Bar News

The JOURNAL of the NSW BAR ASSOCIATION Summer 2004/2005

Features

Looking forward: the direction of criminal law

The agony and the power of dissent

The question that plaintiff's counsel cannot ask

Third party property in Family Court cases

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Scales of justice outside the District Court in Brisbane

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Contents

Editor's note

As editor of *Bar News* over the past five years, perennial questions for me have included: What is the role of *Bar News*? What types of articles should be published? How can the magazine best engage with members and obtain contributions from them?

There has been no easy or simple answer to these questions. My broad aim has been to try to present material of interest and relevance to members across a broad spectrum, from recent developments in the law and their practical implications for barristers; the activities of the New South Wales Bar Association and its interaction with members, both professional and social; addresses or speeches by prominent members or judges; through to sport or humour. Sometimes the balance may not have included enough at the lighter end, but then again distinguished subjects like Bullfry QC develop new tricks slowly.

The Bar News Editorial Committee has gradually expanded over the past five years. One of the aims has been to include progressively members on the committee from as many areas of the Bar as possible. At present we have representatives who specialise in commissions of enquiry, equity/commercial, personal injuries, criminal, industrial and in family law. To be a committee member one has to commit to either writing or sourcing some material of interest for each issue. As the spread of the committee becomes broader, so hopefully there is a better means to extend the subject matter of the magazine across more areas of the Bar.

We are pleased to include in this issue the first in a series of occasional guest columns by Attorney General Bob Debus. We are also fortunate to have once more a perspective on northern events (this time Indonesia) coming from Colin McDonald QC of the Darwin Bar.

Two particular projects which the editorial committee is working on which should come to fruition in the issue following the present are as follows. First, an analysis and discussion of the impact which changes in personal injury law are having upon the Bar. It is planned to put out a survey to members to assist in this task. Second, there will be a report on progress made in discussions between the Bar Association and the protective commissioner on the contentious issue of changes in the fee structure imposed by the protective commissioner.

The invaluable centrepiece of the magazine over the last five years has been Chris Winslow, the Bar Association's public affairs officer. It has been his long term goal to see *Bar News* take its place alongside the *Medical Journal of Australia* and other journals of the professional associations; not only as a source of thoughtful analysis of the law, but as a 'window on the Bar' for solicitors, politicians, the media and informed members of the public.

One difficulty, however, remains in obtaining sufficient feedback from members on what is published in *Bar News* and, indeed, sufficient unsolicited contributions from members on topics of interest to them. The magazine does come at a cost to members: about $25,000 in external cost per issue. We would like to see the breadth of views of members represented as well as possible. Members are urged to write, or e-mail the editor, with any contributions, or with criticisms or comments on the content of the previous issue.

My term as editor has now come to an end. President Ian Harrison SC has appointed Andrew Bell as the new editor. I wish him well.

Justin Gleeson SC

Letters to the editor

Changes to expert witnesses will be harmful to plaintiffs

Dear Sir,

The chief justice, in 2002, delivered an impassioned defence of the capacity of the common law to develop as circumstances change: 'Negligence: The last outpost of the welfare state', (2002) 76 ALJ 432 at 445. According to the daily press he has recently questioned the fairness of the interference with the common law wrought by recent statutory limitations on the award of general damages for personal injuries.

There appears to be some inconsistency between the latter view and his suggestion, which also received publicity in the daily press, that steps need to be taken to rein in expert witnesses.

The problems posed by hired gun expert witnesses are not new. In *Hocking v Bell* (1947) 75 CLR 125 the verdict of a jury which had accepted the evidence of an underqualified expert in preference to that of several highly qualified surgeons was allowed by the Privy Council to stand. But that was a jury trial. Jury trials of civil actions are now an endangered species. Surely judges have the capacity to choose between conflicting experts. *In Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 701 the Court of Appeal has redefined the approach to expert evidence in non-jury trials.

The chief justice's suggestions have the potential to do great harm to all plaintiffs, not just those with small claims and to tilt the playing field in the defendants favour. They are two: prohibit experts from acting for contingency fees and having only court-appointed experts.

Many plaintiffs who have been injured are without the means to finance an action. The contingent fee system allows legal practitioners to represent them. What justification is there to apply a different rule to witnesses? To ban experts from entering into contingent fee arrangements will effectively disenfranchise many plaintiffs. Since 2002 legal practitioners cannot even commence an action for damages unless they are prepared to put their professional standing on the line by certifying that, on the available evidence, there are reasonable prospects of success. How can they do that in a case which depends upon expert evidence, such as a medical negligence action, if no expert is allowed to report.

Of course we all know that there were two reasons why governments reversed a centuries old prohibition on contingency fees for lawyers. First, it was not working. And second, and more important, it was to shift the burden of legal aid in civil matters to the legal profession.

The chief justice's next suggestion is that the courts should rely solely on court appointed experts. The parties should agree on an expert, or if they can not, the court will appoint one for them. There are two problems about this suggestion. First, the court could not appoint an expert until proceedings have commenced and proceedings cannot be commenced until the plaintiff's lawyers have an admissible report from an expert upon which to certify there are reasonable prospects of success. Second, who is pray the expert in the first instance if the plaintiff has no money. You can bet that the government will not fund the courts to do so. And natural justice would require that the defendant, or its insurer, be heard before it could be ordered to do so.

D I Cassidy QC

Silks v Juniors cricket match

Dear Sir,

I refer to an article published by you and written by the Hon Justice Richard White SC (sic).

It is apparent that his Honour, who is now an equity judge, has always practised in that field because of his uncertain handling of matters of fact.

I was described as bowling with 'plenty of flight' and was coupled with Morrison SC as a target for the innuendo that Moorhouse and Stowe were in 'two minds as to whether to hit the ball conservatively for six over the ropes, or with more flamboyance, onto New South Head Road'. The imputation was that we were complete duffers.

My recollection was otherwise. I therefore consulted the scorer's records and to my horror found that not only was his Honour inaccurate, but that the scorer was also.

At least the scorer attributed one wicket to me: 'P Moorhouse, stumped Ireland bowled Poulos'.

My recollection was that I had done better than this; accordingly I contacted our captain, Hastings QC. He remembered my performance well (as it was a clear proof of his captaincy skills). He confirmed that I had taken the wicket of a second batsman (Stone) and that, accordingly, my figures should have read: '3 overs bowled, 2 for 24'.

I telephoned Andrew Stone who confirmed that he had been trying to block out the memory of being bowled middle stump by a ball, bowled by myself, which had deceived him by its complete absence of pace.

To my chagrin, this second wicket had been incorrectly attributed to Douglas QC -need I say more?

In closing, I note that his Honour was replaced behind the stumps by Ireland QC who went on to take three catches, and that, with the bat, his Honour managed to amass four runs

J Poulos QC

Silk selection is a smooth process

By Ian Harrison SC

Every year in October the newly appointed senior counsel are presented with their scrolls by the chief justice of New South Wales. The ceremony is simple but the occasion is always well attended and has a significance which transcends the evening itself. Those who are successful applicants for silk are unlikely to pause to reflect upon, or to question, the process which led to their appointment. The same cannot be said for the far greater number of applicants who are unsuccessful and who in varying degrees have to come to terms with often very significant feelings of disappointment and rejection or being left to speculate about why they should have missed out. In my opinion, it is unsatisfactory for anyone whose application for silk is unsuccessful to have to speculate about anything. My purpose is to attempt to clarify how the process works, how the silks protocol is applied, to offer some transparency where confusion often exists and to give some possible guidance for those who wish to apply in the future.

The present system for the appointment of senior counsel has been in operation now for twelve years. In 1993 ten senior counsel were appointed. In the years since then the numbers have varied but, on average, have been in the order of approximately twenty three senior counsel appointments per year. The numbers appointed in each year are themselves no guide to prospective applicants and say nothing about the likely appointments in the following year. The process is not burdened with a quota which either has to be achieved or cannot be exceeded. Applicants who attain an appropriate level of support are appointed without regard to what will then become the number of appointments in that year. If the system were to operate in any other way it would do so unfairly and unpredictably.

The silks protocol provides for the distribution of the names of all applicants for silk in any particular year to a consultation group. The protocol specifies who should be on the list of consultants in categories which, in broad terms, include judges, senior and junior counsel and solicitors. The list changes from year to year although requiring in some categories the retention of a specified proportion of those who were consulted in the preceding year. In 2003 the number of those consulted was approximately 500. That number was reduced in 2004 to approximately 250. This was done for a number of reasons, not the least of which was to ease the administrative burden created within the offices of the Bar Association by such a potentially large number of responses. The literal application of the protocol would require no more than approximately 120 consultants in any one year.

The Senior Counsel Selection Committee is made up of five senior counsel or queen's counsel including the president, the senior vice-president and three others. Attempts are made generally to include women and men from the major areas of practice. The combinations obviously vary from year to year and historically the make up of the committee has included new members each year.

As is well known, those who are consulted for their opinions are asked to proffer, in the case of any one applicant, a response from a list of four categories being 'Yes', 'No', 'Not yet' or 'Not known'. In previous years a column for comments was also included. I decided this year to discard the comments column. I did this for the reason that the inclination of anybody to write negative or positive comments about a particular applicant universally corresponded to a 'No' or 'Yes' response in that case. The strength of some comments had the potential to inflame or seduce in a way which could add undue weight to the value of the opinion of any person consulted.

I have spoken to a large number of those who applied for silk in 2004 and who were unsuccessful. I invited such meetings and, contrary to popular belief, they were generally pleasant and informative. There were some exceptions, but that is not a matter for adverse comment. The general misconceptions about why an applicant may have been unsuccessful seem to be the following.

First, many unsuccessful applicants feel that they could not have been known by sufficient people on the consultation group and therefore could not have been given exposure to enough people genuinely able to comment upon their application. This view is often associated with the misconception that a successful application requires the attainment by any particular applicant of a specified minimum number of favourable responses in order to succeed. This is wrong. For example, for applicants whose principal area or areas of practice lie in narrow or less well-known disciplines, it is often the case that the total number of responses received will have been small. What is stressed in such cases is the ratio of supporters to detractors. An applicant who receives a very low total turnout in responses of any colour will nonetheless be favourably considered if the proportion of responses for outweighs those against by a reasonable margin. The wisdom that informs this approach is obvious enough. Even though an applicant may be not widely known, those who do know her or him, and who are able to express views, thereby give a reliable indication of suitability or otherwise.

Secondly, some applicants have suggested that, for one reason or another, respondents from the consultation group are expressing opinions either against her or him out of spite or malice or in circumstances where they should have declined to do so because they had absolutely no knowledge of the applicant at all. From my experience, this view, although potentially comforting to unsuccessful applicants, is ill-founded. If it were present it would operate, for example, to favour applicants who generally were regarded as not ready or

not qualified for silk in that year or vice versa. This would have the anomalous effect of both including in and excluding from the list of successful applicants those who should not have been included or excluded as the case may be. Whilst it is true that comment is made each year upon who was successful and who wasn't successful, the list of silks generally receives widespread acceptance. Certainly the list in 2004 appears to have been received in this way. Moreover, this view of how some judges and members of both branches of the profession would treat the important task of responding contradicts the responsible way in which members of the consultation group appear year after year to perform their task.

Thirdly, many unsuccessful applicants 'know' from canvassing those who they discover have been consulted that they should have received more support than their unsuccessful application appears to indicate. In my experience, no unsuccessful applicant should ever assume that what she or he is told by anybody who was consulted is always accurate. Responses from the consultation group are not anonymous and are known to the selection committee in every year. These responses are destroyed once the statistics are compiled as the maintenance of confidentiality and the anonymity of respondents is essential to the continued good operation of the system.

Fourthly, many unsuccessful applicants have no proper understanding of the strength of opinion against them. Many unsuccessful applicants maintain a belief that a power of veto exists, or that they are the victim of some real or imagined long-festering or recent enmity created as the result of a victory over a member of the inner bar who happens to be on the consultation group or the successful prosecution of an appeal from the decision of a trial judge who has also been consulted. Sometimes these applicants are very surprised to learn that the ratio of responses in their favour to responses against them has been as high as 1:4 or 1:7 or more. Whatever subjective material the silks selection committee can call upon to advance the interests of an otherwise apparently worthy candidate for silk, responses in numbers from the consultation group in ratios of that order effectively obliterate any prospect of the committee's deliberations producing a favourable outcome.

This, in my opinion, is the singular strength of the present system. Whereas prior to 1993 the bases upon which queen's counsel were appointed were shrouded in mystery, or at least not measurable by reference to a set of criteria which were published and widely available, the present system operates within a known framework. It has to be assumed that responses for and against candidates are given with a knowledge of the protocol, what it requires and how it applies. The system would degenerate into a morass of subjective preference if considerable weight were not given to the expressed views of the consultation group. To the eternal credit of almost every unsuccessful applicant who came to speak to me about their application this year, those who were told that they were, in effect, soundly rejected by those who responded, were more satisfied to know the harsh truth than to have been given no real indication of why they had failed.

In my experience, many unsuccessful applicants lack insight about their own abilities, the impression they leave with opposing counsel or the regard in which they are held by judges before whom they appear. One applicant one year 'understood' that all judges in that person's area of practice had supported the application. In fact, the complete opposite was true. The view we all have of ourselves often stands in the way of an acceptance of such revelations. Information of this sort, however, can often form the building blocks of a successful application in years to come.

The decision made in 1993 to replace the appointment of queen's counsel by a process effectively owned and controlled by the Bar Association was courageous at the time. Those with the foresight to have conceived it have, in my opinion, been vindicated. All of us have, from time to time, harboured fears that the system was afflicted with frailties and weaknesses that produced favourable and unfavourable results which often were misunderstood and could not be justified. My close association with the operation of the system over the last three years at least has confirmed my view that it operates fairly and has inherent strengths which far outweigh any weaknesses which may exist. It is sometimes argued that too many silks, measured as a proportion or percentage of the total number of members of the Bar at any time, devalues the currency. There is some force in this argument. However, if appointment is to be upon the basis of merit it cannot be constrained by considerations which are not related to merit. Continually unsuccessful applicants will serve their cause best by mollifying their outrage at the 'unfairness' of the silks selection process and by coming to terms with the fact that a significant majority of judges, senior and junior barristers and solicitors who are asked whether they were appropriate candidates for silk simply said no. It is a mistake to assume that unsuccessful candidates, who some people feel passionately have been passed over year after year on inexplicable grounds and for un-stated reasons, are in truth the victims of an unfair system. As harsh as it seems, and as harsh as it is in fact, unsuccessful applicants for silk should not necessarily feel that they have been the victim of discrimination or prejudice or that they are a statistical casualty.

Finally, my experience with past members of the selection committees on which I have served is that they have all come to the task with some trepidation, but have left it with a sense of confidence in the way it works. One senior counsel described membership of the selection committee as the most satisfying contribution that that person had been able to make to the Bar Association. I have never received a negative comment. If the process can be improved then it should be. I am not persuaded that a better system has yet been identified.

A profession with integrity

By Attorney General Bob Debus

In late September this year, William Shatner won an Emmy Award for playing a quirky, overbearing senior barrister in the long running legal drama 'The Practice'.

No critical awards came to Shatner (nor indeed to any of the rest of the Star Trek cast) during his years in a yellow jumpsuit on the bridge of the starship *Enterprise*. However, once draped in a pinstriped charcoal suit and citing imaginary precedents in front of a jury, he was showered with prestigious awards.

This may prove little apart from the obvious point that while lawyers will always get a bad rap in popular culture, it is a very bad lawyer indeed who is less popular than a man in a tight yellow jumpsuit.

It is trite to say that barristers are frequently the target of media attack.

The individual barrister is attacked on the steps of the courthouse as he or she departs with his or her client: the shady businessman or the accused felon, whose qualities he or she is deemed to have acquired, perhaps by osmosis.

The profession as a whole bore the odium when some barristers were revealed to have manipulated the bankruptcy laws in order to evade their taxation obligations. And in a bizarre extension of this phenomenon, the Bar Association was roundly abused for failing to detect and punish tax evasion by its members, when the responsible regulator – the Australian Taxation Office - had been positively supine for decades on the issue.

It takes no particular courage on my part to state, in the Bar's own journal, that barristers are often unfairly criticised. But my experience has been that the very great majority of members of the Bar have a demonstrated commitment to ethical standards and professionalism. And fundamentally, the public understands this. The recent reports by Walker SC and Jackson QC into, respectively, concerns about the health complaints system and the unravelling James Hardie scandal represented not only major forensic achievements but substantial contributions to the public interest.

As attorney general I have now had the privilege of working with three presidents of the Bar Association, each a leader in the profession and each tireless in advocacy both for the interests of the profession and for the interests of the justice system. The Bar Association has not hesitated to criticise the government in robust terms when it disagrees with legislation, and its contributions are singular – I might say notorious – for their comprehensive and vigorous nature.

The three presidents to whom I refer have also been notable for their resolute determination to pursue professional misconduct with all the rigour the law may allow, and we have spent many hours in intricate negotiation as to how to make the complaint handling process as fair and as stringent as possible.

The current process of finalising national legal profession model laws has presented many opportunities in this regard. The process has identified many areas of inconsistency in areas of legal profession regulation which affect legal practice and the rights of consumers, including the complaint and discipline process.

Despite what I have said about the unimpeachable integrity of the leaders of the Bar, there is clearly a remnant of rogue barristers who avoid their tax, neglect their clients or engage in unsavoury professional misconduct. Most competent and honest practitioners will never be the subject of a complaint. However, for those practitioners who are, and for those consumers who feel compelled to bring a complaint, the importance of the existence of an effective and responsive complaints and disciplinary scheme cannot be overstated.

When a difficult public policy issue arises it is well accepted that an inquiry undertaken by a senior member of the Bar will be conducted impartially, independently and thoroughly.

A perception can readily arise among consumers of legal services that the complaint system is tilted in favour of the practitioner. If consumers of legal services are to continue to have faith in the complaints handling system, then there must be adequate mechanisms by which they can achieve redress for damage resulting from misconduct.

The massive and encyclopaedic Bill rewriting the regulation of the legal profession - including the complaint handling system – is at the time of writing at its penultimate draft, with an expected introduction date in mid-November. Of some particular interest will be the provisions relating to the cancellation of practising certificates of legal practitioners who commit indictable offences or tax offences, or are established to have manipulated the bankruptcy laws. These have been the subject of exhaustive review, informed by a number of recent cases.

According to the legal services commissioner, 80 per cent of the complaints lodged each year against legal professionals concern in whole or in part the question of fees and costs.

For this reason it is important that, independent of the legislative review process, the government has established the Legal Fees Review Panel, on which the Bar is represented by its president.

The Legal Fees Review Panel is presently examining the nature of complaints about legal costs, and will explore options for alternative approaches to billing with a view to bringing greater transparency to legal costs. Detailed statistical analysis has been

undertaken of the complaints lodged over the past 10 years with the legal services commissioner and a discussion paper is being finalised for distribution to the profession and to the public for comment and submissions.

The relationship between the state government and sections of the legal profession is prone to stress and strain from time to time, and this is bound to continue. There will be differences in ideology and policy, and actions of the state government undoubtedly impact upon the working lives of many barristers. The changes to civil liability legislation have of course been a major source of contention.

The chief justice, while commenting recently upon some adverse aspects of the legislation, has nevertheless noted the importance of restoring an appropriate balance between personal responsibility and expectations of proper care and compensation.

He also acknowledged the destructive consequences of a culture of excessive litigation.

The government believes that its legislation entrenched important issues of principle, principles also being set out in many appellate court cases as the chief justice pointed out.

The process of law reform and legislative review is continuous and the government of course carefully considers any evidence put forward by practitioners of the anomalous consequences of the legislation. The Bar Association has been active in pointing out many areas of potential reform.

One area of common ground is that the insurance industry is clearly now operating in a more favourable climate as a result of these reforms; and the public are entitled to expect that premiums should reflect this.

The chief justice, while commenting recently upon some adverse aspects of the legislation, has nevertheless noted the importance of restoring an appropriate balance between personal responsibility and expectations of proper care and compensation.

To conclude a somewhat kaleidoscopic survey of issues consuming the attention of the Bar and of my administration, I want to re-emphasise that my daily experience is that the vast majority of the Bar are committed to the service of the justice system and indeed of the public. The substantial and largely unheralded contribution made by the Bar through pro bono representation is a case in point. Relatively recently, I had the opportunity of launching in Dubbo the Cooperative Legal Service Delivery Model (CLSD) developed by the Legal Aid Commission. This is a project through which government and the legal profession work together to deliver legal services to the socially and economically disadvantaged. Through CLSD, regional coalitions of key legal services providers are identifying gaps in legal services, and finding ways to deliver legal services to disadvantaged people. The goodwill involved in this project is truly remarkable and does the legal profession great credit.

It is my privilege as attorney general to work with the Bar Association and indeed the Bar more widely. I look forward to many more robust and stimulating exchanges with your executive. Except on the floor of the parliament itself, I shall never have to resort to Mr Shatner's plea to 'Beam me up Scotty, there's no intelligent life down here'.

The re-engineered blades of section 52 of the Trade Practices Act 1974

By A W Street SC

The action for damages under s82 of the *Trade Practices Act 1974* for a contravention of s52 has being bowdlerised by the introduction of sub-section (1B) into s82 introducing the common law concept of contributory negligence, a new statutory concept of 'shared responsibility' and the Chancellor's foot as to what is 'just and equitable'. If this mandatory diminution was not exciting enough in relation to the statutory cause of action, the new provisions of Part VIA entitled 'Proportionate liability for misleading and deceptive conduct' potentially resurrects a need for the common law practitioners' wisdom and expertise in apportionment claims. This re-engineering of the litigator's playground for concurrent wrongdoers in Part VIA introduces the fuzzy Lord Denning-type criterion limiting the proportion to an amount considered 'just' measured by reference to an unstated foundation and conceived as 'the extent of the defendant's responsibility'. If this was not enough to create the feeling that the occupants of *The Castle* have taken over the role as legislative scriveners, there is also a need for regard to 'the comparative responsibility' of others. The apportionment is concerned with economic loss and damage to property the subject of a claim under s82.

Contrary to what some may think, these changes go beyond, and in some case directly depart from, the recommendations of the Ipp Panel which produced the *Review of the law of negligence* report released 2 October 2002 under a Commonwealth ministerial term of reference.[1] The predecessor of these reforms can be found in *Maritime Conventions Act 1911* (UK)[2] and the history thereafter is summarised by Professor Glanville Williams in *Joint torts and contributory negligence*, published in 1951. These sparkling new reforms are reminiscent of the judicial discretion familiar to Roman lawyers *et judex vel tanti condemnat quanti nos aestimaverimus, vel minoris, prout illi visum fuerit*[3], paragraph 224 of *De Injuriis* in Book II of the Institutions of Gaius on the civil law of Rome penned more than 1,800 years ago. Unfortunately the judicial discretion is confined to the inexact art of assessment of the degree of fault in both reduction and apportionment, the application of the assessment by reducing or limiting damages is mandatory.

It would be churlish to diminish the superlative joy of others by waxing lyrical about the significance of these legislative reforms in the sphere of commercial litigation in which s52 is the modern day crusaders' weapon of mass destruction. The author has tempered the temptation to explore more fully the conceptual difficulties in reconciling a mandated norm with fault. It will be a challenge to determine what misleading conduct is 'a' cause of loss which is a result of the plaintiff's failure in the circumstances to take reasonable care for the safety of its own property or financial position. There can be fine lines between what is contributory negligence, failure to mitigate or unreasonable reliance. The sting of reduction for contributory negligence is likely to bite deep in the utility of this proscribed statutory standard of misbehaviour.

As intent and fraud defeat the statutory reduction for contributory negligence and the apportionment of liability there will be renewed interest in the pleader determining whether intent or fraud can properly be raised. The discovery focus with its expanding electronic treasure chest, will become more significant in attacking the limitation shields for want of intent or fraud. The line of attack in cross examination where intention or fraud has been raised as part of the facts in issue, will no doubt require careful preparation and focus. What level of Nelsonian blindness or recklessness will amount to intent is another interesting issue.

Happily, the existing causes of action prior to commencement of these new provisions will still permit the sanguine blades of s52 to be used with its old vigour. There are a myriad of interesting issues likely to arise in relation to competing cross claims where the loss and damage arguably has not yet been sustained despite the prudence of the pleader having sought relief under s82 and s87. There may be a complex contribution of different causes of action for different s52 conduct with some accrued and some non-accrued causes of action. Some wrongdoers will be made of straw or insolvent and the proportionate contribution will be worthless. No doubt the armoury of s87[4], which is not so circumscribed by the legislative changes, may well be used to escape the adverse impact of empty damages orders. Indeed the relief might be framed as being wholly under s87 so as not to be an apportionable claim.

There may be a need to carefully scrutinise all existing s52 proceedings to determine the extent to which the cause of action has in fact accrued and, if not, careful attention needs to be given to how the case has been pleaded, whether intention or fraud is available, the consequences of contributory negligence and the significance of the proportionate limitation of liability under Part VIA and notification obligations under s87CE. These notification obligations although only sounding in costs open up factual disputes as to grounds for belief and the relevant circumstances. It is a novel notion of disclosure alien to adversarial contest and the notice itself is probably outside the scope of s52.

Working out what is or is not an apportionable claim will be quite exciting. There will be considerable scope for debate in the application of the apportionment legislation as to whether it is 'the same loss and damage' and what is meant by causes of action of a different kind. The problem will be compounded where the different cause of action is outside trade and commerce, involves trade and commerce but is outside the s5 nexus, the minister declines to consent under s5, does not involve corporations or involves persons not with s75B. There are some interesting issues of possible inconsistency in relation

to omissions and intent given the operation of s4(2)(c) in the context of conduct manifested by refusing to do an act which must be otherwise than inadvertent. Speaking of inconsistency, the absence of contributory negligence reductions for breach of statutory duty involving property or economic loss might well have some problems under s109 if included with a s52 claim. So too s5D of the *Civil Liability Act* 2002 (NSW) and Division 5C of Part II of the *Legal Profession Act 1987* (NSW) may raise similar problems unless read down where because of s52 the court is exercising federal jurisdiction.

The reform does not overcome the difficulty in trying to advance claims for equitable contribution for co-ordinate liabilities arising from s52 contravention claims and other statutory claims or causes of action where apportionment is not available. The non-party concurrent wrongdoer limitation is likely to have some very unfortunate consequences given the variety of problems that can arise from identification, location, jurisdiction to enforcement in the non-joinder. The work done by s84 is also likely to be the subject of renewed excitement in the competing positions on apportionment of the parties and also the agency characterisation of the non-parties. Authority for particular conduct or the want thereof may itself be the subject of misleading conduct by the alleged agent or others and will compound the exercise of judicial determination. The potential unfairness for both the non-parties and the actual parties in this area of agency and apportionment is obvious. In this regard s87CF which purports to protect a wrongdoing party the subject of judgment is likely to be abused. Further the reform may well result in increasing dramatically the scope of the dispute, the number of parties, costs and demand upon precious court resources.

Curiously, there is no specific time bar found in Part VIA and the provisions do not sit comfortably with existing *Anshun* notions. The unattractive prospect of re-litigating apportionment outcomes, as well as the damage actually sustained by the plaintiff and the unsavoury prospect of inconsistent findings are all well alive.

Finally, on the battle front, there is still likely to be a healthy use of the unconscionable conduct provisions in Part IVA, contravention of industry codes under Part IVB and s53 as reduction or limit breakers. The amendments will also breathe new life into the advantages of contract and will be the subject of refined provisions which create a material fault exposure in the whole of contract and non-reliance clauses.

The sphere of conduct that leads into error involving financial services or financial products is caught by s1041H of the *Corporations Act 2001* which has similar amendments made by the same statute and raises many of the same issues and concerns touched on above. Personal injuries and death are addressed in the new Part VIB of the *Trade Practices Act 1974* introduced by the *Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004*. There are similar provisions to be introduced by the *Civil Liability Amendment Act 2003* (NSW) assented to on 10 December 2003.

The new and tantalising changes to the *Trade Practices Act 1974* have been enacted by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*, schedule 3.

Section 2 of this reform legislation identified the date of commencement for schedule 3 being the day fixed by proclamation 'however, if any provision(s) do not commence within the period of six months beginning on the day on which this Act receives royal assent, they commence on the first day after the end of that period'. Assent was given to the Act on 30 June 2004. The proclamation as to commencement, published at: http://www.scaleplus.law.gov.au/html/instruments/0/145/0/2004080601.htm, specifies that schedule 3 commences on 26 July 2004.

Paragraph 1466 of schedule 12 to the said Act contains transitional provisions for schedule 3 which relevantly provides 'the amendments made to this Act and the *Trade Practices Act 1974* by schedule 3 to the amending Act apply to causes of action that arise on or after the day on which that schedule commences'.

Second reading speeches

The second reading speech in the House of Representatives was made on 4 December 2003, see: Commonwealth, Parliamentary Debates, House of Representatives, 4 December 2003, p.23761 (Peter Costello, Treasurer), www.aph.gov.au/hansard/hansreps/htm and in the Senate on 1 March 2004, see: Commonwealth, Parliamentary Debates, Senate, 1 March 2004, p.20313, (Senator Ian Campbell), www.aph.gov.au/hansard/hanssen/htm.

The explanatory memorandum

The explanatory memorandum can be found at: http://www.scaleplus.law.gov.au/html/ems/0/2003/0/2003120806.htm.

1 The ministerial term of reference may be found at http://revofneg.treasury.gov.au/content/home.asp.

2 Maritime law both lead the statutory reform and had in fact already recognised the more equitable outcome of apportionment, *The Englishman and the Australia* [1894] P 239.

3 'And the judge may either condemn the defendant in the whole of this sum, or in a lesser sum at his discretion.'

4 *Murphy v Overton Investments Pty Ltd* (2004) HCA 3

The agony and the power of dissent

*By Colin McDonald QC**

It has been a turbulent year for Indonesia and the Indonesian judiciary. Some observers say the Indonesian judiciary is in a crisis that threatens the reputation and the capacity of the nation's highest courts to deliver justice. Other observers, who acknowledge the legal foment of this year, are more optimistic and see this year as an exciting development in the struggle for the rule of law in post-Soeherto Indonesia.

Two cases in particular are referred to by the contending observers in support of their arguments:

- Golkar Party chairman and House of Representatives ('DPR') speaker Akbar Tanjung's acquittal on 12 February 2004 by the Supreme Court; and
- the new Constitutional Court's striking down of Indonesia's Anti-Terrorism Law introduced to respond to the horrific Bali bombings.

The cases have attracted huge national and international attention to Indonesia's Supreme Court and Constitutional Court and exemplify the growing importance of judicial decision making in Indonesian society. What has sharpened the focus and the interest of ordinary Indonesian people in particular has been the unprecedented expression of dissenting judicial opinion in the two cases. The dissents struck a resonant chord across Indonesia dealing as they did with the two major issues facing the nation: corruption and security.

Indonesia is witnessing for the first time the agony and the power contained in dissenting judicial opinion.

In 1970 by Law No.14/1970, General Soeharto's New Order regime denied Indonesian courts the power to review the constitutionality of statutes. Retrospective legislation was utilised where necessary to maintain the policies of executive government. The courts ultimately exercised no real power. Appointments to the Supreme Court were made by President Soeharto, himself. The national courts remained by and large a backwater in Indonesian society - conforming, conservative and careful not to rock the boat. Allegations of corruption and interference with judicial decisions were rife. All this began to change with the fall of Soeharto and the New Order regime in 1998.

Students in Jakarta demonstrate against Indonesia's Anti-terrorism Law introduced in 2002.
Photo: News Image Library

Since 1998 reform and democratisation have been rapid in Indonesia. In the last fifty years there has hardly been a nation where the transition from military dictatorship to democracy has been so swift, so determined and so peaceful. No one should underestimate the determination of Indonesia to reform itself. *Reformasi* advocates were keen to ensure that the executive power not produce the excesses they had experienced for the preceding 30 years. Indonesia gained a new, more democratic constitution which contained a Bill of Rights. Political power passed from the president to the House of Representatives. Law No.14/1970 was rescinded and a new Constitutional Court was given the power to strike down laws on constitutional grounds. President Gus Dur made some radical appointments to the Supreme Court. Change, democratic change was afoot, no more assuredly than in the nation's top appellate courts.

Since 1998 the Supreme Court has taken significant steps to reform itself and its image. Legal reform was considered essential to consolidate democracy. In October 2003 the court released its own blueprint for reform. Chief Justice Bagir Manan is very public reformer and relevant foreign donors acknowledge the court's commitment to clean up not just itself but also courts lower in the Indonesian hierarchy. However, as in other Indonesian public institutions, practical progress is slow. Chief Justice Bagir himself has frankly admitted that 10 to 15 years are needed before a truly credible judiciary can be rebuilt in Indonesia and this depends on widespread political support.

In Australia and other common law heritage countries dissenting judicial opinion is commonplace. Dissents can be powerful and contain reasons that sow the seeds of subsequent legal change as in the High Court decision in *Cullen v Trappell* (1980) 146 CLR 1 applying the dissenting judgment of Justice Gibbs in *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202. In the United States of America in particular, dissenting legal opinion is sometimes both eloquent and scathing. In Australia we have had a recent taste of the passion and legal conviction which can be held in dissenting opinion in the 4 - 3 decision of the High Court in *Al-Kateb v Godwin & Others* [2004] HCA 37. But in England, the United States and in Australia when the highest national courts hand down decisions, police do not battle with demonstrators outside. Riots are not caused by court decisions as they have been in Indonesia this year.

Until this year, the expression of a dissenting judicial opinion was unprecedented in the Supreme Court of Indonesia. A joint

panel decision of the five or more judges was the norm. The dramatic politics in Indonesia from 1998 to 2003, the genuine will for democratic reform, the concern of corruption and the nation's battle to preserve a secular state against Islamic terrorists have however transformed this.

The facts behind Akbar Tanjung's acquittal by a majority in the Supreme Court on 12 February 2004 were not in dispute. In February 1999 Akbar Tanjung was a minister and state secretary in the cabinet of former president BJ Habibie. Habibie charged Tanjung with the task of drawing Rp40 billion (about A$6.5 million) from the Indonesian State Logistics Agency for a food distribution programme to feed the poor. The agency wrote Tanjung the cheques, but no food reached the poor. Tanjung initially denied receiving the cheques, but subsequently in October 2001 admitted that the money was channeled to an obscure foundation with no experience in food distribution headed by one Dadang Sukandar. Sukandar in turn passed the money along to businessman Winifred Simatupang to carry out the programme. The three men were charged in 2002 and stood trial for embezzlement in the Central Jakarta District Court. Tanjung was the senior most Indonesian government person ever to face a corruption charge in a country debilitated by corruption. On the eve of trial, Simatupang returned Rp32.5 billion to the government. On 4 September 2002 Tanjung was convicted by the five judge panel and sentenced to three years imprisonment. The other two defendants were also convicted and received lesser gaol terms. Tanjung appealed and remained free.

