidence do not apply to a military commission trial, provision is made to ensure that the accused can examine and refute the evidence presented against him.[5] Under the rules of the military commissions, the defence shall be provided with access to evidence the prosecution intends to introduce at trial and evidence known by the prosecution that tends to exculpate the accused. In addition, the defence shall be able to present evidence in the accused's defence and cross-examine each witness presented by the prosecution.

Mr Barker refers to the written agreement that defence counsel will be required to sign before acting for an accused in military commission proceedings. Yes, military commission instructions provide that communications between a lawyer and his or her client may be monitored. However, Mr Barker fails to point out that those same instructions provide that information derived from such communications will not be used in proceedings against the accused who made or received the communication.[6] Further, the US has already told the Australian Government that in Mr Hicks's particular case, conversations between Mr Hicks and his lawyers will not be monitored.

The written agreement requires a lawyer to reveal to authorities information relating to the representation of the accused where the lawyer reasonably believes it necessary to 'prevent the commission of a future criminal act' that they believe is 'likely to result in death or substantial bodily harm or significant impairment of national security.'[7] Mr Barker objects to this rule. However, the Professional Conduct and Practice Rules of the Law Society of NSW state that a lawyer may disclose information received from a client for the purpose of avoiding the probable commission or concealment of a felony.[8] The potential saving of lives justifies placing a duty on legal professionals in these extraordinary circumstances.

Mr Barker claims that the agreement requires counsel to waive the client's 'ability to test the constitutionality of the proceedings.' There is no such requirement in the agreement. Yes, President Bush's military order of 13 November 2001 states that an accused shall 'not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought' on his or her behalf.[9] That does not mean that a lawyer cannot seek to bring a proceeding in a court on behalf of a detainee. Whether or not the court will find it has jurisdiction over the proceeding is a matter to be decided by the courts.

Yes, there are restrictions on a lawyer's travel and his communications. Given the security issues related to these cases, such restrictions are not unreasonable. Let us not forget that we are living in a world where the security implications of these matters are real and not imaginary.

Before emotive criticisms are levelled at the military commission process, I would urge careful consideration of the facts. The alleged violations of international and domestic law are not as readily apparent or obvious as Mr Barker has asserted.

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1 See for example Article 4, Third Geneva Convention 1949

2 10 USC sec 821

3 Military Commission Order No. 1, Article 5

4 Military Commission Order No. 1, Article 4(C)(2)

5 Military Commission Order No. 1, Article 5

6 Military Commission Instruction No. 5, Annex A, Article II(I)

7 Military Commission Instruction No. 5, Annex A, Article II(J)

8 Law Society of New South Wales, *Professional Conduct and Practice Rules*, Rule 2.1.3

9 Military Order of 13 November 2001, Section 7(b)(2)

The trial of Amrozi

*By Colin McDonald QC**

It was his smile that so appalled Australia and the western world. It was his smile that so alarmed and discomforted Indonesia. It was his smile that became the hallmark of Amrozi bin Nurhasyim after his arrest, during his trial, at the time of conviction and after his sentence to death by firing squad. Although not the mastermind behind the Bali bombings, Amrozi became the most notorious of the many suspects charged. Although the century is just into its third year, the trial of Amrozi is likely to emerge as one of the trials of the century.

The stark, simplistic and unsubtle medium of television magnified Amrozi's smile and carried it into the homes of Australia, Indonesia and the world. Amrozi gained the sobriquet of the 'smiling assassin' and the 'smiling bomber'. Whilst Americans are used to media, especially television, coverage of criminal trials, Indonesia is not. Nevertheless, a component of the lasting notoriety of Amrozi's trial is that it had the world's largest Muslim nation glued to its TV sets awaiting daily the presentation of evidence and defence theatrics.

By the quirky criteria that make for famous criminal trials, Amrozi's trial had most of the elements. The nature and enormity of Amrozi's crimes was staggering by any grisly standard - 202 innocent people, 88 of them Australians, murdered by obliteration and incineration whilst at leisure or at work on a tropical island that had hitherto been known as a paradise of peace and tranquility. Beyond the huge death toll another 325 persons were wounded and injured, some grievously and no less than 423 separate properties were destroyed or damaged. There was intrigue and treachery, intrepid detective work, a manifest lack of remorse and an in-depth trial, a failed appeal, further appeal and constitutional challenge.

Amrozi is escorted to the court room in Denpasar, 6 August 2003.
Photo: AFP Photo / Putu Pastika

'In their presentation of evidence and the mix of witnesses, the prosecutors quietly, deftly proved their case both legally and in the forum of public opinion.'

Beyond the usual ingredients of famous trials, the trial of Amrozi had an extra and compelling element. Like the trial of Eichmann in Jerusalem and the Kosovo trials in the Hague, the trial of Amrozi involved the exposé of the uncivilised devastation of extremism and bigotry. What the trial of Amrozi did was canvass, sometimes in graphic detail, the major contemporary political issue confronting Indonesia, all modern Islamic nations and the western world - the threat of criminals who espouse extremist Islamic views. The trial confirmed that the conflict sparked off by the Bali bombings and the earlier bombings in Jakarta in 2000 concerned itself more with the world of ideas than the battle plans of generals and military interventions.

In a civil law system most evidence is admitted and it is a matter for the judges what weight is to be given to it later. Also, given the Indonesian civil law system, the trial was not characterised by decisive, or triumphant cross examinations. However, in exploring the issue of political terrorism and in the battle of ideas, the trial was sensational. Under the calm guidance of the Chief Judge I Made Karna, a Balinese Indonesian, the five member court examined the evidence carefully and made gentle points concerning religious values, respect for human beings and freedom that was a foil to the irrational bigotry often mouthed by Amrozi.

The trial of Amrozi was important because it demonstrated in the normal public court forum the persuasive capacity of objective evidence and the importance of reason. In selecting witnesses for trial, the prosecutors no doubt had their eye on the wider national and international issues of the threat posed by Islamic extremists. In their presentation of evidence and the mix of witnesses, the prosecutors quietly, deftly proved their case both legally and in the forum of public opinion.

In providing the statement of Mrs Endang Isnanik and calling her testimony, the prosecutors exposed the criminal lie behind the politico/religious slogans of Amrozi and the other Bali bombers. Mrs Isnanik was a mother of three young boys, a Muslim, widowed and left destitute by the bomb blasts. Her husband, Aris Manandar, was incinerated outside the Sari Club. She was quoted as saying - and no doubt a Muslim nation listened to what she said:

> I wanted to show him that he had not only killed foreigners, but Muslims as well. We were also the victims of his terrible crime. But he showed no remorse or regret for his actions, and just sat smiling, and he really broke my heart that day.

Amrozi arrives at the Nari Graha court house in Denpasar for the second day of the trial. Photo: Renee Nowytarger / News Image Library

The testimony of Ms Isnanik and other Muslim witnesses was compelling, not in the way the ample forensic evidence pointed to guilt, but in the wider war of ideas and morals. The testimony reminded Indonesians of all faiths that Amrozi was no freedom fighter. Amrozi's smile and comments were shown for what they were - banal and evil. The smile and the slogans failed to convince the national jury. A skeptical Muslim nation was convinced by the power and weight of the evidence. The Indonesian prosecutors produced a decisive victory in the battle for the hearts and minds of believers and non believers alike. If lack of public protest and the Indonesian national press was any guide, the nation by and large accepted the death penalty as just. The death penalty is a rarity in Indonesia.

Like those who attacked the World Trade Centre in New York on 11 September 2001, the criminals involved in the Bali bombings had three aims: to terrorize Americans and other westerners; secondly, to polarise the world and separate Muslim from non Muslim and thirdly, to undermine the Indonesian Government and the secular state. In acting as they did they certainly achieved their first aim. But the detection and trial of Amrozi helped thwart them in their other two aims.

Indonesia is no stranger to terrorism; it has lived and survived with it since it became a nation. Amrozi and his colleagues follow in a strong tradition in Indonesia of rebellion against the 1945 Constitution and the secular republic. Throughout the 1950s and early 1960s *Darul Islam* movement conducted a guerilla war against the republican government. Some *Darul Islam* supporters were mere opportunistic local bandits, but the hard core of the movement were supporters of an Islamic state which rejected modern representative institutions and sought the imposition of Islamic law by force.

So, Amrozi's motivation, misguided as it no doubt was, has in some ways a history as old as the Republic of Indonesia itself. In bringing Amrozi to justice, the prosecutors were not only bringing an alleged criminal to answer for an alleged crime, they were asserting the power of the secular state to protect itself against Islamic extremists.

Amrozi's trial demonstrated not just the zeal and depth of the commitment of extremists and their threat to security, both physical and political. Amrozi's trial developed an importance far beyond the tactics employed in the Denpasar courtroom.

After recent governmental denials that there was a terrorist problem, the Bali bombings cemented awareness that terrorism did exist in Indonesia. The national government reacted with determination and quiet courage. The task to find the bombers and bring them to justice accelerated. Indonesia welcomed foreign police and forensic expertise in helping to find those responsible.

That there was a trial at all was the result of extraordinary detective work by Indonesian and foreign police. The speed with which arrests were made and the convincing nature of the evidence amassed, both forensic and confessional, was

impressive by any objective international standard. For Indonesia, the trial of Amrozi witnessed a transparency and professionalism in the task of evidence gathering which proved decisive in the trial itself as well as in the formation of public opinion. Non Indonesians are inclined to overlook this important point.

Before the detective work was revealed in cogent evidentiary form and made available for critical assessment by lawyers for Amrozi, Indonesia was awash with conspiracy theories. One theory had it that the Bali bombs were planted by the American CIA itself - a theory more readily accepted in a post colonial society which was well used to western exploitation. Hence, the intense curiosity which surrounded the unfolding of prosecution evidence contributed to the trial's significance.

'In utilising the nation's normal public court processes Indonesia's response to terrorism is in contrast to that of America which has opted for secrecy, open ended detention at Guantanamo Bay and military courts.'

One of the most important aspects of the trial of Amrozi, and not only for debunking conspiracy theories, was the persuasive power of reliable and objective evidence openly exposed in the public hearing. The trial of Amrozi is a timely reminder that in the battle of ideas, open, public hearings with fair proceedings are one of society's most effective weapons against obscure thugs bent on changing national and international systems of government. In utilising the nation's normal public court processes Indonesia's response to terrorism is in contrast to that of America, which has opted for secrecy, open ended detention at Guantanamo Bay and military courts. So far the United States has not brought anyone to trial and Osama Bin Laden has not been caught. However, recently the US Supreme Court has agreed to judicial review of the detentions at Guantanamo Bay.

What must have been of great satisfaction for Indonesia was the stoicism and professionalism of the panel of judges who sat on Amrozi's trial. The judges listened patiently, at all stages of the trial, sometimes in the face of provocation from supporters and the defendant; their conduct of the case was exemplary by any standard. Here was another plus for Indonesia which has endured criticisms for judicial corruption for many years. A nation and a world conditioned by political hype and spin was being persuaded in an open court by the power of evidence which in its content had intellectual persuasion.

The process of gathering evidence for Amrozi's trial forced a re-examination of earlier bombings in Indonesia. Links with the earlier bombings of the Philippine Embassy on 1 August 2000 and the Jakarta Stock Exchange on 13 September 2000 were established and persons charged. Indonesia has become perhaps the first country in the world which can claim success in uncovering the conspiracy behind terrorist bombings and bringing the perpetrators to justice.

Amrozi angered families of the Bali bomb victims when he waved and laughed before the media, giving the thumbs up. Chief Judge I Made Karna, in handing down the death penalty, justified the five member panel's decision in a lengthy judgment on the basis that Amrozi had violated both the anti terrorist laws introduced in 2002 and long established homicide laws. The Chief Judge cited not just the massive loss of life, but referred to the racial and religious elements of the attacks and its effect of undermining Indonesia's secular state policy. He described Amrozi's acts as ' an extraordinary crime against humanity' deserving the ultimate penalty.

The trial of Amrozi demonstrated him to be a misguided, callow criminal. When Amrozi's first tier appeal was dismissed, the nation notionally breathed a sigh of relief. Then Amrozi's lawyers appealed further taking a constitutional point against the conviction based on a retrospective law. Apprehension levels rose. However, the ordinary legal processes were allowed to take their place. The nation awaits a ruling whether Amrozi's conviction is constitutionally valid.

For Australia and the western world there are lessons to be learnt from the Indonesian investigative process and the trial. No amount of military intervention will turn the tide against ignorance and racial and religious bigotry. Too much meddling could well influence public opinion in Muslim countries in the direction of the fundamentalists.

Amrozi's trial is an example of how to deal intelligently with the problem of international terrorism. The trial powerfully helped the cause of moderate Muslims in demonstrating how the Bali bombers had in fact smeared Islam. The strategies and tactics employed by the prosecutors brought home that the ultimate battle in dealing with terrorism is within the world of Islam. Amrozi, his smile and motivation notwithstanding, was shown to be a criminal and not a religious martyr. Importantly, Amrozi showed himself to be bigoted and ignorant.

At an important time in world history, Indonesia, a modern nation used to threats from Islamic fundamentalists has much to offer the wider world in its approach to dealing with the world's major political problem. By the use of normal public criminal processes, Indonesia has shown a way forward in the real war against terror. It has acted with candour and quiet determination. It has utilised its normal judicial processes. It is in this context Amrozi's trial is so significant.

* Colin McDonald QC is a Darwin barristers and former president of the Northern Territory Bar Association.

Transitional justice

The prosecution of war crimes in Bosnia and Herzegovina

*By Janet Manuell and Aleksandar Kontic**

A growing number of local barristers are playing an important role in international criminal law, particularly in the prosecution of war criminals at The Hague. One such barrister is Janet Manuell. In the following article, she and Aleksandar Kontic provide an analysis of the two tiers of war crimes' jurisdiction - the International Criminal Tribunal for the Former Yugoslavia and the Bosnian-Herzegovinan courts - and the efforts to ensure fair war crimes' prosecutions in Bosnia and Herzegovina after the 1992-1995 war.*

International jurisdiction

In May 1993, at the height of the wars in the former Yugoslavia, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (the ICTY)[1]. It did so in response to international outrage at evidence of war crimes being committed with impunity and on a scale unprecedented in Europe since World War II. The statute empowered the ICTY to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991, in accordance with its provisions.

The ICTY was established by the UN Security Council rather than the General Assembly because it was thought that the situation in the former Yugoslavia was too serious to wait for a lengthy ratification process[2]. By characterising the war as a breach of the peace, the Security Council could act immediately under Chapter VII of the UN Charter[3]. Part of the international community's motivation in establishing the ICTY was to prevent further war crimes being committed in the region, particularly against the people of Bosnia and Herzegovina, and Croatia[4].

The ICTY Statute enacted a two-tiered mechanism for the prosecution of alleged war crimes; the first tier is the jurisdiction of the ICTY in The Hague, and the second tier is the national criminal jurisdiction of the states of the former Yugoslavia. The ICTY Statute provides that the respective jurisdictions are to be concurrent, but that the ICTY is to have primacy over the national courts[5].

Once the ICTY was established in The Hague in 1993 it was possible for war crimes investigations and prosecutions to commence immediately. The twin difficulties of the population's understandable pre-occupation with the ongoing wars and the lack of political motivation in the states of the former Yugoslavia to prosecute their own high-level suspects were addressed by the international nature of the ICTY. Since its inception, the ICTY has issued 50 public indictments (some incorporating multiple accused) and one contempt indictment. It has prosecuted more than 50 accused[6] in The Hague in what are, frequently, extremely complex trials[7].

From the outset, it was clear that the ICTY was never going to be able to prosecute every suspect against whom there was sufficient prima facie evidence of the commission of war crimes. Instead, the aim of the ICTY Statute was to prosecute only the key higher-level individuals, namely the military leaders and others who held senior command positions, while it was intended that the lower-ranking suspects would be prosecuted in the national courts[8]. However, in 1993, with various wars still underway, the reality of war crimes prosecutions being conducted in the states of the former Yugoslavia was still a distant prospect.

A Forensic expert removes layers of soil after discovering remains of bodies in a new mass grave near the eastern Bosnian town of Zvornik, 28 July 2003.
Photo: Hrvoje Polan / AFP / News Image Library

*** Janet Manuell and Aleksandar Kontic are Legal Officers in the Rules of the Road Unit, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia.**

Janet Manuell completed her law degree at Sydney University in 1984 and, after completing College of Law, commenced practice in 1986. She was admitted to the NSW Bar in 1990. She practised at the NSW Bar until moving to The Netherlands in 2001, where she commenced employment in the Rules of the Road unit, within the ICTY's Office of the Prosecutor.

Aleksandar Kontic completed his law degree at Sarajevo University in 1986 and worked in law firms in Sarajevo from 1987-1990. In 1989, he passed his Bar examination and commenced work as a sole practitioner in 1990. The main areas of his practice were in criminal and civil law. During the war, Aleksandar worked for UNHCR in Sarajevo from June 1992 until February 1993, before moving to The Netherlands to live. He joined the Rules of the Road unit in 1997, and continues to be employed in the ICTY's Office of the Prosecutor. In 2002, he was awarded a Master of Laws from Amsterdam University.

The views expressed herein are those of the authors alone and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

National jurisdiction

The wars in Bosnia and Herzegovina and Croatia (two former states of the Socialist Federal Republic of Yugoslavia) ended with the signing of the *Dayton Peace Agreement* ('Dayton') on 30 December 1995. A month later, on 30 January 1996, General Djukic and Colonel Krsmanovic, of the Republika Srpska Army, were driving near Sarajevo, the capital of Bosnia and Herzegovina. Extensive damage had been done to road signs in Bosnia and Herzegovina during the war, and a damaged sign caused General Djukic and Colonel Krsmanovic to lose their way. They were arrested at a Bosnian Muslim check-point and, by virtue only of their military positions, were immediately detained on suspicion of having committed war crimes. They were indicted for war crimes a week later, on 6 February 1996, and it was intended that they be prosecuted in Bosnian-Herzegovinan courts.

The ripple effect was immediate. In Bosnia and Herzegovina, there was a series of arbitrary retaliatory arrests and detentions carried out by the formerly opposing forces in the region. Local and national prisoner exchange programs were suspended indefinitely, and the emerging political co-operation between the formerly warring parties was swiftly eroded. The arbitrary arrests constituted a novel and dangerous threat to peace and security in the country; not only was the right of free mobility within the divided country in jeopardy, but there was also the very real prospect of many politically motivated witch-hunt prosecutions and show trials taking place. The death penalty was still, technically at least, an available sentencing option for those convicted of war crimes.

This spate of reciprocal arrests caused serious concern among the Dayton signatories. Dayton had effectively divided Bosnia and Herzegovina into two territorial parts (albeit under a single constitution), one part predominantly Bosnian Muslim and Bosnian Croat (the Federation) and the other, predominantly Bosnian Serb (Republika Srpska). Freedom of travel between the two parts was essential to ensure the viability of the country's division, and any threat to freedom of travel was perceived to be a threat to Dayton itself. Therefore, it was quickly apparent to the Dayton signatories that a mechanism was needed to prevent retributive arrests, by ensuring that arrests of suspects on war crimes charges could be made only if the charges were founded on evidence that satisfied international standards of fairness. As a result of their concern, the signatories gathered again, this time in Rome, to sign what became known as The Rome Agreement, 18 February 1996.

Rules of the Road

When the Rome Agreement was signed on 18 February 1996, Richard Goldstone, who was then the ICTY Prosecutor, agreed to assume responsibility for the administration of Paragraph 5 of the Agreed Measures of the Rome Agreement. That paragraph states:

> Persons, other than those already indicted by the Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action.

'It was quickly apparent to the Dayton signatories that a mechanism was needed to prevent retributive arrests, by ensuring that arrests of suspects on war crimes charges could be made only if the charges were founded on evidence that satisfied international standards of fairness.'

In recognition of the circumstances giving rise to paragraph 5 of the Agreed Measures, that part of the agreement became known as the 'Rules of the Road'. A Rules of the Road unit was established within the ICTY's Office of the Prosecutor (OTP) in order to review each proposed Bosnian-Herzegovinan prosecution. The unit continues to function within the OTP today, although there are now plans to transfer the unit's legal review function to Bosnia and Herzegovina in 2005.

To comply with Paragraph 5, the judicial authorities in Bosnia and Herzegovina have been obliged, since 18 February 1996, to submit all of their proposed war crimes prosecutions to the OTP for legal review. Although Paragraph 5 refers to the arrest and detention of suspects, in practice the prosecution of a war crimes suspect is *only* permissible in Bosnia and Herzegovina if the ICTY's Prosecutor, through the Rules of the Road unit, has first approved the prosecution. Since its inception, more than 1,350 files containing allegations against more than 3,300 suspects have been submitted to the Rules of the Road unit for review.

Prosecuting authorities from each of the three ethnicities in Bosnia and Herzegovina now comply with the Rome Agreement although, historically, there has been patchy co-operation with the Rules of the Road unit. Part of the explanation for this is that war crimes prosecutions were simply one of the many issues to be dealt with in the aftermath of the wars. Also however, some prosecutors and investigative judges from certain Bosnian-Herzegovinan municipalities were loath to submit any files, and resisted war crimes prosecutions in their courts. On the other hand, other prosecutors and judges embraced the Rome Agreement from its first days. There is now a high degree of cooperation throughout the country although, for different reasons, the quality of the files

is often lacking. This may reflect inadequate legal training of local prosecutors in respect of war crimes prosecutions, inadequate investigative or judicial resources, or the reluctance of certain witnesses to testify. It is clear however, that certain files are still being submitted to the Rules of the Road unit where the proposed prosecution is politically motivated and unsupported by the available evidence.

On occasions, the results of a file review by the Rules of the Road unit are made publicly available by the submitting authority, and given considerable local press coverage, usually with adverse comments about the perceived partiality of the ICTY. Often however, public comment is made to indicate that the unit's integrity is in fact well regarded by local judicial officers and politicians[9].

Notwithstanding the occasional criticisms, there are independent signs that the safeguard imposed by the Rules of the Road mechanism is working; there is freedom of movement and a greater degree of political stability within Bosnia and Herzegovina today than immediately after the arrests of General Djukic and Colonel Krsmanovic, and there have not been widespread, sensationalised 'show' trials in respect of alleged war crimes.

The Rules of the Road unit has contributed to the developing legal system in Bosnia and Herzegovina in other ways. In October 2001, staff from the unit held conferences in Sarajevo (the capital of Bosnia and Herzegovina) and in Banja Luka (the largest city and administrative centre of Republika Srpska) which were attended by more than 350 judges, lawyers and investigators[10]. Conference materials given to the participants included case studies, analyses of the applicable international law and suggestions on how a case should be prepared for review by Rules of the Road. Another aspect of Rules of the Road's contribution to the development of the national legal system is in the form of the notification letters sent by the ICTY's Prosecutor to the local prosecuting authorities advising of the result of the legal review. If a prosecution is not approved, these notification letters specify the legal and evidentiary issues to be redressed, such as the need to properly identify alleged offences, and the need to submit appropriate identification of suspects, relevant eyewitness evidence, medical evidence of injuries allegedly sustained and proof of death. The local prosecuting authority is invited to re-submit the file for further review after the additional material has been obtained. In this manner, the notification letters can perform an educative function.