Tanjung's appeal to the Jakarta High Court failed on 17 January 2003 and the lower court's verdict was upheld. On 20 March 2003 Tanjung's lawyers filed his appeal to the Supreme Court.

The Supreme Court proceedings drew the attention of the nation's media. It was a presidential election year and Tanjung was a Golkar presidential candidate aspirant. The corruption conviction stood in his way. Indonesian TV broadcast the Supreme Court proceedings live across the nation and the many major daily newspapers were all present.

Polls across the nation reflected a cynical national sentiment that Tanjung would 'get off'. On the eve of the decision, rumours abounded in Jakarta that the judges had been bought or pressured.

So, no one was really surprised when after an eight hour reading of the decision, Presiding Justice Paulus Effendy Lotulung overturned the verdict, *inter- alia*, stating that Tanjung's role in the disbursement of moneys was 'merely the implementation of an official instruction and therefore the action cannot be classified as a legal offence.'

After this decision was read, Indonesian TV flashed to the Golkar strongman's home where the DPR speaker was throwing himself on the floor in gratitude to God. Then, the

Indonesian students burn an effigy of Akbar Tanjung outside the Supreme Court in Jakarta, 11 February 2004.
Photo: Ade Danhur / News Image Library

extraordinary occurred; it too was relayed live across the nation: Justice Lotulung stated politely that the Supreme Court verdict included an opinion that dissented from those of the other judges and further, that this opinion was recorded as being included in the Supreme Court verdict. Legal history was being made live on television across Indonesia. Justice Lotulung asked Justice Abdurrahman Saleh to read out his opinion.

Justice Saleh, in the first recorded dissent in the Indonesian Supreme Court, pulled no punches. It was verbal manna from heaven to the cynical watching populace. As quoted in *The Jakarta Post* for 13 February 2004, Justice Abdurrahman Saleh quietly opined:

> This verdict is a humiliation of the law when these judges say that the lower courts have wrongly implemented the law... At a time when the country was sinking in the crisis, the actions of the defendant violated one's sense of justice.

Justice Saleh said that Tanjung had engaged in 'corrupt practice' and was guilty of 'shameful conduct because he failed to show minimal appropriate efforts to protect state money.... which the president had entrusted to him.' Justice Saleh then described in detail Tanjung's failures, which he considered proved the verdict and rejection of the appeal in the Jakarta High Court were correct.

At this point, editorials were being changed hastily in the nation's many newspapers. Outside the Supreme Court, students battled with police with about sixty of their number being taken to hospital. Spontaneous demonstrations occurred across Java. One quiet, one determined judicial dissent was igniting a political powder keg. As he praised Allah and the Supreme Court, Akbar Tanjung was, politically, dead in the water.

The majority decision drew trenchant criticism from lawyers, *reformasi* advocates and many Muslim notables. But it was the dissenting opinion which captured the nation's attention and fuelled these views.

The first public dissent in the Indonesian Supreme Court was, in a very dramatic way, putting the finger on Indonesia's most debilitating political problem: corruption. Whatever the legal merits which lay behind the respective opinions, it was Justice Abdurrahman Saleh's dissent, which resonated in the feelings and frustrations of scores of millions of Indonesian people.

The next day *The Jakarta Post* editorial echoed those of the other Indonesian dailies. The dissenting opinion was quoted extensively and accorded prominence and the majority opinion condemned.

The editorial in *The Jakarta Post* went on to say that the majority Supreme Court decision:

> brings into question the quality of the entire judicial system in the eyes of the public and could seriously impair public trust in the judiciary as a whole - not to mention the wider political implications. Many Indonesians also see it as a serious setback in the fight against corruption, especially that within the country's notoriously corrupt judiciary.

The dissenting opinion made Justice Saleh a reluctant celebrity in Indonesia. He became the popular speaker at all manner of legal and popular fora. He became a hero in the universities. In damage control, in a presidential election year, the Megawati government convened a national law summit of the country's highest ranking legal institutions, the focus of the conference being the eradication of corruption in legal institutions. Justice Saleh was a keynote speaker.

Meanwhile, in the Golkar Party hard thinking was underway. Tanjung was undoubtedly in control of the party machine, ambitious and formally free to run as the Golkar presidential candidate or to put a deal together with Megawati and run as her vice-president.

However, at the House of Representatives election on 5 April 2004 the face of Indonesian politics changed. Megawati's PDI party vote all but collapsed. Golkar, although the party taking the greatest number of seats, slipped and new parties and leaders emerged who espoused reform and change. Politics in Indonesia was inexorably being taken away from the party machine men (and they are all men) to the rank and file. As further evidence of Indonesia's rapid embrace of democracy, the presidential election on 20 September 2004 was for the first time a vote for a person not a party. In the world of ordinary Indonesians and populist politics, whatever the legalities, Tanjung became unelectable.

Abdurrahman Saleh, formerly a Supreme Court judge, is now attorney-general in SBY's government.
Photo: News Image Library

At the Golkar convention on 21 April 2004 the charismatic former defence minister Wiranto thrashed Tanjung for the party's presidential candidate nomination. Wiranto had a strong anti-corruption platform and was the only Golkar candidate who formulated policies for women and the poor. He was tough on terrorism.

Indonesia's first judicial dissent was undoubtedly a part, an important part, of Akbar Tanjung's fall from political grace.

Soon after, the nation's attention was again focussed on legal proceedings, this time the constitutional challenge in the new Constitutional Court by Masykur Abdul Kadir, one of the convicted Bali bombers. The decision in this case, even more than Akbar Tanjung's acquittal, sparked national and international controversy. Again, Indonesia witnessed powerful judicial dissent.

In a majority of 5-4 decision, the Constitutional Court used its review powers and struck down Law No.16/2003. Law number 16 purported to authorise police and prosecutors to use Indonesia's *Anti-Terrorism Law* introduced urgently in the tumultuous aftermath of the Bali bombings. The anti-terrorism laws (Interim Law Number 1 of 2002 which later became Law No. 15/2003 and Interim Law Number 1 of 2003, which later became Law No.16/2003) did not exist on 12 October 2002 when bombs blew away the Sari Club and Paddy's Bar in Kuta.

Argument before the Constitutional Court was vigorous and well presented. Again the nation watched the case on TV and the extensive print media covered counsels' arguments thoroughly.

Mr Kadir's case was that Law No.16/2003 conflicted with a new provision in the recently amended Indonesian Constitution. Mr Kadir argued that article 28(1) of the Constitution gives every Indonesian a constitutional right not to be prosecuted under a retrospective law. Article 28(1) is contained in the new Bill of Rights in the Indonesian Constitution. Mr Kadir sought and obtained, by a majority, a declaration that the *Anti-Terrorism Law* was invalid.

Lawyers for those convicted of the Bali bombings under the anti-terror laws have indicated the decision will probably now lead to a spate of appeals in the Supreme Court by other convicted Bali bombers seeking to have their death sentences and life sentences overturned. They will rely on the Constitutional Court's declaration of invalidity in the appeals as a new factor, a 'novum' which if known at the time of trial would have led to Amrozi's and the others' acquittals.

The political response was immediate and almost overwhelming. There were riots in Bali. The nation's press screamed that people were now powerless against terrorism. The politics around the decision needs to be seen in the context of the clear threat posed by the lethal acts of the persons who perpetrated the Bali and JW Marriott Hotel bombings that killed so many Indonesians. The subsequent car bomb detonation at the Australian Embassy on 10 September 2004 which killed nine innocent Indonesians only served to confirm the grave threat Islamic terrorism poses to the constitutional secular republic of Indonesia.

Jemaah Islamiah (JI) has been responsible for bombings across Indonesia since 2000. JI openly defies the established government of Indonesia fuelled with a zealotry and hatred of the West. Yet, the majority of JI's victims have been innocent Indonesian citizens.

The anti-terrorism laws were a clear set of laws designed to protect the nation and bring to justice those who not only killed, but who also harboured broader goals of spreading fear, causing instability and bringing down the secular state. The anti-terrorism laws did not increase any potential sentence under the pre-existing laws facing perpetrators of the killings in Bali on 12 October 2002 under the ordinary criminal law.

The decision of the Constitutional Court turned surprisingly on a narrow and unexpected point. All nine judges agreed that retroactive enforcement of laws is sometimes justified. Whilst the issue of the constitutional ban on retroactive prosecution was ultimately the basis for the majority decision another real issue in controversy was the narrower question whether there were sufficiently 'special' or 'extraordinary' circumstances in the Bali bombings to justify a retroactive enforcement of the anti-terrorism laws.

The majority judges held that the bombings in Bali and Kadir's involvement in them was an 'ordinary crime'. The dissenting judges characterised the Bali bombings as an extraordinary crime. The issue of 'ordinary and extraordinary' crimes was only an issue because it related to an argument about how the ban on retrospectivity might be avoided. That argument was, in fact, irrelevant, because the constitutional ban says the right against retroactive prosecution cannot be diminished in any circumstances, so no norm of international law or Indonesian law could overrule it, as that would be to diminish a prohibition constitutionally expressed to be absolute and incapable of diminution.

Some commentators asserted the majority decision was 'more political than legal.'

In an opinion piece on 3 August 2004 in *The Jakarta Post*, Professor Jeffrey Winters and Richardson Galinggin of North Western University said:

> The judges who prevailed went to great lengths to make sure that the Bali bombing had no special status as a terrorist act. By insisting that the bombing was simply a horrible but ordinary case of murder the judges crossed the line from pure legal reasoning into the realm of politics.

They continued by observing further:

> The single most important argument against retroactivity is to avoid oppression through the criminilisation of non-criminals. Allowing retroactive enforcement of the terrorism law should have been easier for the judges because no post-hoc criminalization occurred in the Bali bombing case. The actions of the conspirators were criminal whether they were prosecuted under the terrorism law or the ordinary criminal code.

The dissenting opinion emphasized the factual context of the crimes and the motives of the perpetrators. They upheld the arguments advanced by the Ministry of Justice and the prosecutors that Kadir's crime was an extraordinary crime and retroactive enforcement of the anti-terrorism law was justified.

Again, the dissenting opinion struck a chord with national sentiment and provided a focus for a national debate. Decision makers in Jakarta appeared to be in a momentary panic as they sought to answer eager editors from across the country whether Kadir would walk free. Susilo Bambang Yudhoyono (locally known in Indonesia as 'SBY') was given further political ammunition in his popular bid for the presidency - he would crack down on the terrorists and it was a message Indonesians wanted to hear. Australia and other Western countries condemned the majority decision. The issue of security was moving to centre stage and Megawati was on the back foot.

Justice Minister Yusril Ihza Mahendra issued a press release putting the government's interpretation of the majority decision. Surprisingly, so did the chief justice of the

Constitutional Court. Ominously, the press releases carried a similar and almost unbelievable interpretation of the published judgments. Kadir and other bombers could not be released because Constitutional Court decisions cannot operate retrospectively. So according to the press statements, the decision, whilst binding, only operates prospectively and prevents future prosecutions under the invalid Law No.16/2003. The chief justice of Indonesia also gave his extra curial voice, saying the Constitutional Court decision did not operate as a novum and could not be relied upon for a review in the Supreme Court. All in all, the result has been a dangerous mess. The credibility of the courts has been affected. Why would any person bother to challenge the validity of criminal laws where their status remains unchanged despite achieving declarations of invalidity?

The manner in which the chief justices have responded publicly has given rise to wider and potentially more serious issues involving the Constitutional Court and the Supreme Court themselves. The concept and reality of judicial independence, a core feature of modern reforms, was compromised at least in appearance by the near simultaneous issue of press releases. The incredible similarity of interpretative content, temporarily seen as expedient perhaps, has now enveloped the Constitutional Court in a controversy that goes beyond Kadir's case and the issue of national security, but raises the integrity of the functioning of the Constitutional Court itself. The unilateral reinterpretation of the majority view as expressed in the binding judgments was an unacceptable intrusion on the integrity of the majority judicial decision and compromises the judicial power. It has been statements made *outside* the courtrooms by senior judges that have caused the real controversy that affects the courts.

Why there was such apparent panic in the corridors of power in Jakarta may have had something to do with the perceived hostile domestic political response to the majority judgment and the actual hostile political response from the countries of the 'Anglosphere'. Otherwise, it is important to note that of the thirty or so persons convicted in relation to the Bali bombings, many were also convicted and sentenced to death or given heavy gaol terms for the possession of firearms and explosives under the old Emergency Law No.12/1951. The more senior and culpable defendants Muklas and Samudra fell into this category. What is even a greater mystery is why the prosecutors who have been so deft and effective in relation to both the Bali and JW Marriott hotel bombings to date, did not simply immediately charge Kadir and other relevant defendants with the 'ordinary' crime of murder. No principle of double jeopardy applicable in Indonesia would seem to stand in their way if the anti-terror convictions are in fact quashed. If the convictions are not quashed, as they should be, no doubt lawyers acting for Kadir and others may be expected to argue double jeopardy issues. But the press releases would seem to indicate that the convictions probably will not be quashed. The situation is still unclear.

The cases the critics point to involve dramatic facts, vital to the life and health of modern Indonesia. Indonesia is confronted with many crises: any one of which would be enough to consume a country like Australia. However, when the history of other courts are examined in newly formed democracies and the huge problems facing the new, democratic Indonesia are taken into account, the beginnings of another picture emerge.

In April 2004 and September 2004 Indonesians experienced their first fully democratic and direct election of their national representatives and national leader. The House of Representatives is still finding its legislative feet and the disciplined procedures necessary to make wise laws. Indonesia does not yet clearly have what common law countries took so long to achieve: a purposive approach to statutory interpretation. In terms of nation building post Soeharto, these are early days. So too, these are early days in Indonesia's courts adapting to the exercise of truly independent judicial power.

The emergence of dissenting judicial opinion, whilst it may be unprecedented, can nevertheless be seen as a clear sign of the emergence of independent judicial decision making. Discipline in the judicial method and reasoning will surely help the achievement of independence. But in these early years of democracy the agony of Indonesia's first two judicial dissents in the country's highest courts drew enormous interest, whipped up fierce debate and have carried huge influence - because it was the exercise of judicial power. Indonesians hunger for justice just as much as any other people on earth.

Stepping beyond the exercise of the judicial power and giving hasty extra-curial interpretations of judgments for the media will stifle the development of the courts, inhibit genuine reform and give rise to a new form of cynicism. Lessons are no doubt being learned.

One observer, Professor Tim Lindsey from the Asian Law Centre at Melbourne University, is probably right in opining in *The Jakarta Post* on 6 August 2004 that the Constitutional Court at least is facing a watershed in its short existence and so too is that of the use of the judicial power in Indonesia.

Judges must learn to behave simply as judges and decide the cases before them.

The re-emergence of the judiciary to the centre stage in the new Indonesia, has been something the *Negara Hukum* (law state) reformers have been so determined to achieve. The two strong dissenting opinions this year demonstrate how quickly and how assuredly the judicial power is developing. The terms of the dissents may have been agonized, but their effect demonstrates overwhelmingly their power in Indonesian society.

* Colin McDonald QC was a member of the board of the Australia-Indonesia Institute from 1899 to 1994

New South Wales Bar achieves Professional Standards Scheme

By Justin Gleeson SC

As has already been announced to members, after much hard work, the Bar Association has secured the approval of the Professional Standards Council to the association establishing a scheme under the *Professional Standards Act 1994*. Gazettal of the scheme is anticipated shortly and members will be advised by the Bar Association when gazettal occurs, and when the scheme is to commence.

Credit is due to many who have worked to promote such a scheme over the past five years. The Bar Council originally approved the concept of seeking to advance a scheme in 2000 under the presidency of McColl SC. A committee originally chaired by Justin Gleeson SC first developed the concept. Brian Rayment QC's committee has brought it to fruition over the last several years. There has been a sustained contribution from Kim Kemp and Philip Selth of the Bar Association. Importantly, after representations which the Bar Council has made through the Law Council of Australia, amendments to associated legislation have been achieved to make the scheme more effective.

A full copy of the scheme is found on the Bar Association's web site at www.nswbar.asn.au.

Some important practical aspects of the scheme for members should now be noted. First, to take advantage of the scheme, a barrister must:

- hold a New South Wales practising certificate;
- be a member of the Bar Association; and
- have approved professional indemnity insurance.

Second, by reason of limitations in the statute, the scheme cannot operate on a claims made basis. Accordingly, the scheme does not have retrospective effect. It will only limit a member's liability for acts which occur after the scheme comes into force. That will depend upon when the scheme is gazetted and tabled in parliament.

Third, it follows that there will still be a transitional period of several years where a claim might be made against a member arising out of an act or omission which occurred before the scheme came into force. The scheme will not limit liability in respect to such a claim. Thus, when members are considering what levels of insurance to renew in June 2005, and for some years thereafter, they may care to choose to retain levels of insurance higher than the minimum required by the scheme if they think that is necessary in respect to possible claims arising out of pre-scheme actions.

Any barristers who have chosen, or in the future choose, not to make the voluntary contribution necessary to be a member of the Bar Association, will not have the benefit of the scheme.

Fourth, the limit for civil liability under the scheme is $1 million. However, this is $1 million in respect to the principal liability of the barrister to the claimant. The insurance policy, if it is to provide cover for defence costs of the barrister, will need to provide defence costs cover in addition to the minimum of $1 million cover for principal liability. The Bar Association earlier this year provided the four insurance policies approved by the attorney general to the Professional Standards Council. The association has also made the terms of the proposed scheme known to the four current insurers. The association believes that, despite some uncertainties in the wording of one policy (CGU), the better view is that all four approved policies currently in place comply with the scheme. This needs to be checked each year. Members, as always, still need to check their insurance policies as a whole to ensure they provide adequate cover for the specific needs of members. This includes members making a considered decision whether they wish to obtain cover above the $1 million minimum amount required for principal liability. Members are urged to think carefully about this question when renewing policies in June 2005 and thereafter.

Fifth, one of the important changes in associated legislation which has been achieved is that amendments have been made, effective 13 July 2004, to federal Acts being the *Trade Practices Act 1974*, *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*. These are to the effect that state professional standards law cannot be by-passed by litigants attempting to access uncapped payments under these federal statutes. However, the amending legislation requires professional standards schemes to be prescribed. No schemes have as yet been prescribed for the purposes of the Commonwealth legislation, and until that action is taken, the Trade Practices Act and related provisions will continue to apply to persons covered by professional standards schemes including members of this Bar. As soon as the scheme commences in NSW, the Bar Association intends to ask for it to be prescribed under the Federal legislation and will advise members when prescribing occurs.

Sixth, in respect to personal injuries claims, traditionally these were excluded by the Professional Standards Act from the reach of a scheme. This is to be remedied by the *Professional Standards Amendment Bill 2004* (NSW) which was passed by parliament on 26 October 2004 and is awaiting assent. It should be noted that in the manner in which this amendment is drafted, the scheme will now protect barristers from negligence claims when they are conducting personal injury actions. The Act still excludes some matters from the scheme. Thus the scheme will not protect the barrister (or any other professional) in the case of breach of trust or fraud. Further, sec 5(1)(a) of the Act remains in place which provides that the scheme does not limit liability for death or bodily injury. However, sec 5(2) makes clear that sec 5(1)(a) does not apply where the barrister is acting for a client in a personal injury claim. Whether this leaves any other scope for sec 5(1)(a) is a matter barristers may care to consider. Barristers may also consider how their policies respond to liabilities for bodily injury.

Seventh, at present the scheme operates under the New South Wales Act and is given effect under the federal statutes referred to above. It does not yet have effect under the statutes of any other state. How, or to what extent, the scheme applies to work which has an interstate component may be a matter for debate. There would be questions of the constitutional reach of the New South Wales statute; its proper construction; and the interplay of federal law. The most that can presently be said is that there may be some limitations on the ability of the scheme to fully protect barristers where work has an interstate element.

For as long as the position for interstate work remains uncertain, it would seem reasonable for members, if they chose, to be able to insert into their fee agreements a contractual proviso that, wherever work is done, liability will be limited to that established under the *Professional Standards Act 1994* (NSW). As the *New South Wales Barristers' Rules* are currently drafted, there is no express exception to the cab rank rule to allow this to occur. However, a wholesale review of the rules, including this issue, is currently being undertaken. The results of any amendments to the rules will be notified to members in due course in the ordinary fashion.

Eighth, it is an obligation under the Professional Standards Act that all documents given by the barrister to a client or prospective client that promote or advertise the person's occupation, must carry a statement to the effect that liability is limited under the Professional Standards Scheme. This is the sort of warning currently seen at the foot of many solicitors' letters. Barristers should ensure that a similar warning is placed on their letterhead and other promotional material, as soon as the scheme commences (but not until it commences).

In summary, the main matters which barristers need to attend to are as follows:

- maintain membership of the Bar Association as well as a practising certificate and approved insurance policy;
- ensure that each year insurance provides cover for at least $1 million in principal liability with defence costs additional;
- when renewing insurance for at least the next few years, make a considered decision whether a higher limit is needed or desirable as protection against claims arising out of events before the scheme became effective; other possible exceptions to the scheme, i.e. some interstate work; and
- put the appropriate warning on the foot of all letterhead and other promotional material.

On 3 November 2004 Professional Standards Council material was distributed to all members covered by the scheme. The Bar Association also conducted CPD seminars explaining the scheme on 11 & 15 November 2004. Videos of those sessions are available in the Bar Library.

It should be noted that in order to obtain approval of the scheme, the Bar Association needed to persuade the Professional Standards Council that it had an appropriate risk management programme in place. The association's CPD programme is an important element of that risk management programme. The scheme itself has only been approved for five years and will be reviewed after that. Barristers are urged to continue to actively attend support and be involved in the CPD programme because it has this very important relationship with the limitation on liability obtained by the scheme.

Finally, it should be noted that the scheme is not free. The Bar Association needs to make an annual payment in New South Wales of $35 per member, i.e. about $70,000 in total. It is an important expenditure of the association's funds but one considered of significant and proper value to members.

High Court decisions on stateless persons

Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs [2004] 78 ALJR 1056
Al-Kateb v Godwin [2004] 78 ALJR 1096
Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji [2004] ALJR 1156

By Linda Tucker

The prospect of a detention limbo for unsuccessful visa applicants in Australia has been confirmed by the High Court, which has upheld the system of mandatory detention even where it results in the possibility of indefinite incarceration.

Australia's right as a sovereign state to deport a non-citizen who does not have permission to enter or remain hits a snag where there is no country to which the person in question can be sent. In two recent cases,[1] the issue arose as, following their unsuccessful asylum applications with further review either exhausted or not pursued, both claimants had no state to where they could be returned.

Both claimants had written to the minister for immigration, multicultural and Indigenous affairs, asking to be removed but the Australian authorities were unable to do so. Given that both men were classified as 'unlawful non citizens',[2] the *Migration Act 1958* (Cth) required that they must be detained until they were either removed from Australia or granted a visa. As neither was considered eligible for a visa, the only avenue was removal but with no prospect of removal, could the Act's mandatory detention regime still apply?

In a third case heard at the same time as the above,[3] the appellant challenged the provisions in relation to whether they authorised the particular conditions of detention that prevailed at the relevant time at the Woomera Immigration Reception and Processing Centre. The conditions were claimed to be so harsh and inhumane as to be punitive and thus not detention as contemplated by the Act. As this matter dealt with issues narrower than the first two cases, it is discussed separately, below.

Al-Kateb and Al Khafaji

Mr Al-Kateb is a Palestinian who has lived most of his life in Kuwait and it was not contested that he was a 'stateless person' as there is no country in which he has a right to reside. He came to Australia in December 2000. His application for a protection visa was refused and his applications for review of that decision failed. He wrote to the minister in August 2002 asking to be returned to Kuwait or, if this was not possible, to Gaza.

In *Al Khafaji*, the appellant was an Iraqi who was held to have a right to reside in Syria. Mr Al Khafaji's application for a protection visa was refused despite him having a well-founded fear of persecution in Iraq, because it was held that he had effective protection in Syria. His application to the Refugee Review Tribunal for review of the decision was dismissed and he did not pursue judicial review of the decision. Once his visa application process ended, Mr Al Khafaji became an unlawful non-citizen and was detained and, in February 2001, he wrote to the minister seeking removal to Syria. While it may have been his right to reside in Syria that precluded him from successfully applying for protection in Australia,4 such right did not enable the Australian authorities to secure the agreement of Syria to receive him.

Asylum-seeker Abbas Mohammad Hasan al-Khafaji outside court in Adelaide, on 7 August 2004, after the High Court ruling that the Migration Act gave the Commonwealth Government power to hold detainees indefinitely in detention centres.
Photo: Michael Milnes / News Image Library

As the decision in *Al Khafaji* followed the reasons in *Al-Kateb*, the discussion of the two cases here refers only to *Al-Kateb*.

The High Court held, by majority,[5] that ss189, 196 and 198 of the *Migration Act 1958* (Cth) ('the Act') authorised the indefinite detention of asylum applicants designated 'unlawful non-citizens' pursuant to the Act.

Section 189(1) is unambiguous in its requirement that unlawful non-citizens are to be detained. It provides:

> If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

Section 196(1) concerns the duration of detention. It provides:

> An unlawful non-citizen detained under s189 must be kept in immigration detention until he or she is:
>
> (a) removed from Australia under s198 or 199; or
>
> (b) deported under s200; or
>
> (c) granted a visa.

The claimants argued, however, that the provision could not apply to indefinite detention, given the terms of s198 which provides, relevantly:

> (1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the minister, in writing, to be so removed.

Given that there were no prospects of removal from Australia in the reasonably foreseeable future, the High Court considered whether the relevant sections could be construed to authorise indefinite detention. In the leading judgment, Hayne J set out the underlying constitutional questions for the court in this case and in *Al Khafaii* and *Behrooz*:

> whether, and to what extent, the statutory scheme requiring mandatory detention of unlawful non-citizens is consonant with the long-established principle that '[n]o part of the judicial power [of the Commonwealth] can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Ch III.[6]

As the power to detain, pursuant to the Act, can only be incidental to federal parliament's power to make laws with respect to aliens (s51(xix)) and immigration (s51 (xxvii)),[7] is there a point beyond which detention becomes punitive and thus a matter that is only for the judicial power?

As Hayne J noted,[8] referring to *Chu Keng Lim*, the purpose of the provisions determined whether or not they could be construed as punitive and thus beyond parliament's powers. As long as such provisions were 'reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered' then they did not contravene Ch III.

Detention under the Migration Act is not punishment for an offence; it is incidental to the aliens and immigration heads of power, being for the purpose of exclusion of a non-citizen from the Australian community.[9] McHugh J referred to his earlier judgments in which he had described the power conferred on parliament to make laws with respect to aliens under s51(xix) as unlimited as long as such law has aliens as its subject.[10]

'No derring-do'

While in the case of Mr Al-Kateb who, being a stateless person, could be subject to indefinite detention, it was not for the High Court to strike down constitutionally valid provisions. Hayne J noted, 'if Australia is unwilling to extend refuge to those who

have no country of nationality to which they may look both for protection and a home' then detention continues as it does not impinge on the separation of powers.[11] Or, in the words of Judge Learned Hand, cited by Hayne J,

> 'Think what one may of a statute ... If ... society chooses to flinch when its principles are put to the test, courts are not set up to give it derring-do.'[12]

Interpretation of the provisions

The court also dismissed the contention that parliament could not have intended for the provisions to result in indefinite detention or that the provisions should be interpreted consistently with Australia's international obligations. McHugh J described the words of the three relevant sections as 'too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights'.[13] Callinan J also held that the language of the provisions left no room for implication.[14]

McHugh J v Kirby J

Disagreement over two aspects of the decision - in relation to the executive's power to detain aliens and the role of international law in the interpretation of the Constitution – resulted in a fiesty exchange of views within the judgments of McHugh J and Kirby J.

Kirby J's statement in his reasons, that 'indefinite detention at the will of the executive ... is alien to Australia's constitutional arrangements',[15] was soundly dismissed by McHugh J as 'not true'.[16] McHugh J went to some lengths to dismiss Kirby J's contention.[17] His Honour cited regulations authorising the detention of persons, considered disloyal or otherwise a threat in the First World War and Second World War, and the High Court decisions in both wars, that unanimously upheld the validity of such provisions.

Kirby J responded by referring to cases such as the wartime High Court judgments cited by McHugh as 'being viewed with embarrassment'.[18]

McHugh J then proceeded to describe as 'heretical' Kirby J's view concerning interpretation of the Constitution with reference to provisions of international law accepted after its enactment.[19]

Kirby J's response to this criticism began with: 'I cannot agree with much of what McHugh J has written in his reasons...'.[20]

Behrooz

In *Behrooz*, the appellant had escaped from Woomera and was subsequently charged under s197A of the Act. The issue was not whether s196(1) of the Act, which mandates continued detention, is valid, but whether there could be valid detention at Woomera given the conditions that prevailed there. The appellant argued that, given the conditions at Woomera, the detention was not authorised and thus he could not be prosecuted for escaping from immigration detention.

The High Court, by majority,[21] dismissed the appeal. The detention itself remains constitutionally valid (as set out in the reasoning in *Al-Kateb*), irrespective of the conditions imposed.[22] An unlawful citizen still has recourse to civil remedies and the protection of criminal law if subjected to inhumane conditions or assault. Such actions do not alter the nature of the detention, however, which remains the deprivation of liberty as incidental to the executive's power to exclude unlawful non-citizens from the Australian community.[23]

1 *Al-Kateb v Godwin* [2004] 78 ALJR 1096; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] ALJR 1156.

2 Section 14(1) *Migration Act 1958* (Cth).

3 *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] 78 ALJR 1056.

4 Section 36(3) of the Act provides:

Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently ... any country apart from Australia...

5 Hayne, McHugh, Callinan, Heydon JJ.

6 At [212], citing *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.

7 In *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, detention without judicial intervention can be valid: per Gaudron Jat 55; Brennan, Deane and Dawson JJ, at 33.

8 At [251]-[252].

9 Hayne J at [256], [261]-[263].

10 At [41].

11 At [268].

12 *United States v Shaughnessy* 195 F 2d 964 at 971 (2nd Cir 1952), cited by Hayne J at [269].

13 [33].

14 [297]-[298].

15 [146]

16 [55].

17 [55]-[61].

18 [163].

19 [63].

20 [152].

21 Gleeson CJ; McHugh, Gummow, Heydon JJ; Hayne J; Callinan J.

22 Hayne J at [175]-176].

23 See Gleeson CJ at [21], and McHugh, Gummow, Heydon JJ at [50]-[53].

Another instalment in the showdown between the Court of Appeal and the Industrial Relations Commission

*By Louise Clegg**

Previous editions of Bar News have alerted readers to jurisdictional conflict emerging from the unfair contracts jurisdiction of the Industrial Relations Commission.[1] One source of conflict arises due to the presence of s179 in the *Industrial Relations Act 1996* which protects decisions of the commission from review ('the privative clause').[2]

In a suite of recent decisions,3 the Court of Appeal has dramatically upped the ante in its territorial stoush with the commission. It has provided a party who wishes to contest the jurisdiction of the commission with a direct route to the Court of Appeal, despite the presence of the privative clause.

Background

In *Mitchforce v Industrial Relations Commission*[4] a landlord who was a party to a commercial lease agreement to operate a tavern sought prerogative relief in the Court of Appeal in an attempt to quash the commission's earlier decision that the s106 proceedings commenced against it by the lessee were within the commission's jurisdiction.[5] The central question was whether or not the lease agreement was a 'contract or arrangement *whereby* a person performs work in any industry'[6] such that it invoked the jurisdiction of the commission.

The Court of Appeal (Spigelman CJ and Mason P, Handley JA dissenting) found that the lease in question was not a contract or arrangement *whereby* work was performed in an industry because the lease agreement was not one which led 'directly' to the performance of work.[7] However, the Court of Appeal held[8] that the privative clause operated to protect decisions of the commission from review so long as the threefold 'Hickman principle' enunciated in *R v Hickman; ex parte Fox and Clinton*[9] is satisfied. The court by majority decided that although the commission had committed a jurisdictional error, as a matter of construction, the privative clause operated to protect the error.[10] The court determined it was not necessary to address the constitutional question concerning the validity of the privative clause. Instead, the Court of Appeal took the unprecedented step of inviting the full bench of the commission to reconsider its earlier decision.[11]

In doing so the Court of Appeal made plain its views concerning 'the march of the commission's jurisdiction into the heartland of commercial contracts'.[12] Spigelman CJ observed that the commission's jurisprudence had travelled a long way from an 'industrial context' to encompass arrangements not ordinarily fitting a description of an 'industrial colour or flavour'.[13] Mason P observed that this represented a 'significant inroad into the effective and efficient exercise of the Supreme Court's jurisdiction in commercial causes' and observed that 'something has gone seriously wrong somewhere in the process'.[14]

In December 2003 the full bench of the commission delivered its 'reconsideration' of the jurisdictional question.[15] The

Mason P observed that this represented a 'significant inroad into the effective and efficient exercise of the Supreme Court's jurisdiction in commercial causes' and observed that 'something has gone seriously wrong somewhere in the process'

majority (Wright P and Walton J), with significant reluctance and hesitation,[16] concluded it should defer to the view of the majority of the Court of Appeal[17] in the interests of judicial 'comity'[18] despite the fact that it did not agree with the conclusions of the majority in the Court of Appeal. The dissenting decision of Boland J delivered a rebuke to the Court of Appeal. After taking issue with the conclusion of Mason P that the process had gone 'seriously wrong' His Honour concluded:[19]

> I do not agree that the appeal should be upheld... notwithstanding that such a course fails to achieve comity with the majority views of the Court of Appeal....as presently advised, s179 is valid enactment with the consequence that the commission is the final arbiter of its jurisdiction. To uphold the appeal...would amount to a constructive circumvention of s179. I consider that such a course is inappropriate, particularly in circumstances where I regard the observations made by the majority as inconsistent with High Court authority and wrong.

Solution 6 and QSR

Over a few days in April 2004, the Court of Appeal heard three separate applications seeking various forms of prerogative relief from the commission.[20] In each case the claimants had not yet exhausted all avenues of appeal in the commission. In *Solution 6* and *QSR*, no trial had even been held. A central question in each of the cases was whether the Court of Appeal should invoke its supervisory jurisdiction in relation to proceedings which are before the commission in circumstances where the commission had not yet made a 'decision' concerning the jurisdictional issue. If there had been no 'decision' made by the commission, then arguably the privative clause did not operate to prevent prerogative relief being obtained.

In *Solution 6* and in *QSR* the Court of Appeal granted relief to both claimants. In both cases, the Court of Appeal found that the commission had no jurisdiction to entertain the impugned contracts or arrangements on the basis that they were not contracts or arrangements which led directly to work being performed. [21]

In *Solution 6*, there had been no steps taken in the commission other than the filing of pleadings by both parties. The impugned arrangement in *Solution 6* was a share sale agreement which was conditional on the employee agreeing to be employed by Solution 6. The employee complained that the

formula for the computation of share price was unfair, or operated unfairly. The Court of Appeal found that the share sale agreement was a contract for the purchase and sale of a business, and not one *whereby* work was performed in an industry. The relationship between share sale agreement and the performance of work in an industry was merely indirect or consequential, rather than direct. The formulation for the computation of the purchase price bore no relationship to the performance of work.[22]

In *QSR*, the commission had already entertained a motion which had been initiated by the respondent seeking an order that the proceedings be dismissed for want of jurisdiction. Peterson J had dismissed the motion, leaving open the question of jurisdiction to be decided at the final hearing.[23] The Court of Appeal took the same approach as it did in *Solution 6*. As no final decision had been made concerning the question of jurisdiction,[24] the Court of Appeal granted the relief sought by the claimants - again because one (or part) of the pleaded arrangements was not an arrangement *whereby* work was performed in an industry.

Practical implications

The difference between *Mitchforce* on the one hand, and *Solution 6* and *QSR* on the other, is that in *Mitchforce*, by the time the proceedings seeking prerogative relief had been commenced in the Court of Appeal, the commission had already made a 'decision'. This meant that the privative clause came into play to protect the decision of the commission from review. However in *Solution 6* and *QSR*, no decision had yet been made by the commission concerning the jurisdictional question.

The practical import is clear. Respondents in unfair contracts cases now have a direct and effective route to approach the Court of Appeal for orders in the nature of prohibition, so as to restrain the commission from further hearing unfair contract matters - provided the prerogative relief is sought prior to the commission making a decision which would otherwise be protected by the privative clause. It is noted that the opponents in *Solution 6* argued that the prerogative relief proceedings were premature - because the evidence to be adduced in the commission might provide a basis for attracting jurisdiction, and because the commission is not a court of 'strict pleading' and the summons might not necessarily represent the final factual position. However the Court of Appeal took the view that the summary of facts and law contained in the summons was sufficient to establish the factual foundation for relief and noted that the parties were free to place evidence before the Court of Appeal in such matters.[25]

Conclusion

In the meantime, the validity of s179 - described by Handley JA as 'the widest privative clause I have seen'[26] - still remains to be considered.[27] It seems more likely that it will be tested in the commission's criminal (occupational health and safety) jurisdiction, where a finding by the Court of Appeal that the commission has committed error of law which is protected by the *Hickman* principle, might render it 'necessary' for the Court of Appeal to finally consider the constitutional question.[28]

The practical import is clear. Respondents in unfair contracts cases now have a direct and effective route to approach the Court of Appeal for orders in the nature of prohibition, so as to restrain the commission from further hearing unfair contract matters

The Court of Appeal's approach in *Solution 6* and *QSR* heralds a sure departure from the usually restrained approaches of the Court of Appeal and the High Court in days gone by. Spigelman CJ acknowledged this much in *Solution 6*.[29] Minds differ about whether the departure is warranted, and whether the commission's jurisdiction has exceeded its proper bounds. As special leave applications to the High Court have been filed in both cases, it remains to be seen if the High Court pays homage to the famous remarks of Barwick CJ: 'the legislature has apparently left it to the good sense of the Industrial Commission not to use its extensive discretion to interfere with bargains freely made by a person who was under no constraint or inequality, or whose labour was not being oppressively exploited'.[30] In *Mitchforce*, the Court of Appeal thought the commission had gone too far. Will the High Court now say the Court of Appeal has gone too far? Watch this space.

* Louise Clegg appeared as junior counsel to the solicitor general, intervening in QSR v Industrial Relations Commission.

1 See '*Mitchforce v Industrial Relations Commission*' by Ingmar Taylor, *Bar News*, Summer 2003/04, p.4 and '*A source of jurisdictional conflict*' by Malcolm Holmes QC and Andrew Bell in *Bar News*, Winter 2002, p.23.

2 See s179 of the IR Act which excludes all decisions (including 'purported decisions') from review.

3 *Solution 6 Holdings Limited & Ors v Industrial Relations Commission of NSW &Ors* [2004] NSWCA 200 ('*Solution 6*') ; *QSR Limited v Industrial Relations Commission & ors* [2004] NSWCA 199 ('*QSR*'); *Uniting Church in Australia Property Trust (NSW) v Industrial Relations Commission of NSW* [2004] NSWCA 183 ('Uniting Church'); *Old UGC Inc & ors v Industrial Relations Commission of NSW & Anor* [2004] NSWCA 197, where the claimants had exhausted all avenues of appeal, the Court of Appeal found that the impugned contract or arrangement was one whereby work was performed in an industry. Note also in *Uniting Church* the Court of Appeal was considering the commission's powers under s180 of the IR Act concerning the statutory offence of contempt, and not the unfair contracts jurisdiction. A recent decision, *Mayne Nickless Limited v IRC* [2004] NSWCA 359, 1 October 2004, supported the commission's jurisdiction in a case in which doctors claimed to be performing work pursuant to a services agreement through a corporate entity.

4 *Mitchforce Pty Limited v Industrial Relations Commission of New South Wales and ors* (2003) 57 NSWLR 212.

5 *Starkey v Mitchforce* (2000) 101 IR 177 (Hungerford J at first instance) and *Mitchforce v Starkey* (2002) 117 IR 122 (Full Bench).

6 Section 106(1) of the IR Act.

7 Above n4 at 217 - 220 and 224 - 227 (Spigelman CJ). There has been a debate about whether Spigelman CJ added a new purposive 'industrial colour or flavour' test, but in *Solution 6* Spigelman CJ has clarified this.

8 Subject to the question of the constitutional validity of the privative clause. See n27 below.

9 (1945)70 CLR 598 at 617-618

10 Above n4 at 233 (Spigelman CJ) and at 240(Mason P). Note that there were some final relief given by the IRC which was not protected by the Hickman principle, and prerogative relief was granted to prevent an excess of jurisdiction in respect of those orders.

11 On the basis that the full bench had earlier declined leave to appeal the jurisdictional question. Above n4 239 (Spigelman CJ) and at 242 (Mason P).

12 Above n4 at 240 (Mason P).

13 Above n4 at 224 (Spigelman CJ).

14 Above n4 at 241 (MasonP).

15 *Mitchforce v Starkey* (No 2) (2003) 130 IR 378 (Wright P and Walton J, Boland J dissenting).

16 ibid., p.383.

17 ibid., p.390.

18 ibid., pp.385-6.

19 ibid., p.443-444.

20 *Solution 6*, *QSR* and *Uniting Church* above n3.

21 Spigelman CJ delivered the leading judgment in *Solution 6* (Mason P, Handley JA agreeing). In QSR Handley JA (Mason P agreeing) thought the part of the arrangement whereby the applicant was working as a 'promoter' for a start up venture did not constitute an arrangement whereby work was performed in an industry. Spigelman CJ thought the claimant's case was sufficiently unclear that it should go back to the IRC for determination of the jurisdictional question.

22 *Solution 6* above n3 at [53] - [95] (Spigelman CJ). The Court also construed ss105-6 of the IR Act to mean that 'collateral arrangements' or 'related conditions' must also satisfy the '*whereby* a person performs work in an industry' test.

23 Peterson J had declined to make a finding concerning the jurisdictional question at an interlocutory stage because the threshold test in *General Steel Industries Inc v Commissioner for Railways* had not be met. See *Maylord Equity Management Pty Limited & Anor v QSR Limited* (2003) NSW IRComm 366 (Peterson J at [39]).

24 *QSR* above n3 at [85] - [89].

25 ibid., [47] - [51].

26 Above n4 at 252 (Handley JA).

27 See article by Michael Sexton and Julia Quilter, 'Privative clauses and state constitutions' (2003) 5 CLPR at 69.

28 But note possible impact of s 196 IR Act which may bear the result that prerogative relief can only be obtained from the High Court because the full bench of the commission may be taken to be the Court of Criminal Appeal when exercising its criminal jurisdiction. This will probably depend on whether s196 is taken to be either a procedural or substantive provision which vests CCA jurisdiction in the full bench.

29 *Solution 6* above n3 at [136] - [158] (Spigelman CJ) and at [182] (Handley JA).

30 *Stevenson v Barham* (1977) 136 CLR 190.

NT Power Generation Pty Ltd v Power & Water Authority & Anor [2004] HCA 48

By Ian Pike

Introduction

The High Court has, once again, considered the scope of the provisions of the *Trade Practices Act 1974* (Cth) ('the Act') in its recent decision in *NT Power Generation Pty Limited v Power & Water Authority & Anor* [2004] HCA 48, which was handed down on 6 October 2004.

The case essentially considered two aspects of the Trade Practices Act. First, the breadth of s2B, which determines the extent to which the Act applies to the Crown in right of a state or territory, insofar as it carries on a business. This aspect of the High Court's decision is likely to be the most significant - the High Court has potentially significantly expanded the scope of the Act in its application to state and territory businesses.

The second aspect considered by the High Court was s46 of the Trade Practices Act. The decision in this regard more likely turns on its facts, although the result was noted by Kirby J in dissent to be inconsistent with other recent decisions of the High Court, suggesting that, at least in his Honour's opinion, the section is not being consistently applied.

Overview of the facts

The relevant facts can be briefly stated.

The respondent, Power & Water Authority ('PAWA' or 'Power and Water') is a vertically integrated electricity enterprise, wholly owned by the Northern Territory Government. It generates electricity or purchases electricity generated by others, transports that electricity from generation sites to distribution points via transmission equipment, and then transports it from distribution points to customers via distribution equipment, and charges those customers.

The appellant, NT Power Generation Pty Limited ('NT Power'), generates electrical power at a plant which it owns. It decided to sell power to consumers within the Northern Territory. It could not sell power without access to the existing electricity transmission and distribution infrastructure in and around Darwin and Katherine, which infrastructure is owned by Power and Water.

NT Power requested that Power & Water supply the electricity transmission and distribution infrastructure services needed for its plan to sell electricity to consumers in competition with PAWA. Though there were no safety, technical or other problems preventing it from acceding to that request, on 26 August 1998, PAWA rejected it. Thereafter, Power and Water maintained that stand.

NT Power commenced proceedings in the Federal Court of Australia, against Power and Water, challenging its refusal to supply. At first instance, Mansfield J found in favour of PAWA, on the basis that the Trade Practices Act did not apply to it. His Honour held that if it did apply, PAWA would have contravened s46. NT Power then appealed to the full court of the Federal Court. The appeal was dismissed, by majority. Lee J and Branson J held that the Act did not apply to Power and Water. Finkelstein J dissented. Branson J and Finkelstein J also agreed with the conclusion of Mansfield J that, if the Trade Practices Act did apply to PAWA, it had contravened s46 of the Act. Lee J disagreed.

NT Power then appealed to the High Court. By a majority (McHugh ACJ, Gummow, Callinan and Heydon JJ) with Kirby J dissenting, the High Court upheld NT Power's appeal. The majority held that the Act did apply to Power and Water, and that it had contravened s46 in refusing to supply NT Power.

The appeal considered a number of matters. This note focuses on only two of those matters - the High Court's consideration of the scope of s2B of the Trade Practices Act, and its reasons as to why Power and Water's conduct contravened s46.

Section 2B of the Trade Practices Act

Section 2B of the Trade Practices Act was introduced by the *Competition Policy Reform Act 1995* (Cth), which arose out of the Hilmer Committee in the early 1990s. Prior to them, state and territory government businesses were not subject to the Act. The Hilmer Committee concluded that government businesses should not enjoy any advantages when competing with other businesses, insofar as the Act applies.

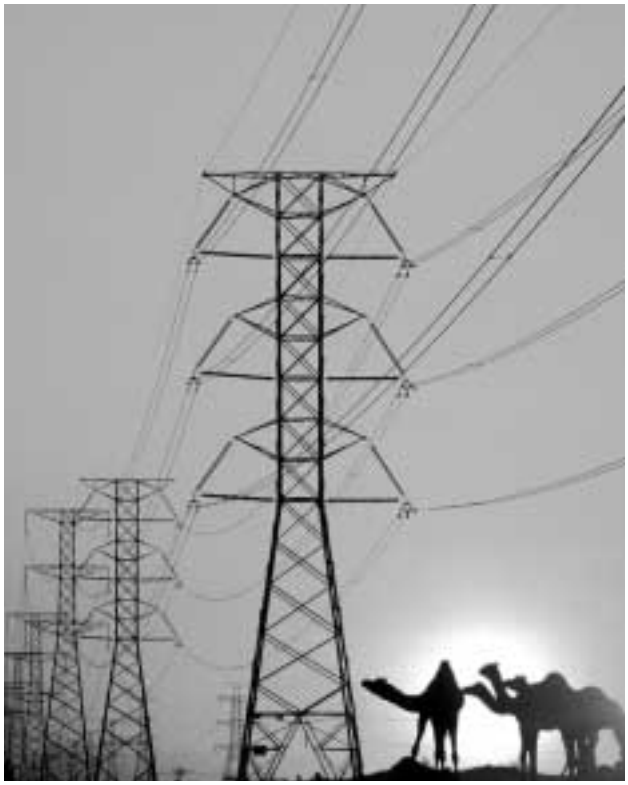

Photo: Greg Newington / Fairfaxphotos

Section 2B(1) provides, relevantly, that Part IV binds 'the Crown in right of each of the states, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the state or territory'.

Both Mansfield J, and the majority of the full court, accepted various arguments advanced by Power and Water that it was not relevantly carrying on a business within the meaning of s2B. Those arguments centred on the fact that PAWA did not provide any access to its infrastructure to anyone. The business that was being carried on by PAWA was the retail sale of electricity to end consumers, which was a different business to the wholesale supply of access to its infrastructure. In this latter respect, it was not carrying on a business. In so construing s2B, the majority of the High Court held that Mansfield J and the majority of the full court of the Federal Court had approached the question too narrowly.

The High Court held that s2B applied for a number of reasons, some factual and some legal.

The majority judgment held, in effect, that s2B of the Act should be given a liberal and broad construction, because it was clearly the crucial provision in attaining the goals of the Hilmer Committee, namely to ensure that it applied to businesses conducted by the governments of the states and territories to the same extent as it did to those conducted by the Commonwealth.

The majority rejected Power and Water's submission that the conduct that is said to breach the Act must, itself, be part of the actual business engaged in. The majority held that whilst conduct, if it is to fall within s2B, must be engaged in in the course of PAWA carrying on a business, the conduct need not itself be the actual business engaged in (see [67]). In the present case, Power and Water's use of its infrastructure assets was a part of its carrying on of the business, whether or not it was in a market for their acquisition, sale or hire.

At [64], the majority judgment stated:

> PAWA used, as part of the means of conducting that business [being the retail sale of electricity], its transmission and distribution infrastructure services to transmit and distribute electricity generated or bought by it to consumers. PAWA made a decision, according to the courts below, not to use or permit the use of its transmission and distribution infrastructure services for the transmission and distribution of electricity generated by a competitor or potential competitor, namely NT Power, to customers, because of the negative impact that this would have in the short term on its business of selling electricity to consumers. That was conduct which advanced the business. It was conduct 'so far as' PAWA carried on a business.

In other words, because the conduct of refusing to supply was conduct which advanced the retail business which Power and Water was clearly undertaking, the refusal conduct was conduct '*so far as*' it carried on a business.

The dissenting judgment of Kirby J is quite short. Kirby J does not explicitly address the construction of s2B although, implicitly, it would appear that his Honour was of the view that the Act did not apply to PAWA's conduct, which was, in effect, a governmental decision concerning the use of the infrastructure of a public agency based on governmental reasons (see [202] of the judgment of Kirby J).

Section 46 of the Trade Practices Act

PAWA advanced a number of arguments in the High Court as to why its conduct, if the Act applied, did not contravene s46. Each argument was rejected by the High Court. It is not proposed, in this note, to canvass all of those arguments, but rather to focus on the major ones.

Power and Water contended that there was no market for, in effect, the wholesale supply of access to its infrastructure - termed either the electricity infrastructure market, or an electricity carriage market, because it had not previously supplied access to anyone, i.e. there had not been any transactions in the market contended for. The High Court rejected this argument. The High Court held that, because the issue was not clearly pleaded in its defence, it was not permissible for PAWA to rely on this argument in the High Court. In any event, the High Court followed the earlier remarks of some members of the High Court in *Queensland Wire Industries Pty Limited v Broken Hill Proprietary Co Limited* (1989) 167 CLR 177, where the High Court rejected an argument that there was no relevant market, because there had not been any earlier transactions.

Power and Water contended that it had no relevant market power because, by virtue of s46(4)(c) of the Act, a reference to power is a reference to power in a market as a supplier in that market, and because PAWA had not previously provided access to its infrastructure, it was not relevantly a '*supplier*'. The High Court rejected this argument. Again, it was held that it was not pleaded, and therefore could not be raised on appeal. Further, as a matter of construction of the Act, it was not correct, because if it was, it would mean that a corporation which never supplied, and always refused, would not be a '*supplier*' and would therefore not be subject to s46.

Power and Water contended that it was not taking advantage of any market power, but only taking advantage of its proprietary rights, as owner of its infrastructure. The High Court rejected this argument, on two bases. First, because on the facts, it was only by virtue of its control of the market or markets for the supply of services for the transport of electricity along its infrastructure, and the absence of other suppliers, that PAWA could in a commercial sense withhold access to its

infrastructure (see [124] of the judgment). Second, to suggest that there is a distinction between taking advantage of market power and taking advantage of property rights, is to suggest a false dichotomy, which lacks any basis in the language of s46 (see [125] of the judgment).

PAWA submitted that, on a purposive construction, s46 of the Trade Practices Act should be read so as to negate the existence of a proscribed purpose in the short-term, if there exists a longer term, pro-competitive purpose. The High Court rejected this argument as imposing an impermissible gloss on s46. The High Court held (at [137]) that:

> s46 does not permit the drawing of a distinction between short-term anti-competitive purposes (here keeping NT Power out of the market) and long-term pro-competitive objectives (establishment of an access regime), and does not permit the former to be nullified or excused by the latter.

The High Court summed up the position, in this respect, as follows (at [138]):

> Paternalistic control from a monopolist is antithetical to competition, and a construction of s46 which permitted it, even if only in the short-term, is inconsistent with the structure of the section in the legislation as a whole.

The dissenting judgment of Kirby J is, as set out above, quite short. His Honour held (at [203]):

> It is one thing, under [s46], to redress the misuse of market power, including by the use of the resources and the property of a corporation to the marketing disadvantage of a would-be competitor. But s46 of the TPA does not give the would-be competitor the right to demand and use, as its own, the property of another corporation. It prevents that other corporation from misuse of its power to prevent the entry of the other into the market. Trade practices laws in Australia, and anti-trust laws in the United States (from which the basic notions of our law derive), have not been interpreted to impose on an owner of private property a duty to make that owner's property available to a competitor.

Kirby J concluded his judgment by comparing the outcome of the present case with other recent decisions of the High Court on s46 which, unlike the present case which involved governmental obligations, concerned the ability of a private corporation to withhold access (at [204]):

> No doubt others will contrast the energetic deployment of trade practices law in the circumstances of this case, affecting a governmental corporation having governmental obligations to the public welfare, with the repeated refusal of this court in recent time to do the same thing when the corporation concerned was private, successfully defending its market power against smaller private would-be competitors.

Conclusion

The High Court has clarified the circumstances in which the Trade Practices Act will apply to state and territory governments. In doing so, it has likely significantly expanded the application of the Act.

The High Court's decision in relation to the s46 aspects of the case, is likely to be confined purely to the facts of the case, rather than being regarded as statements of general principle. Indeed, it is difficult to discern any statements of general principle from the majority judgment. Rather, the judgment takes the form of responding to, and defeating, all of the arguments thrown up by PAWA. The lack of any statements of general principle from the majority make it difficult to determine whether there is, as Kirby J suggests at the end of his judgment, a tension between the result in the present case, and that in earlier decisions, where private corporations have been found not to have contravened s46.

A system less adversarial: the Children's Cases Project

By the Hon Justice Mark Le Poer Trench

The Family Court of Australia is presently engaged in a trial of what is billed as a 'less adversarial method' of determining contested applications concerning children in the Sydney and Parramatta registries. The trial commenced in early 2004 and was the subject of Practice Direction No.2 of 2004.

The key ambitions of the project have been set out by the steering committee as follows:

- to develop a more judicially active and less adversarial approach to parenting cases which focus on the future best interests of the child;
- a speedier, more satisfying (for all persons concerned in the process) method of resolving children's matters;
- to achieve more sustainable outcomes;
- to provide a process which although in the 'determinative phase' of the pathway through the court, nonetheless encourages and promotes resolution by the parties themselves;
- to have all cases entered and the pilot determined within three months;
- to apply simplified less legalistic procedures to the process;
- to achieve cost savings for all interest groups;
- to achieve a more efficient and productive use of judicial time;
- to have the legal profession support the pilot; and,
- to reduce the number of appeals and children's cases.

Involvement at this stage is founded upon the consent of all parties to a number of substantive and procedural alterations to the rules common to adversarial proceedings in all other federal courts. In particular, parties are required to irrevocably consent to the following:

- that it is the judge's (not the parties') role to control the conduct of the whole of the proceedings, to determine the issues which need to be decided, the evidence required and the manner in which it is to be prevailed for the purpose of making Orders which are in the best interest of the child or children;
- that the parties may not withdraw from the programme without the leave of a judge;
- that the judge is not disqualified from hearing and determining the proceedings if they make a finding in relation to various facts and issues during the hearing;
- the judge will be able to use mediation techniques where it is considered that doing so will assist in determining the matter and the judge will not be disqualified from continuing to hear and determine the matter by having used these techniques;

Certainly the programme is moving far closer to an inquisitorial model of determination of proceedings within the traditionally adversarial framework of the Family Court's proceedings.

- the judge may speak with and address questions to the parties whether they are legally represented or not;
- the judge may hold private discussions with the parties providing those discussions are recorded and copies of the transcript of what has been said is available to the other parties if required;
- the judge will determine what evidence is required in relation to the disputed facts that the judge considers important;
- the judge may direct enquiries to be made and evidence obtained on any issue the judge determines is relevant to the decision;
- the judge determines the manner in which this evidence will be given;
- the judge will determine what witnesses are to be called and the issues about which the witness will give evidence;
- all relevant material put before the judge is to be conditionally admitted as evidence. The court will determine the weight to be given to the evidence;
- the order and sequence of questioning by the parties will be determined by the judge;
- judgment may be given in specific parts rather than one event at the conclusion of this hearing;
- perhaps most controversially, the parties consent to a waiver of the rules of evidence pursuant to sec 190 of the *Evidence Act 1995* (Cth); and,
- finally, whilst the parties do not lose their rights of appeal because their case is in the programme they do waive their right to complain about matters to which they have agreed and in particular their consent to participation in the programme.

There are presently four judges in the Sydney Registry and two judges in the Parramatta Registry conducting hearings in the trial programme and at this time and in the nature of the trial there is no one coherent approach to the process to be adopted to any hearing before any particular judge.

Certainly the programme is moving far closer to an inquisitorial model of determination of proceedings within the traditionally adversarial framework of the Family Court's proceedings.

It is anticipated that the results of the programme will be available in 2005.

Third party property in family law cases

By Paul Brereton SC

Introduction

On 17 December 2004 changes to the *Family Law Act 1975* will commence which confer on the court power to bind third parties in financial proceedings.

In the explanatory memorandum, the following was said:

> ### General outline
>
> In line with the government's ongoing reform agenda in family law, this bill makes a range of amendments to the *Family Law Act 1975* (the Act). In particular the Bill makes a range of reforms to clarify those provisions of the Act dealing with property and financial interests.
>
> Of particular importance are the provisions in the Bill that provide clear power for courts exercising jurisdiction under the Act to make orders binding on third parties when dealing with property settlement proceedings under the Act. The provisions make it clear that within defined limits courts will have power to make orders binding on persons such as creditors to one party to a marriage and companies to do certain things.
>
> ...
>
> ### Allow for orders and injunctions to be binding on third parties
>
> Schedule 6 of the Bill provides for the Family Court to be given power to bind third parties in order to give effect to property settlements. This will apply for any creditor of a party to a marriage irrespective of whether the creditor is a friend, relative or financial institution. Procedural rights will be given to third parties to ensure that the changes do not affect the underlying substantive property rights of the creditor.

An outline of the amendments

The amendments are to be found in a new Part VIIIAA, entitled 'Orders and injunctions binding third parties'. Section 90AA provides that the object of the part is to allow the court, in relation to the property of a party to a marriage, to make an order under s79 or s114, or grant an injunction under s114, that is directed to, or orders the rights, liabilities or property interests, of a third party. 'Third party' is defined, by s90AB, to mean a person who is not a party to the marriage. By s90AC, the new part is given effect 'despite anything to the contrary in any other law, whether written or unwritten, of the Commonwealth, a state or territory, or anything in a trust deed or other instrument, whether made before or after the commencement of the Part VIIIAA; and nothing done in compliance with Part VIIIA by a third party is to be treated as resulting in a contravention of any such law or instrument.

Section 90AD provides that, for the purposes of the part, a debt owed by a party to a marriage is to be treated as property for the purposes of matrimonial cause (ca), and for the purposes of s114(1)(e).

By s90AE, the court is empowered to make orders:

(a) directed to a creditor of the parties to the marriage, to substitute one party for both parties in relation to the debt owed to the creditor;

(b) directed to a creditor of one party to a marriage, to substitute the other or both parties in relation to that debt;

(c) directed to a creditor of the parties to the marriage, that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made; and

(d) directed to a director of a company or to a company to register a transfer of shares from one party to the marriage to the other.

The court is further empowered, in proceedings under s79, to make any other order that:

(a) directs a third party to do anything in relation to the property of a party to the marriage, or

(b) alters the rights, liabilities or property interests of a third party in relation to the marriage.

Some limitations are imposed by s90A(3), which provides that the court may only make any such order if:

(a) the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and

(b) if the order concerns a debt of a party to the marriage, it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and

(c) the third party has been accorded procedural fairness in relation to the making of the order; and

(d) the court is satisfied that, in all the circumstances, it is just and equitable to make the order; and

(e) the court is satisfied that the order takes into account the taxation effect (if any) of the order on the parties to the marriage and on the third party, the social security effect (if any) of the order on the parties to the marriage; the third party's administrative costs in relation to the order; and if the order concerns a debt of a party to the marriage, the capacity of a party to the marriage to repay the debt after the order is made; the economic, legal or other capacity of the third party to comply with the order; if, as a result of the third party being accorded procedural fairness in relation to the making of the order, the third party raises any other matters, then those matters; and any other matter that the court considers relevant.

The Act contains some illustrations. For example, as to the requirement that the capacity of a party to the marriage to repay the debt after the order is made be taken to account, the example is given that the capacity of a party to the marriage to repay the debt would be affected by that party's ability to repay the debt without undue hardship. As to the economic, legal or other capacity of the third party to comply with the order, the example given is that the legal capacity of the third party to comply with the order could be affected by the terms of a trust deed; however, after taking the third party's legal capacity into account, the court may make the order despite the terms of the trust deed and if it does so, the order will have effect despite those terms.

...the amendments apply to all marriages, including those dissolved or annulled before commencement date, unless there is an existing order or s87 agreement in relation to the property of the marriage which has not been set aside or revoked.

Division 3 deals with orders and injunctions under s114. Section 90AF provides that in proceedings under s114, the court may:-

(a) make an order restraining a person from repossessing property of a party to a marriage, or

(b) grant an injunction restraining a person from commencing legal proceedings against a party to a marriage, or

(c) make any other order or grant any other injunction that directs a third party to do a thing in relation to the property of a party to the marriage, or alters the rights, liabilities or property interest of a third party in relation to the marriage.[1]

Again, there are some limiting mechanisms, in s90AF(3), which provides that the court may only make an order or grant an injunction of the type described if:-

(a) the making of the order, or the granting of the injunction, is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and

(b) if the order or injunction concerns a debt of a party to the marriage - it is not foreseeable at the time that the order is made, or the injunction granted, that to make the order or grant the injunction would result in the debt not being paid in full; and

(c) the third party has been accorded procedural fairness in relation to the making of the order or injunction; and

(d) for an injunction or order under s114(1) – the court is satisfied that, in all the circumstances, it is proper to make the order or grant the injunction; and

(e) for an injunction granted under s114(3) – the court is satisfied that, in all the circumstances, it is just or convenient to grant the injunction; and

(f) the court is satisfied that the order or injunction takes into account its taxation effect if any on the parties to the marriage and on the third party, its social security effect on the parties to the marriage, the third party's administrative costs in relation to the order or injunction; if the order or injunction concerns a debt, the capacity of a party to the marriage to repay the debt after the order is made or the injunction is granted; the economic, legal or other capacity of the third party to comply with the order or injunction; if, as a result of the third party being accorded procedural fairness in relation to the making of the order or the granting of the injunction, the third party raises any other matters - those matters; and any other matter that the court considers relevant.

Section 90AH is entitled 'Protection for a third party', and provides that a third party is not liable for loss or damage suffered by any person because of things done (or not done) by the third party in good faith in reliance on an order or injunction made or granted by a court in accordance with Part VIIIAA.

The expenses of the third party are addressed by s90AJ, which has the effect that if the court has made an order or granted an injunction in accordance with Part VIIIAA and a third party has incurred expense as a necessary result, the court may make such order as it considers just for the payment of the reasonable expenses of the third party incurred as a necessary result of the order or injunction. In deciding whether to do so, and subject to what the court considers just, the court must take into account the principle that the parties to the marriage should bear the reasonable expenses of the third party equally. Regulations may provide, in situations where the court has not made an order, for the charging by the third party of reasonable fees to cover the reasonable expenses of the third party incurred as a necessary result of the order or injunction; if such fees are charged, that each of the parties to the marriage is separately liable to pay to the third party an amount equal to half of those fees; and for conferring jurisdiction on a particular court or courts in relation to the collection or recovery of such fees.

Section 90AK provides that the court must not make an order or grant an injunction under Part VIIIAA if the order or injunction would result in the acquisition of property from a person other than on just terms, and be invalid because of paragraph 51(xxxi) of the Constitution.

Application

Thus the amendments apply to all marriages, including those dissolved or annulled before commencement date, unless there is an existing order or s87 agreement in relation to the property of the marriage which has not been set aside or revoked.

The Bill was considered by the Senate Legal and Constitutional Legislation Committee, which reported in August 2003. The committee reported that no submission or witness opposed the policy underlying the amendments, but significant concerns were raised about its operation, particularly the exposure of credit providers to credit risk, the potential for unintended adverse effects of other legislation, the implementation costs for business, departmental consultation, and the definition of 'shares'.

Strong concerns were expressed by the Australian Bankers Association, and by the Investments and Financial Services Association, as to the court's power to bind third parties in relation to debt products and risks. Concern was expressed at 'the potential for the court to substitute its commercial judgment for the commercial judgment of the bank and to leave the bank exposed involuntarily to a credit risk'.[2] It was suggested that other third parties - other debtors and guarantors who were jointly and severally liable for the parties' debt, and incoming parties in derivative contracts - may also be disadvantaged. The ABA pointed to the 'erosion of the value of a bank's substantive right of property in debt', and argued that this reduced the bank's ability to recoup the debt from parties whom the bank had originally determined were credit worthy, and deprived the bank for recourse to one of the parties either fully or proportionally and increased the exposure of the bank to credit risk.

These concerns largely resulted in the introduction of the provisions, now contained in s90AE(3) and s90AF(3), which endeavour to provide some protection for third parties.

The Family Court is not without power to bind third parties, even absent the proposed Part VIIIAA. However, particularly in the context of s114, limitations on its ability to do so have been imposed by the decision of the High Court of Australia in *Ascot Investments Pty Ltd v Harper*.[3] There, the High Court held that though the court may grant an injunction directed to a third party, or which may indirectly affect the position of a third party, it cannot do so if its effect would be to deprive a third party of an existing right, or to impose on a third party a duty which the third party would not otherwise be liable to perform. Gibbs J, as he then was, said in a well known passage:-

> The authorities to which I have referred [namely, *Sanders v Sanders*,[4] *Antonarkis v Dely*,[5] *R v Ross Jones*; *ex parte Beaumont*,[6] and *R v Dovey*, *ex parte Ross*,[7]] established that in some circumstances the Family Court has power to make an order or injunction which is directed to a third party or which will indirectly affect the position of a third party. They do not establish that any such order may be made if its effect will be to deprive a third party of an existing right or to impose on a third party a duty which the party would not otherwise be liable to perform. The general words of ss80 and 114 must be understood in the context of the Act, which confers jurisdiction on the Family Court in matrimonial causes and associated matters, and in that context it would be unreasonable to impute to the parliament an intention to give power to the Family Court to extinguish the rights, and enlarge the obligations, of third parties in the absence of clear and unambiguous words.

Thus the view has been adopted that the court cannot make an order which would adversely affect the rights of a third party. But the decision of the High Court was founded, not on constitutional limitations, but on construction of the Act, and the intention to be imputed to parliament. The new Part VIIIAA evinces a plain intention to empower the Family Court to vary and possibly reduce the rights of third parties. The explanatory memorandum perhaps understates the position. These amendments, if constitutional, plainly empower the court to vary and diminish the rights of third parties. There is no lack of clear and unambiguous words to do so.

To an extent, the court has always had power to bind third parties, particularly by injunction on an interlocutory basis.[8] More direct incursions on the rights of third parties were authorised by s85, now s106B.

There is no absolute constitutional objection to orders being made under the Family Law Act which affect or bind third parties, so long as the proceedings in which they are made are a matrimonial cause. The power to legislate with respect to 'matrimonial causes' includes matters incidental thereto. Section 106B is an example of how that can affect third parties. The full court has held that (former) s85 is constitutional, notwithstanding the direct encroachment on the rights of third parties.[9]

Concern was expressed at 'the potential for the court to substitute its commercial judgment for the commercial judgment of the bank and to leave the bank exposed involuntarily to a credit risk'.

Section 78(1) expressly authorises the court, in proceedings between the parties to a marriage with respect to existing title or rights in respect of property, to declare the title or rights if any that a party has in respect of property. On its face, this is not limited to the rights of each party *vis a vis* the other, but embraces the rights of one party *vis a vis* a third party. Section 78(2) then authorises consequential orders to give effect to the declaration.

Formerly, s78(3) provided that such a declaration was binding on the parties to a marriage but not on any other person.[10] However, s78(3) was repealed by the *Law and Justice Legislation Amendment Act 1988*, s39, in respect of proceedings instituted after its commencement. The explanatory memorandum at that time stated that the repeal of s78(3) would enable the court, in appropriate cases, to make orders that are binding on third parties as well as the parties to a marriage. The then attorney-general repeated those observations in his second reading speech,[11] adding:-

> Many family law property disputes involve adjudication of the rights of the parties to a marriage as between themselves and third parties, such as banks. As the Act presently stands, third parties may intervene in proceedings under the Act pursuant to s92, but may not be bound by any order of the court as a consequence of sub-section 78(3). The present lack of power to make binding determinations about the existence and extent of the rights and liabilities of third parties can be frustrating for both the court and the parties as well as adding to the expense of proceedings. For example even if a court concludes that particular property does not belong to either party to the marriage but to a third party, the court cannot, because of sub-section 78(3), make any declaration or order in favour of the third party.