Bosnian Muslim women pray after laying flowers on a stone monument 11 July 2002 at the site of the massacre of some 7,500 Muslim men and boys committed by Serb forces when they overrun the former Muslim enclave of Srebrenica on July 11, 1995. Photo: Fehim Demir / AFP / News Image Library

One other important aspect of the Rules of the Road unit's work is its cooperation with the Office of the High Representative[11]. The evidence submitted to the Rules of the Road unit represents, in essence, a history of the war in Bosnia and Herzegovina because the police, prosecutors, investigating judges and witnesses are drawn from each side of the religious, ethnic and territorial divides. The Rules of the Road unit's database therefore contains comprehensive data on every person who has ever been formally alleged to have committed a war crime in Bosnia and Herzegovina. This data is valuable in assisting the OHR in performing its functions, such as the assessment of the propriety of appointments of candidates to government positions. The data may also be of assistance in identifying suspects who should be prosecuted in Bosnia and Herzegovina as a matter of priority.

'Notwithstanding the occasional criticisms, there are independent signs that the safeguard imposed by the Rules of the Road mechanism is working;'

Difficulties encountered in Bosnian-Herzegovinan prosecutions of war crimes suspects

The court system in Bosnia and Herzegovina has struggled to prosecute those suspects whose cases have been approved for prosecution by the ICTY's Prosecutor in accordance with the Rome Agreement. To date, only about 50 war crimes suspects have been prosecuted in Bosnia and Herzegovina, which is less than eight per cent of those suspects whose prosecutions have been approved. There are many reasons for this relatively low number of prosecutions; the country's court buildings, police stations and prisons were frequently damaged during the war and are only now being repaired, political and ethnic tensions still exist between certain investigating agencies and prosecutors, many victims and witnesses were displaced during the war and contact with them has since been lost, many victims and witnesses fear giving evidence in criminal proceedings in the absence of a witness protection scheme in the country, and many of the suspects live outside Bosnia and Herzegovina and therefore, have not been amenable to arrest.

While there have been attempts to address these problems,

Bosnian Muslim woman wipes away her tears as the body of her husband is being buried in Potocari near Srebrenica in eastern Bosnia, 11 July 2003. Photo: Hrvoje Polan / AFP / News Image Library

especially in the past two-three years, there is still a fundamental problem posed by the absence of an effective witness protection scheme in Bosnia and Herzegovina. The nature of the crimes allegedly committed by Rules of the Road suspects is, by definition, lower level. The witnesses whose statements are reviewed by the Rules of the Road unit are generally, to use ICTY parlance, 'crime-base' witnesses. Commonly, the crimes alleged against Rules of the Road's suspects do not involve high-level planning of mass joint criminal enterprises; they are, instead, the 'grass-roots' crimes. In practical terms, the alleged crimes range from a single rape to the murders of 100 people. Because Bosnia and Herzegovina was so ethnically mixed prior to the war, to a much greater extent than say Serbia or Croatia, ethnic tensions were played out in every municipality throughout the country. This means that, often, suspects are alleged to have committed 'grass-roots' war crimes against their former neighbours and friends or acquaintances. Identification of suspects is therefore often easy for many of the alleged victims, but a concomitant of this is that the victims and witnesses - and their extended families and friends - are often well-known to suspects. Witness protection is therefore an extremely difficult, if not impossible, task because of the vulnerability of a victim or witness' extended family circle. Although effective witness protection is an issue that is currently under the consideration of the judicial authorities and the international community in Bosnia and Herzegovina, it may be too difficult an objective to ever achieve.

Another reason for the relatively low number of war crimes prosecutions in Bosnia and Herzegovina is that political considerations still figure highly in the determination of who is to be prosecuted. To date, prosecutions of alleged war criminals in Bosnia and Herzegovina have not been coordinated by a single authority; each Municipal Prosecutors' Office has acted autonomously. If a suspect is amenable to arrest, the Municipal Prosecutors' Office requests an investigative judge from the relevant Cantonal (District) Court to conduct an investigation. If the investigation reveals sufficient prima facie evidence, the local prosecutor then lays an indictment against the suspect. The inevitably different levels of investigative and prosecutorial skills of lawyers throughout the country have resulted in vastly different approaches to the prosecutions that have taken place. Political motivation and pressure have also often played a role. The legal system of Bosnia and Herzegovina has traditionally operated on the principle of territoriality of jurisdiction; suspects could be prosecuted only in the territory (municipality) in which the crimes had been allegedly committed. This principle meant that if, say, a Bosnian Serb suspect were accused of committing a war crime against Bosnian Muslims or Bosnian Croats in a municipality given to the Serbs in the Dayton division of Bosnia and Herzegovina, then it was unlikely the suspect would be prosecuted because a Bosnian Serb court was the only court with the necessary jurisdiction. It is a rare occurrence for a Bosnian Serb suspect to be prosecuted by a Bosnian Serb court, and the same is true for Bosnian Muslim and Bosnian Croat suspects in the Federation's courts.

'Although effective witness protection is an issue that is currently under the consideration of the judicial authorities and international community in Bosnia and Herzegovina, it may be too difficult an objective to ever achieve.'

Solutions to prosecution difficulties in Bosnia and Herzegovina

There is now a move to address the unfettered autonomy of the courts and the municipal prosecutors in Bosnia and Herzegovina, and centralise the prosecution of alleged war crimes. On 30 October 2003, members of the international community met at a donors' conference in The Hague to decide upon the establishment of a Special Chamber for War Crimes within the State Court of Bosnia and Herzegovina. Various member states of the UN Security Council have already expressed their 'in-principle' approval of the establishment of the Special Chamber, at meetings on 8 and 9 October 2003[12]. Funding in the order of 30 million euros (approximately AU$50 million) is being sought for an initial three-year operation of the Special War Crimes Chamber, an amount that includes building costs and the employment of local and international lawyers.

If, as it is anticipated, the Special Chamber is established and the Special Prosecutor for War Crimes is subsequently appointed, the chamber will provide a forum for those cases

which the ICTY may not otherwise have the time to prosecute. In addition, the Special Prosecutor may choose to prosecute suspects whose prosecutions have already been approved by the ICTY's Prosecutor in accordance with the Rome Agreement, without regard to the territorial principle. Currently, there are in excess of 720 suspects whose prosecutions have been approved by the Prosecutor in this manner, which suggests that the immediate issue for any Special Chamber for War Crimes established in Bosnia and Herzegovina will be to determine its prosecutorial objectives.

If a Special War Crimes Chamber is indeed established and a Special Prosecutor appointed, it is anticipated that the legal review function currently performed by the Rules of the Road unit in The Hague will be transferred to Bosnia and Herzegovina. The Special Prosecutor should be able to assume the workload of the Rules of the Road unit, and immediately commence prosecutions as a result of those reviews. In that way, the international community will have ensured that a major function of transitional justice, namely the fair indictment of a large number of alleged war criminals, is implemented in Bosnia and Herzegovina. The people of Bosnia and Herzegovina should then have a chance to see justice being done, and being done fairly, in their own national courts.

Web sites that may be of interest: www.un.org, www.un.org/icty, www.ohr.int, www.ictj.org, www.eupm.org and www.osce.org

1 Security Council Resolution 827 (S/Res/827 (1993)), 25 May 1993.

2 For a discussion of the relevant principles, see Security Council Resolution 827, Paragraphs 18-30.

3 Article 39 of the UN Charter provides that:

> The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

4 Commentators (for instance, Antonio Cassese, a former ICTY President, in a newspaper interview given to *Slobodna Bosna* (a Bosnian and Herzegovinan weekly), 12 May 2001) note however, that this objective was not altogether successful. Many of the worst war crimes committed in the former Yugoslavia were committed after May 1993, for instance, the Serb massacre of Muslim males at Srebrenica (in Bosnia and Herzegovina) in July 1995.

5 Article 9 (1) the ICTY Statute provides that:

> The International tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

Article 9 (2) the ICTY Statute provides that:

> The International tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present statute and the Rules of Procedure and evidence of the International Tribunal.

6 As at 21 October 2003.

7 The ICTY's Office of the Prosecutor (OTP) has grown from an initial staff of seven in 1993 to a staff of more than 800. More than 1,500 staff are employed altogether in the ICTY.

8 In his address to the General Assembly of the United Nations on 4 November 1997, Antonio Cassese, the then President of the ICTY said:

> We are not capable of trying every war criminal at The Hague and it would help the tribunal in its task if there were more national prosecutions for the multiple crimes committed in the former Yugoslavia. The two approaches - international and national - should go hand-in-hand. The leaders of warring parties and other accused in command positions should be brought before the Hague Tribunal, whilst the other indictees should be tried by national courts.

9 For instance, commenting on a recent Rules of the Road funding shortage, the Prime Minister of the Bosnia and Herzegovina, Adnan Terzic, was quoted as saying,

> This is worrying news for us and I intend to speak about it at the session of the Chamber for Peace Implementation in BH. We find that the Section for the Rules of the Road is absolutely necessary in ensuring the legality of the criminal proceedings.

'A Section of the Hague Tribunal under Threat of Shutting Down' published in O*slobodjenje* (a Bosnian-Herzegovinan daily newspaper), 29 March 2003.

10 Branko Todorovic, President of the Helsinki International Federation for Human Rights, Republika Srpska Branch, commented on the Rules of the Road unit's conferences in October 2001, saying:

> the *(Rules of the Road)* conferences were tasked with giving a lasting contribution towards the completion of criminal procedures in Bosnia Herzegovina against persons suspected for violations of international humanitarian law. It is expected that the ICTY will process 200 - 300 main agents of the tragic violence in the area of former Yugoslavia. The remaining people, surely a large number, who are under suspicion for the commission of war crimes will be subject to domestic judiciary...
>
> Unfortunately, the courts still function as the longer arm of certain policies, rather than as the arm of justice. Some participants *(of the Rules of the Road conferences)* stressed the worrying fact that the politicians in Bosnia Herzegovina in various ways, and unfortunately successfully, exercise strong political control over the judiciary.
>
> The essential question is: how could some of the local investigators, prosecutors and judges initiate proceedings aiming to establish criminal responsibility of those politicians who, during the war, participated in violations of international humanitarian law and who are, even today, in very high political positions or exercise public functions?...
>
> The only thing we're left with is hope that the international community will very closely follow and support the activities in the Bosnia Herzegovinan judiciary, in order to punish all those who took part in the ethnic cleansing, violence and crimes.
>
> Without that, there is no future for this country.

11 The Office of the High Representative (OHR) is the chief civilian peace implementation agency in Bosnia and Herzegovina. The High Representative is designated to oversee the implementation of the civilian aspects of Dayton in Bosnia and Herzegovina on behalf of the international community. The Steering Board of the PIC (international community) nominates the High Representative. The UN Security Council, which approved the Dayton Peace Agreement as well as the deployment of international troops in Bosnia and Herzegovina, is then required to endorse the nominee. The current High Representative of the international community in Bosnia and Herzegovina is Lord Paddy Ashdown.

12 The 4,837th and 4,838th Meetings of the UN Security Council.

A journey to the Persian Gulf

By Michael Slattery QC

In July 1964 Admiral Harrington, the then chief of naval staff, asked a young Laurence Street QC to form a Legal Reserve Panel to support the Royal Australian Navy. This was thought necessary in the wake of the *Voyager* disaster and the royal commission that followed. Before his appointment to the Supreme Court in 1965, Sir Laurence set up panels of barrister reservists throughout the states of Australia.

From that time, the New South Wales Bar has had a close association with the Navy. When practising at the Bar, three members of the New South Wales Court of Appeal led the Navy's Reserve Legal Panel for this state, Rear Admiral the Hon Harold Glass, Commodore the Hon Terence Cole and Captain the Hon Justice Murray Tobias. Other judges and barristers hold senior rank within the Navy.

Nineteen members of the New South Wales Bar and as many solicitors currently serve in the Navy Legal Reserve for this state, undertaking a variety of courts martial, advisory and operations law work. When Australia is involved in military conflict their workload intensifies.

'When I first told my wife that I was about to deploy and be given a course of anthrax injections...she quickly responded, 'That's great darling. You can open the mail now."

Navy sent me to the northern Persian Gulf near the end of the Iraq conflict this year. Immediately before Easter I was appearing as counsel in the courts of New South Wales. The following week I was serving as an officer aboard *HMAS Kanimbla* in Iraq's territorial sea.

In January 2003 the Australian Defence Force ('ADF') commenced anthrax vaccinations of personnel scheduled for deployment to the Middle East. The vaccinations were voluntary, but unvaccinated personnel were refused entry into the Middle East operations area. A number of naval personnel on board HMAS *Anzac*, *Darwin* and *Kanimbla* exercised their rights to decline vaccination and were repatriated. Some made formal complaint that senior officers had threatened them with adverse career consequences if they refused vaccination.

In March I was appointed under the *Defence (Inquiry) Regulations* to investigate and report on these complaints. I first completed a series of interviews in Sydney. HMAS *Kanimbla* was not due back in Australia until July. The Navy required a report before then. Therefore it became necessary for me to visit the ship in the Persian Gulf for further interviews. This meant that I too would need to be vaccinated against anthrax. The initial plan was for me to arrive early in the week commencing 17 March. The week before my planned departure the United States announced that hostilities with Iraq were imminent. My trip was postponed.

The Chief of the Australian Defence Force, General Peter Cosgrove and the author.

It finally took place a little over a month later. Armed attacks against Iraq commenced on Thursday 20 March. Coalition forces entered Baghdad on 12 April. I left Sydney by air on Monday, 21 April, returning on Sunday, 27 April. I was on board *Kanimbla* from 22-25 April.

By then *Anzac* and *Darwin* were preparing to leave the Persian Gulf but *Kanimbla* was still involved in the interception and search of Iraqi vessels and giving support to the coalition's continuing naval operations. The only residual danger at this time was of attack by irregular or terrorist forces.

After completing further interviews back in Australia, I submitted my report in May.

This is an account of an unusual journey for a lawyer. It gives a little perspective on the lives of Australian service personnel at sea in time of war.

The Fleet Legal Officer informed me of this proposed investigation when I took a mobile phone call during a luncheon adjournment in the first week of March. Reactions to my deployment were, at times, unexpected. When I first told my wife that I was about to deploy and be given a course of anthrax injections she foresaw a useful domestic anti-terrorist opportunity, which I had entirely missed. She quickly responded, 'That's great darling. You can open the mail now.'

Inquisitive about my own lack of any physical reaction to the anthrax inoculation that I was given, I asked a Navy doctor about the reason for this. The answer was depressing. He questioned me as to how old I was. 'Just turned forty-nine', I said. 'Well', he answered, 'your negative reaction simply means that your immune system is in decline.'

Leaving legal practice in Sydney at short notice is not easy. Many judges and barristers, including my then opponent in court, were very accommodating about my absence from the jurisdiction and its effects on practice.

All ADF personnel deployed to the Middle East operations area are required to attend a special course to assist in their force preparation. There are no exceptions for lawyers. Amidst the weapons training, gas mask and chemical suit drills, this course included some obviously necessary lectures on how to survive imprisonment, torture and violent interrogations. Every form of human ugliness and degradation was described with clinical exactness over several hours. This is done in order to help build the personal resources of those who might unexpectedly be taken prisoner. About half way through I was startled to realise just how well my professional life as a barrister had prepared me for this aspect of military life. The section on surviving hostile questioning filled me with grateful nostalgia for certain members of the New South Wales Court of Appeal of the late 1970s and early 1980s.

One early flight option for me was to travel to the Middle East via Singapore. By April coalition command was not permitting travel into the operations area via Singapore. In any event I did not want to be remembered as the first Australian to infect a warship with SARS. My flight was finally arranged through Perth, Doha and Bahrain. I arrived in Bahrain International airport at about midday on Tuesday, 22 April. From there I was taken to a military base for helicopter transport out to *Kanimbla* in the gulf.

Crossing the border between the civilian and military worlds presented me with an unforgettable and confronting experience. Still only minutes out of the attentive luxury of Emirates business class, I was dropped at a sand-bagged and concrete command post manned by US Marines. This was the entrance to a vast staging area for coalition forces adjacent to Bahrain International Airport. I was dressed pretty much as I would to go shopping in Chatswood on a Saturday morning. No doubt I looked conspicuously Western among the flowing Arab robes all about me and even more so as I was incongruously holding a sailor's echelon bag and my Phillip Street briefcase.

A Sea King approaches the *Kanimbla*.

'Still only minutes out of the attentive luxury of Emirates business class, I was dropped at a sand-bagged and concrete command post manned by US Marines.'

I was told that there would be someone to meet me inside and there was. My transport's other duties meant though that I had to negotiate this one on my own. No matter what you looked like, no matter how entitled you might feel, in April 2003 you could not just walk up to a US command post in the Middle East carrying two bags. No doubt you still cannot do this.

On my approach there was no failure in alertness by the occupants of the command post. Three marines emerged and stopped at the perimeter of the sandbags. Through my jet lag I became acutely conscious of the automatic weapons they purposefully lifted and then grasped at the ready. In a curious touch of added courtesy, they were not actually pointed at me. This display prompted my very close attention to the commands that followed: 'Stop', 'Put your bags down slowly', 'Hold your arms out from your body.' and 'Approach slowly, holding out your military ID.' I complied. I amazed myself with the earnest literalism of my responses.

Once inside this, the very sharpest end of executive power, I felt an immediate change from the civilian world. As an Australian, travelling at that time through Doha and Bahrain airports, hearing war reports on every news service I felt a special sense of vulnerability. The most immediate change for me was an overwhelming and palpable sense of physical security within this military envelope. The other difference I noticed was a sudden loss of colour. I found myself in a compound filled with marines, soldiers trucks, transport aircraft, attack and troop-carrying helicopters all covered in the colours of war: black, grey and brown, nothing else.

Despite the massed presence of coalition force and transport in its own enclave, I could not leave the Kingdom of Bahrain without an important ceremony acknowledging its sovereignty. Before embarking on an RAN helicopter to join an Australian ship I presented my passport for stamping to a Bahrain immigration officer inside the compound.

During the short Seahawk flight from Bahrain into the Persian Gulf I counted eight warships from patrol boat to destroyer size during the flight. I saw no civilian vessels of any type.

Since the early to mid-1980s, all distinctions between permanent and reserve ADF personnel have been abolished. Before then reservists wore the symbol 'R' somewhere on their uniforms, perhaps as a pre-emptive excuse for the inevitable gaps in their service knowledge. The 'R' earned them the affectionate title 'rockies' from the permanent services. The concept is now of one undivided defence force.

Lt Monica De Martin, permanent legal officer on board HMAS *Kanimbla*, and the author.

My commander's uniform was the same as that of all the other commanders on board. Despite this there were moments during my time on board that I still felt like a reservist. One of these occurred within minutes of my stepping onto the flight deck of Kanimbla.

We had circled the ship before landing. It was early afternoon. Visibility was clear. A long wake of mud-churned water streamed behind her. To make conversation with one of the most senior officers welcoming me I asked him, 'What speed are we doing?' He looked at me quizzically, raised one eyebrow and said, 'Actually we're at anchor.' It turned out that I had only been observing the tidal effects of the Euphrates astern.

A disconcerting but essential part of embarking on any RAN ship at sea is that the very first instruction given is a directive as to where to assemble were an abandon ship order to be given. After learning where this was for me, I was shown my bunk, given a tour of the ship and commenced my interviews.

That night at dinner an important similarity between the profession of arms and the legal profession was brought home to me. I had just left Sydney, which was still debating over the Easter break whether UN resolutions 678 or 1441 provided any legal authorisation for this conflict. That evening I was surprised to find myself as a legal officer invited into exactly the same debate in the ship's wardroom. The inspiring professional commitment of these officers and sailors serving their country was accompanied with a sound sense of objectivity and professional detachment about their client. I heard as varied a range of opinions expressed on board about the conflict as I had in similar situations in Sydney.

The atmosphere on board was efficient but relaxed. Kanimbla is a member of the Navy's LPA class. She operates a small hospital. In the Persian Gulf her watches included armed lookouts and she worked day and night whilst protected by highly manouverable small vessels also used by the ship's boarding parties.

In many ways *Kanimbla* resembled a suburb of metropolitan Australia which had become temporarily stranded in the Middle East. At sunrise joggers and walkers were out exercising. Minimising all unnecessary hierarchy, officers and sailors were all supplied food from a common galley, which produced the cuisine and variety of a good local shopping centre. At night after dinner in the wardroom and surrounding cabins one felt a little like a member of an extended and noisy household. TV was limited to the excruciatingly dull Kuwaiti National Television and a limited range of obviously well watched videos. *Kanimbla* then had a crew of about 350. There were 70 female officers and sailors on board, including several of the ship's navigation officers and a senior engineering officer.

RAN ships are 'dry' at sea when in conflict situations. I just tried to imagine that the red cordial served with dinner was a good Coonawarra cabernet sauvignon. Sleeping space is highly compressed. The biblical cubit of one forearm's length, separated the top of my bunk from the underside of the one above in a cabin built for about 20. Under ship's orders, showering must be accomplished in 90 seconds. What my experience of attempting to carry out this order taught me was that taking 45 seconds to get to the right water temperature was a poor allocation of resources.

Kanimbla kept up a busy schedule supplying other coalition vessels and aircraft. I met crews of British minesweepers and US patrol boats as they were being provisioned. The Persian Gulf is very calm in April and nothing like the open sea. When cloudy, the ambient temperature is about 28-30 degrees celsius. When the sun comes out it leaps to over 40 degrees.

The only increase in operational tension during my stay on board came on the second day. I was in the middle of an interview with a witness. The crew of a civilian vessel a few nautical miles away was not co-operating with *Kanimbla's* boarding party, which was requesting a search. A warning that this was becoming a 'non-compliant boarding' was piped through the ship. Her operational tempo quickly moved up several levels. She weighed anchor and headed towards the uncooperative *dhow*. As *Kanimbla* appeared within sight, the *dhow's* crew changed their minds and invited the Australians aboard.

'What speed are we doing?' He looked at me quizzically, raised one eyebrow and said, 'Actually we're at anchor.'

Crew members only received out of date Australian newspapers, though Internet and some phone access was possible at most times. Given the anti-war protests at her departure from Sydney the wardroom was keen to know what kind of reception she would get on her return. The officers also volunteered many memorable events of the war in late March. Here are two. Low-flying US cruise missiles were much

commented on. Several officers said that some cruise missiles passed so close that at times, from *Kanimbla's* bridge, the ship's company could see the manufacturer's writing on the fuselage.

'This was the first time that my pre-flight safety instructions had come from someone also doubling as the aircraft's starboard machine gunner.'

Others mentioned an incident when *Kanimbla's* crew discovered an Iraqi barge armed with nearly seventy mines ready for launch but concealed under a false deck. The barge's crew was temporarily brought on board *Kanimbla* but they showed increasing signs of desperate terror to the point of complete physical collapse. It was quite clear that they expected to be shot. Food medicine, fresh clothes and reassurance by Arabic-speaking personnel on board eventually calmed them down over some hours.

There were several other service lawyers on board. Service lawyers giving legal advice do not fit easily into the usual chain of command. It is not uncommon to find junior legal officers advising senior commanders directly on some issues. Other senior operations lawyers were assisting coalition commanders with advice about the application of the Geneva Conventions to command decisions. One common issue for such advice is the application to every targeting decision of Article 52 of Additional Protocol I, which requires that 'Attacks be limited to strictly military objectives'. Their unseen legal work has real influence at every level of operations.

I attended a moving Dawn Service on *Kanimbla's* flight deck on Anzac Day morning. As we assembled at 4.30am for the service an Iraqi fishing *dhow* was moored about half a nautical mile to our port and Iraqi land birds played on our deck. Its crew must have wondered at the strange morning customs of these Australians.

Minister for Defence Senator the Hon Robert Hill

An Iraqi *dhow* (background) moored near the Kanimbla.

I left *Kanimbla* by Navy Sea King helicopter late on Anzac Day morning. The helicopter had been arranged to carrying out the VIPs who had been visiting the ship for Anzac Day, Senator Robert Hill, the Minister of Defence and General Cosgrove the Chief of the Defence Force. This aircraft was fully armed against attack. This was the first time that my pre-flight safety instructions had come from someone also doubling as the aircraft's starboard machine gunner.