Since the repeal of s78(3), there is nothing in the wording of the Act to prevent declarations being made under s78 which bind third parties. In *Warby & Warby*,[12] the full court, in the course of considering the availability of accrued jurisdiction, adverted to this point in the following terms:

> Seventhly, there is the issue of the Family Court of Australia's capacity to adjudicate and make orders with respect to third parties. The wife's submissions conceded that orders may in limited circumstances affect the rights of third parties and that is clearly correct. Section 78 of the Family Law Act confers the power to make a declaration with respect to existing title or rights. Since the amendment of the Act in 1988, the provision is not expressly confined to the property of the parties to the marriage or either of them and there is no authority which says that such a declaration may not bind a third party. Relevantly too, the *ratio decidendi of Gould & Gould*; *Swire Investments Ltd*,[13] makes clear that this is within the constitutional power of the Commonwealth Parliament insofar as s85 (as it then was) of the Family Law Act is concerned and, by way of *obiter dicta*, such validity should be assumed with respect to the exercise of other powers conferred by Part VIII of that Act.

Thus, although the issue has never been resolved by the High Court, the constitutionality of s106B seems well accepted, despite involving interference with third party rights. The extension of s78 to bind third parties has been recognised, and no convincing argument has been mounted that it is unconstitutional. Indeed, if it is constitutionally permissible, pursuant to s106B and in aid of or ancillary to proceedings under s79, for the conveyance of property by a party to a third party to be set aside so as to bind the third party, then it is difficult to see any basis for thinking that it would be any less constitutional, pursuant to s78 and in aid of or ancillary to proceedings under s79, a declaration could not be made that property held by a third party was the beneficial property of a party. Insofar as s78 authorises such a declaration, it is a law with respect to matrimonial causes, just as is s106B, and a proceeding for such a declaration, like a proceeding under s85, is within par (f) of the definition of 'matrimonial cause'. There are many s79 cases in which it becomes necessary to determine

Family Court building, Goulburn Street, Sydney.
Photo: Simon Cocksedge / News Image Library

The practical implications of Part VIIIAA are extensive, and will, it may be anticipated, provoke a constitutional challenge sooner rather than later.

if property held by a third party is beneficially property of a party. In such a case there is no reason why, if, in the context of a dispute between husband and wife as to property, an issue arises as to whether the parties or either of them have a beneficial interest in property legally owned by a third party, the court cannot resolve that issue. Frequently it must, and it does. That does not deny the matter the quality of being a matrimonial cause. In such proceedings the court may, under s78, make a declaration which determines that issue.[14] If the third party intervenes to place its position before the court, that does not deprive the proceeding of the quality of a matrimonial cause. And just because the result can be made binding on the third party similarly does not mean that the proceedings lose the quality of being a matrimonial cause.

The drafters of Part VIIIAA have been astute to limit the jurisdiction to orders binding third parties to proceedings under s79, and proceedings under s114. In other words, there must first be on foot proceedings between the parties to a marriage for relief under s79 and/or s114. Those proceedings are a matrimonial cause. The new powers might be justified as being laws with respect to matters incidental to matrimonial causes.

On the other hand, until now, s106B (and before s85) and s78 have authorised orders declaratory of existing rights, or which restore existing rights after a transaction which would defeat a claim. The new provisions go much further, in authorising the variation of existing rights. While s106B is part of the court's armourantarium to protect its undoubted matrimonial causes jurisdiction against attempts to defeat it, the new provisions would have a far wider reaching effect. On the one hand, it is certainly arguable that a law which confers power on a court in a matrimonial cause to grant relief against a third party can be characterised as a law 'with respect to matrimonial causes'. On the other hand, however, the general notion of a matrimonial cause is a proceeding between husband and wife. While there may be interveners, they are not the objects of the suit against whom relief is claimed. A law conferring on a divorce court power to alter the rights of third parties in this way might well be thought to exceed the bounds of what is reasonably incidental to legislation with respect to matrimonial causes, and thus to be constitutionally invalid.

The practical implications of Part VIIIAA are extensive, and will, it may be anticipated, provoke a constitutional challenge sooner rather than later. It can be expected that in many cases where there is joint debt, the jurisdiction will be invoked by a party seeking an order that the other alone be responsible for the debt. Given the frequency with which orders are sought that one party indemnify the other in respect of liability under a mortgage over the home, orders of the type envisaged are likely to be sought if not in every property case, then in a very high proportion of them. Notice to the relevant third party will be required, and it may be anticipated that financial institutions generally - and particularly in the early phases - will take a strict view of defending their legal position. Third parties will become the rule rather than the exception in s79 proceedings.

Conclusion

The Family Court has always had some jurisdiction, under s78, (former) s85 (now s106B), and s114, to bind third parties. The powers so far conferred have not so interfered with third party rights as to take them outside the bounds of matters reasonably incidental to matrimonial causes. The New Part VIIIAA goes much further, because it authorises discretionary interference with the rights and powers of a third party. It certainly should not be assumed that the new provisions would survive a constitutional challenge, though they may.

1 Section 90AF(2).

2 Commonwealth, *Parliamentary Debates*, Senate, Senate Legal and Constitutional Affairs Committee, 22 July 2003, L&C 19 (Mr Ian Gilbert, Director, Retail Policy, Australian Bankers Association).

3 (1981) 148 CLR 337; 33 ALR 631; 6 Fam LR 591; FLC ¶91-000.

4 (1967) 116 CLR 366.

5 (1976) 1 Fam LR 11, 334; FLC ¶90-063.

6 TBI.

7 (1979) 5 Fam LR 1; FLC ¶90-616.

8 See *Sanders v Sanders* (1967) 116 CLR 366; *Antonarkis v Dely* (1976) 1 Fam LR 11, 334; FLC ¶90-063 (in which the court upheld the power under *Matrimonial Causes Act 1959*, s124 to grant injunctions against third parties and said that the power extended to the granting of permanent injunctions; a wife obtained an order against her mother-in-law and the husband's step-brother to vacate the matrimonial home); *R v Dovey; ex parte Ross* (1979) 5 Fam LR 1, FLC ¶90-616 (an injunction may be granted to restrain a party from using his influence or control over a company which owned the matrimonial home to evict the wife).

9 *Gould & Gould* (1993) 17 Fam LR 156; FLC ¶92-434.

10 *Balnaves & Balnaves* (1988) 12 Fam LR 488; FLC ¶91-952.

11 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 1988, p2840.

12 (2002) FLC ¶93-091 (Nicholson CJ, Finn and Strickland JJ).

13 (1993) FLC ¶92-434.

14 *Moran & Moran* (1995) 18 Fam LR 534; FLC ¶92-559.

An unused potential statutory remedy for spousal guarantors

*By Leslie Katz**

Section 47 of the *Anti-Discrimination Act 1977* (NSW) ('the Act' or 'the NSW Act') provides as follows:[1]

> 47 Provision of goods and services
>
> It is unlawful for a person who provides, for payment or not, goods or services to discriminate against a person on the ground of marital status:
>
> (a) by refusing to provide the person with those goods or services, or
>
> (b) in the terms on which he or she provides the person with those goods or services.

Three of the terms used in s47 of the Act are defined for the purposes of certain provisions of the Act, including s47.

First, s39 of the Act provides as follows:

> 39 What constitutes discrimination on the ground of marital status
>
> (1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of marital status if, on the ground of the aggrieved person's marital status ..., the perpetrator:
>
> (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of a different marital status....

Secondly, in s4(1) of the Act, the following two definitions appear:

> marital status *means the status or condition of being:*
>
> (a) single,
>
> (b) married,
>
> (c) married but living separately and apart from one's spouse,
>
> (d) divorced,
>
> (e) widowed, or
>
> (f) in cohabitation, otherwise than in marriage, with a person of the opposite sex.
>
> ...
>
> services includes:
>
> (a) services relating to ... the provision of ... credit ...,
>
> ...

Although no decision has been found in which the matter has been discussed, it would appear that the effect of s47 of the Act is that although a credit provider may require, as a condition of providing credit to a married proposed debtor, that the proposed debtor procure a guarantor of the repayment of the proposed debt, the credit provider may not require that the spouse of the proposed debtor himself or herself become that guarantor.[2]

Although s47 of the Act declares certain conduct to be unlawful, that declaration must be understood in the light of s123(1) of the Act, which provides as follows:

> 123 Effect of contravention of Act
>
> (1) A contravention of this Act shall attract no sanction or consequence, whether criminal or civil, except to the extent expressly provided by this Act.
>
> ...

The extent to which the Act 'expressly' (in the sense of plainly, clearly or explicitly)[3] provides sanctions or consequences for contraventions of the Act, in particular, for contravention of s47 of the Act, will next be summarised.

Under s88(1)(a) of the Act, a person may, on that person's own behalf, lodge with the president of the Anti-Discrimination Board[4] a complaint in respect of a contravention of the Act alleged to have been committed by another person. Under s88(3) and (4) of the Act, such a complaint is to be lodged within six months after the date of the alleged contravention, although the president, on good cause being shown, may accept a complaint which is lodged more than six months after the date of the alleged contravention.

It should be noted that the Act does not require that a complainant lodging a complaint on his or her own behalf be a person who claims to have been discriminated against. It would thus appear that a person (for instance, a spousal guarantor) who claimed to have suffered special damage by reason of another person's discriminating against a third person (namely, the spousal debtor) could be a complainant under the Act. Indeed, the New South Wales Law Reform Commission, in its 1999 review of the Act, considered it 'arguabl[e]' that s88 of the Act amounted to an 'open standing' provision, so that even a person who did not claim to have suffered special damage by reason of another person's discrimination against a third person could complain under the Act. That was an outcome which the commission favoured.[5]

Under s89(1) of the Act, the president is required to investigate a complaint lodged under s88. However, that duty is subject to s90(1), which provides that where, at any stage of the president's investigation of a complaint, the president is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance or that for any other reason the complaint should not be entertained, the president may decline to entertain the complaint. If, under s90(1) of the Act, the president declines to entertain a complaint for any reason other than that the complaint is vexatious, misconceived or lacking in substance, then, under s90(2) of the Act, the complainant may appeal to the Administrative Decisions Tribunal[6] ('the ADT') for a review of the president's decision.

If the president has declined, under s90(1) of the Act, to entertain a complaint otherwise than on the ground that it

does not disclose any contravention of the Act, then the complainant may, within twenty-one days, require the president to refer the complaint to the ADT and the president must do so.[7]

Where the president has not declined to entertain the complaint and is of the opinion that the complaint may be resolved by conciliation, then the president must try to do so.[8]

Under s94(1) of the Act, where the president either: is of the opinion that the complaint cannot be resolved by conciliation; has tried to resolve the complaint by conciliation, but has failed; or is of the opinion that the nature of the complaint is such that it should be referred to the ADT, then the president must refer the complaint to the ADT.

Under s96 of the Act, the ADT is required to inquire into a complaint referred to it under secs 91(2) or 94(1).

Under s106 of the Act, the ADT may try to resolve the referred complaint by conciliation and must take all such steps as seem reasonable to it to effect a settlement of the complaint.

Under s111(1) of the Act, the ADT may dismiss a complaint if satisfied that it is frivolous, vexatious, misconceived or lacking in substance or that for any other reason the complaint should not be entertained. In such case, the ADT may order the complainant to pay the costs of the inquiry.[9]

After holding an inquiry, the ADT may, under s113(1)(a) of the Act, dismiss the complaint or, under s113(1)(b) of the Act, find the complaint substantiated. In the latter case it may do one or more of the following:

(i) ... order the respondent to pay to the complainant damages not exceeding $40,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct,

(ii) make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by this Act ...,

(iii) ... order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant,

(iiia) ...

(iiib) ...

(iv) make an order declaring void in whole or in part and either ab initio or from such other time as is specified in the order any contract or agreement made in contravention of this Act ..., or

(v) decline to take any further action in the matter.

The ADT may also make orders as to costs.[10]

Section 82 of the ADT Act contains a mechanism for converting into a judgment of a court an order made by the ADT that a party before it pay an amount of money.

It will be apparent that the effect of s123(1) of the Act, together with the enforcement mechanism summarised above, is that a spousal guarantor would be unable to rely defensively on a contravention by a credit provider of s47 of the Act in an action brought on the guarantee by the credit provider.[11]

It will also be apparent that a spousal guarantor is given only a relatively short period within which to rely offensively on an alleged violation of the Act, subject to Presidential extension if good cause is shown.[12] It is scarcely conceivable that the president would refuse to extend time in a situation in which the spousal guarantor had, within the preceding six months, been called upon by the credit provider to repay the spousal debtor's debt, even though that call had been made a considerable period of time after the date of the alleged contravention of the Act by the credit provider.

There remains one final question to discuss about s47 of the Act, namely, whether it is inoperative through constitutional inconsistency with s22 of the *Sex Discrimination Act 1984* (Cth) ('the federal Act').

Under the federal Act:

- s22, in so far as it deals with marital status discrimination in the provision of services,[13] is broadly similar to s47 of the NSW Act;
- secs 6, 7B and 7D together are broadly similar to s39 of the NSW Act; and
- the definitions of '*marital status*' and '*services*' in sub-section 4(1) are broadly similar to the definitions of those terms in s4(1) of the NSW Act.

However, by reason of the subject-matter-limited legislative powers of the Commonwealth Parliament, the application of s22 of the federal Act, in so far as it deals with marital status discrimination in the provision of services, is limited. The extent of that application is dealt with in s9 of the federal Act. For present purposes, it is necessary to refer to one subsection only of s9 of the federal Act. Subsection 9(10) of the federal Act provides that if the Convention on the Elimination of All Forms of Discrimination Against Women ('the CEDAW') is in force in relation to Australia, then various provisions of the Act (among which is included s22) have effect in relation to discrimination against women, to the extent that those provisions give effect to the CEDAW.

The CEDAW entered into force for Australia on 27 August 1983.[14] However, s22 of the federal Act, in so far as it deals with discrimination against women on the ground of marital status in the provision of services, does not give effect to the CEDAW, because the CEDAW generally does not deal with discrimination against women on the ground of marital status, but rather generally deals with discrimination against women on the ground of sex, regardless of their marital status: see, for example, Art 1, which defines 'discrimination against women' for the purposes of the CEDAW as meaning (emphasis added),

> any distinction, exclusion or restriction made *on the basis of sex* which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, *irrespective of their marital status*, *on a basis of equality of men and women*, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

See also Art 16(1)(d) of the CEDAW, which requires states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure, *on a basis of equality of men and women*, the same rights and responsibilities as parents, *irrespective of their marital status*, in matters relating to their children. An exception to the main focus of the CEDAW is Art 11(2)(a), which provides relevantly that, in order to prevent discrimination against women *on the ground of marriage* and to ensure their effective right to work, states parties must take appropriate measures to prohibit, subject to the imposition of sanctions, discrimination in dismissals *on the basis of marital status*. However, no equivalent exception exists with respect to the provision of, in particular, credit: see Arts 13(b) and 14(2)(g) of the CEDAW, in both of which the focus is on sex discrimination regarding credit, not marital status discrimination regarding credit.

It is noteworthy that the Commonwealth Parliament did not purport to justify the enactment of any of the provisions of the federal Act, such as s22, in so far as it deals with marital status discrimination in the provision of services, as an implementation in domestic law of Art 26 of the International Covenant on Civil and Political Rights ('the ICCPR'): see s3 of the federal Act, which sets out the Act's objects. Paragraph (a) of that section states, as the federal Act's first object, 'to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women'. No reference is made in the list of the federal Act's objects to the object of giving effect to any provision of the ICCPR.

The ICCPR, except for Art 41 thereof, entered into force for Australia on 13 November 1980 and Art 41 entered into force for Australia on 28 January 1993.[15] There are also two optional protocols to the ICCPR. The second entered into force for Australia on 11 July 1991,[16] while the first entered into force for Australia on 25 December 1991.[17] Article 26 of the ICCPR provides as follows:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR is not gender-specific, as is the CEDAW, while no good reason appears to think that the reference in Art 26 of the ICCPR to 'other status' would not include marital status. For instance, the Human Rights Committee, established under Art 28(1) of the ICCPR, in dealing, under the first optional protocol to the ICCPR, with communications from individuals claiming to be victims of violations of any of the rights set forth in the ICCPR, appears to have proceeded on the basis that marital status is within the term 'other status' in Art 26 of the ICCPR.[18] Further, an officer of the Commonwealth Attorney-General's Department, when giving evidence before the Senate Legal and Constitutional Legislation Committee in connection with the *Sex Discrimination Amendment Bill (No 1) 2001*, stated,[19]

> In terms of our international obligations, the government considers that in a sense it really is not significant whether CEDAW extends to marital status discrimination or not because the question of marital status discrimination is also covered under other international obligations that the government has undertaken, particularly under the International Covenant on Civil and Political Rights.

Presumably, the officer had in mind Art 26 of the ICCPR when giving that evidence. Therefore, the Commonwealth Parliament could have purported to justify the enactment of (relevantly) s22 of the federal Act, in so far as it applies to marital status discrimination against both women and men in the provision of services, as an implementation in domestic law of Art 26 of the ICCPR. However, as already mentioned, it did not do so.

The fact that s22 of the federal Act, in so far as it applies to marital status discrimination in the provision of services, does not have effect by virtue of subs 9(10) of the federal Act has significance for the matter of the operation of state laws.

Two sections of the federal Act deal with the operation of state laws. Section 10 deals with the operation of state laws generally, while s11 deals specifically with the operation of state laws which further the objects of the CEDAW. Each of those sections begins by giving a meaning to subsequent references in the section to the federal Act. Subsection 10(1) of the federal Act provides that a reference in that section to the Act 'is a reference to this Act as it has effect by virtue of any of the provisions of section 9 other than subsection 9(10)', while sub-section 11(1) of the federal Act provides that a reference in that section to the federal Act 'is a reference to this Act as it has effect by virtue of subsection 9(10)'. In light of what has been written above about the relationship between s22 of the federal Act, in so far as it applies to marital status discrimination in the provision of services, and subs 9(10) of the federal Act, it will be apparent that it is s10, rather than s11, which is the relevant provision in the present context for determining the operation of state laws. Turning then to

sub-secs (2) and (3) of s10 of the federal Act, they provide as follows:

> 10. Operation of state ... laws
>
> ...
>
> (2) A reference in this section to a law of a state ... is a reference to a law of a state ... that deals with ... discrimination on the ground of marital status....
>
> (3) This Act is not intended to exclude or limit the operation of a law of a state that is capable of operating concurrently with this Act.

It is obvious that s47 of the NSW Act is a law of a State that deals with marital status discrimination within the meaning of sub-section 10(2) of the federal Act. One therefore turns next to sub-section 10(3) of the federal Act to determine the operation of state laws.

In accordance with accepted principles,[20] sub-section 10(3) of the federal Act:

- excludes any indirect (or 'covering the field') constitutional inconsistency which might otherwise have arisen between, on the one hand, s22 of the federal Act, in so far as it applies to marital status discrimination in the provision of services, and, on the other hand, s47 the NSW Act; but
- is incapable of excluding any direct constitutional inconsistency which arises between the two provisions.

However, no direct inconsistency exists between s22 of the federal Act, in so far as it deals with marital status discrimination in the provision of services, and s47 of the NSW Act. It is not impossible for a person to obey both provisions simultaneously, nor can it be said that s47 of the NSW Act denies to a person engaging in conduct declared unlawful by that section any right conferred on that person by s22 of the federal Act.21 Therefore s47 of the NSW Act is not rendered inoperative through constitutional inconsistency with s22 of the federal Act, in so far as that section deals with marital status discrimination in the provision of services, and s47 of the NSW Act operates according to its tenor.

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* Leslie Katz resigned from the Federal Court in March 2002, after having been diagnosed as suffering from non-Hodgkin's lymphoma. He underwent treatment during most of 2002 and, by the end of March 2003, was well enough to begin working as a part-time volunteer at the New South Wales Law Reform Commission. His lymphoma appears to continue in remission and he continues to work as a part-time volunteer at the commission. He is presently involved in the commission's reference on the operation of the Evidence Act.

1 The use of the phrase 'he or she' in s47(b) implies, as a matter of ordinary language, that the first-mentioned 'person' in the *chapeau* of s47 must be a natural person. The same comment applies to many (but by no means all) of the other declarations of unlawfulness of various types of discriminatory conduct appearing in the Act: see secs 33(1)(b), 34(1)(b), 38N(1)(b), 48(1)(b), 49M(1)(b), 49ZP(b) and 49ZQ(1)(b); and see also secs 38B(1)(a), 49ZG(1)(a) and 51(4). It would have been better to use, in the provisions themselves, terminology which made it plain that those provisions all encompassed legal, as well as natural, persons. However, s8 of the *Interpretation Act 1987* (NSW) would appear to achieve the same result.

2 In July 1995, the Anti-Discrimination Board (constituted under s71 of the Act) published (non-binding) 'Guidelines for Providers of Financial Services'. Those guidelines dealt with all forms of discrimination declared unlawful by the Act at that date, in so far as those forms of discrimination were relevant to financial services providers. The matter of spousal guarantors was not specifically mentioned. However, on p.5 of the guidelines, it was noted that it would constitute unlawful marital status discrimination for a financial services provider to refuse financial services to a married woman unless she had her husband's consent. No doubt the same would have been thought to be the case if a financial services provider were to require, as a condition of providing credit, that a proposed debtor who was a married man have the consent of his spouse. No difference in principle exists between requiring a spouse who is seeking credit to have the consent of his or her spouse and requiring a spouse who is seeking credit to have the guarantee of his or her spouse.

3 See, eg, *Donnelly v Edelsten* (1992) 34 FCR 556, 560-61 (Ryan J).

4 Appointed under s 80 of the Act.

5 See LRC 92, pars 8.12-8.18.

6 Established under s11 of the *Administrative Decisions Tribunal Act 1997* (NSW).

7 Section 91(1)-(2) of the Act.

8 Section 92(1) of the Act.

9 Section 111(2) of the Act.

10 Section 114(2) of the Act.

11 It should be noted that the commission, in its 1999 review of the Act, recommended (see par 8.186) that 'no one should be precluded from relying upon a contravention of the ADA in circumstances where ... the claim [scil, the contravention] is relied upon by way of a defence or set off to proceedings brought by another....' However, that recommendation has not yet been implemented.

12 Section 88(3) and (4) of the Act. In the commission's review of the Act, it recommended that the six month period be extended to twelve months: see pars 8.48-8.53. However, that recommendation has not yet been implemented.

13 Section 22 of the federal Act, as well as dealing with marital status discrimination in the provision of services, deals also with sex, pregnancy and potential pregnancy discrimination in the provision of services.

14 See [1983] ATS No 9.

15 See [1980] ATS No 23 (1998 reprint).

16 See [1991] ATS No 19.

17 See [1991] ATS No 39.

18 See *Danning v The Netherlands* (1987) CCPR/C/29/D/180/1984 and *Vos v The Netherlands* (1989) CCPR/C/35/D/218/1986.

19 Commonwealth, *Parliamentary Debates*, Senate, Legal and Constitutional Legislation Committee, 13 February 2001, L&C 253.

20 See *The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-64 (Mason J; Barwick CJ and Gibbs, Stephen and Jacobs JJ concurring).

21 On the latter issue, see *Grace Bros Pty Ltd v Local Courts of NSW* (1989) 23 FCR 68 (Lockhart, Beaumont and Hill JJ), which makes plain (by analogy) that s22 of the Commonwealth Act confers no right on such a person.

The question that plaintiff's counsel cannot ask

By Justin Gleeson SC and Geoffrey Evans

The last 20 - 30 years have seen an explosion in the number and types of civil suits where an element in the plaintiff's case is reliance. This often involves the plaintiff attempting to prove what the plaintiff would have done had different advice, information or representations been given or made by the defendant. The first example is in the area of medical negligence. *Rogers v Whittaker* (1992) 175 CLR 479 has spawned a number of cases where the plaintiff asserts that, had the medical practitioner given a warning about a particular risk inherent in a proposed treatment, the plaintiff would not have undergone the treatment and thereby would have avoided injuries suffered from that treatment. *Chappel v Hart* (1998) 195 CLR 232 confirmed that a plaintiff can succeed in such a case even though the defendant has performed the operation itself with due care and skill: it is sufficient if the plaintiff proves that had the warning been given the plaintiff would not have undergone that operation at that time under the hands of that doctor.

A second fertile area for this hypothetical evidence lies in negligent advice cases against other professionals. Thus in *NRMA v Morgan* (1999) 31 ACSR 435, reversed on appeal, the plaintiff succeeded at first instance in proving, by calling evidence from each of its directors, that had the lawyer defendants provided advice about the risks arising from an application for special leave to appeal to the High Court in a matter which might impact on a restructuring proposal they were considering, they would have deferred the proposal and avoided legal costs which later proved to be wasted.

A third area of commercial significance has been the application of the *Insurance Contracts Act (Cth)* 1984, s54(1) - see *Commercial Union Assurance Company of Australia v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 per Handley JA at 415 applying Samuels JA in *Ellis* (infra).

More generally, s52 of the *Trade Practices Act 1974*, and its state analogues, has spawned an industry of cases in which the plaintiff claims to have suffered loss or damage by the misleading conduct of the defendant. Often the plaintiff's case involves the proposition that the defendant needed to place appropriate qualifications upon the representations it was making in order to avoid misleading conduct; and had those qualifications been expressed, the plaintiff would not have entered the relevant transaction: e.g. *Demagogue Pty Limited v Ramensky* (1992) 110 ALR 608.

The typical approach of plaintiff's counsel in these cases has been to lead evidence from the plaintiff, either in oral, statement or affidavit form, as to what the plaintiff would have done had the necessary advice, warning or qualification been made or given. Such evidence has been invariably accepted as admissible, notwithstanding that it might be thought to be objectionable on the grounds that it is leading or that it really amounts to a conclusion being given by the witness about the witness's own state of mind. Ultimately, the High Court has made plain its concern as to the weight to be given to such evidence: see, for example, *Rosenberg v Percival* (2001) 205 CLR 434, applying the caution furnished by Samuels JA in *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 581 - 2.

Nevertheless the evidence has remained admissible.

The task of the plaintiff's counsel has been to lead not only this direct evidence on the hypothetical question but also other evidence of conduct or words of the plaintiff in the circumstances, which render it more probable than not that the plaintiff's direct evidence is reliable. For its part the defendant's counsel has sought to cross-examine the plaintiff, again not only on the direct evidence but also on other conduct or words of the plaintiff, and on the surrounding circumstances, which might tend to suggest that the plaintiff's direct evidence should be rejected.

On the point of the plaintiff's direct evidence, the *Civil Liability Act 2002* (NSW) as amended by the *Civil Liability Act Amendment Act 2003* (NSW) has enacted an important change into this field.

Section 5D(3) provides as follows:

> If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
>
> (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
>
> (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

This section applies to actions commenced on or after 6 December 2002.

By reason of the statutory definitions of 'harm' and 'negligence', s5D has application to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise and whether the 'harm' is personal injury or death; or damage to property; or economic loss. (There are certain excepted claims referred to in s3B.) The result is that s5D(3) will have application to a typical professional negligence claim against a medical practitioner, a lawyer or another professional, irrespective of how the cause of action is framed.

We would construe 'any statement' in s5D(3)(b) as extending to include a statement made by the plaintiff in evidence in court in the instant proceedings. A narrower view, to the effect that it excludes only statements made by the plaintiff out of court or outside the confines of the current action is unlikely to be correct. Such statements, unless against interest, would already be inadmissible by reason of their hearsay character:

Evidence Act 1995 (NSW), ss59 and 81.

Of course, where a claim is brought under s52 of the Trade Practices Act, negligence is not an element of the cause of action. If a representation is misleading and if it has induced loss-making conduct, the plaintiff does not need to further prove that the misrepresentation was made negligently. Therefore, in cases brought solely under s52, s5D(3) will not apply. However, there will be some cases where the plaintiff's claim is alternatively based on s52 and on negligence. That produces the invidious position where by direct evidence adduced by the plaintiff of a hypothetical nature may be admissible in the s52 claim, but inadmissible in the negligence claim.

Section 5D(3)(a) confirms that the legal test remains subjective. The court has to determine, in the light of all relevant circumstances, what this particular plaintiff would have done had the necessary warning, advice or qualification been given. Parliament has not chosen to impose a simple objective test of reliance.

However, notwithstanding the test is a subjective one, any statement made by the plaintiff after suffering harm, as to what he or she would have done is inadmissible except to the extent that it is against his or her interest: s5D(3)(b).

In effect, the court is determining a subjective question as to what the plaintiff would have done, but cannot hear directly from the plaintiff on that question.

Arguably, the statute may produce the curious and anomalous effect of substituting the mind of the court for the mind of plaintiff, since the plaintiff goes unheard on the direct point. Gone are any questions of weight or reliability of the plaintiff's direct evidence.

Where a court is exercising federal jurisdiction in the matter question arises as to whether s5D(3), being a state law, is picked up. A court hearing a s52 dispute and a negligence claim arising out of the same facts would be exercising federal jurisdiction.

If such court is a state court of NSW, s79 of the *Judiciary Act 1903(Cth)* would require it to apply the *Evidence Act 1995 (NSW)* subject to the overriding provisions of a later state law being s5D(3)(b) of the *Civil Liability Act 2002 (NSW)*. Result: the plaintiff cannot give evidence in the negligence case that he or she would have done something different had different advice been given by the defendant. (He or she can be asked this in the s52 case since that is not an action based on negligence: s5A(1)).

If the same action is heard in the Federal Court, s79 will not pick up s5D(3)(b) if a law of the Commonwealth, being the *Evidence Act 1995 (Cth)*, otherwise provides. The Commonwealth Act does seem to otherwise provide. The direct evidence from the plaintiff that he or she would have done something different if the defendant had advised differently is relevant to the issue (s55) and accordingly admissible (s56), there being no other provision of the Act excluding it. The plaintiff can therefore give this evidence in both the negligence and s52 action. See generally *British American Tobacco v State of Western Australia* (2003) 200 ALR 403.

In effect, the court is determining a subjective question as to what the plaintiff would have done, but cannot hear directly from the plaintiff on that question.

What then are counsel for the plaintiff and the defendant supposed to do by way of advancing their respective clients' case against the background of s5D(3)? Some plaintiff's counsel may continue to ask the direct question of the plaintiff upon the basis that, if the defendant's counsel does not object and the court does not intervene, the evidence will be received. Over time one suspects this practice will decrease.

It will, of course, remain necessary for plaintiff's counsel to adduce other evidence, either from the plaintiff or from other witnesses, of the relevant circumstances, including other conduct or words of the plaintiff, which assist in allowing the necessary inference to be drawn on the subjective question. For example, in *Rosenberg v Percival*, Gleeson CJ at [17] indicated, in the context of a 'failure to warn' case against a medical practitioner, the relevant circumstances that might arise in order to assist in determining the subjective question. See also Samuels JA in *Ellis* at p. 581F.

Without infringing s5D(3)(b), for example, evidence might be led to show that the plaintiff did not have a great need for the surgery; the plaintiff had expressed a reluctance to undergo other related risks; the plaintiff at the time of consultation had asked specific questions about the risk; and that objectively there was a real possibility of the risk materialising. Indeed, s5D(3)(b) does not seem to prohibit the plaintiff from giving direct evidence about actual mental processes he or she had undergone. The plaintiff could say that in the consultation with a medical practitioner the plaintiff was told about the risks of the operation and, based upon that information, he or she had in fact a particular state of mind when entering the operation. What the plaintiff is not permitted to say is what he or she would have done had some different or other advice been given.

From the viewpoint of defendant's counsel, the tactical decisions are trickier. He or she will also seek to cross-examine as to conduct and words of the plaintiff and all the relevant circumstances, so as to lead the court to conclude that the plaintiff would have gone ahead even if given the extra information. However, does the defendant's counsel take the extra step and put the direct question to the plaintiff that the plaintiff would have gone ahead, even armed with the knowledge of, or information as to, the 'material risk', which ultimately manifested itself? If the defendant's counsel obtains

the necessary admission against interest by the plaintiff, that answer is admissible. If the plaintiff denies the proposition then the plaintiff has been allowed to give, through the defendant's questioning, the very type of evidence that the plaintiff was prohibited from leading in chief. What does the cross-examiner then do? Seek to have the unhelpful answer rejected as inadmissible? Such a course sounds too opportunistic to be permissible, yet arguably it falls within the terms of the Act.

Another possibility may be for the defendant's counsel to seek a *voir dire* on the question: Evidence Act s189.

We suspect that the intention of the Act will work itself out in practical terms and that neither side will elicit direct evidence from the plaintiff on the point.

On one view, the statutory inadmissibility of the plaintiff's evidence now renders the situation similar to the common law position elucidated in *Rosenberg v Percival*. The forensic worthlessness of such direct evidence by reason of hindsight bias, expressly considered by Samuels JA in *Ellis*, has been given statutory effect.

The willingness of courts to give weight to such evidence from harmed persons, despite authoritative caution against so doing, has effectively been stymied. Arguably, that willingness will now play out in the absence of cross-examination of any assertion that a different course would have been taken.

This invites the observation that the legislature, in its habitual wisdom, has removed the defendant's opportunity to either demonstrate the unreality of the plaintiff's assertion that their course would have been otherwise, or, more usefully, draw from him or her the concession that such assertion is not seriously maintained in the circumstances. The subjective mind of the court, on the direct question, is insulated from such cross-examination. An interesting reform indeed, if it plays out that way.

Cross-examination and international criminal law

By Chrissa Loukas[1] *and Lucy Robb*[2]

This tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the completion strategy which the Security Council has endorsed, but by the fairness of the trials. The majority appeals chamber decision and others in which the completion strategy has been given priority over the rights of the accused will leave a spreading stain on this tribunal's reputation.[3]

International criminal law has attempted to reconcile two great legal traditions, the common law and the civil law. It is an uneasy marriage.

This article examines the developing law of the International Criminal Tribunal for the Former Yugoslavia in relation to the admission of written statements, cross-examination and 'crime base' evidence.

Documentary evidence at the tribunal

The rules of evidence at the tribunal are contained in Part 6, section 3 of the *Rules of Procedure and Evidence*. The general principles governing admissibility are embodied in rule 89. This rule allows a trial chamber to admit 'any relevant evidence', including hearsay,[4] which it 'deems to have probative value'. It also gives the chamber a corresponding power to exclude evidence if 'its probative value is substantially outweighed by the need to ensure a fair trial.'