Military aircraft are impossibly noisy. Earplugs are necessary at all times. Except by the limited available intercom, onboard communication for passengers is limited to one's creative capacity with sign language. After a short flight we landed at Kuwait International Airport. On arrival a company of Kuwaiti troops formed up and presented arms to Australia's representative Senator Hill and to General Cosgrove. It looked like a military honour guard was going to be a new form of arrivals gate service for me. This was not to be. The guard had dispersed before I carried my own bags from the aircraft.

Here too, several square kilometers of land adjacent to Kuwait International Airport had been made available for coalition operations. Vast numbers of transport aircraft, *materiel* and stores were assembled. I changed out of uniform to commence my transformation back to the civilian world. Some locally based RAN personnel then took me back across the divide.

I left Kuwait that night and flew back to Sydney. I resumed practice at the Bar the following Monday. Almost every working day of the year a member of the New South Wales Bar will do legal work for the Navy, Army or the RAAF. We are all privileged to do so.

Male liberation

By Roger Marshall

During 2002 a junior member of the New South Wales Bar, Lewis Tyndall, worked to secure the release of an Australian prisoner from incarceration in an Indian Ocean republic. It proved a formidable, but satisfying task that involved making representations to many levels of government, both here and abroad.

In April 2002, Lewis Tyndall went for a 10 day visit to the Maldives, an island group in the Indian Ocean a few hundred kilometres south of Sri Lanka. A keen surfer, Lewis was on an organised trip to surf the coral reefs. Yet this was to be no ordinary surfing holiday, since he also went to represent an Australian who had been sentenced to life imprisonment for the importation of 57 grams of hash oil. That prisoner had been held without access to legal representation for about two years in prison on an island in the South Mali Atoll.

The prisoner was Mark Scanlon. In the 1970s he was shipwrecked in the Maldives when the yacht on which he was sailing struck a coral reef. At that time he was a young travelling surfer. That is how surf was discovered there. Later he helped establish a surf tourism business in the Maldives.

Tyndall was met by Scanlon's wife on arrival in Male. 'She provided me with documents relating to his case' said Tyndall. 'That night, I started reading those papers with a colleague of mine at the Bar and a member of our tourist party, David Elliott.'

Together they made arrangements to have the New South Wales Bar Association forward letters to the Attorney-General's Department of the Maldives, confirming that they were members and requesting the Attorney-General's Department to lend them whatever support it could in the Maldives.

Next, they met the Attorney-General of the Maldives, Mohammed Munavar. 'He was sympathetic and did give us some names of further contacts. I met with the Director-General of Home Affairs, met with the Attorney-General again and met with various people from the Corrections Department', Tyndall said.

'Tyndall and the others were shocked by the conditions in which Mr Scanlon was being detained. It is a cross between Devil's Island out of the movie *Papillon* and the jail in *Midnight Express*.'

The impromptu defence team had four short term goals. The first was to see Mr Scanlon, because he had never been seen by a lawyer. The only person who had seen him during two years of incarceration was his wife, who was allowed to see him once a month.

Surfing in the Meldives. Photo: Roger Marshall.

The second aim was to get some English literature for Mark and some writing material. The third aim was to have him fed fresh fruit and vegetables. The last was to give him the privilege to receive and send mail.

Tyndall and the others were shocked by the conditions in which Mr Scanlon was being detained. 'I went to see him on the island prison. It is a cross between Devil's Island out of the movie *Papillon* and the jail in *Midnight Express*. He lived in a tin shed. It had no light. In it there were 200 men sleeping inches away from each other on mats. There were three holes in the ground for their ablutions and a salt water shower. His diet consisted of fish curry, even though he is allergic to fish. There were no other westerners in the prison. He didn't speak the local language. All the other prisoners were Muslim. He is not. He was in pretty bad shape when I saw him. He was depressed.'

Despite their endeavours, and lots of promises, Tyndall and the others were not able to do anything about Mr Scanlon's living conditions whilst they were there.

On arrival back in Australia, Tyndall put together a 'conspectus': a brief that was presented to the Australian Government at ministerial level. It contained a profile of Mark, a background of the events surrounding his arrest and the options for getting Mark out of the Maldives. It also gave information on the Maldives including the amount of aid that Australia provides. With the assistance of that document, Tyndall set about making representations to parliamentarians and ministerial representatives.

'The early break was that a friend knew the campaign manager for Tony Abbott MP', Tyndall said. 'I sent the conspectus to Tony, Tony saw me, was immediately responsive and wanted to know about the prisoner. He was helpful. I ended up seeing Tony Abbott a number of times. Tony forwarded the conspectus to the Foreign Minister, Alexander Downer and the Minister for Justice and Customs Chris Ellison.'

Some representations were made by Mr Downer directly to the Maldivian Foreign Minister in Male. Mr Downer also saw the Maldivian President in New York at the United Nations. Unfortunately, these contacts amounted to nothing.

Undeterred, Tyndall opened another front in the battle to release Mark. He started to work on the Council of Europe Convention on the Transfer of Sentenced Persons Act. Australia has Commonwealth legislation called the *International Transfer of Prisoners Act 1997*, which, though passed, had not been proclaimed at the time he commenced lobbying.

'Whilst I was lobbying the government the legislation was proclaimed. I had assistance from the Attorney General's Department. A helpful solicitor called Kerin Lenard of that department worked with me on presenting the options to the government for having a transfer of prisoner effected under that legislation in order to bring Mark back to Australia.'

It was whilst they were progressing that action that Tony Abbott set up another meeting in Canberra. That meeting was attended by Tony Abbott, Senator Chris Ellison, Kerin Lenard and representatives of the Department of Foreign Affairs and Trade. During the meeting Tyndall and the others were advised that John Howard, the Prime Minister, was coming home from London via Male in the RAAF 737. The flight was scheduled to stop for two hours at Male for refuelling and he was actually en route as they spoke.

Tony Abbott and Chris Ellison instructed their aides to upgrade the brief on Mark Scanlon. The brief was already being carried with John Howard. The Prime Minister landed at Male Airport and he was met by the Maldivian Foreign Minister. That was the decisive moment. As a result of that meeting and the cumulative effect of the representations, the Maldivians decided to deport Mark.

Mark was escorted out of the jail. He kept very quiet for he was aware that there had been instances of prisoners being bashed and of 'false starts', where the prison authorities pretend they are releasing a prisoner.

'They take the prisoner to the airport, make them wait awhile and then bring the prisoner back disappointed' said Tyndall. 'Anyway, he kept quiet. He was made to wait at the airport under guard for most of the day. He wasn't told what was going to happen to him. Then ultimately he was put on the plane. He was under guard at all times until he was taken on to the plane. He didn't believe he was free until he cleared the airspace of the Maldives.'

The local mode of transport. Photo: Roger Marshall.

'The Prime Minister landed at Male Airport and he was met by the Maldivian Foreign Minister. That was the decisive moment.'

Does Tyndall think it helped to be a barrister?

'Certainly something that you cultivate at the Bar is leaving no stone unturned. Having the imprimatur of the Bar Association in the initial approach assisted over there. I hope it gave Mark some comfort knowing he had a barrister representing him. Being a barrister gives one the persistence to address this problem at senior minister level, where these decisions are made. This approach to this problem is not dissimilar to the approach to any case. That is, use whatever resources we have got advocating the client's cause.'

Undeterred by his glimpse of the dark side of the Indian Ocean resort islands, Tyndall remains as enthusiastic as ever about surfing in the Maldives.

'Honkys is my favourite spot', he said. 'It is a left reef break that was breaking at about eight feet at times while we were there. It has a big bowl section in the middle that throws the wave over you.'

Pausing for reflection, he added, 'It is paradise - unless you are imprisoned for life.'

Voluntary membership

How national competition reform may harm the NSW Bar Association

By Ingmar Taylor

On 1 July 2004 the compulsory cost to practise as a barrister in NSW will be reduced, as a result of a legislative change that has the potential to fundamentally alter the NSW Bar Association.

The 2004 practising certificate fee will be lower and the (voluntary) membership fee for the Bar Association correspondingly higher, reducing the guaranteed portion of the Bar Association's income.

Henceforth, what activities can continue to be undertaken by the Bar Association will depend in part upon a decision by the Attorney General as to the extent to which those activities can continue to be funded out of the compulsory practising certificate fee. The new legislation effectively provides the government with the power to shape the role of the Bar Association.

Currently the NSW Bar is a virtual closed shop. Ninety-eight per cent of barristers in NSW are members of their 'union', the NSW Bar Association. The changes on 1 July 2004, dubbed the introduction of 'voluntary membership', are likely to change that.

Strictly speaking membership of the Bar Association is already voluntary. In order to practise barristers must pay an annual practising certificate fee of up to $4596[1], and can then elect whether to pay an additional $2.20 to also be a member of the Bar Association. Unsurprisingly, very few choose not to be a member (of about 2100 legal practitioners with barrister practising certificates in NSW, all but about 40 are members of the NSW Bar Association).

The association uses the compulsory practising certificate fees to fund its activities. In the 2003 financial year its total income was $5.7m, of which $3.3m was from practising certificate fees. A further $1.6m was from the Public Purpose Fund, to reimburse certain costs, principally the disciplinary and legal assistance referral functions. The balance came from interest and dividends, reading programme fees, and some miscellaneous income.

In the past the practising certificate fees have been set at a level sufficient to cover the costs of those activities that are not funded out of the Public Purpose Fund.

However on 1 July 1994, sec 29A of the *Legal Profession Act 1987* will come into effect. It will require practising certificate fees to be set at a level that covers only those costs associated with the 'regulatory functions' of the association. The cost of providing any other services will have to be funded from (an increased) membership fee.

The Law Society of NSW is subject to the same changes. In July 1997 it surveyed a sample of its members to find out what they would do if membership of the society was voluntary. About 12 per cent of solicitors said they would definitely not maintain their membership of the Law Society, while a further 23 per cent were unsure[2].

The Bar Association has not conducted a similar survey, but it might reasonably expect a lower percentage of its members would not renew their membership. However it is hard to make any estimates without knowing how high the membership component of the overall fee will be. And that is currently unknown.

What is known are the broad parameters by which the Attorney General will determine what current activities of the association can continue to be funded out of the compulsory practising certificate fee. These are discussed below. But within those broad parameters lies a wide discretion.

The Bar Association believes it can justify in the order of 90 per cent of its current activities being funded out of the practising certificate fee. Ian Harrison SC, President of the Bar Association, says in that circumstance the change would be very modest and the association would continue to receive the moneys it needs to operate effectively.

The journalistic temptation is to overemphasise the potential for doom, but it cannot be doubted that there is at least the potential for the Attorney General to determine that a lower percentage of current activities is to be funded out of the practising certificate fee, resulting in a practising certificate fee which is substantially less of the current fee. If that were to come about, then the resultant higher membership fees may see a much higher number choose not to renew their Bar Association membership.

'The Bar Association believes it can justify in the order of 90 per cent of its current activities being funded out of the practising certificate fee.'

To take an example, the current fee for juniors with over seven years at the Bar, is $1994 plus a (voluntary) $2.20 membership fee. If that became a practising certificate fee of $1800 plus a membership fee of $194, then presumably Bar Association membership would remain almost universal. But if, say, it became a practising certificate fee of $1100 plus a (voluntary) membership fee of $894, then there may well be a more substantial reduction in membership (and a consequential drop in the association's income).

In Victoria barristers pay a $200 compulsory fee and membership fees for the Victorian Bar of up to $3300. All but two or three barristers pay the voluntary fees to be members of the Victorian Bar. However there are good reasons why the experience in NSW might be different, as explained below.

The legislation

In April 2002 the state government succumbed to pressure for something called 'national competition reform' and introduced into parliament a Bill which, with bi-partisan support, became the *Legal Profession Amendment (National Competition Policy Review) Act 2002*.

In introducing the Bill the Attorney General , the Hon Bob Debus MP, said the purpose of the amendments was:

> to bring about a true separation of the regulatory and membership functions of the Law Society and the Bar Association. The resultant benefits will include more transparent cost structures of the Law Society and the Bar Association, and potential savings for consumers; and the ability for solicitors and barristers to choose whether they wish to contribute to the cost of membership activities conducted by their professional associations[3].

The Hon Ian MacDonald speaking on behalf of the government in the Legislative Council mentioned another purpose, namely: 'Voluntary membership will lower the costs of legal practice, and the government expects these costs to be passed on to consumers.'

Under the Act practising certificate fees will continue to be determined by the Bar Council and approved by the Attorney General and fees can continue to be set at different levels based on length of service and location of practice. Section 29A however introduces a new requirement defining how the practising certificate fees are to be calculated, as follows :

(4) Subject to the regulations (if any), the Bar Council is to determine the practising certificate fee on a cost recovery basis, with the fee being such amount as is required from time to time for the purpose of recovering the costs of or associated with the regulatory functions of the Bar Council or Bar Association.

(5) The ***regulatory functions*** of the Bar Council or Bar Association are the functions of the Bar Council or Bar Association under this Act, and any other functions the Bar Council or Bar Association exercises that are associated with the regulation of legal practice or maintaining professional standards of legal practice.

(6) The practising certificate fee is not to include any charge for membership of the Bar Association and is not to include any amount that is required for the purpose of recovering any costs of or associated with providing services or benefits to which barristers become entitled as members of the Bar Association.

Regulations can be made specifying the costs that may or may not be recovered by the practising certificate fees.

What will the AG consider 'regulatory'?

The Attorney General is currently considering submissions from the Law Society and the Bar Association as to how the principles established by the Act will play out in practice. At this stage there is a high degree of uncertainty as to what activities will in the future have to be funded out of the (voluntary) membership fee.

'Voluntary membership will lower the costs of legal practice, and the government expects these costs to be passed on to consumers.'

In reply to the second reading debates the Attorney General , in the Legislative Assembly and the Hon Ian MacDonald MLC, in the Legislative Council, gave some indication of what activities might be considered 'regulatory' and which might be considered 'membership'. The Attorney General appeared to suggest that where activities are partly 'regulatory' a proportion of their cost can be claimed from the practising certificate fees (as occurs in Victoria, see below).

The Attorney General said:

> The Government has not yet reached a concluded view about what activities are regulatory, and which are voluntary. However, vital services to regional and rural practitioners are unlikely to be affected by the changes. Services such as the membership department of the Law Society, which deals with the issuing of practising certificates; the Lawyers Assistance program, which provides help for practitioners who are having difficulties with their practice; and the provision of important information to practitioners about statutory and procedural changes are all unlikely to be affected by voluntary membership.
>
> Other services comprise a mixture of regulatory and representational activities, and at least part of the cost of those services will be regulatory. These services include Law Society online, which gives all types of information to practitioners and is especially valuable for practitioners who do not practise in urban areas, and the library, which lends material to suburban and country solicitors through the DX system. I assure honourable members that I will take special care in the course of the implementation of these reforms to ensure that rural practitioners are not adversely affected by voluntary membership[5].

The Hon Ian MacDonald in the Legislative Council in reply suggested certain activities that may be seen as 'membership' services (to be funded out of the voluntary membership fee):

> ...the government expects that most practitioners will elect to join the Law Society or the Bar Association because if they do not they will not receive membership benefits, such as access to the *Law Society Journal*, the members' dining room, social functions and precedent database[6].

Before the Act was introduced the Bar Association and Law Society successfully lobbied for it to take effect on 1 July 2004, rather than in 2003, allowing them more time to prepare. In that time the Bar Council made certain changes which, coincidentally, assist the Bar Association to deal with voluntary membership. The dining room was closed, a loss-making operation which could not have been funded out of the compulsory fees. Ongoing education was made a mandatory requirement, and in that form the education is more likely to be viewed as a regulatory function. And more minor changes have been made, such as the merger of the History Committee into the Forbes Society, which means that the Bar Association can claim all of its committees do work which is in some way 'regulatory'.

Ian Harrison SC expects the Attorney General to take a broad view as to what is 'regulatory'. He said that the Bar Association has done a significant analysis of its expenditure, examining what is properly characterised as membership functions as against regulatory functions.

> We are not a social club anymore. Most of our activities are related to our statutory role. While it is difficult to be precise because of the overlap of certain activities, in excess of 90 per cent of expenditure would fall into the regulatory function category. If that is accepted the practising certificate fee will be substantially similar to the current fee. I am confident that when the government sees the analysis that we have done it will agree with our costings. In that circumstance we will continue to receive the moneys we need to operate effectively.

The association is no doubt hoping its relationship with the Attorney General , and the reputation of its hard-working Executive Director, Philip Selth, will stand it in good stead. Ian Harrison SC said: 'the Bar Association has a very good relationship with the Attorney General. One of the great achievements of the last two presidents has been the development of a close working relationship with the Attorney General to the significant benefit of members.'

This relationship is based in large part on the association's approach of providing high quality advice on proposed legislation. This is not well known because the association's efforts are not well publicised, even to the Bar's own members, as the advice is sought - and given - on a confidential basis[7].

Yet, however highly the Attorney General regards the Bar Association, the approach that he takes (and the regulations that are made) will have to be broadly consistent with the approach he takes in respect of the (much larger) Law Society.

What has occurred elsewhere

Victoria has had voluntary membership, in theory at least, since 1996. However, there are certain practical factors unique to the Victorian Bar which mean that virtually every barrister in Victoria is a member of their professional association.

A certificate to practice in Victoria costs $160 in the first year and $200 thereafter. On top of that are the 'voluntary' subscription (membership) fees for the Victorian Bar. The fees for 2003 in Victoria are compared with those in NSW in the following chart[8]:

As David Bremner, Executive Director of the Victorian Bar, explained to me, there are some important structural reasons why, notwithstanding that membership is theoretically voluntary, virtually 100 per cent of barristers in Victoria 'elect' to pay the subscription fees on top of their practising certificate fee. Indeed of about 1500 practising barristers, there are only two or three barristers in Victoria who are not members of the Victorian Bar.

First, the Victorian Bar, via Barristers' Chambers Limited, owns or leases most of the accommodation used by barristers. In order to rent from BCL one must be a member of the Victorian Bar. About 80 per cent of barristers in Victoria rent from BCL.

Years of practice	NSW		Victoria	
	Membership fee	Prac.certificate fee	Membership fee	Prac. certificate fee
Reader	$2.20	$100	$161	$160
1-2yrs	$2.20	$231	$590	$200
2-5yrs	$2.20	$745	$640 - $800	$200
5-7yrs	$2.20	$1043	$860 - $960	$200
7yrs +	$2.20	$1994	$1020 - $1980	$200
Silk	**$2.20**	**$4596**	**$3320**	**$200**

Second, almost every barrister in Melbourne uses the services of one of 12 clerks who are licensed to act as barrister's clerks by the Victorian Bar. To obtain the services of one of those clerks a barrister must be a member of the Victorian Bar. There are those who practice without a clerk, but they are few in number.

Third, those who are commencing practice as a barrister in Victoria (unless they have experience as a barrister in another common law jurisdiction) must complete the Bar readers course in order to obtain a practising certificate issued by the Victorian Bar, and in order to be accepted into the course they must undertake to become a member of the Victorian Bar.

Fourth, about 95 per cent of the Victorian Bar practise from within the court precinct in Melbourne, and so have immediate access to all the facilities that the Victorian Bar can offer, including an internet service, a library and an internal telephone system. The NSW and Queensland Bars, by contrast, have many barristers who are not located within a five minute walk of their association's facilities, and so might have less reason to be members.

A fifth factor, not mentioned by David Bremner, may be the existence of a misconception amongst barristers in Victoria that they *must* be a member of the Victorian Bar in order to obtain a practising certificate. I spoke to three Victorian juniors in preparing this article, one of whom had been an honorary official of the Victorian Bar, and all told me that they had to be a member of the Victorian Bar in order to obtain a practising certificate, and that the only other option was be a member of the Law Institute (and so practice as a solicitor-advocate, in the tradition of the great criminal solicitor-advocates, such as Frank Galbally). This misconception arises, it appears, from the fact that every legal practitioner in Victoria must apply either to the Victorian Bar or the Law Institute to obtain a practising certificate. Contrary to the misconception, those bodies (like the New South Wales Bar Association) are required to issue such a practising certificate to non-members who hold the relevant qualifications (and indeed David Bremner says about 15 per cent to 20 per cent of solicitors in Victoria are not members of the Law Institute).

The misconception is probably fostered by the fact that, unlike in NSW, there are two renewal forms, one for the practising certificate and one for subscription fees for the Victorian Bar. This means that, unlike the current NSW form, there is no need to highlight the fact that part of the fee is voluntary.

How much of the Bar Association's activities are 'regulatory functions'?

How much of the current practising certificate fee will henceforth become voluntary depends on how much of the Bar Association's current activities the Attorney General believes are associated with the regulatory functions of the association.

As noted above, the Bar Association's submission to the Attorney General is that in the order of 90 per cent of its expenditure would fall into the regulatory function category. If that is accepted the practising certificate fee will be substantially similar to the current fee and there would be little change to the current system.

Certainly, there is no doubt that there are a range of core activities that are purely regulatory. They include:

a) the issuing of practising certificates, including maintaining a register of practitioners and providing that information to the public (including by way of a web-site);

b) identifying professional indemnity insurance providers, negotiating appropriate policy terms and recommending to the Attorney General policies that can be approved;

c) investigating and determining disciplinary matters involving barristers (this is funded by the Public Purpose Fund);

d) providing annual reports to the Attorney General as to the activities of the Bar Council and its committees, as required by sec 49 of the Legal Profession Act; and

e) drafting and revision of the *New South Wales Barristers' Rules*.

Of course those functions are in part done by people who also undertake other functions, which requires various costs to be apportioned.

There are other functions which are clearly non-regulatory, such as: social functions (Bench and Bar Dinner, 15 bobbers, liquor bar etc); the provision of assistance to barristers who are in financial or personal need; the fee recovery service; Bar Council elections; and its charity work (Barrister's Benevolent Fund and the Mum Shirl Fund).

The balance of the activities of the Bar Association, however, are not so easy to categorise, as they incorporate a mixture of regulatory and membership benefits. Some of those activities are discussed below. Many of these are, at least in part, 'regulatory functions' because that expression is defined to include activities that 'maintain professional standards of legal practice'. That definition, combined with the fact that sec 29A refers not just to the 'regulatory functions' but also to activities that are 'associated with the regulatory functions', allows the Bar Association to argue that the practising certificate fee can recover costs in respect of a wide range of its current activities, even if they are partly non-regulatory.

Education

The Bar Association conducts a readers course, which provides five weeks full-time training, principally in advocacy, but also in practice management, ethics, etiquette and court procedure. This could be viewed as regulatory (completion of the course is regulatory requirement and the course assists the public by

maintaining professional standards). It could also be characterised as at least in part as a membership service (in this case a service to its newest members, providing them with advocacy skills). Readers pay a $600 fee to sit the three compulsory exams which they must pass to gain entry to the course, and a further fee of $3000 to do the course. The reading programme generated an income of $240,000 in the 2003 financial year, and so may not need much input from practising certificate fee income in order to continue unaffected.

The Bar Association also provides (an expanding) continuing legal education programme for barristers. This too could be said to both maintain professional standards in accordance with the requirements mandated to obtain a practising certificate, and also provide a service to members. As noted above, in Victoria their programme is partially funded out of the Public Purpose Fund. In NSW the Public Purpose Fund does not fund continuing legal education, and that is not likely to change. Given that 'regulatory functions' are defined to include activities that 'maintain professional standards of legal practice', the Bar Association may be right to claim that all of the cost of providing continuing legal education should be funded out of the compulsory practising certificate fee, but it is an example of an area where much has been left to the discretion of the Attorney General.

The library

The library performs an invaluable service to the Bar generally, and in particular to those practitioners who do not otherwise have access to extensive library facilities. That category includes those new to the Bar and many barristers who practise in the regions.

The library also provides research assistance in relation to disciplinary matters. It provides research to assist with preparing law reform submissions and with lobbying. It also assists in the continuing professional development programme.

Currently the library services are only available to members of the Bar Association, notwithstanding the fact that it is run using income generated by the compulsory practising certificate fees.

That would have to change if the Bar Council were successful in convincing the Attorney General that all of the library costs are to be recovered from the compulsory practising certificate fee. However, like for education, the situation will be more complex if the Attorney General allows only a proportion of the costs of the library to be funded out of the practising certificate fee. Certainly some level of funding is likely to come from the practising certificate fee, given the statements of the Attorney General made in the reply speech on the second reading of the Bill (set out above) as to the important role the Law Society library plays for regional solicitors.

The library is an expensive (and much loved) operation. If the Bar Association were not able to have most or all of its costs covered by the practising certificate fee, then some difficult decisions may have to be made if increased membership fee income did not make up the lost practising certificate fees.

Disciplinary functions

Currently the direct costs of the association's disciplinary functions (including legal fees and cost of employing the Professional Conduct Division staff) are recovered from the Public Purpose Fund. That will not change. However there are indirect infrastructure costs that the association currently covers from its general revenue. Such costs include administration and management costs, IT support, providing reception services and library services. Issues relating to whether to refuse to issue or cancel a practising certificate for example can involve extensive time and effort on the part of the Executive Director and Bar Council (who in turn require administrative support), and those costs are also currently borne by the practising certificate fee.

The Bar Association expects that the Attorney General will accept that some proportion of the overall administrative costs

of running the association should be payable out of the practising certificate fee, in proportion to that level of the overall activity that can be said to be associated with the regulatory functions, including its disciplinary functions.

Legal assistance

The Bar provides a legal assistance referral scheme. It runs two duty advocate schemes, and assists in providing pro bono services by barristers. The administrative support cost is funded out of the Public Purpose Fund (and they would continue to be so funded). However, like the disciplinary functions, the Public Purpose Fund does not cover the cost of administrative and managerial overheads.

Publications

The Bar has three principal publications, *Bar News, Bar Brief* and its web site. The web site includes regulatory information, including access to the register of practitioners, information as to disciplinary matters, information for the public as to how to access legal services, information for those interested in coming to the Bar and information for members regarding regulatory requirements. It also, of course, provides members with information about services (including hybrid services, such as education). As noted above, in the reply to the second reading speech the Attorney General said that the Law Society's service 'Law Society Online' comprised a mixture of regulatory and representational activities.

Similarly *Bar News* and *Bar Brief* could be said provide both regulatory and membership services. For those reasons it might be expected that some part of the cost of providing these publications will be funded out of the compulsory practising certificate fee, with the balance to be funded out of the membership fee.

Policy formulation and submissions

A somewhat hidden but significant activity of the Bar Association is its role in developing policies and submissions relevant to legal reform. 'Lobbying' by the Bar Association for the benefit of its members would clearly not be a 'regulatory' function. However where the Bar Association is participating in debate about legal regulation of the Bar and the legal system more generally, it is fulfilling a role that the Act recognises and expects it to play[9]. Further, many of its contributions to law reform in areas unrelated to the pecuniary advantages of its members could be said to be for the public good. These activities include the work of most of the association's 17 committees. Again, the Attorney General may well take an approach where part of the cost of this function is funded out of the compulsory practising certificate fee.

The Bar Association's ability to influence policy debate in the future is related to its ability to maintain a significant membership base. If the Bar Association were not able to claim to speak for virtually all barristers, it would no doubt lose some of its credibility, as the Hon Helen Sham-Ho stated in debate on the Bill in the Legislative Council[10].

Appointment to silk

One further role of the Bar Association is the appointment of new senior counsel. It is unlikely that the Bar Association would seek to identify that as part of its 'regulatory role'.

Currently the Senior Counsel Protocol stipulates that there is no requirement to be a member of the Bar Association to be considered for appointment to senior counsel, and one could not imagine that changing. Indeed, in recent years a barrister who was not a member of the Bar Association was appointed senior counsel.

The Senior Counsel Protocol provides for the Senior Counsel Selection Committee to comprise the president, senior vice-president and three other senior counsel nominated by the president and approved by the Bar Council, not more than one of whom may be a member of the Bar Council.

If the Bar Council was elected from a membership base that did not represent (virtually) all barristers, then the legitimacy of a selection made by those appointed by the Bar Council would be capable of being questioned. And if there was to be any antagonism in the future between those who maintain their (more expensive) membership and those who choose to refrain from being members, there may arise a perception that non-members will find it harder to obtain silk.

Encouraging membership post July 2004

One would hope barristers will remain members in the new 'voluntary' era because they recognise the importance of being a member of the association which represents their interests, and recognise the great range of activities successfully carried out by the Bar Association.

However, unlike in Victoria, there are currently no structural reasons why high membership would be ensured in circumstances where there is a substantial financial disincentive to maintain Bar Association membership.

Ian Harrison SC is confident that most current members will retain their membership under the new regime. He points to the fact that year after year voter turnout in Bar Council elections is over 50 per cent , which is high compared to equivalent elections in other places where voting is not compulsory. 'That is a good indicator that there is likely to be an insignificant drop in members when so-called voluntary membership comes in. We are the biggest independent referral Bar in Australia, and one of the top three or four in the world. Our proud history is not lost on our members when they give consideration to being a member of a professional body such as ours.'

Inevitably the change will place pressure on the Bar Council to come up with ways to encourage membership in the way that other voluntary organisations, like the AMA, do. The relatively small membership base however will make it harder to offer significant discounts on products such as insurance, banking, hotel, hire car, and other services, which such organisations offer to encourage membership.

Mark Richardson, Chief Executive of the Law Society of New South Wales, wrote in the society's last annual report:

> The Law Society will be offering packages of benefits, services and products on an exclusive basis to solicitors who wish to remain members of the Law Society. Non-members may be able to access a few Law Society products, but that access will be available only on a commercial basis without the discounts members will enjoy.

Currently the Bar's continuing education programme is free for members and non-members. Of course, if the cost of providing continuing legal education were in the future to be partly or entirely funded out of the membership fees, the Bar Association may feel justified charging non-members to attend the courses. In circumstances where, coincidentally, continuing legal education has just become mandatory for the NSW Bar, this might provide a strong incentive for barristers to remain members (although there is no requirement that barristers must obtain their continuing legal education from the Bar Association's programme). The Bar Council has not suggested that it will charge non-members for providing education. If it did the Attorney General would have to consider whether the charges for non-members were appropriate given the extent to which the education services were funded out of the compulsory fee.

Similarly, if the library was not to be substantially funded by the compulsory practising certificate fees, then possibly the current policy of limiting access to members may be continued, or non-members may be charged a fee to use the library.

Such measures might encourage continuing membership, but would not of themselves ensure a continuation of the closed shop. There is however the potential for a change which would encourage almost universal membership. It is the potential for the association to enter into a scheme to cap the professional liability of its members.

The Bar Association is in the process of making an application to the Professional Standards Board of NSW to register a scheme under the *Professional Standards Act 1994* (NSW). Such a scheme would, if accepted, limit the civil liability of the association's members to a pre-set cap. The cap however would not apply to damages for personal injury (although the Bar Council is pressing for this anomoly to be removed), and would not protect a professional from claims made under federal legislation, such as the *Trade Practices Act 1974*.

'The new system provides an increased potential for a future attorney general , if so minded, to influence the activities of the Bar Association. In that way the legislation could make it harder for a future Bar Association to actively and publicly oppose the government of the day.'

Importantly, because of the nature of the legislation, if the scheme were approved the cap would only apply to members of the Bar Association.

Steps are also being taken by Commonwealth and state ministers with responsibility for insurance matters to establish national legislation similar to the Professional Standards Act. The Commonwealth has committed itself to amending the Trade Practices Act and other relevant legislation to support professional standards legislation consistent with the current NSW and WA legislation[11].

As Chris Merritt of the *Australian Financial Review* has said, if such caps were available it would greatly assist associations dealing with the advent of voluntary membership, because lawyers would find they themselves in a situation of 'no ticket, no cap'[12].

Alternatively, the Bar Council may have to think about ways to obtain increased income other than by practising certificate fees and membership fees. One possibility would be to enter the legal education market, selling a premium seminar programme to solicitors. Young Lawyers, a division of the Law Society with three employees, runs a very successful CLE programme which has a turnover in the order of $500,000 to $700,000 per year. The much larger College of Law Pty Ltd had revenue of $10m last financial year. Given that many CLE presenters are members of the Bar Association, there would appear to be the potential at least for the Bar Association to establish a competitive product which could be a money-spinner. This would best be done as a separate initiative to its own internal education programme, but drawing on some of the same material. Already there are internal seminars which are attracting a high level of interest from solicitors even though they are not being marketed outside the bar.

AG's ability to influence the Bar Association

From the outset, the Attorney-General, by deciding what activities can be funded from the compulsory practising certificate fee, will shape the direction of the Bar Association into the future.

The Bar Council is confident that the current Attorney General will be sympathetic to its submissions. Even if that is the case, the new system provides an increased potential for a future attorney general , if so minded, to influence the activities of the

Bar Association. In that way the legislation could make it harder for a future Bar Association to actively and publicly oppose the government of the day.

Under the Act the government can make regulations for determining what parts of the activities of the Bar Association are to be considered 'regulatory'. A hostile government could make or change regulations in a manner that reduced that part of the Bar Association's income that is derived from the 'compulsory' fees.

More subtly, a future attorney general might 'interpret' the Act (and any regulations) in a different manner, and not approve any practising certificate fee that fails to meet with that (new) definition. Also, as new services and activities arise, a future attorney general could take a narrower approach to the question of what percentage of their cost can be funded out of the practising certificate fee, influencing what new activities are introduced.

The amendments also provide the attorney general with the power to require the Bar Association 'to prepare and submit a budget' for such period of time as the attorney general directs, relating to any costs (or projected costs) that are to be recovered by the practising certificate fee; sec 29D. The budget is to 'include such information as the attorney general directs. In particular the attorney general 'may require the provision of information about the administration of the...Bar Association'.

The attorney general has also been given the power to appoint an auditor to audit 'all or any particular activities' of the Bar Association': sec 29E. That auditor is to determine 'whether any activities the costs of which are recoverable [from the practising certificate fee] are being carried out economically and efficiently and in accordance with the relevant laws'.

The current Bar Council believes it has little to worry about because it believes it is well regarded, and Philip Selth, Executive Director, runs a very efficient organisation. However it is quite possible in the future that a disgruntled attorney general could require the association to furnish a detailed line-by-line budget, audit every activity of the association, and take steps to reduce any perceived 'subsidy' of membership activities by a reduction in the practising certificate fee. The risk of such action may influence the Bar Council not to do things which might jeopardise its funding situation.

The future

The Bar Association is no longer the gentlemen's social club it was two decades ago (or at least, it is no longer a social club). There is every reason to conclude that the Attorney General will accept that a great proportion of the Bar Association's activities today are 'regulatory', particularly when one includes all those activities that 'maintain professional standards of legal practice'.

However, whether the Attorney General accepts that in the order of 90 per cent of the Bar Association's activities are 'regulatory' is a moot question. If the Attorney General determines a lower proportion, the result will be a correspondingly higher membership fee, which will influence the future role of the Bar Association and test the commitment of barristers in NSW to the Bar Association.

In the past, barristers who did not like the Bar Association could attempt to change it via the ballot box. In the future there may be those who choose instead to save money and simply opt out.

For my part I hope that does not happen. I believe it is important for professionals to be members of the professional association which represents their interests. However, I am afraid that in the new environment of 'voluntary membership' not all will share the sentiments of United States President Theodore Roosevelt who said:

> I would undoubtedly join the union of my trade. If I were opposed to the policy of the union, I would join for no other reason that to help rectify that mistake. . . In short, I believe in the union, and I believe that all men who benefit by the union are morally bound to help to the extent of their power in the common interest advanced by the union. Unions, while they consist of members, do not belong to the members, but rather, they hold in trust, something for those in the future.

1 The current fees vary, based upon seniority and location. They are set out in a chart below

2 *Law Society Journal*, February 1998 (1998) 36(1) LSJ 81

3 Second reading speech, Legislative Assembly, 10 April 2002, Hansard at p1341

4 Legislative Council, 11 June 2002, Hansard at p2923

5 Legislative Assembly, 8 May 2002, Hansard at p1836

6 Legislative Council, 11 June 2002, Hansard at p2923

7 Some indication of the range of work done by the Bar Association in this regard can be found in the Executive Director's reports contained in the last two Annual Reports

8 The NSW rates here are those applicable for those who are in private practice practising in Sydney. There are lower practising certificate rates applicable for those who practise outside Sydney and for those who are Crown prosecutors, public defenders and parliamentarians. There are higher membership rates for those who are not practising barristers, such as interstate barristers, retired practitioners and Judges. The Victorian membership fees have no discount for those who practise outside Melbourne. The Victorian membership subscription fees are different for each year of practice. The membership fees recorded in the chart are the range applicable for each band.

9 For examples of the work done by the association in that regard, see the Executive Director's reports in the last two Annual Reports, dealing with such matters as the national practice model laws project, and the significant amendments to the Legal Profession Act and regulations

10 11 June 2002, Hansard at p2907

11 Joint Communique of the Ministerial Meeting on Insurance Issues, Adelaide, 6 August 2003

12 Chris Merritt, Hearsay column, *Australian Financial Review*, 1 August 2003.

The aspirational Bar

Sydney Downtown

By Justin Gleeson SC and Chris Winslow

In its quest to report upon all facets of practice at the New South Wales Bar, *Bar News* dispatches reporters from the Dark Heart of Phillip Street to interview regional barristers and discuss the issues that concern them. In doing so, we look beyond the Bar as a profession and study it as a social, political and commercial entity.

The chambers that comprise the downtown Bar have grown and benefited from the commercial maxim 'location, location, location'. In addition to lower overheads and newer office space, they enjoy close proximity to many courts, the green expanse of Hyde Park and an abundance of fine cafes and restaurants.

Despite these advantages, and their general contentment, the barristers practising there perceive themselves as being 'shut out' of key appointments and other mainstream political developments of the New South Wales Bar. These issues would not seem out of place in a regional Bar, such as Parramatta or Newcastle, but they do seem incongruous for a group of chambers that lie well within the City of Sydney. The result is an 'aspirational Bar', which craves recognition and a stronger voice in the Bar Association.

Despite a decade of consolidation, the growth of the downtown Bar may have reached its high tide mark. Like a number of other chambers in NSW, wave after wave of the government's tort law reforms must inevitably impact upon their work.

Bar News went to investigate.

The growth years

The rapid growth and diversification of the New South Wales Bar since the mid-1970s has been accompanied by the formation of new chambers. In 1949 there were 324 practising barristers. In 1962 there were 434, and by 1975, more than a decade later, that number had only increased to 670. The opening of Wentworth Chambers in 1957 and Selborne in 1962 ensured that 'Phillip Street and barristers' chambers [became] virtually synonymous'[1]. At the first annual general meeting of Counsel's Chambers Limited in August 1954, Sir Garfield Barwick explicitly linked the construction of a 'permanent home for the Bar' in Wentworth / Selborne with the building of 'an institution' capable of retaining to the full its role as a 'vital element in the administration of justice'. Tom Hughes QC, during a CPD seminar, described this period as the 'apogee of cohesive collegiality' for a small 'monocultural society' of barristers[2].

Downtown epicentre: the Downing Centre stands on the corner of Liverpool and Elizabeth streets.

Since that time, the numbers increased rapidly, to the point where there have been for some years almost 2000 practising barristers in this state. Barristers seeking to expand their horizons spilled out of Phillip Street and spread throughout a legal precinct which encompasses the MLC Centre, Martin Place and Macquarie Street.

An important outcome of this spread was the growth of a distinct downtown Bar: a cluster of chambers in the gravitational pull of state and federal courts and tribunals

Downtown in a nutshell

	Total	Male	Female	Silk	Junior
Henry Parkes Chambers, 10/299 Elizabeth St	32	29	3	0	32
Sydney Chambers, 13/130 Elizabeth St	24	23	1	0	24
Samuel Griffith Chambers, 18/157 Liverpool St	32	29	3	1	31
Trust Chambers, 15/157 Liverpool St	21	20	1	0	21
Ada Evans Chambers, 1/370 Pitt Street	18	14	4	1	17
Total	**127**	**115**	**12**	**2**	**125**

housed in the Downing Centre, John Maddison Tower and the Lionel Bowen Building. Beginning in the early 1990s its growth has been qualitatively and quantitatively influenced by the augmenting of the jurisdiction of the District Court, as well as the consolidation and relocation of registries and court facilities.

The Mason-Dixon Line

There is no boundary line on the footpath of Elizabeth Street to mark your arrival in the downtown area. To use a planetary metaphor, more than 120 barristers in five chambers are under the gravitational pull of the Downing Centre, John Maddison Tower and the Family Court's Sydney Registry on Goulburn Street. They are Henry Parkes, Sydney, Samuel Griffith, Trust and Ada Evans chambers. Another cluster on Elizabeth Street, comprising Forbes, Sir Owen Dixon, Elizabeth Street and Denman chambers, lie almost equidistant from both the Downing Centre and Supreme Court. To continue the planetary metaphor, these chambers are also under the gravitational pull of the Supreme Court, with Forbes Chambers for example, reflecting this with a higher number of silks doing appellate work in the Court of Criminal Appeal.

No discussion of downtown barristers would be complete without at least some mention of two other key elements: the public defenders and the crown prosecutors. Although they share many characteristics with their counterparts in private practice, they will not be the focus of this article.

The founders of Sydney Chambers.

An overview of the downtown chambers

In February 1992 David Dalton founded Samuel Griffith Chambers. Soon after, Sydney Chambers was formed in the adjacent building by a committee of barristers comprised of Tony Jamieson, S Russell, A Goldsworthy, N Mayell and others from Hyde Park Chambers. They were attracted by the location, the quality of the rooms and the favourable lease,

Sydney Chambers today. Seated: Dr Tom Hickie, Peter Linegar, Ross Hanrahan Standing: Frank Santisi, David Calverley (Floor Clerk), Leah Rowan, Anthony Jamieson, David (Sandy) Wetmore, Tom Howard, Peter Lander, Evan Smith.

which allowed for further expansion. A decade later, Sydney Chambers has 24 barristers, practising predominantly in criminal law, workers compensation and personal injury.

Trust Chambers was originally formed in King Street in the Trust Building. That is where the name originated. It was established by Woods (later Judge Woods) at around the same time, with 17 barristers, but has grown to 21 members, although a greater proportion of the work (up to 70 per cent) is in criminal law, with the balance being personal injury and workers compensation, family law and commerical.

Three years later, in January 1996, Henry Parkes Chambers was formed when two groups of barristers migrated from First Floor University Chambers and 6th and 7th Floor University Chambers in Phillip Street. Today, there are 30 barristers practising mainly in common law and workers compensation. They are spread over two floors, connected by an internal stairway.

The most recent addition to the Downtown Bar was Ada Evans Chambers, which was opened by Justice Mary Gaudron on 20 November 1998. Occupying most of the first floor of an office block opposite the Downing Centre, Ada Evans was founded by Michael Maxwell and Michael Barko, who remain in chambers to this day. The initial complement of two barristers has expanded to 18, practising in criminal law, workers compensation, industrial, employment, insurance, family law and common law.

Lower overheads and better facilities

Sitting on a lounge in the bay window of Tony Jamieson's 13th floor chambers, it is easy to gain an appreciation for downtown chambers. The view from the northeast corner of Sydney Chambers, which extends over Hyde Park, St Mary's Cathedral and on to the harbour and the eastern suburbs, is superb. Most rooms in Samuel Griffith, Trust, Sydney and Henry Parkes

130 Elizabeth Street, home of Sydney Chambers.

Chambers are external, many with views over Hyde Park or Central Railway Station and South Sydney.

The modern office buildings, which house most of the downtown chambers, offer more spacious rooms than in Phillip Street and include facilities such as basement parking spaces and loading docks. However, the primary advantage of locating outside the Phillip Street - Martin Place axis is reduced cost.

Tony Bellanto QC moved to Ada Evans Chambers in 1998 becoming the first silk south of Liverpool Street. His reasons for moving exemplify those who have established a practice downtown. 'Most of my work was down this end of town. I halved my overheads, yet had the convenience of being close to the courts.'

Ada Evans Chambers, to which Bellanto QC moved, is doubly advantageous in this respect. No 'key money' is required to buy into chambers, thereby considerably reducing the barrier to entry of any aspiring junior barrister. The downside of this arrangement is that when a barrister leaves or retires, there is no capital gain.

The lower overheads enjoyed by these chambers are derived not just from their location. In terms of business principles, the four downtown chambers have much to educate other chambers in. When they were established they managed to obtain long term leases at moderate rentals in modern offices, together with flexible bank financing. The clerks pride themselves on running on strict financial principles: Sydney Chambers, for example, does not even permit an overdraft for chambers.

Restaurants & watering holes

For too many years downtown Sydney was synonymous with urban decay and the unfinished remnants of the 1980s building frenzy. The landscape south of Bathurst Street was pockmarked with adult entertainment shops and abandoned construction sites. These enormous craters, like disused urban quarries, were filled with stagnant ponds, buttressed with raw concrete skeletons and hoardings festooned with bill posters.

'You could say that it was seen as a less than fashionable location', said one barrister from Ada Evans Chambers, with just a hint of understatement.

In recent times, however, downtown Sydney has enjoyed a renaissance. One by one the abandoned construction sites have been replaced with towering apartment buildings, premium grade office complexes and shopping arcades. There is a growing vibrancy in the streets surrounding the Downing Centre. Barristers in downtown Sydney say they now enjoy easy access to a range of affordable, cosmopolitan cafes and restaurants which rivals, if not surpasses, that which is available to their counterparts in Phillip Street. Traditional favourites such as The Hellenic Club, Diethenes and Capitain Torres are now jostled by scores of laksa bars sushi trains and Italian cafes.

This urban regeneration and renewal will culminate in the completion of the mammoth World Square development and the redevelopment above the Masonic Centre, both of which are expected to attract a number of medium to large solicitors' and accounting firms as tenants.

A close knit group

The downtown chambers are a close-knit community. Nowhere is that more apparent than in relations between the clerks. Deborah Da Silva, clerk of Trust Chambers, clerked in

Samuel Griffith Chambers.

Phillip Street before coming downtown. She comments on the sense of informality and co-operation with David Calverley, Jenny Lewis and the other clerks downtown. District Court judges and Local Court magistrates regularly attend social functions hosted by the chambers. Sydney Chambers invites judges and magistrates to informal social functions each month, and judges are included on many guest lists at chambers Christmas functions.

Issues

In most downtown chambers at least half of the barristers are practising in criminal law. This fact alone ensures that issues such as legal aid fees are of greater concern to members of the downtown Bar. In chambers such as Samuel Griffith, where a high proportion of work is funded by legal aid, the long-running campaign to increase barristers' fees was closely followed.

Another issue, which perhaps impacts differently upon downtown chambers, is direct access. Although there is general agreement that direct access briefs are workable in situations such as pleas in the local court, downtown barristers offer only lukewarm support for direct access in more substantive matters. They criticise the added burden which it places upon clerks. As one barrister explained to *Bar News*, 'In direct access situations there is the real risk that the barristers' clerk can become the de facto solicitor's clerk. That places the clerk in a hopeless situation'. The clerks we spoke to were quick to concur with this criticism. 'As the first point of contact you are taking statements from people and witnessing affidavits', an added responsibility they felt they could do without.