In its early years, the tribunal expressed a preference for oral evidence. Rule 90(A) stated: '... witnesses shall, in principle, be heard directly by the chambers.' As time went on, the rules were amended to allow for the introduction of written evidence. In December 2000, rule 90(A) was removed and rules 89(F) and 92 *bis* were inserted. Rule 89(F) now reads: 'A chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.'

Rule 92 *bis*: Proof of facts other than by oral evidence

Rule 92 *bis* is a special procedure which allows the chamber to admit witness statements and transcripts from previous trials while denying, in certain circumstances, the opposing party's right to cross-examine. 'The purpose of the rule is to facilitate the admission by way of written statement of peripheral or background evidence in order to expedite proceedings while protecting the rights of the accused under the statute.'[5] It is only available:

1. when a document was prepared for use in legal proceedings;
2. where the contents of the document go to 'proof of facts other than the acts and conduct of the accused'; and
3. where the evidence will be tendered in lieu of oral testimony.

It is primarily intended for use in establishing 'crime-base' evidence.[6]

Rule 92 *bis* operates within the framework of principles enshrined in rule 89. In the words of the appeal chamber in *The Prosecutor v Galic*, 'it identifies a particular situation in which, once the provisions of rule 92 bis are satisfied, and where the material has probative value within the meaning of rule 89(C), it is in principle in the interests of justice within the meaning of rule 89(F) to admit the evidence in written form.'7

The test for determining admissibility under rule 92 bis

The admissibility of a document is assessed in two stages.

First, the trial chamber must establish that the document is capable of being admitted. This will depend upon the contents of the statement and, in particular, upon whether it relates to the 'acts or conduct of the accused'. The 'acts and conduct of the accused' include his or her mental state.[8] It might also, in appropriate cases, include the accused's omission to act.[9]

Chrissa gives a demonstration of Australian-style cross-examination.

Rule 92 *bis* therefore excludes evidence which might prove that:

1. the accused actually committed (that is, he or she personally physically perpetrated) any of the crimes charged, or
2. the accused planned, instigated or ordered the crimes charged, or
3. the accused aided or abetted those who did plan, prepare or execute those crimes.

The Office of the Prosecutor has indicted many accused on the basis of command responsibility under article 7(3) of the statute[10] and increasingly, on the basis of co-perpetration in a joint criminal enterprise under article 7(1).[11] In cases based on command responsibility, rule 92 *bis* excludes evidence that:

1. the accused had effective control over the perpetrators, or
2. he knew or had reason to know that those crimes were about to be, or had been, committed by his subordinates, or
3. he failed to take reasonable steps to prevent the illegal acts or punish the perpetrators.[12]

When an accused is charged with joint criminal enterprise, written statements will be excluded if they may be used to establish that:[13]

1. he had participated in the joint criminal enterprise; or
2. he shared the requisite mental state of those did who commit the crimes.

The second stage involves the exercise of the chamber's discretion to admit or exclude the evidence. Factors which may be taken into account include, but are not limited to:

1. the fact that there is an overriding public interest in admitting the evidence orally;[14]
2. the fact that its nature and source render it unreliable or, alternatively, more prejudicial than probative;15 or
3. any other factor,16 such as the 'proximity'17 of the evidence to the accused.

The right to cross-examine under rule 92 *bis*

Under rule 92 *bis*, cross-examination is effectively reduced from the status of a right to a privilege. In this respect, there is, in the words of the trial chamber in *The Prosecutor v Kordic and Cerkez*, 'a marked tension with the guarantee in article 21(4) [of the tribunal's statute] that the accused has the right to examine the witnesses against him.'[18]

The trial chamber is more likely to require a witness to appear for cross-examination if the document tendered relates to a 'critical element of the prosecution's case or a live and important issue between the parties',[19] as opposed to 'a peripheral or marginally relevant issue.'[20]

Conversely, the opportunity to cross-examine will generally be denied if the chamber is satisfied that the witness has been thoroughly cross-examined in an earlier case and that the defence case in both trials shared a 'common interest'.[21]

The right to cross-examination under international law

Under international law, cross-examination is generally considered to be a 'minimum' right or guarantee. The statues of the international criminal tribunals for Rwanda[22] and Yugoslavia,[23] the European Convention on Human Rights,[24] the Inter-American Convention on Human Rights[25] and the International Covenant on Civil and Political Rights[26] enshrine, with only slight variations, the following fundamental guarantee:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... . To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him

In practice, this right is not considered absolute.[27] In exceptional circumstances, uncorroborated out-of court statements, which are not subjected to cross-examination, will be admitted provided they do not form the basis of a conviction.[28]

This compromise may not, however, be sufficient to guarantee the rights of the accused at the tribunal. In the first place, judgments, although published with reasons, do not always contain an explanation of the specific evidence upon which the judges have relied in reaching their conclusions. Secondly, there is extensive use of inference in the jurisprudence of the tribunal which somewhat negates the elemental guarantee provided by the 'no conviction without cross-examination' principle. The risks are particularly evident when the accused is indicted under article 7(3). While rule 92 *bis* prohibits the admission of evidence which goes to the acts and conduct of the accused, it does not prevent the prosecution from tendering evidence relating to the defendant's immediate subordinates. The appeal chamber has itself recognized the problem this causes. In *The Prosecutor v Galic*, it stated that, 'there is often but a short step from a finding that the acts constituting the crimes charged were committed by... subordinates to a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by them.'[29]

Individual judges of the court have repeatedly expressed their concern. The Hon Justice David Hunt's dissents were highly principled and passionate.[30] Judge Patrick Robinson also dissented, admitting to feeling 'a long period of disquiet in the application of [the] rule.'[31] His main criticism concerned the use of transcripts from previous trials as evidence in subsequent trials. He stated, inter alia, that 'foisting cross-examination from a previous case on an accused in an ongoing

case interferes with the statutory right of an accused to determine his defence'[32] and that the factors which ostensibly counterbalance the risk of injustice 'are not sufficiently cogent to correct the unfairness to the accused that results from his lack of opportunity to cross-examine the transcript witness.'[33]

At the heart of these dissents lies a deep discomfort with the gradual erosion of rights typically afforded by the common law system of justice. The tribunal's rules are increasingly being influenced by the civil law, in which dossiers of evidence are accepted prior to trial. This has led to an uneasy compromise. While it is admirable to attempt to reconcile the procedures of two great justice systems, it is sometimes difficult to avoid the conclusion that criminal law relies upon the coherence of well-established legal system in order to avoid injustice. As the Hon Justice David Hunt wrote recently in an article addressing the role of judges in the ICC, 'My own experience as a judge of the ICTY has taught me that the most attractive colours do not always make the most appealing picture, and that two legal traditions may simply not mix.'[34]

1 Defence counsel, *Prosecutor v Momcilo Krajisnik*, International Criminal Tribunal for the Former Yugoslavia, barrister and public defender, Sydney.

2 Defence legal assistant, *Prosecutor v Momcilo Krajisnik*, International Criminal Tribunal for the Former Yugoslavia, law graduate, University of Sydney.

3 Judge David Hunt, dissenting opinion, *Prosecutor v Milosevic* IT-02-54-AR73.4, 'Decision on interlocutory appeal on the admissibility of evidence-in-chief in the form of written statements' (30 September 2003) at para 22.

4

5 *ICTY annual report 2001*, UN Doc A/56/352 - S/2001/865 para 51.

6 *Prosecutor v Galic* IT-98-29-AR73.2, 'Decision on interlocutory appeal concerning rule *92bis*(c)', (7 June 2002) at para 16.

7 ibid., at para 12.

8 ibid., at para 11.

9 ibid., at para 11.

10 Article 7(3) states: 'The fact that any of the acts referred to in articles 2 to 5 of the present statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.'

11 Joint criminal enterprise is a basis of liability with arises 'where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.' *The Prosecutor v Tadic* IT-94-1-A (15 July 1999) at para 190.

12 *The Prosecutor v Galic*. Above n6 at para 10.

13 *The Prosecutor v Galic*. Above n6 at para 10.

14 Rule 92 *bis* (A)(ii)(a).

15 Rule 92 *bis* (A)(ii)(b).

16 Rule 92 *bis* (A)(ii)(c).

17 Above n6 at para 13.

18 *The Prosecutor v Kordic and Cerkez* IT-95-14/2, 'Decision on appeal regarding statement of a deceased witness' (21 July 2000) at para 23.

19 *The Prosecutor v Milosevic* IT-02-54-T, 'Decision on prosecution motion for the admission of transcripts in lieu of viva voce testimony pursuant to 92 *bis* (D)' (30 June 2003) at para 39.

20 *The Prosecution v Milosevic* IT-02-54-T, 'Decision on prosecutor's request to have written statements admitted under rule 92 *bis*' (21 March 2002) at paras 24-25.

21 Above n19.

22 Article 20(4)(e)

23 Article 21(4)(e)

24 Article 6(3)(d)

25 Article 8(2)(f)

26 Article 14(3)(e)

27 See, for example, the jurisprudence of the tribunal in *The Prosecutor v Kordic and Cerkez* IT-95-14/2, 'Decision on appeal regarding statement of a deceased witness' (21 July 2000). Also, the jurisprudence of the European Court of Human Rights in *Unterpertinger v Austria*, 24 November 1986, Series A, No. 110 at para 33 and *Saidi v France*, 20 September 1993, Series A, No. 261-C at para 44.

28 ibid.

29 Above n6 at para 14.

30 David Hunt retired from the tribunal in 2003 after sitting on the appeals chamber for two years.

31 Judge Patrick Robinson, dissenting opinion, *The Prosecutor v Milosevic* IT-02-54-T, 'Decision on prosecution motion for the admission of transcripts in lieu of viva voce testimony pursuant to 92 bis(D) – foca transcripts' (30 June 2003) at para 2.

32 ibid., at para 44(i).

33 ibid., at para 44(v).

34 The Hon David Hunt, 'The International Criminal Court: High hopes, 'creative ambiguity' and an unfortunate mistrust in international judges', (2004) 2(1) *Journal of International Criminal Justice* 56.

Lucy Robb and Chrissa Loukas

Practice after personal injury

In 2002 the Bar Association, through the Personal Injuries Litigation Committee, set up a pilot scheme in which barristers whose practices would be eroded by legislative changes to motor accidents, workers compensation and personal injury law could be mentored by senior practitioners in other areas of practice. The aim was to give them assistance and practical experience to enable them to redeploy their skills.

That project has since evolved into the Practice Enhancement Scheme. On 27 July 2004 Tom Bathurst QC and Anna Katzmann SC presided at a well-attended CPD forum in the Common Room, aimed at explaining how this important Bar Association scheme operates. As a follow up, Terry Ower interviewed Tom Bathurst QC for Bar News.

Terry Ower: Thank you for agreeing to talk to *Bar News*. Perhaps I could begin by asking you how you first became involved in the Practice Enhancement Scheme.

Tom Bathurst QC: I thought it was important that the Bar Council did something for people who, through no fault of their own, had a substantial decline in work. I've got some connections in the commercial and other areas which I thought may be of assistance to deal with it.

Terry Ower: I understand that the project began life as the 'mentoring scheme' and is now the 'practice enhancement scheme'. Has the scheme been operating for very long?

Tom Bathurst QC: The scheme started a year or so ago and then subsided a little bit. The Bar Council resurrected it early this year and we publicised it. I've had a substantial response from people who want assistance and what I might say is a pretty satisfactory response from people who are able to give it. It takes time to match people in those circumstances and, let's be honest about it, there are some occasions where it's not going to work, but we think it's a worthwhile project.

Terry Ower: Do people who are interested, first have to approach the Bar Association?

Tom Bathurst QC: People interested need to approach me or the Philip Selth direct. What I do is to get a CV from them, try and have chat to them and seek to place them with someone who I think may be able to assist. But it has to be done to some extent individually because you're dealing with people with different levels of seniority, ambitions and expectations and give those people opportunity to deal with those expectations.

Terry Ower: Sometimes are those expectations unrealistic? I heard anecdotally of someone who approached you and said that they were just interested in doing special leave applications.

Tom Bathurst QC: There's been one or two of those, but there's nothing you can do about that except explain that those expectations are unreal. The other thing in that regard that has to be made clear is that the scheme is not a guarantee of employment at all nor is it a guarantee to restore the level of work that some people had before. What we hope it does is provide an opportunity for people who have been affected by tort reform or for that matter people who have seen their practice decline for any reason, to get into a new field in which they are interested and hopefully succeed in it but sooner or later it becomes a matter for them.

Terry Ower: I attended the seminar the other night that was held at the Bar Association and you prefaced your remarks by saying that you hadn't done a personal injury matter in 20-odd years.

Tom Bathurst QC: That's right.

Terry Ower: Has that been a disadvantage to you in dealing with people in the scheme?

Tom Bathurst QC: No, I don't think so. What I was at pains to emphasise was that our basic skills are advocacy; they cut across the whole spectrum of litigation. Because of the volume of work in personal injury there was a degree of specialisation. What I was seeking to convince people...explain to them, that, given the right opportunity, advocacy skills would transcend over a whole series of areas. So, in those circumstances, people who were practising in a limited field should feel capable of expanding their practice.

Terry Ower: Tom, you mentioned at the seminar there had been 35 odd referrals to date of which there had been about 20 placements and some pending, has there been any feed-back at all that you've had from those that have been placed?

Tom Bathurst QC: No

Terry Ower: Is there any structure for any feed-back to occur at this stage?

Tom Bathurst QC: No. Although I don't think that's a bad thing. I'd like to see feed-back over 5 - 6 months when it's just more likely to sort itself out. There are still a considerable number of people who I haven't placed which I'm trying to do

at the moment. It takes a bit of time because you've got to find people willing and able to assist and I'd hope by the end of the year we would have a really good idea of how it's going.

Terry Ower: Is this largely something that you're doing yourself or in conjunction with Anna Katzmann SC or are others involved?

Tom Bathurst QC: Anna's been an enormous help because she knows people who need to be involved in the scheme and has used her contacts to get potential 'masters' involved. I'm doing at lot of it by myself.

Terry Ower: In terms of the co-operation you've had from some floors, is it fair to say that on some floors you get more co-operation than others?

Tom Bathurst QC: I try to deal with individual barristers so that issue really hasn't arisen.

Terry Ower: Of the people that you've placed so far, have they had a specific desire to go into a different area of law?

Tom Bathurst QC: By and large they've nominated a number of areas they want to go into. A lot want to go into, which they think are associated with personal injury in particular, industrial law, and some forms of administrative law. A lot of them merely want, and you can understand this, to expand their practice and they're not being too fussy about what field of law it is. I think it's a good thing because when I came to the Bar, probably many more years ago than most, the best training barristers had was to ply their skills in any number of diverse areas. I think it's very encouraging that people are facing up to the fact that they may need to do that.

Terry Ower: Have you always had a fairly diverse practice at the Bar rather than specialising in any particular area?

Tom Bathurst QC: I initially practised in a wide range of fields, including personal injuries litigation and family law. I can't say that I have over the last 20 years. One of the great advantages for people of my vintage was that it was expected that no matter where you came from you'd go out and do those things and hone your skills as an advocate. You weren't immediately slotted into any particular field. It is more difficult, I think, at the present time. Those who started out in a particular field *a fortiori* would find it difficult to get out of that field.

Terry Ower: If you had just one piece of advice to give to someone who's a personal injury specialist looking to enhance their practice, what would that advice be?

Tom Bathurst QC: Three related matters; get as much exposure as you can; recognise that the cases you might take aren't perhaps of the same quality of law or command the same fee as you were doing: and thirdly, tell people that because of what's happened you're interested in going into a different field.

I'm amazed that some find it necessary to maintain a pretence to solicitors that there hasn't been a decline in work. Clearly there has and those solicitors themselves are attempting to develop other areas of work.

Terry Ower: So therefore, you believe it's a good strategy to attempt to diversify into the same areas that those solicitors are developing?

Tom Bathurst QC: Of course. It is most important to maintain old contacts as this is the most likely basis for future work.

Terry Ower: Isn't there a problem with that approach in that it is more likely for solicitors finding their way in a new area to seek out counsel who are already established experts in the new area rather than those they have used in the past?

Tom Bathurst QC: Yes, that will certainly happen. However, that does not mean that people should give up on their old solicitors.

Terry Ower: Tom, thank you for your time. I'm sure we all hope the scheme is successful.

Counsel at the permanent commissions of inquiry

By Keith Chapple SC

Over the past 15 years or so one new area in which barristers have become involved is in appearances before the various permanent commissions of inquiry.

For decades counsel have been briefed from time to time in royal commissions and judicial inquiries which were set up to investigate discrete topics. The Independent Commission Against Corruption and the Police Integrity Commission are both permanent commissions which often involve appearance by counsel at both ends of the Bar table. The Legal Representation Office which is intimately involved with the commissions also regularly briefs counsel to appear at them.

The Independent Commission Against Corruption

The ICAC is an autonomous body set up in March 1989 to investigate allegations of corruption in the NSW public sector.

It has conducted highly successful investigations throughout the 1990's under a series of commissioners including Ian Temby QC and Justice Barry O'Keefe. Its success continued under the current commissioner, Irene Moss AO, whose statutory term is due to expire in late 2004. Assistant commissioners have often been appointed from the Bar.

Some investigations are long if the subject matter is complex or requires intensive financial analysis. The Inquiry into the NSW Grains Board Collapse began in December 2000 and the final report was issued in August 2003. Others are relatively short - such as the recent hearings regarding allegations involving the former minister for health.

Counsel assisting the commission are appointed under s106 of the *Independent Commission Against Corruption Act 1988*. Counsel assisting is instructed by the Solicitor to the Commissioner, Roy Waldon, and his staff. The counsel who is briefed is regarded as a key player in the particular investigation being conducted. The commission's proceedings are inquisitorial not adversarial and counsel assisting makes important decisions about lines of inquiry, whether hearings will be public or private and who will be summonsed to appear at those hearings. Often counsel is briefed before the commissioner becomes directly involved.

Apart from appearing at the hearings as well, towards the end of proceedings counsel assisting prepares submissions. These are circulated to those affected by the ICAC inquiry to allow their legal representatives to respond.

Deputy Commissioner John Pritchard described counsel assisting as the type of person who is capable of wearing a number of hats, not just a barrister fulfilling the traditional role of counsel. 'We are always on the lookout for competent counsel,' he said 'and I am happy to receive applications or CVs from any barrister interested in being considered for this type of role'.

Obviously a capacity for hard work is essential. Counsel assisting is often required to take decisions in the planning of an investigation and advise commission officers on the directions in which inquiries should be made. Hearings often bring their own complications and preparing submissions is a large part of counsel assisting's obligations - evidence has to be summarised, issues identified and views expressed about the findings available to the commission.

Both John Pritchard and Roy Waldon are solicitors of vast experience in this type of work. They are happy to liaise as far as possible with counsel who are authorised by the commission under the ICAC legislation to appear for a witness or an affected person during the course of a hearing. Co-operation is obviously limited by the inquisitorial nature of proceedings and confidentiality requirements.

The Legal Representation Office and private solicitors are involved in briefing counsel to appear for those summonsed by the commission.

The Police Integrity Commission

The PIC began operating in 1997 following recommendations from the Royal Commission into the NSW Police Service, conducted by Justice Wood. The extent of corruption uncovered by the royal commission clearly indicated the need for a permanent investigatory body and the first commissioner of the PIC, Judge Paul Urquhart QC, was a commissioner assisting Justice Wood in a number of the police royal commission probes.

The current commissioner of the PIC, Terry Griffin, is a former Commonwealth deputy DPP and highly experienced government lawyer.

The *Police Integrity Commission Act 1996* provides for the appointment of counsel assisting the commission in a similar way to the provisions governing the ICAC. The commissioner of the PIC can also authorise legal representation for those summonsed to private or public hearings.

The senior operational lawyer for the PIC, Michelle O'Brien, described the role of counsel assisting the PIC as involving some direction of the investigating activity of an inquiry, conducting hearings before the commission and overseeing the collating and presentation of evidence. Counsel assisting also prepares submissions on evidence presented to the commission and possible findings that can be made. Ms O'Brien said: 'I am the PIC's obvious contact point for barristers who want to be considered for the position of counsel assisting in a particular inquiry'. Applications can be forwarded to her at the PIC Offices at 111 Elizabeth Street Sydney.

PIC inquiries regularly involve many of the investigatory tools that received prominent publicity during the Police Royal

Commission. Telephone intercepts, listening devices and video surveillance are often used. So called 'rollover' witnesses are common. Investigations can be long and sometimes feature attempts by police officers targeted by the PIC to frustrate inquiries.

In a similar way to the ICAC, counsel appearing for those summonsed to the inquiry can be briefed by private solicitors or the Legal Representation Office. Ms O'Brien pointed out that the PIC legislation makes provision for an inspector of the PIC and as a result of work by the inspector and the PIC itself practice guidelines have been published governing appearances before the commission. They deal with such matters as the powers of the commission, procedure before the commission and other questions including conflicts of interests and the like.

The Legal Representation Office

The LRO operates through the Attorney General's Department of the New South Wales Government. It employs a number of solicitors who appear themselves at various inquiries including ICAC and the PIC. It also briefs counsel to appear at these bodies and various other inquiries, including for example the Thredbo Inquiry and the Waterfall Rail Inquiry.

Witnesses and affected persons summonsed to the ICAC and the PIC are provided with information regarding the LRO. In that sense the bodies are connected but the representation provided by the LRO is completely independent of the ICAC and the PIC. Co-operation is high between all three entities as far as operational requirements allow.

Because of the wide ranging powers of both investigatory bodies, clients for whom counsel appear instructed by the LRO are compellable. Witnesses often require detailed advice at short notice and they are subject to sanctions under the legislation that controls both the ICAC and the PIC. On many occasions, especially at PIC hearings, clients may be involved in an involuntary change of status when they decide to assist the commission either in private or in public hearings.

Because of the inquisitorial nature of ICAC and PIC hearings, many of the general litigation devices are absent. Although the general scope of an inquiry is publicised, for obvious reasons witnesses are told little before they appear. They are often stood down and recalled, sometimes weeks after their first appearance. Particulars and discovery and similar processes are deliberately unavailable at these commissions.

The director of the Legal Representation Office, Annette Sinclair, also welcomed applications by counsel who wished to be considered for appearance work instructed by the Legal Representation Office. Ms Sinclair advised that advertisements for counsel to be included in the LRO's panel will be appearing later this year and details may be sent directly to her.

Looking forward

The direction of criminal law

The Hon Justice John Dunford delivered the following keynote presentation at the Criminal Law Conference 2004, Tuesday, 27 July 2004 at the Marriott Hotel, Sydney.

To give a keynote address to a conference, the theme of which is 'Looking forward: The direction of criminal law' confronts the speaker with a dilemma. Does he endeavour to discern current trends and attempt to predict where they may lead? Does he try and anticipate, with or without regard to current trends, what political, economic and social pressures may lead to changes to the criminal law in the future? Or does he simply muse on those variations or changes that he would like to see implemented in the foreseeable future?

What I intend to say involves elements of all three without clearly distinguishing between them, but I hope to provide some thoughts for your consideration, particularly in so far as they may be relevant to the other papers to be presented during the course of the day.

Let me first, however, start with a short and rather cynical view of what I see as the future of the criminal law. I believe that people will continue to commit offences, a lot of them will be charged, their trials will get longer, and in particular the summings up will get longer as more and more directions are required, a large number of those tried will be convicted, and nearly all of them will appeal to the Court of Criminal Appeal.

There have of course been substantial amendments both to the substantive and the procedural law over the last 20 to 30 years. Some of the substantive offences have been redefined, such as provocation, diminished responsibility and self-defence in relation to murder, offences relating to drugs have been strengthened by the introduction of the *Drugs Misuse and Trafficking Act 1985* which introduced a whole new code, and more recently the further offence of ongoing supply has been introduced. Perhaps the greatest change to the substantive law has been the replacement of the offences of rape and carnal knowledge by the various categories of offences relating to sexual assault, which has not only reformulated the different offences, but has also significantly changed the definition of what constitutes sexual intercourse.

There has also been a great upsurge in the number of cases involving sexual assault. Whereas twenty years ago the most common offence of this nature was the rape of an adult woman, where the issue was either identification of the offender or whether the woman had consented, and the most common form of carnal knowledge case was the charging of 16–20 year old males for having intercourse with their 15 year old girlfriends, the most common charge nowadays relates to child sexual assault, particularly, but by no means exclusively, by fathers and stepfathers on young girls in their early teens, and these charges are most commonly brought 10–20, or even more, years after the offences are alleged to have been committed.

In addition, parliament has, in respect of a number of offences, significantly increased the maximum penalties resulting in the general level of sentences being imposed by the courts being increased, eg culpable driving or, as it is now known, dangerous driving causing death or grievous bodily harm, although in the same period the maximum sentence for manslaughter was reduced from life imprisonment to 25 years.

Photo: A media scrum surrounds a witness in a 'Lebanese gang rape trial'.
Photo: News Image Library.

There have also been a number of procedural reforms. Juries are no longer sequestrated from the commencement of a murder trial, and are allowed to separate in all cases, even whilst considering their verdicts. The statement from the dock has been abolished and the judge is, by statute, allowed to comment on the failure of an accused to give evidence although, as a result of the series of decisions of the High Court, the comment that he or she can make, has been severely circumscribed.[1]

The introduction of the *Evidence Act 1995* has produced a number of changes relevant to the criminal law, including the circumstances in which an unfavourable witness may be cross examined,[2] and in relation to complaints in sexual assault cases,[3] evidence of which now relates not only to the credibility of the complainant.[4] In relation to Commonwealth offences there has been the introduction of the Criminal Code,[5] which I understand it is hoped will eventually be applied to state offences as well, but this is apparently some way off.

In addition, legislation has been enacted to prevent offenders enjoying the proceeds of their criminal activities,[6] and providing a statutory scheme for the compensation of victims of crime,[7] and different forms of punishment, alternatives to full time imprisonment have been introduced such as periodic and home detention, and community service orders.[8] The Drug Court has been established to place emphasis on the rehabilitation of addicts[9] and the MERIT[10] and Circle Sentencing[11] programmes have been set up.

Other developments relate to the manner of police investigation, which has become much more sophisticated, particularly with the development of DNA evidence, telephone and listening device intercepts and controlled operations. Moreover, some of us can remember the old police

'verbals' which then gave way to the typed record of interview, both signed and unsigned. This was followed by the video recorded interview, which has now been further refined with the introduction of the custody manager provisions in the *Crimes Act 1900*.[12]

These reforms have all been most commendable, providing greater facility for detection of actual offenders, whilst at the same time preserving and enhancing the rights of suspects. On the other hand they all add to the length of the trial. Trials were much quicker when the main evidence in the crown case was often the evidence of the police officers reciting the verbal admissions allegedly made by the accused, and the crown prosecutor would comment to the jury, as sometimes the judge would also comment, 'why would they [the detectives] lie?' No right thinking person would regret the departure of the old ways, but the fact is that criminal trials are now much longer.

There have also been amendments to the *Bail Act 1978*, making it more difficult for those accused of offences of violence (particularly domestic violence), repeat offenders, those alleged to have committed offences whilst on bail or parole etc, or accused of terrorism offences, to obtain bail. I see that some of these matters, such as DNA evidence, search warrants, terrorism offences and bail are to be the subject of papers during the day. On a more technical basis, the distinctions between felony and misdemeanour and between imprisonment and penal servitude have been abolished.

Another recent development has been the proliferation of bodies charged with detecting and exposing of criminal, particularly corrupt, conduct, but without prosecutorial or sentencing powers. I refer to bodies such as the Ombudsman,[13] the Police Integrity Commission[14] and the Independent Commission Against Corruption.[15] These bodies can be very effective in exposing wrongful conduct, and we often see on our evening television news bulletins, sensational videos of wrongful conduct taking place. I suspect that it gives a lot of satisfaction to many to see such conduct exposed, but I believe the majority of the community wants more: they do not just want to see the conduct exposed; they want to see it punished. That must be left to the criminal courts but the courts are constrained by the rules of evidence, which these other bodies generally are not; and in addition, these other bodies generally are provided with greater facilities and financial resources than are the courts. Politicians seem to like them and give them resources, probably because they generate publicity and convey the impression that 'something is being done'.

Finally, the work of the Court of Criminal Appeal has become much more extensive. Whereas 30 years ago the court used to sit most Fridays, and finish by lunchtime, it now sits every week of the legal year, usually on most days, and sometimes sitting two separate courts. Arguments which used to be oral are now substantially by way of written submission.

Finally, a number of amendments to the sentencing laws have created greater scope for argument about the sentences imposed and there has been the development of crown appeals. The increase in the number of appeals is, of course, largely due to the fact that there are now a lot more judges, both in the Supreme Court and in the District Court, sitting in crime at any given time.

So much for the past. Let me now look at some current developments which are still evolving.

Guideline judgments

A comparatively recent development in the criminal law of this state has been the introduction of guideline judgments, dating from *R v Jurisic* in 1998.[16] The object of guideline judgments is to produce consistency in sentencing whilst preserving the individual judge's discretion, by indicating in advance the range of sentences that the Court of Criminal Appeal considers to be generally appropriate for specific offences, when particular elements are present.

They are not rules of law nor rules of universal application and the guidelines may be departed from when the justice of a particular case requires, including, where appropriate, considerations of matters such as youth, parity, assistance to the authorities, delay in sentencing etc.[17] Where a sentencing judge departs from the guidelines he or she will be expected to give reasons for doing so.[18]

Guideline judgments were in the first instances an initiative of the Court of Criminal Appeal, but following *Wong v The Queen*,[19] where the High Court held that the Court of Criminal Appeal did not have power to promulgate guidelines in respect of offences against Commonwealth law, the New South Wales Parliament amended the C*rimes (Sentencing Procedure) Act 1995* to expressly authorise such judgments in respect of state offences.[20] This amendment also provided for the attorney general to apply for guideline judgments,[21] and consequently, the most recent applications have been made by the attorney general.

Guideline judgments have now been promulgated in respect of dangerous driving causing death,[22] armed robbery,[23] break enter and steal,[24] pleas of guilty,[25] and taking into account additional offences under s33 of the C*rimes (Sentencing procedure) Act 1995*.[26]

The court declined to issue a guideline judgment in respect of the offence of assault police because it considered the circumstances so varied that no useful guideline could be formulated,[27] and it has recently reserved judgment on an application for a guideline judgment in respect of the offence of high range PCA.[28]

Generally the guideline judgments have taken a set of common or typical circumstances relating to such offences and indicated a range of sentences for cases with those typical characteristics, so that cases can be measured as to how they fit into the profile, and those which do not fit into the profile can be assessed by reference to the guideline. However, in respect of break enter and steal, and taking other offences into account, the court did not promulgate quantitative guidelines, but rather indicated relevant matters to be considered.

Although I do not have any specific statistics to rely on, the impression I have is that whilst some of the guidelines, for example *Jurisich* (now *Whyte*), and *Henry*, are more commonly relied on by the crown in crown appeals, the guideline on the utilitarian value of the plea of guilty is most commonly relied on by appellant's counsel in severity appeals, and the reason for this can be seen from the ratio for, and nature of this guideline.

That guideline was promulgated to ensure that all offenders who pleaded guilty, particularly at an early stage, received a discount on account of the utilitarian value of such pleas in the saving of court and jury time with resulting savings in costs and inconvenience, and in enabling the courts to process more cases. To encourage such pleas, it was necessary not only to give a discount on the sentence, but also to make the process transparent, so that the offender could see that he or she was in fact receiving the discount, and for this reason sentencing judges were encouraged to specify the discount. What has been apparent recently has been that some judges have been specifying a discount but then apparently not applying it, because the final sentences pronounced are in rounded periods (a specified number of years or months) incompatible with rounded periods as a starting point before allowing the indicated discount. For this reason it is desirable for judges to specify a notional sentence before the application of the discount for the utilitarian value of the plea.29

Sentencing generally

Two other recent changes to sentencing law result from the amendments introduced by the C*rimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. That Act amended s21A by replacing the list of relevant matters to be taken into account on sentencing, with an expanded list, including those described respectively as aggravating and mitigating circumstances. It also included s3A, specifying in statutory form the objects of sentencing. Those amendments apply to all offenders sentenced after 1 February 2003, irrespective of when the offence was committed.

At the same time, but only applying to sentences for offences committed on or after 1 February 2003, s44 was amended to require the sentencing judge to first impose a non-parole

16 February 2004, Sydney. A protest by families of police and victims of crime outside the state parliament, calling for tougher sentences.
Photo: Sam Ruttyn / News Image Library

period (which was defined in statutory form) and then the balance of the sentence, which is to be not less than one-third of the non-parole period unless 'special circumstances' are shown. 'Special circumstances' in this context have been with us since introduced by the *Sentencing Act 1989*, but since *R v Simpson*[30] it has become a rather elastic and variable term. Recent statistics from the Judicial Commission show that in 2002 in the Supreme and District courts 'special circumstances', which justify a reduction in the non-parole period in comparison with the head sentence, were found to exist in 87.1 per cent of cases - which I suppose reduces special circumstances to circumstances which are not really special.31 One can ask whether there is really any purpose in specifying the relationship between non-parole periods and head sentences when it is so easily and frequently avoided.

...experience shows that heavier and heavier sentences imposed in the past have failed to deter criminal activity.

Another comment. Although 'special circumstances' justifying a variation in the relationship between the head sentence and the non-parole period can now amount to any number of factors, the most common reason given by sentencing judges for variation of the ratio is that he or she believes that the offender would benefit from a longer period of supervision on parole, and sentences are constructed with this in mind. However, time and time again, one hears that, although the judge has reduced the non-parole period so that the offender can have a longer period of supervision on parole, the Probation and Parole Service of its own accord, and without the consent of the sentencing judge, has ceased its supervision before the expiration of the parole period, thereby defeating the whole purpose of reducing the non-parole period, and frustrating the judge's intention in doing so. This is a matter that needs to be addressed at a suitable time.

The other new development in this regard is the specification of standard non-parole periods by the new ss54A to 54D introduced by the same Act, and applicable to sentencing for offences committed on or after 1 February 2003. This is not the time, nor the place for a dissertation on how those provisions are to be applied in practice, particularly in relation to other sentencing principles, including the other provisions of the Crimes (Sentencing Procedure) Act. They have already been discussed in some detail in R v Way32 and no doubt other cases will follow.

We live in a community where there seem to be constant calls for criminals to receive tougher sentences, and one can readily understand why victims, and in the case of homicide, members of victims' families, press for longer sentences for offenders. Those calls are taken up, as we know, by the media, particularly talk-back radio hosts and newspaper commentators, and then politicians of all parties take up the call for law and order, and threaten longer sentences with less parole, and other so-called reforms.

However, very often, in fact I believe in the majority of cases, the victims, the talkback radio hosts, the persons who telephone their programmes, the newspaper correspondents and the politicians know nothing about the particular cases except the objective facts as reported in the media, which from the nature of things are the more sensational and horrific features. They generally know nothing of the personal circumstances of the offender, his or her lack of a reasonable childhood in a loving and supportive family, his or her lack of employment or opportunity for employment, the fact that a large number of offenders are unable to read and write, their drug problems or the emotional or other problems confronting them at the time of the commission of the offence.