Tony Jamieson, head of Sydney Chambers.

In addition to the large amount of criminal work, many downtown barristers practise in the Family Court and it is there that direct access is perceived to be a source of more problems. Tony Jamieson can discern a growth trend in fathers applying for access to their children, but 'where a father files an application himself and then sees a barrister, the barrister must deal with ill-prepared affidavits'.

Struggling to be heard

Beneath their outward signs of contentment, there runs like an undercurrent among downtown barristers the belief that they are under-represented in at least three important aspects of the functioning of the New South Wales Bar:

- Appointment of senior counsel
- Appointment to committees
- Election to Bar Council

Silks

Aside from the contingent of senior counsel among the ranks of public defenders and crown prosecutors, and if the chambers in mid-Elizabeth Street are excluded, only two silk, Tony Bellanto QC and Ian Lloyd QC (both of whom obtained silk before moving downtown) can be counted among more than 120 barristers in the downtown chambers.[3] The relative dearth of silks in the downtown Bar is what opinion pollsters would call a 'hot-button issue'; a topic which is almost certain to elicit a response.

Those we spoke to were quick to point out that it is much more than an issue of prestige or status. 'It is an enormous logistical problem', said one head of chambers. Others we spoke to agreed, saying that it was a 'very cumbersome' process, involving multiple trips back and forth across Hyde Park. A downtown junior might walk uptown to a conference with a silk at 8.00 o'clock, return to a District Court call over at 9.30 (and wait some time), then return uptown to the silk's chambers where the client had been waiting, only to return to the District Court if the matter was called on. Some of those who spoke to *Bar News* said that briefing a silk really was not worth it.

At one time or another, Henry Parkes, Sydney and Trust Chambers have all attempted to entice senior counsel to relocate downtown, largely to no avail. This is despite the widespread belief among those interviewed that there would be ample work for any silk bold enough to make the move, not to mention the numerous benefits of location and quality and cost of accommodation. One only needs to ask Tony Bellanto QC.

What about appointments from within the ranks of downtown barristers? In the last ten years, not one of the silk applicants from downtown chambers has been appointed. True to form, in the list of silks for 2003, not one of the 12 applicants from downtown was appointed. Whereas the Parramatta Bar were quite realistic about their lack of appointees to senior counsel, there is a strongly held view that of the 120 barristers in the 'core' downtown chambers, more than a handful would be amply worthy of silk.

One senior barrister, who did not wish to be named, said that when it comes to the appointment of senior counsel, Phillip Street 'gets first bite of the cherry'. The names of applicants for senior counsel are circulated to, among other people, existing senior counsel and court of appeal judges. Downtown barristers believe appointment of silk becomes a question of familiarity - silks uptown have more knowledge of those uptown and this "tilts the balance in favour of uptown applicants".

It does appear that downtown barristers are caught in a vicious cycle. Senior juniors are appearing in complex murder and drug trials, frequently on circuit and often against a silk prosecutor.

But few would appear in civil matters before the Court of Appeal and most criminal appellate work goes to silks in Forbes Chambers.

Those with whom *Bar News* discussed this issue were quick to dismiss any suggestion of a downtown 'quota' for silk or any amendment to the senior counsel protocol. Instead, they proffered a number of practical steps, such as 'alliances' with uptown chambers in which a downtown room could be licensed for a number of years, thereby circumventing some of the logistical problems of briefing silks in the downtown. It would also give uptown barristers, including silks, more exposure to downtown barristers and their practices.

...without representation

In addition to their problems with silk, the downtown barristers in private practice believe that they are under-represented on Bar Council and on Bar Association committees, particularly in what they regard as core areas of interest: criminal law, legal aid and personal injuries litigation. Their counterparts among the crown prosecutors and public defenders are well represented, which begs the question as to whether the downtown barristers are not applying in sufficient numbers or whether it is another reason why they have been 'overlooked'. There is an onus on downtown barristers to put themselves forward for committees. Each year, the Bar Association calls for volunteers to serve on committees. The notice for 2004 was circulated on 19 November and it will be interesting to see what response there is from downtown.

Even more telling is the statistic that in the ten years since the formation of downtown chambers, they have not succeeded in getting one of their members elected to Bar Council. This is not through want of effort. On a number of occasions a 'downtown ticket' has been organised for Bar Council elections, but even where the candidate has been loyally supported by colleagues in Liverpool Street, the numbers are still not sufficient to get them 'over the line'. What is needed is recognition and support from at least a handful of members in other chambers.

In contrast to the situation with senior counsel appointments, representation is one area where downtown members feel that there should be a concerted effort by the Bar Association to broaden the membership of Bar committees and invite persons to join from outside the uptown chambers. To assist members outside Phillip Street and Martin Place, it is suggested that the association follow the lead of the Continuing Professional Development Programme, which schedules CPD seminars downtown. The Criminal Law, Legal Aid and Personal Injuries committees, if they were to succeed in gaining new members from downtown, would be ideally suited to such a move.

A further possibility would be to emulate the practice of the West Australian Bar Association, which has a clause in its constitution which reserves at least one place on Bar Council for members who practise at chambers other than those leased or owned by the WA Bar Chambers Limited. An amendment here could, for example, guarantee one or a small number of places on Bar Council for barristers outside the uptown area.

157 Liverpool Street: home to Trust and Samuel Griffith chambers.

Tort law reform: on the frontline

It is not without irony that whilst the growth of the Downtown Bar is due to the stimulus of administrative decisions by governments to locate court facilities south of Liverpool Street, the same group of chambers may be on the front line of one of the most important professional issues confronting the NSW Bar: the impact of successive waves of tort law 'reforms' by parliament to motor accident, workers compensation and personal injury law.

However, the downtown barristers have braced themselves for this change, and feel that collectively, their solid grounding in criminal and family law cases will ensure their survival.

Conclusion

The view from downtown is that it's a great place to practise, and the chambers are well run, happy places, but more inclusiveness from the uptown Bar, and the Bar Association is called for.

1 Bennett, JM, *A history of the NSW Bar* (Sydney, The Law Book Company, 1969) p.197.

2 TEF Hughes AO QC, ['Ethics 1', Bar Association CPD Seminar, 13 November 2002.]

3 Sydney Chambers did have Greenwood QC, who unfortunately passed away in 2001.

English appeals court considers application to remove advocate from appearing

By Alister Abadee

In *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 (noted 77(4) ALJ 221) the English Court of Appeal held that the court may, in exceptional circumstances, prevent an advocate from appearing for a party, if it is satisfied that there is a real risk of his or her participation leading to the situation where an order made at trial might be set aside on appeal. The court also found that if an advocate considered that there were matters that impinged upon the propriety of the advocate appearing, then those matters should be disclosed to the other party and then, if necessary, to the court.

'One of the provisions of Code of conduct of the Bar of England and Wales that received close attention in this decision was a very general provision to the effect that a counsel should not appear where he or she would be professionally embarrassed because by reason of some prior connection it would be 'difficult for him to maintain his professional independence or because the administration of justice might be or might appear to be prejudiced'

The factual context was an application by the debtor to a bankruptcy petition to remove the petitioner's counsel. The basis for such application was a social acquaintance between the petitioner's counsel and the bankrupt's wife during a period relevant to the proceeding. The main submission was that because of the barrister's acquaintance, he might consciously or unconsciously have obtained information about the debtor's family that might give rise in the mind of a lay observer to the view that justice might not be done, or be seen to have been done and thus undermine public confidence in the administration of justice. The application was dismissed before a judicial registrar whose decision was upheld by a judge on appeal. The English Court of Appeal dismissed an appeal from the judge's decision.

As it transpired, nothing ultimately turned on matters of principle: the barrister's acquaintance could only have been relevant to an issue upon which the debtor succeeded and orders were made on other grounds. What followed from the English Court of Appeal was strictly *obiter*. After enunciating the test referred to above, the Court of Appeal referred (at [42] - [43]) to some of the factors that a court should consider before acceding to an application to remove counsel from appearing, including:

- the existence of a personal connection between counsel and a witness (the connection may be insignificant for an expert witness);
- the type of case and length of hearing and any special role of the advocate (such as prosecutor, friend of the court and where counsel appears in child care proceedings); and
- that the choice of a party of its counsel should be respected; and the importance of the 'cab - rank rule'.

The English Court of Appeal laid down (at [46]) a number of steps for the advocate to consider in deciding whether to appear. First, a barrister affected by some 'personal factor' must himself or herself consider whether reasonable grounds exist for concluding that his or her appearance would prejudice the administration of justice, or result in a procedural irregularity. In that event, the barrister should not appear. Second, if he or she decides to appear, but the position can *reasonably* be regarded as open to objection, the barrister should disclose relevant facts to the other side as soon as practicable and (unless the party accepts the barrister's decision to appear) to the court at the opening of the hearing.

From the opponent's perspective, the Court of Appeal found (at [47]) that it should make it clear to the barrister of its objection without delay. Secondly, if it is necessary for the court to rule on the objection, such application should be made as soon as the circumstances giving rise to the objection are known. Thirdly, the opponent should, if possible, make a separate application in order to avoid the risk of an adjournment of the substantive hearing.

Several comments might be made about this decision, and how it might guide the conduct of counsel in New South Wales. First, as indicated above, the passages devoted to the issues were in *obiter*, which detracts to some degree from their persuasive value. Secondly, in this state, barristers' ethical obligations are substantially governed by the *New South Wales Barristers' Rules*, the breach of which may expose the barrister to disciplinary sanction[1]. Whilst not exclusive[2], those Barristers' Rules are very prescriptive in detailing exceptions to the 'cab-rank rule': in defining what briefs a barrister must not accept[3] and briefs that a barrister may refuse to accept[4]. Complementary to those Barristers' Rules are Rules of Court that impinge upon a barrister's conduct, some of which are couched in general terms. Part 1 r 3(4) of the *Supreme Court Rules*, for example, mandates that a barrister must not cause his or her client to be in breach of the duty of parties to civil proceedings to assist the court to further the overriding purpose (of facilitating the just, quick and cheap resolution of real issues). Barristers in this state are thus are faced with detailed ethical guidelines and more broadly expressed Rules of Court which set out the circumstances in which they can, or continue to, appear.

One of the provisions of the *Code of conduct of the Bar of England and Wales* that received close attention in this decision was a very general provision to the effect that a counsel should not appear where he or she would be professionally

embarrassed because by reason of some prior connection it would be 'difficult for him to maintain his professional independence or because the administration of justice might be or might appear to be prejudiced'. The English Court of Appeal in its decision focused on the second part of that formulation. It may be seen that such a provision is cast in very broad terms, in contrast with the more specific ethical rules proscribing barristers from appearing in this state.

Specifically, in New South Wales, a barrister must not appear if he or she has reasonable grounds to believe that:

- there is a real possibility that he or she will be a witness in the case[5];
- his or her own professional conduct may be attacked in the case[6];
- where he or she has information confidential to any person, including the opponent of his or her client, with different interests to those of the client, where such information would be advantageous to the client and the other person has not consented to its use[7].

Detailed provision is made to prevent barristers appearing before judicial officers who are related to the barrister[8] and impose time restrictions upon barristers, who were former judicial officers, from appearing before the court in which they served[9]. A barrister may also refuse to appear if there is a real possibility that he or she will be required to cross-examine or criticise a friend or relation[10]. In the criminal law domain, prosecutors must attempt to act 'impartially'[11] and are subject to other obligations[12]. It may be seen, therefore, that where there are 'personal factors' that might intuitively inhibit a barrister from deciding to appear, the Barristers' Rules provide very specific guidance.

The Barristers' Rules in this state do not, however, contain an equivalent provision to the English *Code of conduct*, which has some express overriding obligation to limit or prevent a barrister from appearing because of the interests of the administration of justice. Is such a general legal rule necessary? In light of the potential disciplinary sanctions that might be imposed for their breach, it would be surprising if a barristers went on to appear in contravention of the Barristers' Rules. This result would be even more so especially if such appearance might cause a proceeding to be aborted, since on top of the potential disciplinary sanction, the barrister might also be subjected to a wasted costs order[13]. If a barrister appeared in contravention of the Barristers' Rules and/or Rules of Court, it is submitted that a court would be fully justified, and would be so empowered, in restraining a barrister from appearing, or continuing to act.

On the other hand, it is submitted that a court should not readily accede to an application to remove a barrister who appears in accordance with the Barristers' Rules and rules of court on the general basis that such participation could prejudice the administration of justice. To do so would not only effectively add another exception to the 'cab rank rule', but would also undercut a barrister's reliance upon the Barristers' Rules themselves. Whilst it may be conceded that such rules are not exhaustive, arguably barristers should not have to apprehend that their decisions to appear would be second - guessed by the courts on a generalised basis. It is, with respect, difficult to reconcile the Court of Appeal's propositions that:

(a) a barrister affected by a 'personal factor' where there are reasonable grounds for concluding would prejudice the administration of justice should *not* act, even if he or she feels he or she is not professionally embarrassed; and

(b) if he or she considers he or she *can* act, he or she should disclose all relevant facts to the opponent and the court.

'The Barristers' Rules in this state do not, however, contain an equivalent provision to the English *Code of conduct*, which has some express overriding obligation to limit or prevent a barrister from appearing because of the interests of the administration of justice.'

Surely if there is any doubt at all about proposition (a), according to this view, proposition (b) does not come into it. It is also difficult to see why barristers should have to worry about how a decision in accordance with ethical and other court rules is 'reasonably regarded', particularly by their opponents. Further, it is difficult to draw the line at where the court may intervene: what would happen, for example, if the barrister conducted himself or herself incompetently: would the court view that as an affront to the administration of justice that would justify a direction (of its own motion) that the barrister no longer act for the client?

Perhaps one solution is to modify the Barristers' Rules so that when a barrister is in genuine doubt as to whether he or she is able to appear in accordance with the provisions of the rules, he or she is generally able to obtain the approval of a member (being a senior counsel) of a professional conduct committee; as presently applies to the situation where the barrister apprehends he or she may be attacked or otherwise be the subject of criticism. If there is to be such a general jurisdiction, it is arguably better that a provision similar to the one analysed in the English *Code of conduct* is added to the Barristers' Rules. It is better, it is submitted, for barristers to know where they stand than to have new and vague obligations created for them by the courts.

It is noteworthy that in the recent decision of the Western Australian Supreme Court of *Westgold Resources v St Barbara Mines* [2003] WASC 29, which considered (inter alia) *Geveran Trading*, the judge suggested (at [24]) that there had to be

some identifiable right, obligation or interest that was imperiled or infringed by the barrister's appearance before the court would intervene to restrain the advocate from acting. It is submitted that the courts should follow this more focused approach, in preference to the approach in *Geveran Trading*, which seems to empower courts to restrain at large.

As to the requirement of disclosure, if the premise is accepted that a barrister should not appear on the generalised basis referred to in *Geveran*, it is submitted that it would be prudent practice to follow the steps set out therein: with disclosure, in the first instance, being made to the barrister's opponent; then, if necessary, to the court. One would hope that a quiet word to the barrister's opponent might resolve the problem; although of course there may be limits to this when the opponent is unrepresented.

1 *Legal Profession Act 1987* (NSW), sec 57D(4)
2 *New South Wales Barristers'* Rules, Rule 9
3 Ibid., Rules 87 - 90
4 Ibid., Rules 91 - 92
5 Ibid., Rule 87(c) and (d)
6 Ibid., Rule 87(e). In this case a barrister need not refuse to act in the circumstances set out in Rule 88, which include the approval of senior counsel on a professional conduct committee.
7 Ibid., Rules 87(a) and 89
8 Ibid., Rule 87(i)
9 Ibid., Rule 87(j)
10 Ibid., Rule 91(d)
11 Ibid., Rule 62
12 Ibid., Rules 63 - 66A
13 For example: Part 52A r 43A of the *Supreme Court Rules*

Chief Justice Murray Gleeson

An interview by Rena Sofroniou

Rena Sofroniou: Did you enjoy the High Court Centenary Conference in Canberra last weekend?

Chief Justice Gleeson: Yes I did, I was pleasantly surprised. I have a vivid imagination for things that can possibly go wrong. I had a long list of potential disasters in my mind, but none of them seemed to happen.

Rena Sofroniou: Has celebrating the court's centenary been a drain in addition to your normal workload? Has it involved a lot of socialising?

Chief Justice Gleeson: It has involved a lot of socialising. I wouldn't describe myself as a party animal, but I enjoyed the socialising.

Rena Sofroniou: It must be quite wonderful to hold the position of Chief Justice of the High Court at the time of its centenary. I gather that you were already quite interested in Australian legal history. Has the court's centenary provided an opportunity for you to look into that more deeply?

Chief Justice Gleeson: Yes it has. When looking at material for the purpose of preparing speeches I found a number of things that came as a surprise to me. For example, I had never realised that there were strong political attacks upon the appointment of Sir Samuel Griffith as the first chief justice of the High Court. I had known from other reading that there were grievances about the role that he and Chief Justice Way of South Australia played in relation to clause 74 of the Constitution. I had been aware that each had used his position as state lieutenant governor to communicate with the Imperial authorities in a way that was regarded as undermining the negotiating position of the Australian delegates in London. But I hadn't been aware of the extent to which the ill feeling spilled over into the process of appointment of the first members of the High Court.

Rena Sofroniou: Would that have been a somewhat defensive start for the new justices?

Chief Justice Gleeson: Sir Samuel Griffith doesn't seem to have been a particularly defensive person. So far as I can tell from my reading, there was quite a deal of conflict and controversy about appointments to the court and about arrangements between the court and the government in its early years.

'The *Engineers* case is not a fine example of judicial reasoning but, subject to the qualification expounded by Sir Owen Dixon in the *Melbourne Corporation case*[2], it has represented the orthodoxy ever since.'

I only learned recently that one of the people who strongly criticised the appointment of Griffith as chief justice was a protégé of Andrew Inglis Clark, who had himself been regarded as a candidate for appointment. As I understand it, the position on the court that ultimately went to Sir Edmund Barton was one that many people had expected would go Clark. However, being prime minister himself, Barton seems to have been in a position to choose to be appointed, although people told him at the time that it would be inappropriate to choose to be chief justice.

Rena Sofroniou: It is interesting to see the course that history took. Given the degree to which Griffith and Clark had been involved in the drafting of the Constitution, would it have been more of an advantage or a disadvantage to have both of them as first justices of the High Court? In that case one might have forgiven them for taking an entirely subjective approach to the interpretation of the Constitution that they had drafted. We would have obtained a very acute insight into the 'intentions of the framers'!

Chief Justice Gleeson: Both Griffith and Clark were closely involved in the early stages of the drafting but then Griffith was appointed chief justice of Queensland and Clark was appointed a justice of the Supreme Court of Tasmania. Their involvement in the later stages of the drafting was less immediate, though still important. But all three of the first members of the court adopted a method of interpretation of the Constitution that reflected their participation in the negotiations, and the compromises that had been made.

Rena Sofroniou: Acknowledging the 'federal compact'?

Chief Justice Gleeson: Yes. The change in direction, culminating with the *Engineers case*[1] began when Isaacs and Higgins were appointed to the court as its fourth and fifth members.

It is interesting to reflect on personalities and the role that they play in constitutional interpretation. Isaacs had been excluded from the drafting committee at the constitutional conventions and was resentful of that. Higgins had opposed federation on the basis that the Constitution didn't go far enough towards giving power to the central government.

When Griffith, Barton and O'Connor were together they found, as Clark would have done, implications in the Constitution in favour of state powers and immunities that reflected their view of federation as a negotiated compromise. Isaacs and Higgins, however, took the line that the Constitution should be interpreted on the basis that the grants of power to the Commonwealth were to be taken literally and widely. They didn't favour implications supporting state reserved powers and immunities, and ultimately that view prevailed in the *Engineers case*.

Rena Sofroniou: So the minority two were vindicated?

Chief Justice Gleeson: Well, they prevailed. The *Engineers* case is not a fine example of judicial reasoning but, subject to the qualification expounded by Sir Owen Dixon in the *Melbourne Corporation case*[2], it has represented the orthodoxy ever since.

Rena Sofroniou: All of this recalls to mind the discussion about schools of interpretation of the Constitution that one sees from commentators, but also now explicitly in the High Court judgments themselves. In light of what you've said, I wonder whether you are interested in following certain specific approaches to constitutional interpretation at the expense of others?

Chief Justice Gleeson: There is no single problem of constitutional interpretation and therefore there is no single solution. There are some issues of constitutional interpretation about which history and an understanding of the context at the time provide much assistance. There are other issues of constitutional interpretation about which the opposite is true.

Let me give a particular example. One of the puzzles about constitutional interpretation has always been the relationship of section 122 dealing with territories to other provisions of the Constitution. It seem to me that it does assist a resolution of such an issue to understand what was in contemplation at the end of the nineteenth century or the beginning of the twentieth century. One could see then the kinds of territories with which Australia would be concerned. It would be a mistake to interpret the Constitution as though the Australian Capital Territory was regarded as the only kind of territory with which the instrument was concerned.

At the other extreme, take the post and telegraphs power. The framers of the Constitution were interested in and aware of technology and understood the potential for change and development. It was plainly not the intention that that power was to be confined to apply only to the technology that was available at the time.

Rena Sofroniou: This leads me to refer to the paper you delivered in Melbourne to the AIJA on the 3 October this year[3]. It contained, quite beguiling, if I may say so, references to the maintenance of public confidence in the High Court by means of what you describe as 'a collective reputation for independence and impartiality', which you suggested is what sustains judicial review and makes that sort of exercise of power tolerable.

Chief Justice Gleeson: That's right.

Rena Sofroniou: In a similar vein there was something almost soothing in the way you assured your audience that even 'noisy criticism', when a decision of the court might have frustrated political objectives, gives no cause for alarm. It's just, you said, simply what you'd expect in a democracy. You referred to Sir Owen Dixon's promotion of 'close adherence to legal reasoning' and to Alfred Deakin's vision of the Constitution as a document flexible enough to adapt to modern times. There is a question here somewhere! I guess it's this. To what extent are you glossing over the fact that, as long as the court keeps to quite orthodox legal reasoning and process, it has a huge scope to make choices in its decisions, the content of which may have a huge political impact? Is your seductive invocation of that careful, orthodox, principled approach taken by the court really going to be sufficient to defend the court from criticism if it delivers drastic outcomes, given the 'criteria of selection' that are available to you within even quite orthodox judicial approaches?

'I had tended to assume...that there is something novel about strong criticism of judicial review of legislation and administrative action. When you look back at the reaction to some of the leading decisions of the court, it is clear that such an assumption is wrong.'

Chief Justice Gleeson: There are two things about that. The first is that we all tend to assume, or at least, I had tended to assume, that in the past, as a general rule, the decisions of the court had been accepted calmly by government and by the public and that there is something novel about strong criticism of judicial review of legislation and administrative action. When you look back at the reaction to some of the leading decisions of the court, it is clear that such an assumption is wrong.

Starting from the early part of the twentieth century you will see that there were strong and sometimes almost hysterical reactions to judicial decisions. For example, in 1908 the court gave a decision[4] that invalidated some legislation promoted by the Labor Party and labour unions on an issue that was called, at the time, 'new protection'. It is probably impossible now to capture truly the economic and political significance of that issue. But the consequence of the court's decision was to lead to a demand from the Labor movement that the Constitution be amended to take away from the court the capacity to invalidate legislation.

The decision in the *Engineers* case in 1920 was said by a leading commentator to have caused 'consternation' in the state camp. Well, a lot of decisions of the court have caused consternation in the state camp.

Rena Sofroniou: That underscores the point a little, doesn't it? While perhaps no-one doubts the legitimacy of the reasoning adopted in the judgment, look at the political outcomes.

Chief Justice Gleeson: Yes. Now the second thing is that it's true that within the bounds of proper legal technique judges have choices. But they have to give reasons for their decisions. They have to justify their choices and the methodology that they employ can always be tested against accepted principles. For all the fuss that is often made about the exercise of judicial choices, judicial reasoning is, by the standards of most decision-makers in the community, enormously conservative.

What is increasingly borne in on me, when I listen to argument in the High Court, is how conservative legal argument is. The barristers will almost immediately go to precedent. When did you ever hear a barrister get up in the High Court and say: 'Don't worry about what all these other people have said in the past, this is the principle and this is what you should do'? When did you last see a judgment written by anybody who said 'I don't care what all these judges have said in the past, I think that this is the way to go, and whatever people have done in the past, this is the direction we should now take'? That's just not the way barristers argue cases and it's not the way that judges reason their decisions.

Rena Sofroniou: Is it a phobia about 'committing' palm tree justice'? Now isn't that an example of applying a methodology insufficiently in keeping with the traditional approach to precedent? Doesn't it just depend upon how ingenious a given judge is in being able to present their judgment, however radical it may be, in a sufficiently traditionally accepted manner? Such a judge might then decide anything they like. And surely they can't just say, 'Look, this is the inevitable outcome of my 'close judicial reasoning'. You can't be worried about the political outcome of my judgment.'

Chief Justice Gleeson: Sometimes you read commentaries about the technique of judges where the commentators don't make it clear what kind of judges they're talking about.

Rena Sofroniou: Types of judges?

Chief Justice Gleeson: Sometimes you read theories about judging which seem to assume that the only judges who matter are judges of ultimate courts of appeal. There are only seven judges in Australia whose decisions are not potentially subject to appeal. So the first constraint on a judge is appeal. All judicial decision-makers except the seven members of the ultimate court of appeal have the possibility of judicial review of their own decisions.

Rena Sofroniou: Sure.

'Sometimes you read theories about judging which seem to assume that the only judges who matter are judges of ultimate courts of appeal. There are only seven judges in Australia whose decisions are not potentially subject to appeal. So the first constraint on a judge is appeal.'

Chief Justice Gleeson: And that is a powerful force for conformity to legal technique and methodology. Now if you turn to the seven who sometimes seem to be the only ones that commentators are interested in, they operate in a collegiate manner. Their decision-making is by majority. No single one of them can ever prevail and the pressure of collegiate decision-making is again a force for conformity.

But the best test of the constraints under which judicial decision-making operates is to look at the techniques by which judges justify their decisions, and look at the techniques by which barristers seek to persuade them to make their decisions. By the standards of most decision-makers, those techniques are highly conformist.

Rena Sofroniou: And I suppose it follows from that, that even my hypothetical 'ingenious judge' is not going to fool all of those people all the time?

Chief Justice Gleeson: Exactly. The other thing that I think you need to bear in mind is that the concern about what you call 'palm tree' justice is really a reflection of a wider legal and ultimately political principle. The political philosopher Hayek[5] pointed out that freedom of individual action is best preserved by the formulation and application of general rules. The opposite of that is ad hoc discretionary decision-making. Most people feel free to conduct their personal affairs and their business with confidence and security because they know what the law is. Most legal questions never get near a court. A solicitor ought to be able to answer most legal problems that are raised by the solicitor's clients and shouldn't have to say to the client, 'If you get involved in litigation about that matter the outcome will depend on the identity of the judge or magistrate before whom the case comes'. The law is working best when the solicitor can say to the client, 'If that case goes to court then this is going to be the outcome.' In the case of the great majority of legal questions that affect the day to day lives of ordinary members of the public, that's the way the issue is resolved, not by the case going to the High Court. The High Court only deals with about seventy appeals per year.

The other point that has recently been made by a French professor[6] who was out here about a year ago in relation to ultimate courts of appeal is that the authority of ultimate courts of appeal depends upon the predictability of their decision-making.

Rena Sofroniou: I think you echoed that in your AIJA paper?

Chief Justice Gleeson: The court influences judicial decision-making only insofar as judges of other courts believe that they know what the court would do.

Rena Sofroniou: Is that always so? This may just be about my own shortcomings but I have to confess here that when *Perre v Apand*[7] was handed down I, for one, became a little anxious and despondent about precisely how on earth I could predict not only the outcome of a case involving purely economic loss but even the correct approach sanctioned by the High Court in dealing with the question. There appeared to be differences of approach that the court did not appear to have resolved by the time this judgment was handed down. Is the predictability to which you refer intended to apply at individual case outcome or is the best that we advisors can hope for, some general approaches? Because if I may say so I think it would have been very difficult to advise a client the day after that decision was handed down!

'If what a court needs is constant attention, critical comment and constant suggestions for improvement from the profession and law teachers, then in that respect the High Court is freakishly fortunate!'

Chief Justice Gleeson: Up until the decision of the House of Lords in *Hedley Byrne v Heller*[8], people thought, or lawyers thought, that, as a general rule, the circumstances in which a person would be found to have a duty to take care to protect somebody else from what was called pure economic loss would be extremely limited. *Hedley Byrne* opened that up. I tried to argue this with painful lack of success in the Privy Council in the *Candlewood case*[9], where I endeavoured unsuccessfully to support the decision of the High Court in *Caltex*[10].

If you look at the argument and the decision in *Candlewood* you can see a strong resistance on the part of the English courts because of their understanding that the decision in *Hedley Byrne* had let the genie out of the bottle.

Ultimately, of course, the great fear is of indeterminate liability, which is only another way of expressing the problem that you've just mentioned: people don't know what they're liable for and you can't confidently advise people as to their responsibilities. That had always been the fear about allowing for a duty of care to take reasonable steps to protect other people from economic loss.

When you think about it, the circumstances in which some act or omission of yours might cause foreseeable financial harm to somebody else are almost endless. You might be negligently driving a motor car in heavy traffic and as a result of a collision you cause, somebody four or five cars away, who isn't injured personally, and whose property isn't damaged, might miss an important business appointment and suffer financial loss as a consequence of that. When a ship ran into a bridge in Hobart and it interfered with supplies of gas and electricity and other services, the economic loss that would have radiated out from that occurrence was virtually limitless. I don't expect that this problem is about to be put to bed.

Rena Sofroniou: Perhaps not, but I gather that you are not giving up on 'predictability' as a foundation of the High Court's influence? I also gather that you are not offering sure-fire methods for reining in the law of negligence, either. What do we then do? Are we to say 'well, there's not much point even advising on this, the High Court will do something or another and never fear they will do it in conformity with close judicial reasoning, but what the outcome is I can't tell you?'

Chief Justice Gleeson: I thought that the author of the headnote in the CLRs did a very good job with *Perre v Apand*. A remarkable job, actually *(smiles)*. If you look at the reasons you will find at least some common factors and then if you look at later cases in which the court has refused to find a duty of care to prevent economic harm you can work towards greater predictability. 'Incrementalism' is a word that is often used: it's an interesting word in relation to the law of tort

because it seems to imply that the scope of the liability of defendants is always on the increase - nobody ever talks about 'decrementalism'. It's an interesting assumption that all progress in tort law is in the direction of expanding the rights of plaintiffs, because the corollary is that it always operates in the direction of expanding the liability of defendants.

Now when you look at the potential responsibility of people to be liable for causing financial harm to others, there are quite large implications for the security with which people can conduct their affairs are quite large. When a company like HIH fails it causes a lot of fuss, but it also reminds some lawyers that not all people are effectively insured against all forms of potential liability.

You may recall that about a year ago we had a case concerning the vicarious liability of employers for sexual abuse of children by their employees[11]. That just provides a practical example of what we are talking about. I don't know whether kindergarten operators can obtain insurance against liability for that kind of conduct on the part of their employees, but it's a significant question. It's wrong to assume that all kindergarten operators are wealthy individuals or large corporations. The assumption is often made that affordable insurance is readily available against all kinds of potential liability. That assumption is often false, and judges may not know whether it is true or false.

Rena Sofroniou: It's not every man or woman who has the experience of having an era of a court named for them. You've referred to the impact of decisions upon people's ability to conduct their affairs at large. How conscious are you in day to day decisions of the extent to which commentators, academics and practitioners are immediately looking to identify directions, leanings and tendencies of the court? Are you conscious of laying down and guiding the Chief Justice Gleeson High Court or is the nature of the Gleeson High Court just a matter of how the accumulated cases play out on a day to day basis?

Chief Justice Gleeson: *(Laughs)* That question assumes that a court is amenable to guidance, which, thank God, it is not.

Rena Sofroniou: Do you care at all about such a 'macro' view?

Chief Justice Gleeson: Yes, we get a lot of feedback. To paraphrase a remark that a District Court judge made many years ago on his retirement, if what a court needs is constant attention, critical comment and constant suggestions for improvement from the profession and law teachers, then in that respect the High Court is freakishly fortunate!

'One of the aspects of judicial independence that people often overlook is the independence of judges from one another. Once again in that respect the High Court is very lucky!'

Rena Sofroniou: There was a wonderful visual metaphor in seeing the seven members of the court literally squeezed in elbow to elbow at the Supreme Court of Victoria Banco Court, in a recess designed to fit three! Is *esprit de corps* an important factor in the day to day operation of the court as far as you are concerned, as its chief justice?

Centenary sitting of the High Court, Melbourne, 6 October 2003.
Photo: AAP Image/ Jason South.

Chief Justice Gleeson: One of the aspects of judicial independence that people often overlook is the independence of judges from one another. Once again in that respect the High Court is very lucky! I don't think there has been within my memory a time in the High Court when the members of the court have not been very independent of each other. My memory doesn't extend back further than the 1960s, but ever since then all of the justices of the court have operated as individuals - and they still do. On the other hand, obviously, in terms of its day to day functioning and administration, the court has to operate in a collegiate fashion.

The High Court is administered by all of its judges collectively. The responsibility for the financial aspects of the court's affairs does not reside in the chief justice, but in the justices collectively. So we have to meet once a month to discuss aspects of the running of the court. We have to work together in what I call the judgment production process as distinct from the judgment writing process. We have a judgments meeting once a month to discuss reserved decisions. On most sitting days the justices meet in my chambers for a cup of tea or coffee at the conclusion of argument.

In addition you barristers won't have failed to notice that during the course of argument the justices will often express tentative views. So there is a constant process of discussion when a hearing is going on.

Rena Sofroniou: In that regard could you provide any tip or advice for practitioners addressing the court, particularly when the judicial smirking, whispering, or interrogation starts, that might make it easier for said practitioners to survive the experience?

Chief Justice Gleeson: If you ask, if I were a barrister now or again, whether I would do some things differently in light of my experience as a judge, the answer is yes. What would I do? It is hard to be precise about that. Perhaps I would be less deferential but not, I hope, inappropriately tenacious. One of the essential skills of a barrister is to strike the right balance between saying or writing too much and saying or writing too little. It's natural I suppose that most people err on the side of saying too much rather than too little. It requires a good deal of self-confidence to make economical submissions. But if that can be achieved, it has a great impact.

Rena Sofroniou: Do you ever find junior barristers addressing the court?

Chief Justice Gleeson: We probably have more juniors who appear in criminal cases than in civil cases. But the answer is, not many.

Rena Sofroniou: Was it ever thus?

Chief Justice Gleeson: Yes. I don't know now how often counsel appear in the High Court without fee. It's none of my business and I would have no way of knowing. In my day at the Bar, junior counsel with sufficient confidence were often willing to take cases in the High Court without fee just for the benefit of the experience. Whether nowadays it's very rare for counsel to appear without fee, I can't say.

Rena Sofroniou: Your elevation to the Bench seems to me to have continued a series of professional situations in you've found yourself at the apex of a given hierarchy. First, as a barrister providing advice, then as silk at the head of a legal team; next as chief justice of New South Wales without being a *puisne* judge first, and of course as the Chief Justice of Australia. Yours is constantly the position at the top. Does this suggest that you are not much of a team player, or that you are not comfortable in partnership roles? It must seem solitary at times.

Chief Justice Gleeson: I don't think it's so solitary. When I was a barrister there were particular solicitors from whom I used to get a lot of work, so I had the benefit of a quite a number of professional associations that I found both valuable and congenial. Of course I'm conscious of the criticism that in my day at the Bar there was an atmosphere that some people have described as inappropriately 'club-like'. I think that broke down gradually over the time that I was the Bar. But I never regarded myself as a solitary individual, although I don't think I'm notably gregarious.

Rena Sofroniou: In that regard, do you like your 'Smiler' nickname?

Chief Justice Gleeson: That nickname came from Leycester Meares, and I have no doubt that he called me 'Smiler' for the same reason that a brunette might be called 'Snowy'.

Rena Sofroniou: I think that's the general gist of it.

Chief Justice Gleeson: But it actually wasn't a nickname that was very widely used when I was at the Bar, for one reason or another.

Rena Sofroniou: You don't mind it do you? It seems to be quite affectionately meant.

Chief Justice Gleeson: No, no *(Smiles)*.

Rena Sofroniou: Well, even if you were not isolated, as such, in the positions you have held or the professional roles that you have played, do you consider yourself to be an ambitious person who wants to have the, well, the most control, however much you may work with others or may be assisted by others?

Chief Justice Gleeson: That's probably a fair comment. I really have always enjoyed taking responsibility and at the same time I have always found it a little disconcerting to be in a situation where other people are in control.

Rena Sofroniou: Was social service or civic service something that was inculcated in you as a child?

Chief Justice Gleeson: No, as it happens I come from a small country town and my father who died many years ago was very active in local government, which was an unpaid activity.

Rena Sofroniou: You don't consider that that was such an influence?

Chief Justice Gleeson: If that was an influence, it was unconscious. When I was at the Bar, I thought that it was important to attempt to give back to the profession something I had taken out of it. I was active in the affairs of the Bar Association for a number of years. I also belong to a generation of barristers that, I think, have a habit of thought that is probably now gone forever.

I can remember ten or fifteen years ago a leading member of the English Bar saying to me, in relation to the English profession, that for more than a hundred years the Establishment played a kind of confidence trick on the Bar. The Establishment managed to persuade barristers that becoming a judge is the natural culmination of a career as a barrister. He then said to me: 'English barristers don't buy that any more'.

I think that when I was at the Bar that attitude of mind still prevailed. Of course there always were barristers who never wanted to become judges, but generally speaking the view was still taken that to become a judge was the natural outcome of a successful career as a barrister.

Rena Sofroniou: The job descriptions are so different! Is the move from professional advocate to professional listener an easy one to make?

Chief Justice Gleeson: It has always been assumed that the best way to learn how to be a judge is to watch people doing it. There's still a significant element of truth in that, but it's far from the whole truth. That's why I attach so much importance now to judicial education, orientation and continuing legal education for judges. Bill Ash, who was a barrister on the Seventh Floor and who died many years ago, used to say to his clients: 'You don't need to be frightened of the judge. Judges are only retired barristers'. That retired barrister syndrome is almost unknown now but it reflected an attitude of mind in the past.

Rena Sofroniou: What do you make of the apparent trend of judgment writing that sets out in agonising detail *all* of the evidence, written and oral, and all of the competing submissions, with a concluding outcome at the end? It is so aggravating to read and to try to glean any particular principle that's being decided. Do you have any views about it?

Chief Justice Gleeson: Well, if you ask yourself who is the intended reader of a given judgment, the answer must be, principally, the parties, the lawyers for the parties and any appeal court. Appeal judges are major consumers of the literary products of primary judges. Writing judgments can be a very difficult skill to attain and courses on judgment writing are an important part of judicial education. I have a lot of sympathy for primary judges nowadays because of the length and the complexity of cases.

Rena Sofroniou: But we don't have to experience such length and complexity first hand when we read the said judgments, do we?

Chief Justice Gleeson: Perhaps some of them write their judgments as the case goes along, almost in the manner of a diary of the day's events.

Rena Sofroniou: And we experience them in real time...

Chief Justice Gleeson: I admire concise expression in judgments, but I do understand the difficult circumstances under which trial judges operate. I think sometimes appeal judges have to share the responsibility, too. I'm thinking now not so much of reasons for judgment in civil cases, but of directions to juries in criminal cases. It is obvious that a lot of lengthy and complex directions to juries are the consequence of the apprehension of the trial judge about what an appeal court will do if it gets hold of the case, so they're looking over their shoulders at the appeal courts rather then concentrating on the jury. As I say, I think appeal judges have to take at least part of the blame for that.

Rena Sofroniou: Are there any particular judges or other mentors whom you have particularly admired?

Chief Justice Gleeson: When I first came to the Bar I read with Laurence Street and I did a great deal of work as a junior with Bill Deane. I admired them both enormously as barristers and judges. Another wonderful equity judge at the time was Kenneth Jacobs. Of course I was impressed by many of the judges that I appeared before. I always thought that the member of the High Court who seemed to have the sharpest intellect was Sir Frank Kitto. I also appeared on a number of occasions before Lord Wilberforce in the Privy Council. He was outstanding.

Rena Sofroniou: A final reflective one: In many respects the work of the court appears to be extremely gruelling. At the end of the day, is it worth it, do you ever dream of escape?

Chief Justice Gleeson: I can't answer that question because I'm not at the end of the day. Perhaps I can in five years time!

Rena Sofroniou: You have surely been at it for a sufficient time to have the beginnings of an idea! I suppose I'm asking whether you consider the rewards to make up for the sheer hard work that you are doing?

Chief Justice Gleeson: Well, if you ask whether I would do it again, the answer is 'yes'. If you ask whether I would recommend it to anybody else who had the opportunity, then I wouldn't be so sure. When I said earlier that barristers no longer assume that becoming a judge is the natural culmination of a successful practice, I think that's partly because, in some respects, barristers are now a little wiser then they were in my time. Many that I know appear to realise that there is more to life than just being a barrister or a judge. *(Interviewer gasps in alarm at this concept)*. That suggests to me that they may be a little smarter than I am!

Rena Sofroniou: *(Recovering)* Thanks very much for your time, Chief Justice.

1 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129
2 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.
3 13th AIJA Oration in Judicial Administration 'The centenary of the High Court: Lessons from history' delivered by the Hon. Murray Gleeson, AC, Chief Justice of Australia, 3 October 2003, Melbourne.
4 *The King v Barger* (1908) 6 CLR 41.
5 Friedrich Hayek (1899-1992), Austrian economist and political philosopher.
6 Professor Michel Troper, 'The limits of the rule of law', in C Saunders and K Le Roy (eds) *The rule of law* (The Federation Press, 2003), pp. 81-97.
7 *Perre v Apand Pty Ltd* (1999) 198 CLR 180
8 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465
9 *Candlewood Navigation Corp. v Mitsui OSK Lines Ltd* [1986] AC 1
10 *Caltex Oil (Australia) Pty Ltd v Dredge 'Willemstad'* (1976) 136 CLR 529
11 *New South Wales v Lepore* (2003) 77 ALJR 558

Pride but not complacency

*By the Hon Justice Michael Kirby AC CMG**

I remember the first time I heard of the High Court of Australia. When I was a boy my grandmother remarried. Her new husband was a communist. A finer man I never met. In 1949 the Menzies Government promised to outlaw communism. The law was challenged in the High Court.

On the day the court struck the law down as unconstitutional, a great burden of fear lifted from our family. I was eleven. It was a curious feeling. Far away judges, without any help from a Bill of Rights, had held that the law on communists was incompatible with the Australian Constitution. At virtually the same time in the United States, the Supreme Court, by majority, had upheld similar legislation as valid.

Over the century since the first sitting of the High Court in October 1903, with few exceptions, when it has been faced with major challenges, it has generally come to the conclusion that advanced the interests of the nation and the rights of the Australian people.

Of course, it would be wrong to suggest that the High Court never made a mistake. The many dissenting opinions (including some of my own) indicate strongly held differences. In its early days, a number of the court's decisions reflected the attitudes of racial superiority that existed in Australia. Sometimes, as in its decisions over the freedom of interstate trade, excise duties and implications upholding the independence of the judiciary and free speech, the court took decades to reach a clear result. But given the extreme difficulty of amending the Australian Constitution by referendum, it is as well that the High Court has found the means to adapt that document to rapidly changing times. How else could our country have coped?

Although defending the Constitution is the most important function of the High Court, its role as a general court of appeal for the nation has profoundly affected its character. Above all, it is a court of law. It is the sole final court of Australia. Its decisions establish the law that applies from one side of the continent to the other. Having a single common law is a great advantage for Australia both in economic and social terms.

In my lifetime, I have witnessed great changes in the law that have enhanced freedom. Many of them have been stated or applied in decisions of the High Court. The rights of Aboriginal people, women, ethnic minorities, homosexuals and others are safer in Australia than in most other countries because of the existence of independent courts with constitutionally guaranteed links to the High Court. No-one doubts the independence of our judges. Whatever differences they may hold, all are dedicated to the rule of law.

Over the century since its establishment, the High Court has seen many innovations. The creation of its own building in Canberra in 1980 saw a great period of legal innovation during Sir Anthony Mason's time as chief justice. Old rules of law, found to be unclear or out of keeping with contemporary values, were re-expressed with clarity and confidence. It was a time of legal renewal. Sometimes, as now, such periods are followed by times of caution.

The High Court has embraced new technology in ways that lead the world. Suitably for a country of Australia's size, the judges in Canberra hear applications for leave to appeal conducted by videolink. Transcripts and decisions are immediately posted on the Internet. In future it seems inevitable that proceedings will be broadcast live. Maybe one of the judges will explain the decisions of the court in simple terms as they are handed down. Maybe some judges will relate more closely to the experiences of women and other minorities. Adaptation to new ways and values is part of the genius of our law, although some of its practitioners need to be dragged kicking and screaming to accomplish the changes.

'The lack of proper media coverage of the court's work, including informed criticism, is a depressing feature of the superficial world of infotainment.'

These reasons for pride do not warrant self-satisfaction. The large numbers of self-represented litigants illustrates an institutional failure in the way we organise legal services in Australia. Whilst legal aid in criminal trials has been improved since the High Court's decision in the *Dietrich* case in 1992, civil legal aid in family law, for refugees and representation in criminal appeals is by no means guaranteed. There are still people who miss out on their legal rights. The law is often needlessly complicated. There is still much injustice. Despite *The Castle*, the High Court is not able to solve every problem and cure every wrong.

Recent attacks on the court and on individual judges by people who should have known better undermine the rule of law. The lack of proper media coverage of the court's work, including informed criticism, is a depressing feature of the superficial world of infotainment. Yet it can still be said that the High Court has fulfilled its national role beyond the expectations of those who created it.

What do the next hundred years hold? Will some judicial decisions be made by intelligent machines? Will judges be spared the present routine so as to concentrate on more and better decisions? Will those decisions be expressed in a simpler, clearer way? Can we continue to get by without a Bill of Rights? Will international law and global courts come to supplement or replace our proud national institutions and if so at what cost?

* Justice of the High Court since 1996

Looking backwards encourages us to look forwards. When the justices of the High Court filed into the Supreme Court in Melbourne for the centenary sittings inevitably their thoughts were with the judges of 100 years earlier. But when the speeches were over, today's judges returned to the busy work of upholding constitutionalism and law throughout this country. The future presents dangers but also opportunities to do better in the quest for justice under law for all people. Law in the end is not enough. Sometimes law can oppress - as it did my grandmother's new husband in 1951 and many Aboriginal people, women, immigrants, gays and others before and since. That is why we allowed but an hour for congratulations. When that hour was up, the challenges of the second century of the High Court of Australia began.

A significant addition to the Bar Association's art collection

The Bar Association's art collection now boasts a magnificent example of Aboriginal art, due to the generosity of Bret Walker SC. The 2003 Bar Council gratefully accepted the work of art during the final meeting of Mr Walker's presidency.