I am not suggesting that any of these matters constitute excuses for criminal conduct - they do not, but they are matters which need to be taken into account in the sentencing process where the object is to do justice to the community as a whole, the victims and also to the offender. Whilst I believe that general and personal deterrence have significant parts to play in the sentencing process, I also believe that to suggest that longer and longer sentences will reduce the incidence of crime and is a simple 'one stop' solution to the problem, is extremely naïve and counter productive. I also suggest that, in spite of all their posturings, the politicians do not want more persons in custody for longer periods - that necessitates the expenditure of more money on building and maintaining more gaols and paying more custodial officers.

Rather, I believe that to reduce the incidence of crime what is needed is better family support where the parents are inadequate, better special education for those who are having difficulties learning, and better employment opportunities and encouragement for young persons, particularly in the more economically deprived areas of our large cities and regional areas. On occasions, on bail and sentencing proceedings, one hears from young offenders who have left school to go on the dole, and who have never been employed, say that they got into drugs and committed crimes because they had nothing else to do – what a terrible indictment on our so-called 'lucky country'! Rehabilitation of offenders is not a luxury or a soft option – it is a necessity, and is for the benefit of the community as a whole. Drug programmes and more educational facilities in gaol are required so that, on release, offenders can get a job and settle back into the community, rather than returning to crime. Such proposals not only cost money, but also dedicated instructors and proper organisation.

Recently, the *Daily Telegraph*[33] published the results of a survey it had conducted which showed a large number of respondents were dissatisfied with the criminal justice system and wanted significant changes. The survey was said to have been

conduced amongst 7,000 readers of the *Daily Telegraph*, so it was hardly representative, because it was a comparatively small number compared to the large number of people who read that newspaper, or read other newspapers, or do not read newspapers at all, or who read the *Daily Telegraph* and did not respond to the survey. As is often the case with voluntary surveys, those who are dissatisfied tend to respond, and those who are satisfied do not bother.

...controversial or potentially unpopular decisions are more likely to be accepted by the community generally and in the media if they are decisions of fellow citizens rather than decisions of professional judges.

I shall return to the survey later in a different context, but for present purposes, I refer to the answers given to a question about sentencing, and in respect of most of the offences specified, a majority considered that the penalties should be 'toughened': drug trafficking 82 per cent, murder 90 per cent, sexual assault 87 per cent, gang rape 92 per cent, theft 56 per cent. The only offences where more than 50 per cent did not consider the sentences should be toughened were: drug possession 48 per cent and prostitution 30 per cent. In answer to another question, 73 per cent considered the death penalty should be introduced for murder; 54 per cent for gang rape; and 74 per cent for terrorism.

Rehabilitation, coupled with appropriate punishment, and seeking to deter others, are all appropriate components of the sentencing process, but experience shows that heavier and heavier sentences imposed in the past have failed to deter criminal activity. We should realise this particularly in Sydney, which was founded in the days when conviction for any felony carried the death penalty, and the only relief from the death penalty was for the sentence to be commuted to transportation to Botany Bay for life or 14 years, or whatever. The death penalty will not stop many people killing when under emotional stress, or in a number of other situations, nor will it stop the drug addict from committing robberies and/or larcenies, in order to feed his or her habit. An offender who is not deterred by the prospect of a three year gaol sentence is unlikely to be deterred by the prospect of a seven year sentence. Whilst I strongly believe that general deterrence has a significant part to play in the sentencing process, in some situations more than in others, I do not believe that massive 'over the top' sentences, including the death penalty, are appropriate. I regard the death penalty as a barbaric sentence for any civilised community to carry out in the twenty-first century, and mistakes cannot be reversed although unfortunately, mistakes will be made from time to time, no matter how hard we try to avoid them.

One source of the push for increased sentences comes from the loving families of homicide victims. One can understand their feelings, their grief, their loss and their frustration at what they regard as inadequate sentences for the death of their loved ones, but taking their feelings into account creates a serious philosophical problem of its own, namely, what of the man who has no loving family, the homeless, the derelict, the estranged or the unmarried orphan His life cannot be regarded as any less worthy of protection, or as of less worth than the life of a person with a loving family.[34]

One matter that a lot of people seeking higher penalties overlook is that the courts are constrained by sentencing principles such as those of parity, totality, consideration of youth, assistance to the authorities, pleas of guilty. Judges are not free agents to give free rein to their feelings in individual cases.

Another consideration often overlooked by members of the community and commentators is that when the crown accepts a plea of guilty to a lesser offence, such as manslaughter for murder or assault occasioning actual bodily harm for malicious wounding, the offender can only be sentenced for the offence for which he has pleaded guilty, and the court cannot, under the guise of sentencing him for the lesser offence, in effect sentence him or her for the greater offence.[35]

Why the director of public prosecutions accepts pleas to lesser offences is often a mystery to the judge, but he or she is virtually powerless to do anything about it.[36] Sometimes the reason will be obvious; it will be clear that the crown probably cannot prove an essential ingredient of the greater offence, e.g. intention, or there may be a risk of not getting any conviction at all, for example, where two persons have custody of a young child, and the child dies from injuries and abuse, each can blame the other with the result that a jury may not be satisfied beyond reasonable doubt which of them inflicted the injuries, so that they both have to be acquitted.

In those circumstances the crown will quite reasonably accept a plea to the lesser offence of manslaughter from one of the

April 7, 2004. Sydney, Justice Bruce James and the jury inspect the brothel where Sef Gonzales said he visited the night of the murders of his parents and sister.
Photo: Matthew Vasilescu / News Image Library

two suspects. In that situation the court can only sentence for manslaughter, it cannot sentence for murder, no matter how horrific the injuries, nor how clearly such injuries indicate an intent to kill or to do grievous bodily harm.

However, I must say that there are a number of cases where, looking at the material in the statements tended at the committal hearing, it is difficult to see any reason why the crown should accept a plea to a lesser offence and, in many cases, tender an agreed statement of facts which leaves out a lot of material which would, if admitted, make the offence more serious. There may be doubts about how the witnesses will stand up in court and whether some or all of them will be believed, but this is a matter for the jury, and the crown has nothing to lose by running the trial for the greater offence, and if the jury only finds the lesser offence proved, so be it. There is, I believe, a greater chance of justice really being done in that situation, and a greater chance of the victims, their families and the community as a whole being satisfied that justice has been done.

The jury

I turn now to the jury, and let me start by saying that I am a firm believer in the jury system for the trial of serious criminal offences. I also believe in it for the trial of various types of civil matters but that is a different question. The reason I support the jury system for serious criminal trials is that it is a feature of our democracy in that it enables ordinary men and women to take part in the judicial process and exercise their right as citizens in determining the guilt or otherwise of their fellow citizens. It is of the essence of a democracy that decisions (whether political through the ballot box or judicial through the jury system) are shared amongst the community as a whole, rather than being limited to the exercise of power by a few elite. Moreover the exercise of the common sense of the community as a whole, as opposed to the perceived attitudes of a legal elite, is desirable, and controversial or potentially unpopular decisions are more likely to be accepted by the community generally and in the media if they are decisions of fellow citizens rather than decisions of professional judges.

But most importantly, I see the jury as a bulwark against the exercise of arbitrary power by a corrupt or politically motivated judiciary - not that such is a problem in this country at present, but one only has to look to Nazi Germany or Soviet Russia, or to the threat presently posed in Zimbabwe, to understand what I mean.

Moreover, the jury system can be a check on unpopular laws, as for example when juries repeatedly failed to convict those engaged in the Eureka Stockade in 1854-55, notwithstanding the clearest, most cogent, evidence or in the censorship trials in this state in the early 1960s.

Unfortunately there are a number of persons in the legal profession who seem to regard jurors in much the same way as politicians regard voters, that is, as absolute idiots, who need to be spoon fed any information, are incapable of rational thought and can be easily swayed by irrelevant matters and information. I disagree. Jurors are our fellow citizens, our neighbours, the persons with whom we do business and so on, and they are not lawyers.

I know some lawyers believe that juries can be swayed by emotion and red herrings, but after almost 18 years on the Bench I remain, as I say, a supporter of the jury system, and over that time there are only a handful of cases where I have personally disagreed with the jury's decision, and even in those cases, I have been able to see a reasonable and logical reason why the jury has come to a different conclusion.

From time to time suggestions are made that certain types of cases should no longer be tried by juries, for example, white collar or corporate fraud cases, which are said to be too complicated for lay juries to understand, and recently a former chief justice suggested that where jury verdicts in sexual assault cases are set aside on appeal, the retrial should be by the Court of Criminal Appeal on a review of the evidence in the previous trial aided, as I understand it, by a video recording of the complainant's evidence in the earlier trial. I would not support either proposal.

In my experience juries do not find corporate fraud cases too complicated and it is up to the Crown to present the case in an intelligible form. This can often be facilitated by charging a number of specific simple offences, rather than a general conspiracy count, which tends to get lost in its own detail. An intent to defraud, which is often an ingredient in the offence, involves a subjective finding to be inferred from surrounding circumstances applying ordinary common sense based on the conscience of the community, and is accordingly a most suitable issue for trial by a lay jury of fellow citizens.

Unfortunately there are a number of persons in the legal profession who seem to regard jurors in much the same way as politicians regard voters, that is, as absolute idiots

Similarly I would not support the abolition of juries in retrials of sexual assault cases. These cases are, from their very nature, almost always cases of word against word where the essential issue in the case is the assessment of the credibility and reliability of the complainant. Unfortunate and all as it is (and it is most unfortunate), that victims of such crimes have to go through the ordeal of giving evidence a second time, I do not see how the complainant's credibility can be assessed otherwise than by a real live hearing.

Having said all this, there are some reforms which I believe could make the jury system more efficient. For one thing, I support the introduction of majority verdicts after a specified period of deliberation. I understand the proposal presently

Supreme Court judges are greeted by protesters at a Red Mass.
Photo: Marc McCormack / News Image Library

before the government is for an 11–1 majority, whereas in England and various other places a 10–2 majority is sufficient. I understand that in Scotland they have juries of 15, and an 8–7 majority is sufficient for conviction or acquittal, but I gather there are other safeguards.

The object of the 10–2 or 11–1 majority is to avoid new trials in cases where the jury is hamstrung by a perverse, disinterested or unreasonable, or simply incompetent juror, where the result of the new trial is going to be that of the overwhelming majority in the original trial. Bear in mind that the judge often knows the voting figures in the hung jury situation because it is at times included in the note he or she receives from the jury, although such figures are not disclosed to counsel, and it would be inappropriate to do so. No one so far as I am aware has suggested that say 8–4 or 7–5 majority should be sufficient for a conviction, or an acquittal.

One possible amendment which, so far as I am aware, has not been seriously floated is that where a jury is unable to agree between conviction on a more serious and a lesser offence, for example, murder, or manslaughter, armed robbery or steal from the person, the judge should have the power to enter a conviction for the lesser offence, but only if, on his or her consideration of all the evidence, he or she considers it appropriate to do so.

Recently there have been a number of cases where convictions have been upset and new trials ordered because of the conduct of what have been described as 'rogue jurors' that is, jurors who have done their own research such as by looking up newspaper cuttings of previous trials on the internet[37] or by having a private view at night in the absence of the judge, the accused, counsel and their other jurors.[38] I am not sure these persons should be described as 'rogue jurors' - they thought they were merely improving their chances at arriving at the correct end result; but, in both cases they disregarded (presumably because they were not aware of its application) the principles of procedural fairness, namely that an accused should be aware of the evidence adduced and to be taken into account against him and in the former they informed themselves of evidence which was inadmissible against the accused. The result in both cases was a new trial, a most unfortunate result, particularly for the two complainants in the second case, who will face the ordeal of having to relive and give evidence, yet again, of the alleged sexual assaults.

A journalist in this city recently published a newspaper article generally critical of the processes of criminal trials, due process, judges, and a number of specific decisions, particularly of the Court of Criminal Appeal, describing what had occurred as an 'outbreak of Brahmanism' which he explained as a 'self appointed higher caste' and accusing the Court of exhibiting a 'fetish for the rights of the defence over those of the prosecution'.[39] At least two letters were written to the editor in response, criticising the article and correcting errors in it, one by the attorney general and one a joint letter by the director of public prosecutions and the senior public defender, but the newspaper declined to publish either of them. I can only conclude that the newspaper does not believe in fairness, either to accused persons on trial for serious crime, to its correspondents who seek to put forward a different view to its own, or to its readers who might like to hear both sides of a controversy. Apparently we should all recognise that journalists are a superior caste who are capable of commenting on legal issues, without any real knowledge of the subject, and usually without reading the relevant judgments, and whose opinions cannot be questioned or contradicted in any way, particularly by those with some knowledge of the subject matter.

I understand that legislation will shortly be introduced to make it an offence for jurors to deliberately disregard directions not to carry out their own research etc.[40]

One of the greatest threats to jury trials is, I believe, the ever growing length of the average jury trial. When I was a judge's associate in 1959 the usual length of a murder trial was one to two days. When one trial involving two accused went for nine days the length of the trial was regarded as newsworthy and it was, if I remember correctly, something of a record. Now a murder trial that finishes in less than two weeks is a rarity.

There are a number of reasons for this, including the increase in scientific and technical evidence, the increasing attention to the requirement for the Crown to call all relevant evidence, even if it does not significantly assist the Crown case, the length of recorded interviews, the length (often unnecessary and excessive) of cross-examination, the very commendable abolition of the 'verbal', and the length of the summings up, which, like the trials themselves, are getting longer and longer,

...if trials are going to take longer it will become more and more difficult to obtain suitable persons to serve as jurors. We do not wish to reach a stage where the only persons available to serve on juries are the unemployed and the unemployable.

due mainly to the increasing number and complexity of directions of law or warnings about particular types of evidence, which are required to be given.

It is also necessary for the directions to be intelligible. I have no doubt that juries follow the fundamental directions, particularly in relation to the onus of proof and ingredients of the offence, but I often wonder whether they fully understand all of the others. In particular I often wonder whether most jurors understand the standard direction on circumstantial evidence, particularly if it is intoned at 3 o'clock in the afternoon when the patience and fatigue of the jury have already been tested by addresses from the Crown and defence counsel.

Or what do the jurors make of a direction that the failure of an accused to give evidence cannot be used against him as an admission that he is guilty? I suspect that a lot of jurors would nevertheless reason that if the accused did not do it, then he or she would give evidence and say they did not do it. The failure to call an alibi witnesses could be viewed the same way.

In relation to sexual assault cases, there are a large number of directions which need to be given particularly in cases where there has been delay in the making of a complaint. A catalogue of the various directions and warnings which may be required in such cases appears in the judgment of Wood CJ at CL in *R v BWT*.[41] One of the directions required is that commonly referred to as the *Longman*[42] direction and the requirements of such a direction have been discussed in detail by Sully J in the same case (i.e. BWT).

I have two concerns about this collection of necessary warnings: Firstly, how can any trial judge reasonably be expected to get all the warnings right every time, or most of the time, and still make the summing up relevant to the trial at hand and the issues in that trial; and in seeking to explain them in meaningful terms, avoid saying something which may ultimately be found to constitute appellable error; and secondly, what do the jury make of them, do they follow them and apply them, do they become so confused that they ignore some or all of them, or do they regard them as a hint from the judge that they should acquit irrespective of their own assessment of the evidence, and if so, do they regard it as an unwarranted interference with their function as the tribunal of fact?

As to the effect of giving all those directions, particularly the *Longman* direction, the anecdotal evidence is confusing. One District Court judge told me (and bear in mind these cases are always invariably heard in the District Court) that since he started giving *Longman* directions, he had not had a single conviction, whilst another told me that the more *Longman* directions he gave, the more convictions he had.

However I have become sidetracked. I was talking about how the jury system can, I believe, be threatened by the increasing length of the trials, because the jury system can only operate where we have jurors, preferably willing jurors, and if trials are going to take longer it will become more and more difficult to obtain suitable persons to serve as jurors. We do not wish to reach a stage where the only persons available to serve on juries are the unemployed and the unemployable. I am not suggesting the problem is imminent but even now a number of persons who would make ideal jurors and are willing to serve for 1–2 weeks find it necessary to be excused from trials which are estimated to last 3–4–5 or even six months.

The future generally

So much for the future of the criminal jury. What of the future of criminal law generally?

It used to be said that the purpose of the criminal law was to preserve the king's peace. As a matter of history and as a matter of present constitutional theory that is correct, but I suggest that the modern citizen, unburdened by the study of legal history and constitutional theory, would define the object of the criminal law in more contemporary terms, as being to maintain peace and good order between citizens by punishing those guilty of breaking the law, but only the guilty.

No one wants an innocent person to be convicted and punished; and safeguards must be established and maintained to avoid this happening; but the community also expects that those who are guilty are convicted and punished adequately; and if this is not done the community, encouraged by journalist and talk back radio hosts, will not be satisfied and will demand changes which, may or may not be an improvement and which politicians may be tempted to adopt if they see, or the polls tell them, that there are votes to be won.

One of the generally beneficial consequences of democracy is that if sufficient people in the community become dissatisfied with a system, the system is liable to be changed, and sometimes quite radically. An example was the abolition of the remission system in the mid 1980s when it was perceived to be subject to abuse, and had ultimately become almost farcical.

Another, more recent, example has been the changes in the law relating to damages for personal injuries. The community perceived that a number of persons were receiving large amounts of damages when they were really at fault themselves, others were getting damages for injures which were part of recreational activities resulting in the closure or restriction of those activities, while yet others were getting damages for minor injuries which should have been regarded as part of everyday life; and overall the cost of insurance premiums was constantly increasing. In other words, a significant section of

the community took the view that the system was not working adequately, and so the system has been changed: juries generally abolished, there are requirements to negotiate etc before commencing proceedings, caps have been placed on damages and now, most recently, there has been an attempt to re-define the concept of negligence itself.[43]

In the *Daily Telegraph* survey to which I have previously referred, 69 per cent of respondents believed judges and magistrates were out of touch with the community in regard to issues or murder and drug trafficking and 74 per cent in regard to sexual assault, whilst only 8 per cent believed the judicial systems is fair, whilst 78 per cent believed it favoured criminals. I have already referred to the survey's limitations, but even allowing for those, this last finding is disturbing.

As I say, the community expects those guilty of breaking the law to be convicted and punished appropriately. The community is not interested in elaborate mind games played by the Crown and defence lawyers, they expect the courts to ascertain the truth and having established the truth, deal appropriately with those involved, and if they believe that the rules of evidence or of procedure inhibit the discovery of the truth, they will push for those rules to be changed.

I have already referred to some changes that have recently been implemented, more are, I understand, under consideration such as reviews of the principles of double jeopardy and the so called right to silence. Moreover, since the decision of the High Court in *Festa v The Queen*,[44] the Court of Criminal Appeal has become more inclined to apply the proviso and dismiss conviction appeals notwithstanding that a ground of appeal has been established. In my opinion, consideration could also be given to the *Criminal Appeal Act* s6 being amended to expressly provide that a conviction appeal be dismissed notwithstanding that any ground of appeal is established if the court is itself satisfied of the guilt of the appellant beyond reasonable doubt. This would, I believe further reduce the number of re-trials, without resulting in the conviction of any innocent persons.

But if incremental changes such as those already in place or changes similar to those I have referred to do not satisfy the community, pressure may build for more radical changes such as the abolition of juries, having the judge take part in the jury's deliberations (which I understand is the case in some European countries), the abolition or modification of the adversarial system, mandatory sentencing, or having the jury involved in sentencing.

I do not see these as immediate or proximate threats, but I suggest that some at least of them may be lurking below the horizon, and the crucial question is would they effect any improvement on the present system, which would be at least debatable, and in some cases, I believe, positively disastrous.

So let us all press on with our respective functions as prosecutor, defence lawyer or judge, making the most of the present system but at the same time, I suggest we should not be afraid to take part in debate about how the system can be improved.

1 *Azzopardi v The Queen* (2001) 205 CLR 50
2 *Evidence Act 1995* s38
3 ibid., s66(2)
4 *Papakosmos v The Queen* (1999) 196 CLR 297
5 *Criminal Code Act 1995* (Cth)
6 Confiscation of Proceeds of Crime Act 1989, *Criminal Assets Recovery Act 1990*, *Proceeds of Crime Act 2002* (Cth)
7 Now the *Victims Support and Rehabilitation Act 1996*
8 The current legislation is contained in the *Crimes (Sentencing Procedure) Act 1999* Parts 5,6,7
9 *Drug Court Act 1998*
10 The Magistrates Early Referral into Treatment Program, a diversion treatment program designed for alleged offenders who come before the local courts presenting with illicit drug problems. It is governed by Local Court Practice Note no 5 of 2001
11 The Circle Sentencing Intervention Program for Aboriginal offenders is governed by the *Criminal Procedure Regulation 2000*, schedule 3
12 *Crimes Act 1900* part 10A (ss354-356Y)
13 *Ombudsman Act 1974*
14 *Police Integrity Commission Act 1996*
15 *Independent Commission against Corruption Act 1988*
16 *R v Jurisic* (1998) 45 NSWLR 209
17 *R v SDM* (2001) 51 NSWLR 530
18 *R v Henry* (1999) 46 NSWLR 346
19 (2001) 207 CLR 584
20 *Criminal Legislation Amendment Act 2001*, no 117
21 *Crimes (Sentencing Procedure) Act 1999* s37
22 *R v Jurisich*, supra, modified by *R v Whyte* (2002) 55 NSWLR 252
23 *R v Henry* (1999) 46 NSWLR 346
24 *Attorney General's Application (No 1) R v Ponfield* (1999) 48 NSWLR 327
25 *R v Thomson* (2000) 49 NSWLR 383
26 *Attorney General's Application No 1 of 2002* (2002) 46 NSWLR 147
27 *Attorney General's Application No 2 of 2002* [2002] NSWCCA 515
28 5 May 2004
29 *R v Lynn* [2004] NSWCCA 222 at [13]
30 (2001) 53 NSWLR 704
31 Judicial Commission of New South Wales: *Sentencing trends and issues* no 30 (March 2004) at pp 3–4, and see *R v Fidow* [2004] NSWCCA 172 at [20]
32 [2004] NSWCCA 131
33 *Daily Telegraph*, 12 July 2004 at p 4
34 cf *R v De Souza* (unreported – Dunford J – 10 November 1995) at p 13, and see also *R v Previtera* (1997) 94 A Crim R 76 at 85
35 *R v Di Simoni* (1981) 147 CLR 383
36 *Maxwell v The Queen* (1995) 184 CLR 501
37 *R v K* [2003] NSWCCA 406
38 *R v Skaf* [2004] NSWCCA 37
39 Paul Sheehan in the *Sydney Morning Herald*, 14 June 2004
40 *Sydney Morning Herald*, 5 July 2004 p 5
41 *R v BWT* (2002) 54 NSWLR 241
42 *Longman v The Queen* (1989) 168 CLR 79
43 *Civil Liability Act 2002* ss5B-5T
44 (2001) 208 CLR 593

Dealing with complaints and notification requirements under the Legal Profession Act 1987

By Carol Webster

This article is a revised version of a paper delivered during several continuing professional development mini conferences in May and June 2004. Relevant statistics have since been updated. The article considers three aspects of 'professional conduct':

- the procedures that apply to conduct complaints;
- matters to bear in mind in responding to conduct complaints; and
- the procedures that apply to notification matters: the disclosure/ notification requirements introduced in April 2001 by the *Legal Profession Amendment (Notification) Regulation 2001*, requiring barristers to report to the Bar Council certain bankruptcy events and offences.

In respect of the first two issues particularly, the paper and this article draw heavily on an article by Jeremy Gormly SC, 'Conduct of complaints against barristers' which appeared in the Spring/Summer 1994 issue of *Bar News*. It was subsequently republished in the February 1998 edition of *Stop Press*.

Complaints procedure

The *Legal Profession Act 1987* ('Act') makes detailed provision for the handling of complaints: all complaints must be investigated or otherwise dealt with in accordance with the Act. The procedures under the Act mean that barristers are more likely to find themselves facing full, formal hearings to defend complaints than under the previous regime because of the 'reasonable likelihood' test in s155 of the Act.

Under the Act, the legal services commissioner[1] is the person to whom complaints about barristers are to be made. The Act requires the commissioner to assist complainants to formulate their complaints.

Any complaint made directly to the Bar Association is forwarded on to the commissioner. The commissioner then determines whether to investigate or attempt to mediate the complaint himself or whether to refer the complaint to the Bar Council for investigation or mediation. A copy of any complaint made by the Bar Council itself (pursuant to s134(2) of Act) must be forwarded to the commissioner under s135(3).

The Bar Council can and will act of its own accord if a professional conduct issue comes to its attention other than by the making of a complaint by a third party.

The Act does not require the legal services commissioner to notify the Bar Council of all complaints against barristers made to the commissioner and he does not in fact inform the Bar Council of all complaints against barristers he receives.

The commissioner has power to take over the Bar Council's investigation if he considers it appropriate. There is an ongoing obligation on the Bar Council to keep the commissioner informed about the progress of complaints referred to it for investigation.

The commissioner also has a wider public role in promoting community education and enhancing professional ethics and standards, and the Bar Council plays its own part in this.

Complaints referred to the Bar Council for investigation are distributed by the director, professional conduct (Anne Sinclair) to one of the four professional conduct committees (PCCs) of the Bar Council.

Nature and source of complaints

In recent years the 'source' of complaints has been (in order, from Bar Association 2003/04 figures[2]):

- clients and former clients (44 per cent of the complaints made in 2003/04)
- opposing clients (29 per cent of all complaints)
- the Bar Council (9 per cent of all complaints)

Looking at the *type* of complaints made over the last two financial years points to some common threads, in particular, failure to communicate:

Complaint type	2003/ 2004	2002/ 2003
Acting contrary to/failure to carry out instructions	3	4
Acting without instructions	0	1
Breach of s152 *Legal Profession Act 1987*	0	3
Breach of undertaking	0	1
Breach costs disclosure provisions Part 11 *Legal Profession Act 1987*	0	1
Breach of *Barristers' Rule* 35 (Clyne case)	3	0
Breach of *Barristers' Rule* 36 or 37	0	2
Breach of *Barristers' Rule* (other)	3	2
Breach of confidentiality	0	1
Conflict of interest	1	3
Conspiracy to pervert course of justice	1	2
Delay/failure to provide chamber work	2	3
Failure to adduce evidence available	1	0
Failure to advise properly or at all	4	1
Failure to appear	5	1
Failure to conduct a fair hearing	0	2
Failure to explain terms of settlement (properly or at all)	1	1
Other incompetence in legal practice	0	3
Misleading conduct/dishonesty	7	5

Other unethical conduct	12	3
Over zealous cross-examination (harranging a witness)	3	1
Overcharging and/or overservicing	3	4
Personal conduct	3	4
Practising without a practising certificate	0	5
Pressure to change plea/plead guilty	2	1
Rudeness/discourtesy	1	1
Total	**55**	**55**

Note that a failure to comply with provisions of the *Barristers' Rules* (whether or not the barrister is a member of the Bar Association) can amount to professional misconduct or unsatisfactory professional conduct: see s57D of the Act, which provides:

(1) *Barristers rules* are binding on barristers, solicitors rules are binding on solicitors and joint rules are binding on both barristers and solicitors.

(2) Any such rules are binding on legal practitioners acting as barristers or solicitors without a practising certificate as if those legal practitioners were barristers or solicitors.

(3) Any such rules are binding on barristers or solicitors even though they are not members of the Bar Association or the Law Society.

(4) Failure to comply with any such rules does not of itself amount to a breach of this Act. However, failure to comply is capable of being professional misconduct or unsatisfactory professional conduct.

Professional conduct committees

Those committees consist of about fifteen barristers of varying seniority, about six of whom are senior counsel, including the chair who is a member of the Bar Council. In 2004, every Bar councillor, except the president and the senior vice-president, is a member of a PCC. Each PCC also has two community members and a legal academic member. The community and academic members rank equally with the other members of the committee in the decision-making process. Academic and community members are now appointed for a term of two years. Community members are eligible for appointment for one further two year term, and at the discretion of the president, academic members may be appointed for further terms.

Each PCC meets regularly: in 2004, generally every three weeks. The PCCs investigate complaints, generally by obtaining information from the complainant, the barrister and any possible witnesses, who are usually instructing or opposing solicitors or other Counsel, perhaps interpreters and so on.

In a large number of complaints, the details provided by the complainant in the initial complaint are inadequate to enable either the PCC or the barrister to understand what is the conduct in respect of which the complaint is made. In such cases, further information in respect of the complaint will be sought before the barrister is asked to respond, although the barrister will in the interim have been advised that a complaint has been made.

Most professional indemnity policies require a barrister to notify his or her insurer on receipt of a complaint.

Gaps in the material available may be filled by obtaining transcripts, court or other relevant documents, or by requests for further information from the barrister or any other person.

It should be noted that under s152 of the Act, when investigating a complaint, the Bar Council has power to *require* a barrister or other legal practitioner to provide information and furnish documents necessary for the investigation of a conduct complaint.

Section 152 provides:

(1) For the purpose of investigating a complaint, a council or the commissioner may, by notice in writing served on any legal practitioner, require the legal practitioner to do any one or more of the following:

  (a) to provide written information, by a date specified in the notice, and to verify the information by statutory declaration,

  (b) to produce, at a time and place specified in the notice, any document (or a copy of any document) specified in the notice,

  (c) to otherwise assist in, or cooperate with, the investigation of the complaint in a specified manner.

  ...

(2) If a legal practitioner against whom a complaint is made claims a lien over documents relating to the matter the subject of the complaint, the council or the commissioner may require the legal practitioner to waive the lien if satisfied it is necessary for the orderly transaction of the client's business.

(3) A requirement under this section is to be notified in writing to the legal practitioner and is to specify a reasonable time for compliance.

(4) A legal practitioner who, without reasonable excuse, fails to comply with such a requirement is guilty of professional misconduct.

(5) A legal practitioner must not mislead or obstruct a council or the commissioner in the exercise of any function under this division. The wilful contravention of this subsection is capable of being professional misconduct.

A barrister or legal practitioner who fails to comply with a s152 notice, without reasonable cause, is guilty of professional misconduct under s152(4) of the Act. Barristers served with a notice pursuant to s152 of the Act to provide information should respond promptly: failure to comply with a s152 notice without reasonable cause can lead to the Bar Council making a further complaint against the barrister, which may ultimately be referred to the Administrative Decisions Tribunal[3], even if the original complaint investigated is dismissed or otherwise dealt with.

PCC reports

When sufficient material is available to form a preliminary view about the matter, one member of the committee prepares a draft report for discussion by the committee.

Before a report is finalised and a recommendation made to the Bar Council, the draft report which reflects the views of the committee is sent to the barrister for comment if it is adverse to the barrister. The barrister is given an opportunity to make submissions as to whether the conduct could amount to unsatisfactory professional conduct or professional misconduct (as the case may be) and, if yes, what determination the Bar Council should make under s155 of the Act[4].

The barrister's submissions are considered by the committee. The committee incorporates that consideration and any further discussion into one final report to the Bar Council reflecting all of material before the committee. The report almost invariably includes a recommendation to the Bar Council as to the resolutions it could make to deal with the matter. Conduct matters are treated with priority by the Bar Council.

Conduct complaints are usually the subject of considerable analysis by both the relevant PCC and then by the Bar Council. There can be extensive debate in either or both of the PCC and the Bar Council where there is not a clear view as to the appropriate course of action. Most matters, however, involve a reasonably clear course of action.

Mediation

Since 1 July 1994 the Bar Council and the commissioner have been able to refer complaints that are or involve consumer disputes to mediation. Participation is voluntary and anything said is confidential and cannot be used later. Mediations are a useful tool for resolving complaints which do not involve any real 'conduct' issues but where clients have felt aggrieved, for example by lack of involvement in the settlement process. Written apologies by barristers are becoming more frequent, and appropriate.

Related litigation

Quite frequently, something that becomes the subject of a professional conduct complaint may also be the subject of either civil or criminal proceedings. When that occurs, the investigation process by the Bar Council may cease until completion of the related litigation[5]. While each case is looked at individually, the Bar Council endeavours to ensure that its investigation and the results of conduct proceedings are not misused by litigants as a method of obtaining evidence in unfair circumstances. As noted, a barrister has a professional obligation to make admissions and provide a full and frank response to any complaint, whereas in a criminal matter there is a right to silence.

There can be extensive debate in either or both of the PCC and the Bar Council where there is not a clear view as to the appropriate course of action. Most matters, however, involve a reasonably clear course of action.

Options available to the Bar Council to deal with complaints

Having considered the matter, the Bar Council has a number of options available to it under s155 of the Act:

- to dismiss the complaint - sometimes a barrister may also be counselled with respect to the conduct the subject of the complaint – s155(4);
- to find that it is satisfied that there is a reasonable likelihood that the barrister will be found guilty by the Administrative Decisions Tribunal (Legal Services Division) of unsatisfactory professional conduct, but that a reprimand is sufficient – s155(3)(a);
- to find that it is satisfied that there is a reasonable likelihood that the barrister will be found guilty by the tribunal of unsatisfactory professional conduct, but that the complaint ought be dismissed as the Bar Council is satisfied that the barrister is generally competent and diligent and that no other material complaints have been made against the barrister: s155(3)(b); or
- to find that it is satisfied that there is a reasonable likelihood that the barrister will be found guilty of either unsatisfactory professional conduct or professional misconduct and refer the matter to the tribunal for hearing – s155(2)

'Unsatisfactory professional conduct' and 'professional misconduct' are defined in s127 of the Act which is set out below.

The Act no longer requires that the practitioner to be reprimanded give consent. A practitioner who does not consent to a reprimand decision may appeal to the tribunal against the decision: ss155(6), 171N of the Act[6]. Reprimands are delivered orally in chambers by the president. In considering the exercise of its discretion under s155(3)(a) or (b), the Bar Council has regard to prior adverse findings against the barrister.

Complainants have a right to seek a review by the commissioner of a decision by the Bar Council to reprimand or to dismiss the complaint. Where part of the complaint is dismissed and part is referred to the tribunal for hearing and determination, the complainant also has a right of review in respect of that part which was dismissed.

Tribunal hearing

Where a matter is too serious to be dealt with by way of a reprimand, the matter must be referred to the Administrative Decisions Tribunal (Legal Services Division). It hears matters of both unsatisfactory professional conduct and professional misconduct, defined in s127 of the Act as follows:

> (1) For the purposes of [Part 10], *professional misconduct* includes:
>
> (a) unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence, or
>
> (b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners, or
>
> (c) conduct that is declared to be professional misconduct by any provision of this Act, or
>
> (d) a contravention of a provision of this Act or the regulations, being a contravention that is declared by the regulations to be professional misconduct.
>
> (2) For the purposes of this Part:
>
> *unsatisfactory professional conduct includes conduct* (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.
>
> ...
>
> (4) For the avoidance of doubt, conduct:
>
> (a) involving an act or acts of bankruptcy, or
>
> (b) that gave rise to a finding of guilt of the commission of an indictable offence or a tax offence,
>
> whether occurring before, on or after the commencement of this subsection, is professional misconduct if the conduct would justify a finding that the legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners.