Entitled 'Awelye Women's ceremony', the painting by Aboriginal artist Minnie Pwerle now takes pride of place in the boardroom. Its bold colours and linear patterns depict the ceremonial procedure of 'Awelye'; body painting, singing and dancing to celebrate the Bush Melon in her central Australian homeland.

Photo: Murray Harris Photography.

A portrait of Sir Frederick Jordan in the Court of Appeal

On 25 Augtust 2003 a portrait of Sir Frederick Jordan KCMG, chief justice of New South Wales between 1934 and 1949, was unveiled in the President's Court, Queens Square.

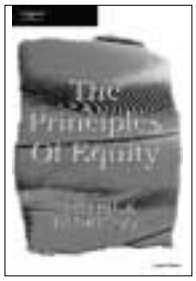
Justice Meagher told those gathered at the ceremony how the artist, Mary Edwards, was commissioned by the Bar Association in 1947, or thereabouts, to paint a portrait of Sir Frederick Jordan. The Bar Association refused to accept it or to pay for it, ostensibly because the 'sprig of greenery in the bottom left hand corner offended them mightily'. They offered to return the painting in order to have the painting corrected, but the artist 'declined to take it back under these terms and they declined to alter their attitude that she should not be paid'.

According to Justice Meagher, the portrait next appeared in Fiji, where the artist lived for many years. There, it was acquired for the Court of Appeal Justice Meagher, the portrait artist lived for many the Court of Appeal.

Sir Frederick Jordan. Photo: Murray Harris Photography.

The principles of equity (2nd ed)

By Patrick Parkinson (ed)
Lawbook Company, 2003



This book offers the work of twenty-five authors, with a good mix of academics and practitioners. Each has contributed to an overall work that is a fine example of the scholarship and consideration that allows a full appreciation of the subtleties of the principles of equity.

This is the second edition of a book first published in 1996, in which twenty authors combined to address the principles of equity. More authors have been added in this second edition to revise and update the work of those of the original twenty who were not able to undertake the task themselves. The result is that the original approach of the book is maintained with currency.

It is also to be noted that the editor acknowledges that many of the chapters in the first edition were based on material which first appeared, in a different form, in the 'Equity' and 'Unfair dealing' titles of *The laws of Australia* (Lawbook Co.) first published in 1993. Again, the original work has been reviewed and updated where appropriate.

For those not familiar with the work, the book allows an author a chapter dealing with a particular area concerning the operation and application of the principles of equity. Because of the many authors involved, the sense is one of a collection of essays or analyses rather than a single text. This approach is advantageous as it provides a ready assessment of the general principles in a particular field.

This second edition deals largely the same topics with some broadening of the scope and comparison with recent important authorities and scholarship in the UK, Canada and New Zealand, and to a lesser extent the United States and elsewhere. Some recent reference material is also acknowledged and incorporated, particularly in the areas of equitable remedies, the law of tracing and restitution.

John Glover's chapter on 'Equity and restitution' in the first edition has been replaced by an analysis by Michael Bryan, which deals more with the issue of unjust enrichment and restitution, with a consideration of restitution in equity then addressed. John Glover's chapters on 'Contribution' and 'Subrogation' in the first edition remain, having been updated by Andrew Robertson.

Barbara MacDonald, having contributed to the first edition in chapters on 'Marshalling' and 'Constructive trusts', has updated her own work and the original chapter of David Maclean on 'Injunctions'.

Chris Rossiter addressed the area of 'Relief against penalties' in the first edition and has updated this chapter. Also, he has expanded into a somewhat related area by also revising and updating Michael Tilbury's chapter entitled 'Relief against forfeiture'.

Ian Davidson's chapter on 'Taking accounts' has been updated by Mark Cleary, and remains a big plus for the book. This analysis of the availability, principles and procedure of remedy often sought is a valuable guide to those who practice in equity.

While there may be overlapping of certain areas because of the number of individual authors, this does allow the reader to be informed from different points of view. While a subject is considered of itself, the reader can contrast the approach or conception of each author in consideration of the more fundamental precepts of equity.

As a result of the scope of the endeavour, and the collection of the thoughts of so many authors, time and space becomes limited. Those interested in a deep analysis of particular or general issues in equity may be better advised to seek a publication that does not strive to engage such a large field of scholarship and law.

For example, the assessment as to whether a constructive trust is properly considered to be an institution or a remedy, or both, or why it matters, is somewhat short. The issue is described as vexed and the author suggests that there are matters of practical and conceptual importance which turn upon it. However, space prohibits any detailed analysis of what those matters are and their suggested importance. Indeed, one's curiosity is pricked by the footnote that acknowledges, contrary to the author's position, that others consider the matter to a 'bogus discourse' or idle, a matter of rhetoric and unsound. The potentially sharp dialect on the question is only hinted at, and the reader is left to pursue the debate by references to journal articles and cases provided.

The obvious comparison for those considering a text on equity in Australia is with *Meagher, Gummow & Leane's equity, doctrines & remedies.* In simple terms, the titles of each book give an appropriate indication of the respective advantages.

As the primary focus of this work is with 'principles', and in approaching the broad field by the employment of so many authors, this work provides a good analysis of the law and its application in areas of practice in equity. In some contrast (although it is shades of grey rather than black and white) *Meagher Gummow & Lehane,* by dealing more with 'doctrines' and with fewer authors, provides a more unified, and perhaps fuller, exposition of the concepts and thought which underlies the principles of equity with which it deals.

In conclusion, the first edition of this book was a worthy addition to the well-known texts on equity and trusts. The second edition maintains that position and reflects impressively on the authors and on the developments of the principles of equity in recent years. It undoubtedly has a place in any well-furnished library on equity.

Reviewed by Frank Hicks

Experts' reports in corporate transactions

By L McDonald, G Moodie, I Ramsay & J Webster
The Federation Press, 2003

In 1990, Henry Bosch, former chairperson of a predecessor entity to the Australian Securities & Investments Commission, the NCSC, wrote:

> Despite claims in the liturgy of the theological devotees of perfect competition, a completely free market for corporate control nowhere exists. In all successful capitalist countries there are measures designed to increase disclosure, to promote fairness and to restrict excesses.

This statement, cited in this book, was written shortly after the 1987 October stock market crash, in justification of the role of experts' reports to add information to (in the authors' words) 'an informationally deficient market'. Fast forward now to over a decade later, and in the wake of the Enron and World.Com scandals, and our own collapses of HIH and One.Tel, the role of experts in corporate transactions in transmitting accurate and independent information and opinion concerning the financial health of companies is just as pertinent today. Where experts fail in performing this role and investors suffer financial losses, as this book shows, there is every likelihood that the investors will try to sheet home some of the blame to the experts; even though there involvement might be secondary to the malfeasance or negligence of other corporate insiders. The recently settled litigation concerning AMP's hostile takeover of GIO, in which the latter's merchant bank, that valued the shares in GIO in the target's response, was joined to the representative proceedings in the Federal Court, is a case in point.

As its title indicates, this book is directed to the specialised context of corporate transactions; in particular capital raisings, acquisitions and restructuring. Its targeted audience is relatively narrow, as with other legal books directed to niche topics: it includes those persons asked to write reports; as well as those who, like directors of publicly listed companies and their legal advisors, use the expert reports. Accordingly, a chapter that is concerned with the tests applied by experts in the corporate setting and deals with issues of significance to commercial lawyers such as the meaning of the compound expression 'fair and reasonable' and 'fair value', as it applies to the value of securities offered as consideration for acquisitions, has limited relevance to those not concerned with or involved in corporate transactions.

The vast remainder of the book is not so confined in its appeal but contains topics of interest and relevance both to the specialist practitioner and the more general reader. These chapters include: the purposes and uses of expert reports in the corporate context; statutory and other definitions of 'expert', the liabilities of experts; defences and limitation of the liability of experts; reliance by directors and, lastly, the buzzword topic, the 'independence' of experts.

One feature - and a major strength - of the text is the practical orientation of its content. Whilst the legal principles are succinctly expressed, with reference to important cases, statutory provisions, provisions in industry codes and the regulator's practice statements and policy notes, the book is replete with actual examples of the content of some reports, many (but not all) of which have been examined in the courts, to support the particular points being made. This is seen, for example, in the context of the chapter dealing with disclaimer and indemnity clauses. The book does not spare those authors of reports that have been criticised in the courts and sets out passages from reports that have incurred the wrath of judges. In this sense, the book serves a salutary function in indicating, to those asked to prepare experts reports, of the mistakes and vices contained in previous reports, as identified by the courts. This practical orientation may be attributed to the profile of the authors: all of who are trained commercial lawyers, with one being a highly respected academic. The practical nature of the text is also demonstrated by the frequent reference to commentary from other practitioners in the commercial law area; as well as financial journalists, which usefully critiques this area of the law from the perspective of its most immediate practitioners.

The timing of the publication is good: it has now been a few years (March 2000) since Chapter 6A was added to the (then) Corporations Law, which stipulated a new regime for the reports required to facilitate acquisitions and capital raisings. Those changes have been bedded down and already been looked at in the courts. Reference is made to the decisions interpreting these recent statutory provisions.

Those lawyers engaged to deal with claims of misconduct, statutory contravention or negligence leveled against experts in this area of the law will derive much benefit from the chapters dealing with the liability of experts, defences and limitation of liability and reliance by directors. The point that comes through strongly in those chapters is that recourse by litigants seeking civil compensation to statutory causes of action - mainly the Corporations and Trade Practices legislation - and defences, may be much more productive than application of the common law. That trend may accelerate if the dicta of certain judgments of the High Court in *Graham Barclay v Ryan* (2002) 77 ALJR 183 at [62], [129] - [130], regarding the doctrine of statutory pre-emption of the general law, is developed. The treatment of these statutory actions and special defences is thorough. As to the common law, whilst detailed commentary is provided regarding the long - running *Duke Group* litigation, it is, perhaps, surprising that no reference is made to the High Court's decisions in *Esanda Finance Corp v Peat Marwick Hungerfords* (1997) 188 CLR 241 (duties of care to third parties) and *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 (negligent misstatement). In respect to the chapter concerning limitation of liability and defences, despite the topics remaining, somewhat, in a state of legislative flux across the country, some consideration might have been given to the

implications of 'proportionate liability' to the incidence of cases brought against experts, or the legislative 'standard of care' that now applies generally to professionals in New South Wales.

Further, it is a pity that a chapter was not inserted that considers the use of experts' reports *in the court-room*, including the ethical and procedural requirements for the use of such reports as well as evidentiary rules as to admissibility and the legal professional privilege that attaches to experts' papers and draft reports. The insertion of such a chapter would have broadened the book's appeal to advocates who practice in corporate and securities law. There are a range of issues that might have been considered. Recently, for example, in *FGT Custodians v Fagenblat* [2003] VSCA 33 the Victorian Court of Appeal examined the admissibility of a report from a valuation expert, not because of a failure to adhere to formal requirements, but on the basis that the expert was shown to be less than 'independent'. In the Supreme Court of New South Wales, *Practice Note 121* provide for joint expert conferences. Finally, of course, there is the burgeoning list of cases that interpret secs 79 and 80 of the Uniform Evidence legislation. Case law, statutory and procedural developments of this kind indicate the reliance increasingly placed by the courts upon experts to assist with the identification of issues and resolution of parties' disputes. Inclusion of such a chapter might have added a sense of completeness. In fairness, there are other more general texts that deal with such topics.

Despite these minor criticisms, the book fills a long-standing vacuum in the legal literature concerning experts who produce reports in corporate transactions. It is something of an instruction manual for such experts and gives commercial lawyers an informative and very readable exposition of the principles and important current issues concerning expert reports in the corporate context.

Reviewed by Alister Abadee

Meagher, Gummow & Lehane's equity doctrines and remedies (4th ed)

By RP Meagher, JD Heydon & M Leeming
Lexis Nexis Butterworths, 2002

This is and has been *the* book on Australian equity since the first edition was published in 1975. Ten years have elapsed since the previous edition so that a new edition was needed by the profession and students.

Australian equity is a vital part of the commercial law in Australia, largely as a result of chance factors. The first is that the commercial heart of Australia moved from Melbourne to Sydney in the 1950s and the second is that, apart from a small commercial causes list, all matters other than equity matters had to be heard by a jury of four. The principal mode of escape was to cast the dispute as an equity suit. Prior to 1972 such a move could be countered by a defence of 'no equity'. Thus, the pleader had to find a bona fide claim in equity. In this he or she was aided by the practical wisdom of Charles McLelland, CJ in Eq and later Laurence Street, CJ in Eq. Thus began the practice of commercial disputes taking on equitable flavour. In due course, the commercial list in New South Wales became part of the Equity Division and the Victorian Supreme Court commenced a Commercial and Equity List.

This new growth of equity caught the traditionalists by surprise. In Melbourne, I believe, equity was only taught as part of legal history even in the early 1960s. New South Wales lawyers indeed worried about Victorian decisions which did not seem to be based on true equitable principles. They worried even more about English decisions made by judges who had either never attended law school or had spent their entire career at the Bar in common law matters.

The only reputable Australian textbook on equity in Sydney in 1960 was Frederick Jordan's *Chapters on equity in New South Wales*, a Government Printer edition of the Sydney Law School notes of 1945, slightly revised.

Thus, in 1975, the field was way open for an Australian textbook on equity. And it arrived with a bang. The book was probably the most brilliant 'first novel' ever to hit the legal bookshops (now, unfortunately, virtually a thing of the past!).

Understandably, the book spent a considerable amount of time attacking the heresies of the time, particularly those that were seemingly becoming entrenched in England. It dealt with the true principles in these area in considerable detail. However, it did not deal at all with trusts, as these were already well covered in the companion work, *Jacobs' law of trusts in Australia*, and covered some other subjects in less-than full detail. The references to authority and to statute were perfectly done, thanks to the skill of the research assistants.

However, by the third edition, the work was getting a little tired. Interstate readers complained that references to the law in their states were not updated. The focus on the problems of the 1960s was also getting less useful.

The new edition revivifies the work. Its tiredness has gone. The basic structure is still there. Indeed, if one sees a reference to an earlier edition of the book in another text, and checks to see the corresponding section in the 4th edition one will almost invariably see the identical text from the earlier edition with additions and further case references. The additions, however, bring the work right up to date and often provide a more balanced view of some areas of the law.

The work has now such a reputation that it is an authority of itself which can be quoted on its own without reference to the underlying authority.

I will not waste space by commenting on minor errors such as the typo 1897 for 1987 on p xi. There are, however, two areas of weakness which could be simply remedied in later editions.

As to the first, I am reminded of what Maddock said in his preface when writing his new book on equity in 1815. Ballow had written the first real equity textbook in 1737. Fonblanque had adapted Ballow's manuscript and had added authorities and updating. However, Fonblanque did not feel it appropriate to alter Ballow's sacred text. Maddock said that had Fonblanque's delicacy permitted him to recast the whole treatise a better work would have resulted.

As I said earlier, the present work is focused on the heresies of the 1960s. Many of these heresies have now been abandoned. The focus of equity in the twenty-first century has changed. The enemies today are not the English judges but the restitutionalists, the disciples of Professor Birks and the trendy university lecturers who would like to discard the whole of the learning of traditional equity and substitute some pale substitute based on unjust enrichment. There is very little in the work to counter these people's theories or to defend the basic concept of unconscionability.

It may be that the next edition should not be too tender to rewrite some of the text that has remained the same since 1975.

The second defect is the continued attack on particular judges whose decisions are thought by the authors to show heretical leanings. Thanks to this work, Lord Cooke is now thought of here as the rich man's George Palmer! As Mason P said recently, one does not expect works of great scholarship to descend to the level of such attacks.

These criticisms are relatively minor. *Meagher, Gummow and Lehane's equity doctrines and remedies* remains the standard work in the field and is a 'must have' for any serious equity practitioner.

Reviewed by the Hon Justice Peter Young, Chief Judge in Equity

Laying the foundations of industrial justice

The presidents of the Industrial Relations Commission of NSW 1902-1998

By Greg Patmore (ed)
Federation Press, 2003

The Industrial Relations Commission of NSW, which celebrated its centenary last year, is the oldest industrial tribunal in the world.

It was established as a result of a decision to implement a 'radical liberal collectivist approach'[1], namely compulsory arbitration of industrial disputes conducted by a specialist tribunal.

It has played an important role in ensuring the stability and economic success of NSW. Yet very little has been published about those who made up the commission over the last 100 years.

That has been remedied by a great publication which contains a series of pen-portraits of the nine men who held the position of president of the Industrial Relations Commission of NSW prior to the incumbent, Justice Lance Wright.

The publication is a credit to Justice Wright, who conceived the book to mark the centenary of the commission and Greg Patmore, who wrote the introduction and conclusion and edited chapters written by four other leading labour relations historians: Andrew Frazer, Andrew Moore, Lucy Taksa and John Shields.

In launching the book on 25 August 2003, Professor Ron McCallum, Dean of the Sydney University Law School, described the book as a series of readable vignettes which allows the commission's important work over the last century to become better known. He noted that the book records the commission's path-breaking work in areas such as annual leave, long service leave, equal pay and redundancy pay.

As well as providing for the first time a concise history of the commission, the pen-portraits provide an entertaining insight into the lives of these nine men.

The first president, Justice Henry Emanuel Cohen (1902-1905), was the first Jew to be appointed to a permanent position on a supreme court in the British Dominions, becoming a judge of the Supreme Court in 1886.

Cohen had to deal with an entirely new concept, namely compulsory arbitration which had been introduced against a background of the major industrial disputes of the late nineteenth century, which had brought great disharmony and economic harm to the country.

The principle of a 'living wage' is usually traced back to HB Higgins' *Harvester* decision. But, as recounted by Andrew Frazer, the principle was in fact first expounded two years earlier by the second president of the NSW Commission, Justice Charles Gilbert Heydon[2] (1905-1918), in the *Sawmiller's* case[3].

During Justice Heydon's time he had to deal with the consequences of a series of Supreme Court decisions which restricted the tribunal's power, including decisions that the tribunal did not have power to vary its awards and did not have power to regulate 'labour only' contracts with tradesmen. The book quotes Justice Heydon in a decision[4] stating in frustration:

> In consequence of the recent discoveries of the true meaning of the Act, access to the court is blocked, the area of its operations narrowed almost to vanishing point, its freedom of movement checked with bonds, and all its actions paralysed...The barque of the Industrial Arbitration Act made a brave show with sails and bunting at its launching . . . but since I took the helm, the Act has been riddled, shelled, broken fore and aft, and reduced to a sinking hulk. No pilot could navigate such a craft.

Lucy Taksa's essay on the fourth president, Justice George Stephenson Beeby (1920-1926) reveals his many and varied political allegiances prior to his appointment. As a young man he expounded socialist ideas and was attracted to William Lane's utopian 'New Australia' in Paraguay. He later became a leading light of the Labor Party, and in 1898 along with Holman and Hughes, successfully advocated the removal of the socialist plank from the party's platform. He was elected to the Legislative Assembly for the Labour Party, and held ministerial positions with the first Labor government, but later resigned and stood as an independent. Upon being elected he formed the National Progressive Party, which expounded the rights of those who worked in agriculture, and which formed the basis of the later Country Party (now the Nationals). While some of Beeby's decisions as president were of great importance (such as the 1938 award for the boot industry which recognised the skilled work of women workers) his greatest influence on industrial relations was probably his time as a parliamentarian, when he sought and obtained important amendments to the *Industrial Disputes Act 1908*. He insisted that the Industrial Relations Court had to be presided over by a judge (with tenure); the tribunal had to have the power to deal with all matters involved in an industrial dispute; and only parties who were registered could appear before the tribunal. These principles continue to be fundamental aspects of the NSW industrial relations system.

Lucy Taksa's chapter on the fifth President, Justice Albert Bathurst Piddington (1926-1932) is a well-written story of a radical and honourable man. Piddington is perhaps best known for his two resignations. Before his appointment to the Commission he had been appointed a High Court Judge, but resigned the appointment without ever having sat. His resignation followed severe criticism from the press and the Sydney and Melbourne Bars regarding the appointments of Powers and Piddington[5]. Powers weathered the storm, but Piddington resigned on principle. He felt compromised because immediately prior to his appointment, while overseas, he had answered a query made at the instigation of the then

Attorney-General WM Hughes as to his attitude to States rights.

His second resignation, many years later, was from the position of President of the Commission. Again he resigned on principle, in that case in protest over the dismissal of the Lang Government.

The seventh President, Justice Stanley Cassin Taylor (1942-1966), comes across as a very colourful and robust character in Andrew Moore's entertaining chapter. Taylor prided himself on having a 'common touch', speaking in the vernacular of the worker. He was very much a 'hands on' Judge, travelling extensively to worksites, conducting regular workplace inspections.

Taylor was 'hands on' in another way too. As Moore recounts, when President Taylor conducted regular wrestling bouts at lunchtime in his Queens Street chambers. Fisher J, speaking at the book's launch, recalled that one of Taylor's opponents in these bouts was a professional wrestler known as Chief Little Wolf.

Taylor's greatest success involved the Snowy Mountains Hydro-Electric scheme. Moore recounts that Taylor was part-heard in proceedings for a first award for the scheme when he got an anonymous tip that the Commonwealth Conciliation and Arbitration Commission was about make a Commonwealth award for the Hydro-Electric scheme which would have ousted NSW from field. Taylor arrived early the next day, drafted a NSW award, and refused to take phone calls from his Commonwealth counterpart until the award was made later that afternoon. The award had the effect of entrenching the NSW industrial system as the regulator of the scheme. Thereafter Taylor worked assiduously to ensure that the mainly immigrant workers on the scheme were properly paid and importantly that the work was done with the minimum of industrial disputation. He has been credited with playing a very important role in the success of the Hydro-Electric scheme.

Justice Alexander Craig Beattie (1966-1981), the eighth president, was a great jurist, who built on the foundations laid by his predecessors a great body of industrial law. Andrew Frazer describes how Beattie also modernised the workings of the commission. Beattie introduced the panel system, whereby judges were allocated to particular industries and callings, allowing them to more closely understand those particular areas. Beattie also abandoned the wearing of wigs and gowns in arbitration hearings (although they were maintained when the commission sat in court session).

It was in Beattie's time that the commission's role was expanded into areas which are now very familiar, namely unfair contracts and reinstatement for unfair dismissal and Beattie, sitting on almost every full bench, helped shape the law that we know today. The ninth, and last of the presidents covered by the book, Justice William (Bill) Kenneth Fisher (1981-1998), steered the commission through major changes in industrial relations. John Shields' essay notes that the commission under Fisher had to deal with the wages explosion of 1981-2, the economic slump of the early 1980s, the wage freeze of 1982, the advent of the Accord system, the advent of productivity bargaining and award restructuring in 1987-8, the return of recession in 1990-92 and the move to enterprise bargaining in the first half of the 1990s. Shields concludes: 'That the NSW Commission survived these immense challenges at all was a remarkable achievement; that it emerged a stronger and more effective judicial body was Bill Fisher's singular triumph'.

Fisher built upon the industrial jurisprudence of Beattie, and advanced the industrial law in many important ways. In the early 80s, in the face of the depression that was causing so many to become unemployed Fisher handed down a series of decisions which established a right to redundancy pay, something which has since become expected as a legal minimum. Professor McCallum, in launching the book, gave this as an example of Fisher's 'great humanity'.

Professor McCallum also noted that it was during the presidency of Fisher that the commission established what is now considered 'the best and most authoritative jurisprudence on occupational health and safety of anywhere in the common law world'.

As is often the case with essay collections, the result is not entirely consistent. However overall the book is an entertaining and informative account of an otherwise little recorded part of our legal history. It should be read by all those with an interest in NSW legal history. Industrial practitioners will find it full of historical insights relevant to current industrial issues.

As the current president, Wright J, said at the book's launch, the book helps to remind us of the important role played by the commission and the arbitration system more generally in the prosperity and social stability that we have inherited. The book in an appropriate way pays tribute to those who played such a major role in making that system work in a way beneficial to all.

Reviewed by Ingmar Taylor

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1 Andrew Frazer, *Law and industrial arbitration in NSW, 1890-1912*, Phd thesis, ANU, 1990, which can be found in the Mitchell Library

2 I am told that Justice Heydon was the great uncle of our most recent High Court appointment

3 *New Saw-mill and Timber-yard Employees' Association v Sydney and Suburban Timber Merchants' Association* [1905] AR 300

4 *Amalgamated Miners' Association, Wrightville v Great Cobar Ltd* [1907] AR 53 at 58-59

5 The *Bulletin* wrote under the heading 'The Ghastly Error of WM Hughes' that the pair were 'not so much mistakes as grim tragedies': See the entry on Powers in the *Oxford Companion to the High Court*, Blackshield, Coper, Williams, 548-549.

The law of unfair contracts

Jeffrey Phillips SC and Michael Tooma

Law Book Co., 2003

The publication of this work by Jeffrey Phillips SC and Michael Tooma comes at a significant point in the history of sec 106 of the *Industrial Relations Act 1996* (NSW), the statutory successor of sec 88F of the *Industrial Arbitration Act 1940* (NSW). As the authors observe in their preface, the book appears hot on the heels of the New South Wales Court of Appeal's controversial judgment in *Mitchforce v Industrial Relations Commission* [2002] NSWCA 151, in which, to quote the authors, the commission's 'march into the heartland of commercial contracts has come under attack'. They observe that the Court of Appeal (which comprised Spigelman CJ Mason P and Handley JA) was 'troubled by the evolution of this jurisdiction from its humble origin in the 1950s as a device designed for worker protection and preservation of the award system'.

Apart from describing the actual majority decision in *Mitchforce* as wrong and inconsistent with *Stevenson v Barham* (1977) 136 CLR 190 and *Caltex Oil (Aust) Pty Ltd v Feenan* [1981] 1 NSWLR 169 (PC), the authors are critical of the *Mitchforce* court's express and implied criticism of the imperial 'march' of sec 106, as interpreted by the commission. They argue that the viewpoint espoused by the Court of Appeal in that case 'neglects the changing nature of modern working arrangements and their dramatic divergence from the traditional master and servant relationship', stating that 'these changes have been characterised by changes in the Australian economy, the client and the trade union movement, a rise of franchise agreements, increasing use of contractors and out workers, the communications revolution, globalisation, increasing labour force mobility and the frequency of organisational restructure'. All of these factors, in the authors' opinion, have altered the emphasis on the place of the individual within the workplace with a consequent shift in the focus of attention towards individual rather than collective answer to workplace problems.

The decision in *Mitchforce* can be viewed as a direct institutional clash between the Supreme Court of New South Wales and the Industrial Relations Commission of New South Wales. In terms of their constitutive statutes, both have the same status as superior courts of record, albeit that the Supreme Court (probably) retains at least limited scope for review of decisions of the commission notwithstanding the terms of sec 179 of the *Industrial Relations Act 1996*. Resonances of this institutional competition could be detected in the Court of Appeal's earlier decisions in *Resarta Pty Ltd v Finemore* (2002) 55 NSWLR 320 and *Tszyu v Fightvision Pty Ltd* [2001] NWCA 103; (2001) 104 IR 225. In the former case the Court of Appeal did not accept as sufficiently forceful arguments based on the specialist nature of the commission's sec 106 jurisdiction as a reason for declining to transfer sec 106 proceedings to the Supreme Court of Victoria. Spigelman CJ referred to members of the commission having a 'cast of mind' rendering more likely the exercise of jurisdiction to reformulate rights and obligations of a contract.

The authors predict that the impact of *Mitchforce* and the sentiment expressed in *Resarta* will only serve to encourage litigants, and respondents, in particular, to create skirmishes with a view to bringing proceedings before the Supreme Court. Certainly the device of commencing proceedings in the Supreme Court of another State or in the Federal Court has been used by some respondents as a means of cross-vesting sec 106 cases out of the commission's reach. *Resarta* sanctioned such an approach, at least in cases broadly capable of being characterized as 'commercial'.

In the context of the *Mitchforce* 'debate', avid commission watchers will be fascinated by the observation of commission President Wright in the book's Foreword:

> The events of next year or two may well determine whether section 106 remains an important part of the legal landscape in New South Wales or falls into desuetude as appears to have largely happened with the *Contracts Review Act*. Nevertheless, irrespective of what happens in the time frame mentioned, it is most timely that this book is being published now. It will be an essential guide for the practitioner. It will be of assistance to judges hearing cases under section 106. It will undoubtedly be of benefit to those students who might wish to chart the way in which society shapes its laws.

These sentiments may be readily endorsed. The book is organised in 9 chapters together with a useful set of appendices containing forms relevant to a sec 106 application.

Chapter 1 contains an introduction to the history of the unfair contracts jurisdiction, locating the original use of the words 'harsh and unconscionable' in the English *Moneylenders Act 1900*. This chapter deals with key definitional elements that underpin the jurisdiction such as the definition of contract and the concept of a contract 'whereby a person performs work' in an industry. This chapter contains a short but important discussion of the application of sec 106 to work performed (or aspects of work performed) outside Australia but with some nexus to New South Wales.

Chapter 2 is headed 'Unfairness' and considers what Sheldon J famously described as the 'tautological trinity', namely the concepts 'unfair, harsh and unconscionable'. This chapter should especially be consulted by those coming fresh to the jurisdiction. It gives a brief (perhaps overly brief?) account of the central concept of 'unfairness', making it plain that fraud, deceit or misrepresentation are unnecessary, that a contract may become unfair by reason of a change in circumstances or in its operation, notwithstanding that its terms may be unexceptional. In the chapters which follow Chapter 2, the broad concept of unfairness is sought to be illustrated by the authors by exploring instances of unfairness as revealed in

the decided cases. This is broadly done by reference to employment contracts, on the one hand, and commercial contracts on the other.

Chapter 3 deals with unfairness in the context of incentive schemes and share option schemes in employment contracts and Chapter 4 considers unfairness in the context of termination of employment and the relationship between unfair dismissal, jurisprudence and unfair contracts law. It draws attention to those kinds of employment contracts in respect of which applications cannot be made.

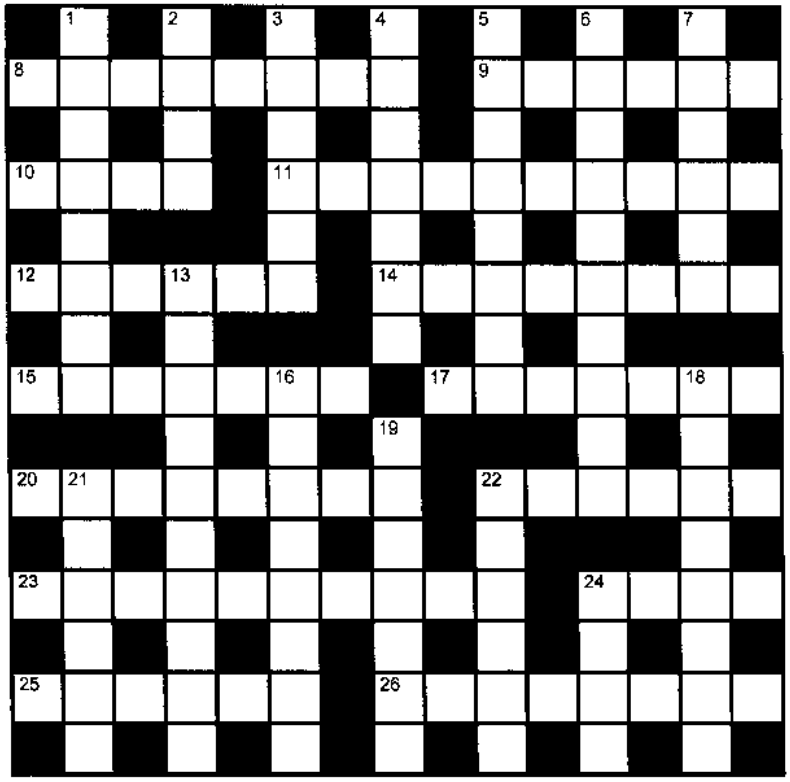
Chapter 5 interestingly considers the *Trade Practices Act 1974* as an alternate remedy to relief under sec 106. That may be of particular significance given the $200,000 'salary cap' recently introduced by 2002 amendments to the Act. The authors note that the scope for relief under the Trade Practices Act is narrower than under the Industrial Relations Act. Whilst that may be correct, in this reviewer's opinion at least, the scope for creative fashioning of relief afforded by section 87 of the former Act is not dimensionally different to that which is currently vested in the commission exercising its sec 106 jurisdiction.

Chapters 6 and 7 focus on commercial contracts. Chapter 6 deals with sec 106 in the context of franchise contracts and agreements, an area which has arguably escaped the recent jurisdictional limitations on the reach of the sec 106 jurisdiction. Chapter 7 is concerned with unfairness in partnerships and partnership disputes.

Chapter 8 is devoted to considerations of relief, including a detailed discussion as to the commission's ability to grant injunctive relief. Chapter 9 deals with questions of practice and procedure and contributes to making this book of invaluable assistance to practitioners.

This last observation applies not just to practitioners who practice regularly in the jurisdiction but also to those who may not be familiar with the commission's jurisdiction and jurisprudence on the basis that it represents an arcane specialised area. As this book demonstrates, however, what some may see as the imperial march of the commission into significant areas of commercial law - the very matter which excited the concern of the Court of Appeal in *Mitchforce* - means that a familiarity with this area of law and the reach of sec 106, in particular, cannot be responsibly avoided. That is only emphasised by the statistic provided by the authors that in 2001-2002, there were some 653 cases dealt with by the commission under sec 106, a 450 per cent increase since 1997-1998.

Reviewed by Andrew Bell



Across

8 Embarrassed, freed cad beaten up. (3-5)

9 Judge by the sound: GG by the bird? (5,1)

10 Behind each within two rights? (4)

11 Athiest, not exactly ever-nubile. (10)

12 Celebratory kick-off for LA's global church. (6)

14 Again, onsets of wavering. (8)

15 Kind about one non-Jew. (7)

17 Happiness lad heads Ch III. (7)

20 Call in al all-together Queensland novelist. (8)

22 Dried grass backed measure to jump start Yarra jurist. (6)

23 She takes gander near Nowra for a shrubbery (10)

24 Charge (or fall on first news). (4)

25 Native tree cut down curial representative. (6)

26 Retrench one who digs for one who carves. (8)

Down

1 Trade fee kyboshed upon deciding to do this. (8)

2 Loud within two notes never-ending and distant. (4)

3 Son of Scot in embrace of fashion centre judge. (6)

4 Munchies? "Delis can be converted!" (7)

5 Stale elk remains in bony outline (8)

6 Some found in thin soup with a ponytail, horribly. (10)

7 Cow's tail precedes nervy nervy dragon (with and eagle's feet and snake's tail too). (6)

13 Irritable Elton meets new style. (10)

16 Serious genuflections for Agincourt's victors? (8)

18 Vigilant, tempestuous, needy Poe. (4-4)

19 Lie hurt nut on head? (7)

21 A louse blew up the god of the winds. (6)

22 Dried grass in lion's house feeds Sydney jurist. (16)

24 Place (Latin) (abbr) before key, wherein key goes. (4)

Bullfry and the Queens Square blues

'*Militavi non sine gloria*' said Bullfry in an equity whisper into his large glass of warm milk. In what lists, forensic and philandering, had he not carved the casques of men, and won the admiration of women? And now all changed, all changed utterly.

The solemn advice, given that morning with measured *schadenfreude* by Dr Bomberg, his Macquarie Street adviser, had brought him up sharply. (He relied on Bomberg for all procedures save the one he reserved for his begloved, pneumatic internist at Double Bay.) Bullfry had sat, half-naked and in a ruminative mood, counting the liver spots on his upper abdomen. He had just reached double figures when Bomberg returned from his pathology room, poring with relish over a long, furled document (the blood 'printout'). It reminded Bullfry distinctly of the 'priors sheet' he had been used to brandish as a young prosecutor. 'I've never seen so many asterisks' the quack had said, shaking his head disconsolately. Bullfry had looked closely at the offending asterisks, each indicating a large variation from the acceptable norm. He realised slowly, but with mounting horror, that he had no properly functioning organs left. Bar one? Perhaps, even that was contingent.

And yet, when he sought to share his woes with discreet coeval acquaintances, he received no sympathy. To the contrary. Every second interlocutor had a more sinister tale to tell. One man's legs were being deep-mined to remove the damage caused by a year of standing in front of a country magistrate; another common law counsel contemplated a wholesale internal diversion, joining trachea and duodenum, to undo the ravages of exorbitant alcohol consumption; a hypertensive episode had almost killed a criminal hack who had been 'attending a conference out of chambers' at a block of flats in Coogee.

Bullfry scratched the nasty weal caused by his pedometer which had dug its way deep into his abdomen - only two thousand steps and it was already lunchtime. He turned to look on the mournful vista which was Queens Square spread out below him. A litigant in person, bright placard in hand, inveighed against the criminal sanctions attaching to zoophilia; some jackanapes from a select, larger firm, had lost control of his trolley and had run headlong into a funeral cortege at the church; a van from Long Bay giving gaol delivery was honking sonorously at the gates of justice.

How times had changed! In his youth, the Square had represented all his dreams and aspirations; he had thought of it upon his arrival from Wee Jasper as one of the most wonderful architectural confluences of ferro-concrete that his young eyes had ever seen. He had thrilled to stand at the juncture of those two great esplanades, so close to the Paris end of Castlereagh Street, on a wet and windy day, wildly clutching a folder and reversed umbrella, exulting as the gale tempted him airborne.

Now, to his tiring eyes, it hardly looked like the epicentre of the entire Oceanic legal world. For thousands of kilometres in any radial direction, this was it. Forget the oddities of a mundane Brisbane practice, or the furbelows and rosettes of Collins Street; forget the autochthonous jurisprudence of Auckland, forget Singapore, or the pervid legal haunts of the Kowloon magistracy - forget all those other venues where the common law in her majesty in whatever polyglot version there obtained. This was it. Until one reached the further shores of the Pacific and the lawless regions of California, this was it. And at that thought, Bullfry's heart sank within him.

As he gazed at the Square he espied a shambling figure. What a difference a day makes! It was one of his old enemies, a now-retired jurist who had treated Bullfry shamefully in many subtle ways when presiding and who now more lately lurked hoping for the cast-off reference, or a day's mediation for a trading bank.

He looked wistfully around his chambers. Even the skull of the former judge (purchased from its wanton executrix) looked forlorn, and the inscription on its base - '*hodie mihi*, *eras tibi*' - sent a slight shiver down Bullfry's spine.

Perhaps his general dysphoria could be traced to the modern judicial officer. With a diastolic which hovered constantly above 110, Bullfry knew that any extended passage of arms with a rebarbative beak could prove fatal to him.

Matters had not been improved by his perusal of a recent biography. To learn that the pre-eminent jurist in the Commonwealth's history had had no relevant holiday in forty years, wrote all his judgments in long hand, and at the end, had taken to reading the classics and not the *Commonwealth Law Reports,* was enough to shake the steadiest of temperaments. Was it Kafka, or someone else, who had likened legal studies to chewing sawdust which had been chewed by other mouths for centuries?

He turned as Alice, changeless in her unmannerliness, reminded him of the next conference. What was it about? Bullfry recalled a recent incident in which it was only after he had advised the client for fifty minutes and radically and cruelly deconstructed the plaintiff's case that his solicitors had reminded him that he was for the plaintiff. He had never used that junior again. Bullfry scrambling through the *disjecta membra* of forty briefs piled promiscuously across his floor, looked up as the senior partner and his assistant were announced. Barrakesh had been briefing him since his earliest days at the Bar. He had a rare and now quite old-fashioned belief that counsel should not be retained unless money was being held on account.

'How are you, Jack? It must be almost time for a drink. But before we begin to analyse this unit-trust, may I introduce my new assistant, Miss Chloe Rutwell?'

Bullfry looked around, and at his first glance (the slight venerean strabismus; the ill-concealed decolletage) that old feeling came over him, inspired by Dionysius, or his riotous son. 'I am delighted to meet you, Chloe'. The skull whispered to him another Latin tag - '*sublimi flagello tange Chloen semel*' - and a large ray of sunlight shone in from the Square, and reflected briefly off the decanter which he now preferred with a gibbous smile to his old, and newer, retainer.

The Class of 1989

By Rodney Brender

Not the title for a revamping of the highly successful teen soaps Class of 1974 and Class of 1975 watched avidly by pre-Neighbours teenagers back when Kylie was in nappies, but what the Americans would call the graduating readers' group of March 1989. Rodney Brender goes down memory lane with the readers of 14 years ago.

In late 1988 George HW Bush was elected president. Ferdinand and Imelda Marcos were indicted on racketeering charges. And a few months later in Sydney, a small group gathered in the basement of the Selborne/Wentworth building at 8 to 9am and 4 to 5pm each day to undergo the Bar Practice Course.

Most of the readers had some experience in the profession, usually as a solicitor. They held high hopes of a rewarding and glittering career at the Bar, no doubt tempered by some apprehension about the examination they would face in the next 12 weeks - a pass/fail ethics exam, and also the mock hearings to be endured before a real judge. For those wishing to get through with a minimum of work and inconvenience, the course compared favourably with the College of Law conducted in Sydney in the mid-1980s. For those wishing to learn from some of the leaders of the profession, it was a useful if not intensive experience. For entertainment value however, on most days it was comparable to a slow afternoon at the Sheffield Shield, the competition yet to be re-named after a brand of milk.

There were exceptions however. For example, on one afternoon there was the unexpected appearance of an actor briefed by the late Paul Donohoe, who appeared in a bizarre street person's outfit, arriving in the middle of a lecture on some arcane subject, telling us that all barristers were beneath contempt and that we, and particularly that president of ours, 'Barry' Handley, could all stick our books up our jumper, or words to that effect. We then learned how wildly inaccurate affidavits could be, even when drawn by persons seeking to tell the truth, and done relatively soon after a memorable event. I also remember being grilled by Gummow J during a mock appeal and telling his Honour that I would address his questions in what we both knew were non-existent written submissions. His Honour was suitably unimpressed. The highlight of my reading year was the look of relief on my master's face when I told him that I would have no objection to him skipping the master-readers dinner.

Times have changed in the last 14 years. The whole High Court bench of 1988 has now retired. We've had *Mabo*. We've won the Rugby World Cup twice. Politically, the federal government has gone from ALP to Coalition, the New South Wales Government the reverse direction. We've had the Corporations Law, Act and Code (not necessarily in that order). We've had September 11, 2001 and 12 October 2002. We are onto our second Bush in the White House.

Over those 14 years, the group of barristers has progressed with varying success through the ranks of the Bar. A few have taken silk. Some are in the employ of the Crown. They have been a mobile group - averaging perhaps three different chambers in that time according to my unscientific (and statistically unreliable) survey.

Other than the silks, most are rarely briefed with a junior these days. Nor are many briefed with a leader anymore. Their insurance varies generally from $1m to $5m per annum. As one would expect, their areas of practice vary widely.

When drawing the survey, I refrain from asking whether they preferred the blonde to the brunette in Abba, or perhaps, if I were to be more up to date, whether their favourite blonde was Britney or Christina.

To be non-sexist, I should disclose that I also fail to ask whether they preferred Benny to Bjorn, or Ricky to Justin (Timberlake, not Gleeson SC). I did ask about favourite judges though. Without disclosing names, sexes or other preferences, Mason CJ, Deane J and Kirby J all received big wraps. In the Supreme Court, Hidden J, David Kirby J, McLelland CJ in Equity, Samuels JA and Greg James J received honourable mentions. Blanch CJ was mentioned by several as well, particularly those practising in crime.

Most barristers of 1989 profess, in 2003, to be relatively happy with their choice of profession. None would admit to regretting their decision to join the Bar and none would express any yearning to go off and be a lion tamer or rock star in their latter years. Most seem happy to continue the path trodden to date, perhaps ending up as a silk or judge, and retiring at about 70.

Despite my best efforts to stir up some controversy, most respondents to my survey supported the Bar's efforts in the areas of continuing professional development, and in the controversy over the Bar's role in disciplining barristers, particularly in respect of taxation matters. I asked them to tell me their highs and lows at the Bar. I remember falling flat on my face, literally, in my haste to get to the Bar table in John Leslie's court, and being humiliated by some of the late but not lamented District Court judges of the old school, but no one else was prepared to share such memories on the record. Their answers were either non-responsive or a little boring - we are not a gushing or imaginative lot, at least not in print. No stories of breaking down witnesses and having them confess all *a la* Perry Mason were told. No titillating stories of being caught *in flagrante delicto* under the desk made the light of day either. It seems we are happy with the odd acquittal in a murder case, winning a High Court appeal or the more metaphysical realisation that we are in the right career and being paid for what we enjoy.

In 1989 Justice McHugh joined the High Court. The US invaded Panama but didn't catch the bad guy immediately. The Berlin Wall fell. Reagan walked out of office alive, the first president since 1840 to be elected in a year ending with a zero to do so. When we walked out of the readers' course we were walking out to the unknown. Had we our time again, the consensus seems to be we wouldn't change our decision. Most of us would *say je ne regrette rien*.

The Kaiser Stub'n

On Friday I took the former party of the second part, sadly confined in a nursing home, out to lunch. Nearby was a previously untried Austrian restaurant which had been recommended by one of the Winter Swimmers.

What a pleasant surprise it was! Nestling in McCarr's Creek Road where it meets Mona Vale Road, it has bushland on three sides and is bright and cheerful, with very pleasant views.

Every table had freshly cut flowers and there were fresh flowers in vases around the room. Red and white checked tablecloths completed the Tyrolean atmosphere.

The service was nothing short of excellent with the chef and proprietor and the proprietor's wife all taking part in the waiting. We were scarcely seated at the table when drinks, which included a Bitburger on tap, were offered. The beer came in two sizes: 300 mls and 500 mls and is as nice a continental beer as I have ever drunk. Warm bread rolls followed whilst we chose three entrees: first, the special of the day, fresh warm asparagus with shaved Black Forest ham and a frothy, hollandaise sauce. Next we shared dumplings, stuffed with pork crackling, and salad. The dumplings, somewhere between a squash ball and tennis ball in size, were delicious and filled with the crunchy pork bits. The sauce was, again, creamy but light, frothy and apple cider-flavoured. A real delicacy.

Last we shared veal kidney quickly sautéed with shallots in a tasty brown sauce. These were served with German-style fried potato sliced thin and cooked crisp. To my mind the kidneys were a little bit tough as if they had been cooked and re-heated, which is fatal with offal, but overall it was a nice dish.

One glass of Margaret River sauvignon blanc rounded of what was a wonderful meal.

I know Terry Hills hasn't got a circuit court, but if anybody is on a view on the Mona Vale Road, The Kaiser Stub'n is *the* place to go for lunch. Booking is recommended because on the Friday we were there, the restaurant seemed to be filled with local Austrians and Germans.

The Kaiser Stub'n
302 McCarr's Creek Road
Terry Hills
Ph: 9450 0300
Open for dinner: Tuesday to Sunday
Open for lunch: Wednesday, Thursday, Friday and Sunday
Credit cards: All major cards
John Coombs QC

25 March 2003