Publication of tribunal decisions

Hearings in relation to professional misconduct matters are held in public: s170 of the Act. Any decisions relating to unsatisfactory professional conduct (as opposed to professional misconduct) are heard in camera but are generally published on the making of an adverse finding against the barrister by the Tribunal.

Decisions of the Legal Services Division of the tribunal are linked on the professional conduct page of the Bar Association's web site

Appeal and review

An order or decision of the tribunal may be appealed to the Supreme Court: s171F of the Act[7]. The appeal is to be by way of rehearing, not a de novo hearing. Leave of the Supreme Court is required for an appeal in respect of an interlocutory decision, a decision made by consent and a decision as to costs.

Penalties

The tribunal may impose a wide range of penalties. Section 171C of the Act provides that if, after it has completed a hearing relating to a complaint against a barrister the tribunal is satisfied that the barrister is guilty of professional misconduct or unsatisfactory professional conduct, the tribunal may do any one or more of the following:

- (if guilty of professional misconduct) order that the name of the barrister be removed from the roll of legal practitioners: s171C(1)(a)
- order that the barrister's practising certificate be cancelled: s171C(1)(b)
- order that a practising certificate not be issued to the barrister until the end of the period specified in the order: s171C(1)(c)
- order that the barrister pay a fine specified in the order (not exceeding $50,000 if guilty of professional misconduct; not exceeding $5,000 if guilty of unsatisfactory professional conduct): s171C(1)(d)
- make an order publicly reprimanding the barrister or, if there are special circumstances, privately reprimand the barrister: s171C(1)(e)
- order that the barrister undertake and complete a course of further legal education specified in the order: s171C(1)(f)
- if applicable, make a compensation order: s171C(1)(h)
- order that the barrister pay the informant council's costs of the proceedings.

Responding to a complaint

Receiving notification from the Bar Association that a complaint has been made could never be pleasant. The experience of members of PCCs and the Bar Council has been that responses to complaints fall into two general categories. The first is a short uninformative, dismissive letter of denial as though the matter ought not be taken seriously (often expressed in intemperate language). The second is a lengthy response detailing a blow by blow history of the whole case but frequently failing to deal with the complaint in the process, which reflects the understandable distress of the barrister at being the subject of any complaint, whether justified or not.

Neither form of response is in the barrister's best interest given the nature of the Act and the duties it imposes on the Bar Council (and the legal services commissioner) to investigate complaints.

The dismissive response usually results in a protracted investigation as the PCC struggles to obtain a full factual picture and a full response from the barrister, which deals with the precise complaint. Flippant or ill-considered comments in the first response become part of the investigation file. This may ultimately become evidence before the tribunal. Further, it can prompt a second complaint by the complainant about the contents of the response.

The long and detailed response also prolongs investigation, but in a very different way: the barrister's response to a complaint will be sent to the complainant for comment. Although the barrister is informed by the Bar Association this will occur, it seems that not infrequently this is not always considered by a barrister when responding to a complaint.

Private or confidential correspondence cannot therefore be received in the course of investigation unless a real issue of legal professional privilege arises, or there is some other good reason of law.

In the nature of things, a long and detailed response from the barrister dealing with the whole history of the matter inevitably seems to provoke even longer comment from the complainant. Everything slows down as the issues are unravelled.

Responses to complaints often have to be written long after the brief was returned. Recollections of precisely what occurred will fade, particularly if the case was relatively small or insignificant (for the barrister in the course of practice, cf. the lay client).

Although the Act now sets a three year time limit for the making of complaints, under s137 of the Act the commissioner may accept a complaint after that three year time has expired if he believes that it is just and fair to do so, or if it is in the public interest to investigate or if the complaint involves professional misconduct. The Bar Council may similarly determine to accept its own complaint made after expiry of the three year time limit, after receiving submissions from the barrister as to whether it should do so.

An initial reply written without reference to the brief frequently contains unwitting inaccuracies which may be seized on by the complainant during the complaint process or emerge in a hearing before the tribunal. A 21 day time limit for a reply is usually fixed but if additional time is needed to respond, a further short time will usually be granted. However, the Bar Council does expect barristers to give priority to responding to conduct complaints. The policy of the Bar Council is to require a barrister to personally sign any correspondence responding to enquiries from the Professional Conduct Department or to co-sign correspondence if the barrister retains a solicitor.

Some guidelines for responding to a complaint are as follows:

- Consider whether your professional indemnity insurance policy requires you to put your insurer on notice of the complaint: most policies require notification on receipt of a complaint.
- Few people – including barristers – are capable of being fully objective about a personal or professional complaint. Advice may be available through the professional indemnity insurer's solicitors. Alternatively, approach another barrister (preferably a silk who is not a member of a professional conduct committee or council), or your own solicitor, with a copy of the complaint or other correspondence from the Professional Conduct Department and/or the legal services commissioner, and the draft reply. Most people will resist doing this, but no matter how embarrassing, it invariably produces a better response (at the very least toning down intemperate language).
- Responses are best if they are succinct, but they *must* deal with the factual circumstances of the complaint and provide a full answer.
- Isolate and address the complaints that have been made rather than give a full history of the whole case. If the complainant has provided no background to the case, or taken things out of context, some background may be necessary for an understanding of the issues raised.
- Although the process required by the Act is prosecutorial in nature, conduct proceedings are not criminal proceedings. Failure to provide a prompt, full and frank response may in itself amount to a breach of proper standards of professional conduct. A solicitor's failure to disclose was significant in the recent High Court decision of *A Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1 (2004) 78 ALJR 310.

Flippant or ill-considered comments in the first response become part of the investigation file. This may ultimately become evidence before the tribunal.

Notification provisions and Part 3 Division 1AA of the Act

The *Legal Profession Amendment (Notification) Regulation 2001* was gazetted on 9 March 2001 ('notification Regulation'). It applied to both barristers and solicitors. The changes introduced by the notification Regulation required legal practitioners to notify the relevant council of certain bankruptcy events and offences.

Some four months later, the Act was amended by the *Legal Profession Amendment (Disciplinary Provisions) Act 2001*. At the same time, there was further amendment to the Notification Regulation by the *Legal Profession Amendment (Disciplinary Provisions) Regulation 2001*. The amendments commenced on 27 July 2001. The extent of the obligation to notify was extended in some respects, and the councils were given further, 'special', powers to cancel or suspend practising certificates[8]. In *Bar Brief* No 85, July 2002, the president outlined the changes that had been made.

Part 3 Division 1AA (secs 38FA-38FJ) of the Act is headed 'Special powers in relation to practising certificates'.

The (new) *Legal Profession Regulation 2002* ('2002 Regulation') which commenced on 1 September 2002 has substantially the same notification provisions as the notification Regulation, albeit with significant renumbering. The continuing notification provisions are to be found in Part 13 of the 2002 Regulation. Part 2 deals with issue of practising certificates.

The obligation to notify certain bankruptcy events and findings of guilt of certain offences is now to be found in clauses 7, 133 and 134 of the 2002 Regulation. The 2002 Regulation also sets out when a notification should be made, and what the disclosure statement should address. Part 3 of the Act attaches particular consequences to the commission of an 'act of bankruptcy' and being found guilty of an 'indictable offence' or a 'tax offence'.

Obligation to notify offences and 'acts of bankruptcy'

Applying for a practising certificate

Clause 7 of the 2002 Regulation specifies the matters required to be included in an application for a practising certificate. Particular attention should be paid to cll 7(1)(g) and (h). Clause 7(1)(g) requires the nature of any offence of which the practitioner has been found guilty (other than an 'excluded offence' but including a 'tax offence') to be included in the application; and cl 7(1)(h) requires details of an 'act of bankruptcy' committed by the practitioner to be included.

It should be noted that clause 7(1)(g) applies to a finding of guilt of an offence *whether or not* the court proceeded to a conviction for the offence, and even if other persons are prohibited from disclosing the identity of the offender: cll 7(2)(b) and (d).

The obligation to notify certain bankruptcy events and findings of guilt of certain offences is now to be found in clauses 7, 133 and 134 of the 2002 Regulation.

Continuing obligation

Clause 133(1) of the 2002 Regulation provides that if a barrister is found guilty of any offence other than an 'excluded offence'9 (but including a 'tax offence'), the barrister must notify the Bar Council in writing of the finding and the nature of the offence and furnish such further information as the Bar Council requires relating to the finding or commission of the offence.

Clause 133(2) is in like terms to cl 7(2) regarding the obligation to notify applying to a finding of guilt of an offence whether or not the court proceeded to a conviction for the offence.

Clause 134(1) of the 2002 Regulation provides that a barrister who commits an 'act of bankruptcy' (as defined in s3(3) of the Act) must notify the Bar Council in writing of the details of the act of bankruptcy.

The notification must be made *within 7 days* of the finding of guilt or act of bankruptcy: cl 133(3), 134(2). Information previously disclosed in an application for a practising certificate or under clauses 133 or 134 does not have to be disclosed again: cl 133(4), 134(3).

Definitions

'Excluded offence' is defined in clause 3(1) of the Regulation. The effect of the definition is to impose a general obligation to notify a finding of guilt in respect of *all* offences other than offences under the road transport legislation (formerly, traffic offences) and parking offences, with specific exceptions for the following more serious driving matters, which are required to be notified:

- negligent driving where the barrister was sentenced to imprisonment or fined not less than $200
- furious or reckless driving
- failing to provide particulars
- unlicensed driving
- driving a speed or in a manner dangerous to the public etc

Note particularly that offences of driving with more than the prescribed concentration of alcohol are *not* excluded and *are* required to be disclosed: cl 3(1)(a)(v) and (vii); as are other offences where the barrister is disqualified *by court order* from holding a licence: cl 3(1)(a)(ix).

'Tax offence' is defined in s3(1) of the Act - it means any offence under the *Taxation Administration Act 1953* (TAA).

Part 3 of the Legal Profession Act 1987: acts of bankruptcy, indictable offences or tax offences

Section 38FB of the Act, in Part 3, requires that a legal practitioner applying for, or holder of, a practising certificate who has committed an 'act of bankruptcy' or has been found guilty of an 'indictable offence' or a 'tax offence' provide a written statement, in accordance with the regulations, showing why, despite the act of bankruptcy or finding of guilt and any circumstances surrounding the act or finding, the legal practitioner or barrister considers that he or she is a fit and proper person to hold a practising certificate. Again, this is whether or not the court proceeded to conviction for the offence: s38FB(7)(b) and (e)[10].

No fresh notification or determination is required where a written statement has previously been provided under s38FB or a determination made under s38FC[11].

Definitions

Section 3(3) defines 'act of bankruptcy' for the purposes of the Act:

> ... a person is taken to have committed an act of bankruptcy if the person:
>
> (a) is bankrupt or the subject of a creditor's petition presented to the court under s43 of the *Bankruptcy Act 1966* of the Commonwealth, or
>
> (b) has presented (as a debtor) a declaration to the official receiver under s54A of the *Bankruptcy Act 1966* of the Commonwealth of his or her intention to present a debtor's petition or presented (as a debtor) such a petition under s55 of that Act, or
>
> (c) has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit.

The significance of the definition including compounding with creditors is that a person who compounds under ss73 or 74 of the Bankruptcy Act and obtains the agreement of creditors to an annulment of his or her bankruptcy must *still* notify, because the 'annulment' does not affect the fact that the specified event occurred.

There is no definition of 'indictable offence' in the Act. However, s21(1) of the *Interpretation Act 1987* (NSW) – headed 'Meaning of commonly used words and expressions' – provides that 'indictable offence' means an offence for which proceedings may be taken on indictment, whether or not proceedings for the offence may also be taken otherwise than on indictment.

Time for notification and provision of written statements

Clause 135(2) provides that for the purposes of s38FB(3) a barrister must provide the written statement *within 14 days* of the 'appropriate date'. 'Appropriate date' here is defined by clause 135(3) as the (first) date on which the act of bankruptcy was committed or finding of guilt made. Clause 135(1) of the 2002 Regulation provides that for the purposes of s38FB(1) an applicant for a practising certificate must provide the written statement required within 14 days after making an application for a practising certificate.

Refusing to issue, cancelling or suspending practising certificates

Sections 38FC, 38FD and 38FE provide powers for the Bar Council to refuse to issue, cancel or suspend a practising certificate.

Section 38FC(1) provides that a council *must* refuse to issue, or must cancel or suspend a practising certificate if the council is aware that since being admitted as a legal practitioner an applicant for, or holder of, a practising certificate has committed an act of bankruptcy or been found guilty of an indictable offence or a tax offence *and* the council considers that act or offence was committed in circumstances that show that the applicant or holder is not a fit and proper person to hold practising certificate. Sub secs 38FC(3) and (4) deal with matters occurring very close to the date when practising certificates would ordinarily expire.

Under s38FE a council *may* refuse to issue or may cancel or suspend a practising certificate if the applicant or holder has:

- failed to provide a s38FB statement when required to do so under the section; or
- failed in the s38FB statement to show that he or she is a fit and proper person[12].

Further, s37(1)(a) of the Act provides that a council may refuse to issue, may cancel or may suspend a practising certificate if the applicant or holder is required by the council to explain specified conduct (whether or not related to practice as a barrister or solicitor) that the council considers may indicate that the applicant or holder is not a fit and proper person to hold a practising certificate and fails, within the period specified by the council, to give an explanation satisfactory to the council.

Failure to notify

A failure to notify can have quite serious consequences. Sections 38FB(2) and (4) provide that an applicant for a practising certificate or a barrister who fails to notify a matter as required by the regulations, where the failure is one declared by the regulations to be professional misconduct, must provide a written statement, in accordance with regulations, showing why despite the failure to notify the applicant or barrister is a fit and proper person to hold a practising certificate.

Under clause 136 of the 2002 Regulation, the statements required under secs 38FB(2) and (4) with respect to a failure

to notify a matter as required by the Regulation must be provided *within seven days* of the appropriate date: being either the date of the actual notification or the date of the s38FC notice given by the council.

If a council becomes aware that an applicant for or holder of a practising certificate has, since being admitted as a legal practitioner, committed an act of bankruptcy or been found guilty of an indictable offence or a tax offence, under s38FC(2) the council must, within 14 days, give notice in writing to the applicant or holder dealing with four matters:

- if the council has not received a statement under s38FB in relation to the incident, require the applicant or holder to make a statement in accordance with s38FB;
- inform the applicant or holder that a determination in relation to the matter is required to be made under s38FC;
- inform the applicant or holder of the 'relevant period' in relation to the determination of the matter and that the applicant or holder will be notified of any extension of the relevant period; and
- inform the applicant or holder of the effect of the automatic suspension provisions in s38FH in the event of the matter not being determined by the council or the commissioner within the relevant period.

'Relevant period' is defined in s38FA - three months commencing when (a) the notification is given, or (b) where no notification has been received by the time a s38FC(2) notice is sent, the date of issue of the notice under s38FC(2). It may be extended by the commissioner under s38FA(2) but such extension is limited to a further month.

Under s38FD a council may refuse to issue, cancel or suspend a practising certificate if:

- the applicant or holder has 'failed to notify a matter (being a failure declared by the regulations to be professional misconduct)'; and
- the council considers the failure occurred without reasonable cause.

...taking an overly technical view of what is or is not required to be notified, and not making a notification where there may be some doubt could well lead to further explanations being required.

Failures to notify declared to be professional misconduct

Clause 137(1) of the 2002 Regulation declares that failure to notify, without reasonable cause, information in relation to:

(a) a finding of guilt of the commission of an indictable offence or a tax offence as required by cl 7(1)(g);

(b) an act of bankruptcy as required by cl 7(1)(h);

(c) a finding of guilt of the commission of an indictable offence or a tax offence as required by cl 133 in the time and manner specified in that clause; or

(d) an act of bankruptcy as required by cl 134 in the time and manner specified in that clause, is professional misconduct.

A sub cl (2) was added on 2 April 2004, to provide that a failure to notify, without reasonable cause, information in relation to:

(a) a finding of guilt of the commission of an offence (not being an indictable offence or a tax offence) as required by cl 7(1)(g); or

(b) a finding of guilt of the commission of an offence (not being an indictable offence or a tax offence) as required by cl 133 in the time and manner specified in that clause.

is *capable of constituting* professional misconduct or unsatisfactory professional conduct:

Notices requiring production of documents or information

Section 38FI is analogous to s152 in Part 10 of the Act. The section gives power to a council or the commissioner to require a barrister to provide information, produce documents or otherwise assist in or co-operate with the investigation of a matter under Part 3 Division 1AA.

Part 10 complaints

If conduct issues arise in the course of investigation of a Part 3 notification matter, the Bar Council can make (and has in the past made) a Part 10 conduct complaint against the barrister. The Part 10 complaint is then in turn investigated by a PCC in the manner which has been described above.

Issues to note

Some matters should be noted:

Time limits

The time limits imposed by the Act for the Bar Council to make a determination with respect to a matter notified under Part 3 of the Act are very restrictive (see s38FC of the Act and the definition of 'relevant period'), and there is only a limited ability for the Bar Council to seek an extension, of a further month, from the legal services commissioner: s38FA(2).

Section 38FH effects an *automatic suspension* of a practising certificate where the Bar Council has been unable to determine a matter within the 'relevant period' as defined.

Accordingly, particular attention must be paid both to events which must be notified, and then to the information to be provided.

Because of the time limits and the effect of s38FH, it is in a barrister's own interests to provide a full s38FB statement with as much information as possible regarding the circumstances of the relevant matter when making a notification, and thereafter promptly to respond to any requests for further information, particularly any notice served under s38FI of the Act (which is to the same effect as s152 in relation to conduct complaints). The same comments made about responding to conduct complaints under Part 10 of the Act above apply to the content of 'show cause' statements required in relation to notification or disclosure matters.

Equally, given the duty to co-operate in relation to 'conduct' matters, taking an overly technical view of what is or is not required to be notified, and not making a notification where there may be some doubt could well lead to further explanations being required. Again, it is in a barrister's best interest to seek advice as to whether notification or disclosure may be required in respect of any offence, particularly where there may be some doubt as to whether and what sort of notification or disclosure is required.

Risk management strategies to consider: tax matters

– with a view to avoiding the possibility of having to notify a tax offence or act of bankruptcy involving the ATO:

- proper record keeping;
- employing an accountant or financial adviser;
- getting financial records to your accountant or financial adviser on time to enable prompt completion of tax returns (and being aware of when tax returns are due);
- making provision for payment of income tax and GST, by setting money aside - which may be by banking a percentage of gross receipts into a separate account;
- ensuring that any change of address (personal or business) is notified to your accountant or tax agent, or direct to the ATO, as appropriate;
- ensuring that your accountant or tax agent brings any notice served by the ATO to your attention by more than one means – preferably including some form of personal contact with you;
- giving priority to complying with any notice to file returns (and if necessary, seeking an extension of time before rather than after the due date).

Penalty notices and similar infringement notices

A legal practitioner or barrister is not obliged, pursuant to cll 7(1)(g) or 133 of the 2002 Regulation, to notify:

- the issue of a penalty notice, and payment of the 'fine' specified without electing to contest the matter in court; or
- the issue of an infringement notice as an alternative to prosecution, and payment of the penalty specified amount.

Similarly, the imposition by the ATO of an administrative penalty need not be notified pursuant to cll 7(1)(g) or 133 of the 2002 Regulation, nor is the Bar Council required to make a determination in respect of such a penalty pursuant to s38FC of the Act.

Equally, no question of potential professional misconduct or unsatisfactory professional conduct pursuant to cl 137(2) of the 2002 Regulation arises.

However, the Bar Council has recently published[13] a statement noting that matters which may not formally be required to be disclosed under cll 7(1)(g) and 133 of the 2002 Regulation could still affect a legal practitioner or barrister's good fame and character and fitness to remain legal practitioner, where the relevant conduct suggests an habitual or systematic disregard of legal and civic obligations. The Bar Council has stated that it:

> expects that a legal practitioner or barrister would disclose conduct which may affect good fame and character and fitness to remain legal practitioner, but for the avoidance of any doubt, advises that the accumulation in the preceding 12 months of 15 or more penalty units, or fines or penalties totalling $2,000 or more in respect of penalty or infringement notices or other forms of administrative penalty should be disclosed as a matter which could affect a legal practitioner or barrister's good fame and character and fitness to remain a legal practitioner.

Personal misconduct as 'professional misconduct'

Some of the more recent (and high-profile) decisions have concerned questions of personal conduct, and whether and when that will amount to 'professional misconduct'. It is not the purpose of this article to discuss these issues in any great detail, but as a matter of reference, the following decisions might be noted:

- *A Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1 (2004) 78 ALJR 310
- *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320
- *New South Wales Bar Association v Hamman* [1999] NSWCA 404
- *Bryson v New South Wales Bar Association* (LSD) [2003] NSWADTAP 29 (dismissing an appeal from *New South Wales Bar Association v Bryson* [2003] NSWADT 19)

Part 3 matters:

- *New South Wales Bar Association v Cummins* [2001] NSWCA 284 (2001) 52 NSWLR 279
- *NSW Bar Association v Somosi* [2001] NSWCA 285

- *Murphy v The Bar Association of New South Wales* [2002] NSWCA 138 (2002) 55 NSWLR 23 (the appeal of the Association from the decision of McClellan J in *Murphy v The Bar Association of New South Wales* [2001] NSWSC 1191)

1 The first legal services commissioner, Mr Steve Mark, was appointed on 1 July 1994.

2 The Bar Council's annual reports set out the statistics as to frequency of complaints and the nature of them.

3 A number of decisions of the tribunal available on the Bar Association's web site concern failure to respond to s152 notices, including *NSW Bar Association v Howen* [2003] NSWADT 117 and [2003] NSWADT 118

4 Frequently referred to as 'Murray compliance': *Murray v Legal Services Commissioner* (1999) 46 NSWLR 224

5 The principles relevant to whether or not an investigation should be delayed are discussed in *McMahon v Gould* (1982) 7 ACLR 202 at 206; *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26; *Edelsten v Investigating Committee* (1987) 14 ALD 22; *Carson v LSC* [2000] NSWCA 308 3 November 2000 at [274], [275]; and relevant provisions of the Act include sec 155, 171P, 171R and 171Q.

6 Following amendments made by the *Legal Profession Amendment Act 2004* which commenced on 15 August 2004.

7 A further amendment made by the *Legal Profession Amendment Act 2004*. Previously appeals lay to an appeal panel.

8 Inter alia by the insertion of s37 of the *Act*

9 The equivalent clause of the former Regulation was amended in 2001 to delete 'any indictable offence' and substitute 'any offence (other than an excluded offence)'.

10 In the same terms as cll 7(2)(b) and (d), and 133(2)(b) and (d) of the *Regulation*.

11 See ss 38FB(5), 38FC(7) (and Schedule 8, which set out transitional provisions) and cll 133(4) and 134(3) of the 2002 Regulation

12 The interrelationship between secs 38FC and 38FE was discussed in *Murphy v The Bar Association of New South Wales* [2002] NSWCA 138 (2002) 55 NSWLR 23

13 *Bar Brief* – edition No 116, p 8

2004 Tutors & Readers Dinner

By Keith Chapple SC

The Dockside Restaurant at Cockle Bay was the venue for the 2004 Tutors and Readers Dinner.

The guest of honour was well-known journalist and author David Marr. The speakers list included the president of the NSW Bar Association, Ian Harrison SC and Philip Carr who spoke on behalf of the readers.

The evening was noteworthy for its good humour, good food and conviviality.

The president offered the readers some tips and advice to assist them in their time ahead at the Bar and illustrated a number of the points he was making with reminiscences of earlier cases in which he had appeared.

In one of the highlights of the night he gave a sensitive reading of the transcript of the arraignment on assault charges of an unrepresented accused in the Adelaide Central Criminal Court, a feat very rarely attempted in public. The prisoner appeared to suffer from a form of Tourette's syndrome and the presiding judge continually chastised him for what he described as his 'torrent of language'. The president's ability to complete the reading was a triumph.

Philip Carr had a difficult job in such illustrious company. He made a number of short but significant points about his experiences with his tutors. There was much sympathy for him at our table for his travails.

In a shock development the guest of honour revealed that in the mid 1970s he had become a member of the non-practising Bar of New South Wales. Apart from all his other accolades, he was prepared to admit he was really one of us. How this status helped him cope with the tribulations of journalism, broadcasting and Pauline Hanson, endeared him to everybody in the room. David was also able to offer some insight into the 'Cash for Comment' proceedings and some advice on dealing with the media before he left the stage in a glow of goodwill.

My readers enjoyed the event enormously. I hope next year's function can reach the same heights.

Four out of five stars from me for this one, Margaret!

Guest of Honour David Marr

President Ian Harrison and David Marr

L to R: Richard Wilson, Keith Chapple SC and Lucy McCallum

Bench & Bar Dinner 2004

The Bench and Bar Dinner was held on Friday, 14 May 2004 at the Westin Sydney.

The Guest of Honour was R P Meagher QC, Madame Senior was Christine Adamson SC and Mr Junior was Garry McGrath.

President Ian Harrison SC

Mr Junior, Garry McGrath

Back row, L to R: Karena Viglianti, Kate Guilfoyle, Jeremy Morris, Susan Phillips, Michael Green, Bede Kelleher.
Front row, L to R: Christopher Norton, Jane Needham, Peter Taylor SC, Mark Sneddon.

The Guest of Honour, R P Meagher QC

L to R: Ross Hanrahan, Garry Walsh, Michael Elkaim SC, Phillip Perry, Dennis Benson.

L to R: James Loxton, David Godwin, John Levingston, Andrew Gee

Madame Senior, Christine Adamson SC and Attorney General Bob Debus

Jennifer Stuckey-Clarke and Tina Jowett

L to R: Josephine Kelly, Mark Robinson, Jodi Steele, Mark Dempsey

Senator Helen Coonan and Senior Vice-President Michael Slattery QC

Edmund Barton Chambers celebrates its silver jubilee

By Philippe Gray-Grzeszkiewicz

In 1979, Edward St John QC, barrister and member of the House of Representatives, collected some barristers together and formed the first set of chambers off Phillip Street. Those barristers took the name of Australia's first prime minister, and became known as Edmund Barton Chambers. Legal quidnuncs predicted it wouldn't last.

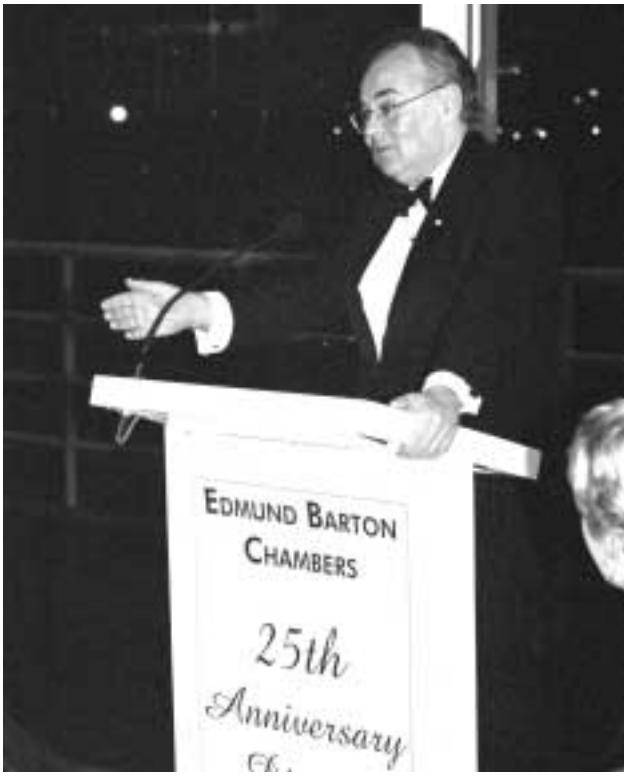
Twenty-five years later, on 9 October 2004, Edmund Barton Chambers celebrated its silver jubilee. In terms of years, Edmund Barton Chambers is a relatively young organisation, but since beginning it has produced two attorneys-general, 10 judges, and many silks.

Past members and politicians Peter Collins QC (former opposition leader) and Kevin Rozzoli (former speaker) of the NSW Legislative Assembly attended. The late Greg Sullivan QC (former solicitor general for NSW) was fondly remembered in speeches. In keeping with the political flavour of chambers, Prime Minister John Howard was kind enough to call an election for the night.

A thriving set of almost 50 current members gathered for a dinner dance at the Maritime Museum in Darling Harbour. Along with their partners, also in attendance were past members, including Justice John Dowd, Judge James Black QC, Acting Judge Phillip Twigg QC, Rod Craigie QC and Robert Lethbridge SC to name but a few. Members of the Bar Association executive, including President Ian Harrison SC, Senior Vice-President Michael Slattery SC and Junior Vice-President Anna Katzman SC, attended with their spouses. Gordon Salier, president of the Law Society, and his wife were among several solicitors joining the celebrations.

Pre-dinner drinks on board HMAS *Vampire* preceded speeches. Mark Stevens, chairman of chambers, gave a brief history of chambers. In choosing to honour Edmund Barton by the adoption of his name for these chambers, it was the hope of the founders that his ideals of fairness, his generosity of spirit, his love of classics, of cricket, of good fellowship and, above all, his remembrance at the Bar as being always most courteous and helpful to younger barristers will be perpetuated by all who practice within those walls.

The Beatniks entertain the guests



Chief Justice Spigelman AC addresses the gathering to celebrate the 25th anniversary of Edmund Barton Chambers.

Ian Harrison SC spoke about the importance of vibrant chambers in these uncertain times. Conspicuously absent was any mention of the success by the chambers cricket team against 11th Floor Selborne, or the extensive collection of original Don Bradman memorabilia jealously guarded but on display in chambers.

Malcolm Broun OAM QC, a founding member of chambers, told some very amusing anecdotes of the last 25 years, including one of the late Patrick Lanigan, a member of the floor, and upon whom it is rumoured Barry Humphries has modelled the character Sir Les Patterson.

The chief justice of New South Wales, the Hon Justice JJ Spigelman AC, spoke of the integrity of Edward St John, and the lasting effect that has had on the legal community, and made some interesting suggestions as to what opportunities China held for Australian advocates over the next 25 years.

Regrettably, Sir Lawrence Street, who opened chambers, was unable to attend at the last moment, but will be the guest later in the year at another function.

After speeches, guests were transported back a little more than 25 years to the sounds of McCartney & Lennon courtesy of the talented *Beatniks*, and Edmund Barton Chambers further cemented its reputation of throwing the best parties in town. Bookings have already been taken for the golden jubilee.

The Hon Justice Richard White

In the winter edition of this journal a report of a cricket match between the silks and juniors, included the following:

Peter Naughtin, a veteran of NSW Bar cricket showed contempt for the attack until he was dismissed by Morrison to an outfield catch by White SC (as he then was) which surprised everyone.

What might '*surprise everyone*' is that the author and the catcher were one and the same - White SC (as he then was). Have you heard about 'The Catch'? If not, you cannot have had a conversation, even a short conversation, with Richard White since The Catch was taken.

Justice White has, on numerous occasions, described The Catch as 'a classical outfield catch' involving 'a 25 metre sprint' (although, to be fair, this sometimes can extend to 40 metres) culminating in 'a full-length dive' and secured 'one-handed, the body only inches from the ground'. Of course, The Catch was taken 'in diminishing light' and 'at a crucial moment in the game'.

The greatness of The Catch has been independently confirmed by Francis Douglas QC who described it as 'a wonderful catch; very similar to one I took a few years ago' – surely there can be no praise higher than that.

Now while Justice White may even border on immodest in respect of The Catch, what makes that quite strange is that you would never hear him mention anything about his achievements in 'The Law'. The achievements of which he never speaks include the following:

- in 1977 he graduated from Sydney University Law School with first class honours and the University Medal. As was the custom, he then spent a year as associate to Sir Nigel Bowen, chief justice of the Federal Court of Australia;
- in 1979 he was employed as a solicitor by Stephen Jaques & Stephen and was made a partner in 1982 – that is, after only three years;
- in 1986 he was admitted to the Bar, taking silk in 1998 – that is, after only 12 years;
- while at the Bar his Honour practiced from Seven Wentworth, mainly in commercial law and equity, with a speciality in trade practices. He appeared in many of the great cases. At the time of his appointment he had emerged as one of the leaders of the Bar.

Yet of these remarkable achievements his Honour is almost dismissive. No doubt because, unlike The Catch, they came so easily to him.

Despite his achievements his Honour is a naturally private man, quiet but dryly humorous. He is a modest man, but with no reason to be modest. Although his words are few, they counted. He is an intellectual lawyer, a clear thinker with a clipped and precise way of conveying his thoughts. When he has a view about a matter, he is able easily to convey, with a smile, a feeling that you should not argue with him. In fact, there is always a hint of something a little intimidating about his manner – perhaps his quietude. And despite the self-effacement there was always plenty of steel: he was the scourge of the actuarial profession.

His Honour does not stand on ceremony, but he is a polite and formal person. Perhaps this partly explains why, while his Honour was appearing as counsel assisting in the HIH Royal Commission, the press described him as 'patrician'. His Honour did not like that. He did not want (or need) the attention and his natural modesty made him embarrassed about being called 'patrician'. Because of his obvious embarrassment, those who knew his Honour called him 'The Patrician' on every occasion they could. His Honour stood up to this ragging well; with a forced smile, some polite forbearance and considerable patience – you might think, an entirely patrician response.

What can we expect from Justice White? We would bet on the following: His Honour will conduct a court where the rule of law will reign supreme. It will not be a court absent of compassion, but compassion will not get in the way of the law. Timetables will be observed. The Evidence Act will be well-thumbed. Short adjournments will be accommodated during test matches. It will be a court where counsel who are under-prepared, or who like to run hairy points 'just to see how it flies', will be made to feel most unwelcome. And woe betide those guilty of fusion fallacies – his Honour is a classicist who learned his law articled to W M C Gummow. By the end of his judicial career (and he has plenty of time) he will have established himself as one of our great judges.

The Hon Justice Cliff Hoeben AM RFD

Cliff Hoeben AM SC RFD was sworn in as a judge of the Supreme Court on 16 August 2004 to universal acclaim. As the chief justice said on that occasion, 'your appointment comes about after a long and distinguished career at the highest levels of the Bar and a significant element of community service in various areas of activities, particularly in the military.'

His Honour matriculated from Riverview as dux of the school in 1964, and then graduated from Sydney University with a Bachelor of Arts degree with first-class honours in ancient Greek and Latin in 1968 and a Bachelor of Laws degree with honours in 1972. He was later awarded a Master of Laws degree from Sydney with honours in 1984.

He has had a very distinguished career not merely in the day to day practice of the law but also in terms of his public service. He was a member of the New South Wales Bar Council from 1991 to 1995. In terms of military service, he enlisted in the Sydney University Regiment in January 1965 and earned a commission in May 1967. He rose to the rank of major-general, commander of the Second Division, Australian Army Reserve and was awarded the Sword of Honour in qualifying for promotion to lieutenant-colonel. From 1993 to 1997, he was the commander of the 8th Brigade, and in charge of deployment of reservists to East Timor and of the army security for the 2000 Olympics in Sydney. He richly deserved his award of an AM in the military division.

Speaking at his swearing in ceremony, Ian Harrison SC said:

> You have had a wide and successful practice from [1976] until approximately 12.30pm last Friday. Your areas of practice revolved predominantly around medical and professional negligence and personal injury litigation. Your interests and skills, however, extended your practice into areas much wider than that. I seem to recall my first case against you many years ago was a Family Provision Act matter in the Equity Division. I remember being very confused when you kept asking me whether or not 'owner/driver' was admitted.
>
> You are known as a prodigious worker. You have for years churned out detailed and readable advices in a timely way for almost every insurance company or plaintiff's solicitor in New South Wales. You are the only man or woman I have ever met who understood and could explain s151Z of the Workers Compensation Act.
>
> You had an extensive appellate practice, more particularly so in recent years. You were well regarded in that year for your no-nonsense advocacy and commonsense approach. The eleventh floor has been the beneficiary of a series of briefs in unheard appeals which your Honour's appointment forced you reluctantly to relinquish. It would have to be said that your Honour had a reputation as a man who formed a very close relationship with any brief that came into your room. The biggest obstacle in getting you here today was to convince you to loosen your vice-like grip on anything which looked vaguely likely to produce a fee note. Your Honour has a reputation for financial prudence, something which the Scots describe as 'canny'. I have heard members of the eleventh floor use other words as well. Bartley SC wondered this morning how many other swearings-in your Honour was attending today.
>
> Army life has strongly influenced you for the whole of your adult life. As far as I am aware, even to this day, you still get your hair cut by an army barber. But then I probably should have mentioned that under the heading 'canny'. Your daughter told me that your army career even influenced the way you spoke. She reminded me that one time you were travelling in Europe with her, in France, and she asked you what a *bidet* was and you had no hesitation in telling her that it was two days before D-day.
>
> For a long time your Honour wore a moustache. This was generally thought to be the reason for your popularity amongst Greek solicitors. You shaved it when it started to turn white. A white moustache would immediately have qualified you for appointment to the District Court.

The Hon Justice Diana Bryant

On 28 July 2004 Diana Bryant QC was sworn in as only the third chief justice of the Family Court of Australia since its inception in 1976.

Her Honour was most recently the inaugural chief federal magistrate having served in that capacity from May 2000 and guided the Federal Magistrates Court from inception to the growing force in the legal landscape that it is today.

Ian Harrison SC spoke on behalf of the independent referral bars of Australia in welcoming her Honour on her appointment, commenting that:

> The members of the Australian legal profession, and more importantly those they represent, can have complete faith and confidence in your Honour's ability to dispense true justice to people whose lives are by definition in a state of painful turmoil and whose ability to discriminate between their own understandable prejudices and a wise judgment is in most cases significantly impaired.

Her Honour was born in Perth, a third generation lawyer, and educated in Melbourne. Her Honour initially graduated from the University of Melbourne in 1969 and returned to complete a masters degree in law in 1999. Following admission as a legal practitioner in 1970, her Honour practised as a solicitor in Victoria before joining the Perth partnership of Phillips Fox in 1977 where roles as both solicitor and counsel were pursued. In 1990 her Honour returned to Victoria and commenced at the Bar reading with Michael Watt QC (now Justice Watt of the Family Court of Australia). In 1997 her Honour was appointed Queen's Counsel.

Whilst her Honour's practice was predominantly in the areas of family law and de facto relationships, appearances in bankruptcy, human rights and equal opportunity were not uncommon. In addition, her Honour made a significant contribution to the broader legal community holding positions as president of the Family Law Practitioner's Association of Western Australia, vice-chair of the Victorian Family Law Bar Association, executive member of the Family Law Section of the Law Council of Australia, a commissioner of the Legal Aid Commission of Western Australia, and as a director of Victoria Legal Aid. Her Honour was also a director of Australian Airlines.

If not self-evident from the preceding outline, her Honour has a considerable breadth and depth of experience in the family law jurisdiction, having regularly appeared in the Family Court of Australia and High Court of Australia in proceedings of significance including *Re K* which defines the proceedings in which children are to be represented before the court, *AMS v AIF* which is the leading authority concerning the relocation of children and the well-publicised matter of *Gillespie v Bahrin* (1993) FLC 92-388.

The appointment of her Honour was greeted with universal acclaim and commended highly by those practising in the area of family law. In concluding, Harrison SC noted the lack of comment made as to her Honour's gender following upon announcement of the appointment as follows:

> Appointments such as the appointment of your Honour serve to entrench in the minds of all right-thinking people in this country that merit and excellence are gender neutral.

Bar News welcomes her Honour to the bench.

The Hon Justice Frances Backman

On 19 August 2004 the Industrial Relations Commission of New South Wales formally welcomed its most recent appointment, the Honourable Justice Frances Backman, previously of H B Higgins Chambers, Jack Shand Chambers and the Commonwealth DPP.

After her Honour took the judicial oath of office, the attorney general, on behalf of the Bar, congratulated Justice Backman upon her appointment and said:

> Your Honour today joins a court rich in history, a court which recently celebrated its centenary. The commission is a most august institution, close to the heart of the Labor movement and responsible for a careful and sensible approach to dispute resolution, the diligent adjudication of unfair dismissal proceedings and the determination of workplace safety breaches.

The attorney general went on to summarise Justice Backman's career in these words:

> In 1990 you were admitted as a barrister in New South Wales. From late 1990 until mid-1995 you worked as in-house counsel / crown prosecutor for the Commonwealth director of public prosecutions. In this role you practised in many areas of Commonwealth criminal law including copyright, trade practices prosecutions, extradition hearings, validity of search warrant hearings in the Federal Court and Customs Act prosecutions.
>
> In July 1995 you commenced practice as a barrister at the private Bar. During your career at the Bar your Honour obtained a broad range of experience. You practised in administrative law, civil and human rights and discrimination law, criminal law, industrial and employment law amongst others. You appeared for both the Crown and the accused in the area of Commonwealth criminal law.
>
> You have practised extensively in the Federal Court, appearing primarily for the government in immigration matters.
>
> When your Honour moved your practice to HB Higgins Chambers in late 1996 you began practising in the area of occupational health and safety law. You have continued to practise consistently in that area.
>
> During your time in practice you have also worked as counsel assisting coronial inquests, including the inquest into the death of a young girl at the Big Day Out concert in 2001. In 2002 you were counsel assisting the ICAC inquiry into alleged solicitation of bribes from public housing applicants.
>
> You have influenced many members of Sydney's legal community during your career. You have acted as a mentor for many junior solicitors and barristers. I am told that, in particular, you have provided invaluable guidance and assistance to female practitioners who have wished to go to the Bar.
>
> Your Honour brings sophisticated tastes which can only enhance the quality of the commission's social functions. That would not be hard, I should think. I am told that you drink only Moet or strawberry daiquiris. Your Honour, nevertheless, has impressive experiences and strong knowledge of the law and it is certain that you will make a valuable addition to the Industrial Relations Commission.
>
> I am sure that your career with the commission will be as successful and fulfilling as your career at the Bar and at the Commonwealth director of public prosecution's office. I offer you best wishes on your appointment and congratulate you on what I am sure will be your continued success.

In introducing Justice Backman, the Justice Wright said:

> Your Honour's appointment has been warmly received: your Honour brings impressive legal and personal skills and also great energy to your new role.
>
> Your Honour's appointment is a reflection of the increasing and established importance of the commission's work in the field of occupational health and safety and its criminal jurisdiction in that area. Your Honour has demonstrated outstanding legal skills and scholarship. Your experience in the criminal law transcends that of many judges when appointed to other superior courts in New South Wales when they first preside in criminal trials and criminal appeals. A warm welcome.

Justice Backman thanked all those who attended. She spoke of her life, including her arrival in Sweden in 1977 with her future husband, who, as a Swede was promptly conscripted, resulting in Justice Backman having to spend the next three years half a degree below the Arctic Circle.

Justice Backman recalled fondly her time with the Commonwealth DPP initially as a solicitor and then as one of the first in-house counsel. Justice Backman then spoke of her more recent practice at the private bar, including as counsel assisting in coronial inquests.

Her Honour concluded by speaking of her work before the Industrial Relations Commission:

> Since I have been appearing before the commission in court session I have seen occupational health and safety

law gaining more and more importance and prominence as a direct result of the body of jurisprudence which has been evolving and developing at a rapid pace in the court.

One only has to look, for example, at the *Industrial Reports* for the last few years and compare the number of reported decisions under the occupational health and safety legislation with earlier *Reports* to gain an indication of how extensive this area of law is and how rapidly it has expanded.

Important and significant developments in judgments of the court have occurred as a result of the interpretation and application by the judges of statutory provisions relating to the duties and obligations of all employers towards workers as well as members of the public.

The application of these duties and obligations to non-traditional employment arrangements such as labour hire companies' responsibilities towards workers sent to foreign work sites has been recognised in a now significant body of case law, having its genesis in the *Drake Personnel* and *Swift Placements* decisions, and most recently in *Inspector Piggott v CSR Emoleum Services*.

There is now a substantial body of case law on the statutory interpretation of the former section 53 defences under the 1983 Act. A relatively recent example is the full bench decision in *Inspector Patton v Fletcher Constructions*. Now, decisions of the full bench of the court provide valuable guidance to all practitioners in this important area.

I am honoured and pleased to join the commission, an institution with a fine history of carrying out important work and to which I hope I can make some contribution.

The Hon Justice John Ellis

The following is an edited version of a speech delivered by Ian Harrison SC at a ceremony marking the retirement of the Hon Justice John Ellis of the Family Court on 16 August 2004.

It is with great pleasure that I speak on behalf of the Australian Bar Association and the New South Wales Bar Association to farewell your Honour on the occasion of your retirement from this Bench.

My pleasure is, however, tinged with trepidation of the prospect of honouring, in such a short period of time, a judge who has been the keystone in the arch of this court since its inception in 1976. The longevity of your service is matched only by your contribution to family law. Many of the principles enunciated in your judgments have become hallmarks of practice in this court and are cited and applied by practitioners on a daily basis.

Your Honour was born – as opposed to Justice Nicholson, who was quarried – in Dubbo on 23 August 1934. Your family later moved to Wollongong and you attended Scots College, before studying law at the University of Sydney in 1952. You were articled with Adrian Garling for three years and for a further two years at Abbott Tout Greer and Wilkinson.

You were admitted as a solicitor in 1957. One year later you were called to the Bar. There you remained until 1967, when your Honour moved to Canberra.

Your Honour was indeed a prolific writer of judgments, and it is through those that you have spoken. Reported judgments written by you, in whole or in part are too numerous to count accurately. There are at least 168 judgments in the *Family Law Reports* alone. Some that stand out include *Black v Kellner*, which related to full and frank disclosure and the adverse inferences that are made from a failure to do so. Another was *Davidson v Davidson*, which related to discretionary trusts and the powers of this court to set aside transactions. Your judgment at first instance was upheld on appeal.

Other well known judgments include *Cilento*, *De Lewinski*, *Flannagan*, *Figgins* and *B v B*. But perhaps your most notable recent decision was Bachtiari; in which the full court claimed jurisdiction over children in immigration detention centres. In that appeal you were the dissenting judge, but your opinion was upheld in the High Court.

Your Honour will be missed by this court. There is widespread praise among your judicial brethren and beyond for the manner in which you readily and generously spared the time to give recent appointees the benefit of your enormous experience. There is also a sense of gratitude for what some have called your 'proper appellate practice': that is, the presumption that the judge in first instance should be supported.

Complementing your Honour's long standing list of noteworthy cases is your reputation for quickly grasping the facts of the matter and effectively managing the case. All those I have spoken to noted your Honour's adherence to procedure and legal principle.

Your Honour had a reputation, no doubt confined to counsel who were unprepared, for being somewhat formidable. One practitioner described his appearance before you as being 'a near death experience'. I told him it could have been worse. Perhaps it is not altogether surprising that in a survey by the *Justinian* in June 1995, your Honour was listed as being among the best judges in the country. Regrettably, my only appearances before you have been ceremonial.

On behalf of the Australian Bar Association may I wish your Honour well in your retirement. I trust that you and your family enjoy the next stage of your life.

His Honour Judge Peter J Johns

The following speech was delivered on behalf of the Bar by Anna Katzmann SC at the ceremony marking the retirement of Judge Johns of the Dust Diseases Tribunal.

Kastellorizo is the most easterly island of Greece. It is where Europe ends and Asia begins. It was ruled by the Turks for nearly 400 years. It was then ceded to Italy until Italy surrendered to the allies in 1943 and British commandos evacuated the entire population to Egypt, ostensibly to protect them from German air attacks. Most of them did not return, (no doubt at least in part because the troops who were there to protect them ransacked their houses) but accepted an offer to emigrate to Australia. Your Honour was *not* one of them. Your Honour's family had the foresight to come here a lot earlier.

I have mixed feelings about this event.

On the one hand I am honoured to have been asked to speak on behalf of the Bar. It gives me particular pleasure, having have run the odd case before your Honour in the Compensation Court and the DDT over the last fourteen years. On the other hand, I, like all my colleagues here, am sad to see your Honour leave. Your Honour is universally known as a kind and decent man, a truly Christian man, who practices what he preaches.

Your Honour leaves the bench to spend more time with your adored family, to ski, to travel and to pursue further studies.

It is, of course, very difficult to understand why your Honour would choose to leave a job which frequently requires taking evidence from dying people, many of whom are struggling to control intractable pain, in their homes, often day and night, and deciding the fate of their cases which, if they were to lose, could result in the impoverishment of their loved ones. It is difficult to imagine why your Honour would choose international travel, skiing or contemplative study in preference to a life such as this.

When your Honour was sworn in as a judge of the Compensation Court in 1990 the tributes were glowing. Murray Tobias, as his Honour then was, spoke on behalf of the Bar. He spoke, not only of your Honour's intelligence, but also of your Honour's essential humanity, courtesy, sensitivity and gentle and caring disposition. These qualities have stood your Honour in good stead as a judge of the Compensation Court and of the Dust Diseases Tribunal and have eased the way for both litigants and practitioners in often stressful circumstances.

Your Honour exhibited a compassion for the injured and the sick but, at the same time, did not shirk from making the hard decisions.

Your Honour is one of that band of misguided souls who support the South Sydney rugby league side. I am informed that, you boasted at one time of having one red and one green eye but I have seen no evidence that your Honour's judgments were similarly coloured.

I have also been told that your Honour became ill tempered at times during the running of cases. Although that is readily understandable I, for one, never witnessed it and have trouble accepting it, for I know that I tried your Honour's patience more than once and I vividly remember an occasion when I lost my temper and your Honour completely disarmed me, with a charming, self effacing remark, bringing me quickly to my senses.

Your Honour has made a substantial contribution to the work of the tribunal, a unique and remarkable institution and one of which the state government is justly proud.

On the tribunal your Honour has had to deal with a wide variety of cases, not merely the traditional dust diseases of asbestosis and silicosis but also other dust diseases like cryptogenic fibrosing alveolitis, a disease caused by exposure to dust from the faecal deposits of pigeons and other birds (at least that was our case and your Honour quite rightly accepted that to be so). Your Honour has also had to decide at least one constitutional issue, the wisdom of which decision no one called into question. Your Honour has been to the High Court once and the Court of Appeal twice in the one case, contributing to your Honour's considerable store of knowledge not only of the relevant law but also the medicine in the area of pulmonary fibroses, particularly silicosis. And a decision of your Honour's on the effect of a settlement against a concurrent tortfeasor (*Boyle v SRA* (1997) 14 NSWCCR 374) has even been cited with approval by the House of Lords. For those interested the reference is *Jameson v Central Electricity Generating Board* [2000]1 AC 455. Few New South Wales judges have that distinction.

Your Honour leaves the Bench, not to return to the Bar, as is the fashion amongst some retiring judges, but to spend more time in the bosom of a close and loving family and, in the short term, at least, to travel to the ski fields of the Dolomites. An unkind observer might describe this move as leaving the pissed for the piste.

By all accounts the pace of life in Kastellorizo is a lot slower. I hope that you and Val get to spend some quality time there in the near future.

Balzac said 'The more one judges, the less one loves.' So I wish your Honour good loving and for my own part, and on behalf of the Bar of New South Wales, I also wish your Honour good health and much happiness for the future.

The boulevardier

By Justin Gleeson SC

Earlier this year an eerie calm descended over Phillip Street. Coffee shops were strangely silent during the usual morning rush hour. Female solicitors reported they were attending conferences in court without undue male charm and attention. Young CJ in Eq was puzzled that the Equity Division was churning through double its normal workload. He could only put it down to the surprising circumstance that both counsel were now usually present when the matter was called on. The Federal Court found in its bankruptcy list that desperate debtors with novel defences based on the fusion of Roman law with modern insolvency law were increasingly running them in person. What was the explanation for this strange set of circumstances?

Early in the year the answer seemed to be that Lee Aitken had left the Bar, and possibly the legal profession, for good. Rumours abounded. Was it the ever increasing strain of producing more articles on Bullfry QC without being entirely self-referential? Had Aitken taken up practice at the London Bar? Had he decided instead that the answer to life lay in practice as a US attorney conducting class actions against negligent banks? Had he, like his hero Ovid, simply been banished into exile?

Gradually reports filtered through that he had not truly disappeared. He was seen lunching with Heydon J at The Barracks, developing a sophisticated and intense legal proposition which had the interest, if not the acceptance, of Heydon. Coffee sales began to return to normal levels. Pace in the Equity Division slowed. Coles QC began complaining that it was back to the bad old days when he would have to wait patiently in court while his opponent was detained elsewhere.

Lee Aitken: Blood pressure now below 200

The truth then emerged: Aitken had managed to secure a full-time position at the University of Sydney as an associate professor, teaching in the areas of real property and litigation and pursuing further his academic interests in equity and trusts, insolvency and federal jurisdiction. Clearly a life-transforming experience had occurred. His blood pressure had been reduced below 200. Alcohol was now treated with disdain. The University of Sydney web site described him as follows: 'married with three daughters, Lee enjoys reading and dozing'.

Notwithstanding this fulltime academic appointment, Lee has continued to practice at the Bar. He churns out many advices in his favourite areas of equity, banking and insolvency. He is appearing in shorter cases in the Equity Division, the Federal Court and sometimes interstate courts, consistent with his conscientious attention to the needs of his students. For the time being at least he has avoided turning into Bullfry QC.

John Alfred Crumpton (1926 - 2004)

An edited version of the eulogy delivered by Ian Cullen at the chapel of St Ignatius College, Riverview, on Friday 30 July 2004

John Alfred Crumpton was born on 15 May 1926. He enjoyed the privilege of attending St Ignatius College on a scholarship, wherein he not only absorbed sufficient knowledge to obtain his Leaving Certificate with marks adequate to enrol in the Faculty of Law at Sydney University, but also developed a love of the school, which he retained throughout his life. He enlisted in the army but the war ended before he could see active service.

He graduated from the University of Sydney in 1950 with an LLB and was admitted as an attorney, solicitor and proctor of the Supreme Court of NSW on 27 October 1950. Soon after he took off and worked in England and in Canada. He was called to the Bar on 6 May 1955 and practised as a crown prosecutor for a few years.

He joined the 3rd Floor Wentworth Chambers in about 1960 and began to build up a wide ranging practice in many and diverse areas of the law. The floor was one that developed into a judicial nursery producing such distinguished jurists as Justice Slattery, Justice Mahoney, Justice Ash, Justice Rath, Judge Thorley, Judge Robson, Judge George Smith and later Justice Gibson and Justice Rourke of the Family Court.

He obtained his Master of Laws degree in 1969. He went to Canada and America, working in Portland Oregon but America wasn't ready for him and neither were Dianna, Tim and Rosemary ready for it.

Although we all think of John as one who practised primarily in the common law jurisdiction, over the years his practice ranged far and wide. In a case which bears his name – *Crumpton v Morrine Hall Pty Ltd* – in 1965, he was junior counsel for the plaintiff, led by Dennis Mahoney QC, then also of the Third Floor, and subsequently a judge of appeal and president of the Court of Appeal – against WP Deane – later a High Court justice and governor-general – and Brian Beaumont – now a judge of the Federal Court – in a case about the rights of the holders of shares in home unit companies. John's client succeeded and the case to this day remains a leading authority on minority rights in corporations. It is still frequently recited in argument and judgments.

In *Churton v Christian*, in 1988, he was leading counsel for the respondent in the Court of Appeal; leading Rick Seton, then of the Third Floor and now himself senior counsel, in one of the first cases to go the Court of Appeal under the then new Family Provision Act. John succeeded in upholding an order for provision out of an estate in favour of the divorced wife of the deceased, which then was completely novel. That case, too, remains an important precedent today.

John was a tenacious and effective cross-examiner. Paul Brereton remembers well being led by him before Whitlam AJ - then an acting judge of the Supreme Court - for a defendant. John cross-examined the exaggerating plaintiff, who struggled when pressed by John to raise the decanter in the witness box above his head and then exposed his malingering by video showing him drinking with ease from an up ended flagon of wine. Thereupon, the plaintiff's claim collapsed.

John took silk on 12 November 1986 and thus commenced another stage of his life at the Bar. John's practice as a silk was fairly general but he still tended to appear mainly in personal injury type cases. He appeared both for Insurers and for plaintiffs and in the late 1980s became involved in the then new field of common law industrial deafness cases. This meant prolonged stays on circuit in places such as Muswellbrook in the company of his instructing clerk Michael McGee and his usual junior Peter Seery. Many good times were had, they won some, they lost some but they all appeared to enjoy circuit life.

On 30 June 2003 John took the momentous decision to retire after 48 years of practise as a barrister in order to enjoy life, his children and particularly his grandchildren.

I'm sure John would like me thank his former clerks Pat Robinson, Roxanne Hmelnitsky, Cec Featherstone, and in particular his last clerk Judy Wilkes, who remained his unofficial clerk until the last, for their support during his years at the Bar. Further I'm sure he would want me to thank his legal family, past and present members of the Third Floor for their friendship, assistance and support, in good times and in bad.

In retirement, he planned at first to spend some months driving around his beloved France but regrettably due to a fall fracturing his femur on the very day of his farewell lunch this had to be postponed. John's attitude to his disappointment at this development, not to mention the pain and rehabilitation, was stoic and he recovered with much assistance from his loving family and friends. He used to talk with such pride of his beautiful grandchildren and his love of watching Nicholas play 'good rugby'.

His illness was unexpected and cut short plans to attempt a further invasion of France amongst many other things. The illness was short, perhaps mercifully so, and I'm sure he would have wished to have had the opportunity to have said goodbye to his many friends from the law and elsewhere. He was particularly buoyed by visits from such old mates as Judge Paul Flannery QC, Brian Murray QC, Snake McMahon and his brother in law Peter Brett in his last days.

He will be missed by the many people whose lives he touched. John now goes to be reunited with his beloved Dianna and also Andrew.

Vale John Alfred Crumpton.

Investigating corruption and misconduct in public office: Commissions of inquiry – powers and procedures

By Peter M Hall QC
Lawbook Company, 2004

For anybody appearing in commissions of inquiry this book is essential.

Peter Hall QC was recently counsel assisting the inquiry into the Waterfall train accident. In this book the author has followed a far wider brief. As he writes in the preface he has set out to consider 'the functions, powers and procedures of standing commissions of inquiry and of federal and state royal commissions'. He also turns his attention 'upon the investigation of corruption and other forms of illegal or improper conduct in public office'.

The result is an exhaustive analysis of those subjects.

The first few chapters deal with corruption and bribery in a more general sense. There is an historic treatment of the concept of public trust and a detailed treatment of bribery and corruption offences. A number of chapters deal with the history, practice and powers of specialist commissions of inquiry in New South Wales, Queensland and Western Australia.

The permanent commissions of inquiry dealt with in detail in this state are the Independent Commission Against Corruption and the Police Integrity Commission. The author's thorough treatment of both bodies is compulsory reading for any practitioner appearing there.

The book also includes a wealth of information relating to search warrant powers, listening device and telephone intercept legislation and controlled operations powers and techniques.

The final chapters have been given over to an examination of procedure and practice in royal commissions and the like and judicial review of commissions on inquiry. They are indispensable reading for any practitioner in this field.

There are many intriguing details in the text. For example it seems that it is largely agreed that the Doomsday Book ordered to be compiled by the Norman Conqueror, William I is the first recorded royal commission in England.

This is a significant publication and Peter Hall can take pride in producing such a valuable reference work.

Reviewed by Keith Chapple SC

Judicial review of administrative action

By Mark Aronson, Bruce Dyer and Matthew Groves
Lawbook Company, 2004

Although nominally the third edition, this book has its provenance in Whitmore and Aronson's *Review of administrative action* (1978) and in Aronson and Franklin's 1987 work of the same name. The first two editions of the present title were by Aronson and Dyer, published in 1996 and 2000.

These earlier works have been cited regularly in the High Court and in state and federal courts of first instance and of appeal over the last 25 years. Over the same period they have been text books of first resort for practising administrative lawyers.

The present title has a sharper focus on judicial review itself. There is here no treatment of merits appeals, freedom of information or the ombudsman. In this edition there is necessarily much more on s75(v) of the Constitution given the continuing invocation of the High Court's refugee jurisdiction and the impact of the section on attempts by the Commonwealth Parliament to limit judicial review, as explained in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

The treatment of judicial review is comprehensive, covering with critical commentary a vast number of reported and unreported decisions There are 868 pages of text. The chapters are logically organised, beginning with 'Judicial power to engage in judicial review', traveling through 'The scope and nature of judicial review', 'Errors of law and fact' (much re-written from the second edition), 'Irrationality', 'Illegal outcomes and acting without power', procedural fairness (250 pages), the results of establishing a ground of judicial review, standing to sue, remedies (140 pages) and 'Statutory restriction of review'.

Bruce Dyer has retained primary responsibility for 'Procedural fairness: the scope of the duty'. Matthew Groves, who has joined as an author for the third edition, has taken over primary responsibility for 'The hearing rule' 'The rule against bias' and 'Habeas corpus' while Mark Aronson wrote the remainder.

The book remains lucidly written. It tackles the difficult issues, such as the consequences of a decision infected by

jurisdictional error as explained in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, and does so by reference to principle. The new edition thus retains the radical edge of the earlier editions. Wherever one opens the book, the discussion is invariably pithy and stimulating.

The book is sharply up to date. There is a reference on page 246 footnote 454 to *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [46] where Santow JA, last December, cited the relevant page of this new edition having 'had the advantage of reading the relevant chapters in typescript.' The proposition was that '*the merits*' is that diminishing field left after permissible judicial review. It is a good example of the powerfully distilled propositions which makes the text a pleasure to read.

The authors write that this edition is current to the end of March 2004, with some important cases decided after that point noted.

The new edition includes reference to and important discussion of *Plaintiff S157/2002* (above); *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179; (2003) 77 ALJR 1263 on the difficult question of the means of distinguishing between public and private power; Re Minister for Immigration and Multicultural Affairs; ex parte Lam (2003) 214 CLR 1 on the overriding requirement for practical injustice to be established by the applicant in a denial of procedural fairness case and the downgrading of the role of legitimate expectations; and *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59; 77 ALJR 1165 (*Gamaethige's* case) on the question of whether irrational or illogical reasoning constitutes jurisdictional error.

Whether S20/2002 supports the authors' contention that a new review ground of extreme irrationality or serious illogicality has been generated remains to be seen. But the argument is persuasively developed in Chapters 4 and 5. It certainly seems clear that Wednesbury unreasonableness review is not presently available for review of factual findings and that a different and arguably more stringent test is to be applied, even where the relevant function is couched in terms of the decision-maker's satisfaction or opinion.

A discussion of *E v Secretary of State for the Home Department* [2004] 2 WLR 1351 and any aftermath must await the next edition. There the Court of Appeal held that the time had now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts, such as asylum law, 'where the parties share an interest in co-operating to achieve the correct result'.

It seems reasonable to assume that the gap between English and Australian administrative law will continue to widen, as evidenced by the treatment by the High Court in *Lam's* case (above) of the judgment of the Court of Appeal in *R v North and East Devon Health Authority; ex parte Coughlan* [2001] QB 213 concerning substantive remedies for denial of procedural fairness. The learned author of the headnote in the *Commonwealth Law Reports* notes that *Coughlan's* case was 'doubted' by the High Court, a mild enough statement of the treatment that case received.

The index is full if sometimes whimsical. It is as well that the only entry in the index to *Craig v South Australia* (1995) 184 CLR 163, explaining jurisdictional and non-jurisdictional error, is not 'Volvo driver'. The reference on page 100 to Sir John Laws' metaphor for the intention of parliament as a fig-leaf to cover the true origins of judicial review is indexed as '**nude** Laws J'.

The important refugee cases named in the law reports and media neutral citations only by number and year are difficult to find in the table of cases. They seem to be listed only under 'Immigration and Ethnic Affairs'.

I would have wished to read what the authors would say on the relationship between invalidity and tortious liability, for example whether, in the context of discretionary powers, administrative action which is not ultra vires may be negligent. *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 and *Northern Territory v Mengel* (1995) 185 CLR 307 are tantalisingly mentioned. But that matter, unfortunately, is outside the scope of this work.

This is a textbook of broad learning and scholarship, clearly and attractively written. Ready access to a copy remains essential for those who practice in administrative law, federal or state.

Reviewed by Alan Robertson SC

The mortgagee's power of sale (2nd ed)

By Clyde Croft & Jan Johansson
LexisNexis Butterworths, 2004

The second edition of this work has been long overdue, the first edition having been published in 1980, almost 25 years ago! The authors describe the object of their work 'to provide in a convenient form an exposition of the law relating to the exercise of the power of sale by mortgagees of land.' There is abundant evidence in the work of the authors having achieved their objective.

The work adopts a method of writing that has become known as 'transactional writing', that is, the book is arranged in the same chronological order as the steps to be taken by a mortgagee when exercising a power of sale and the issues that may be encountered in that process. This method proves useful in first, recognising a relevant issue and, secondly, in providing a ready reference to the solution.

The book is not a comprehensive treatise on each of the issues that may arise in the exercise of the power of sale. Indeed, at 245 pages, it could not possibly provide such a comprehensive treatment of the issues. The work does not, however, purport to be such a treatise. It provides a concise examination of the relevant issues and, in doing so, will be of great assistance to practitioners, bankers and other persons who have an interest in the subject matter of the work.

The first two chapters of the work examine the nature of mortgages and the source of the power of sale both at general law and under statute. Chapters 3 - 5 address the conditions precedent to the exercise of a power of sale, the mortgagee's right to possession and the manner in which possession is recovered. Chapters 6 - 8 focus on the exercise of the power of sale and the important issue of the mortgagee's duties when exercising that power. The position in both England and Australia is considered and an attempt is made to reconcile the differences in approach between the two countries to the duty. (It is a reconciliation which, in the opinion of this reviewer, is not possible to achieve on the state of the authorities in each of the countries). Importantly, the text examines the difference in standards depending upon whether the mortgagor is a corporation or a natural person and whether, in reality, there is any difference (a view shared by this reviewer).

The work culminates with a consideration of the position of the purchaser of land pursuant to a power of sale (chapter 10) and the distribution of the proceeds of sale (chapters 12 & 13). In considering the question of distribution of the proceeds of sale, the authors examine the position of caveats and the effect they may have on the exercise of the power of sale. An inference is made that a caveat must necessarily be lapsed or withdrawn before a mortgagee sale of Torrens title land can be completed. Whilst it is true, as the authors say, that there is no specific provision in either of the relevant statutes in Victoria and New South Wales providing for a lapsing of caveats on the exercise of a power of sale, the authors do not address the effect of sec 74H(5)(g) of the *Real Property Act 1900 (NSW)* which provides that a caveat does not prohibit the registration of a dealing by a mortgagee exercising a power of sale. This provision is not a lapsing provision but it does enable a mortgagee exercising a power of sale, in some circumstances, to transfer title notwithstanding the existence of a caveat.

Reviewed by Anthony Lo Surdo

The Coroner

By Derrick Hand & Janet Fife-Yeomans
ABC Books, 2004

To walk a mile in the shoes of a coroner is an exhausting journey. The late night phone calls, urgent inspections of disaster scenes, painstaking investigations and lengthy court hearings mean this is not a job for the faint-hearted. Then there's death, the central fact of coronial life. Death is the focus of most coronial inquests. This book could have been a depressing litany of tragedy and horror. It's not. Instead Derrick Hand and Janet Fife-Yeomans have produced a very readable behind the scenes account of Hand's time as a coroner.

Hand spent 47 years in the New South Wales court system. He began as a clerk in his home town at the Forbes Court of Petty Sessions and climbed the ladder of opportunity to become the Westmead coroner in 1984. In 1988 he became deputy state coroner in the new Office of State Coroner, second in charge to Kevin Waller. He was appointed state coroner in 1995, and retired in 2000 at the end of the lengthy inquest into the Thredbo landslide.

Hand's account ends with Thredbo and begins on a January day in 1980 when the body of Frank Nugan was found in the bush near Lithgow slumped over the wheel of his Mercedes, grasping a rifle, a gun wound to the head. Rumours that the Nugan Hand Bank was a CIA front did not prevent Hand from reaching a finding of suicide. But then someone claimed to have seen Nugan in 1981 in a Las Vegas casino. Perhaps that person saw Elvis and flying pigs as well. The body was exhumed and dental records confirmed that it was Nugan. Kevin Waller reached the same finding as Hand.

There are many other fascinating stories in this book, which reads like a social history of criminal justice in New South Wales over the last quarter of a century.

I remember prosecuting Daryl Suckling for social security fraud at Goulburn District Court in 1991. Prior to the hearing I knew little about this diminutive man who seemed harmless enough. But there was great relief for some authorities when he pleaded guilty and was sentenced to a period of imprisonment, because it was believed he had committed a string of crimes on women in western New South Wales, including rape, abduction and murder. Some regarded him as a sort of outback Hannibal Lechter. In 1990 Hand remanded Suckling in custody for the murder of Jodie Larcombe after an inquest. However, the following year the NSW DPP no-billed the case because of insufficient evidence. Hand regarded the gaol term for fraud as a twist similar to locking up Al Capone for tax fraud. More evidence emerged after his release and Suckling was finally brought to justice for the murder of Larcombe in 1996, when he received a life sentence.

Harry Bailey (who sent so many patients into a deep sleep at Chelmsford Hospital), John Glover (the North Shore 'granny killer') and Wade Frankum (the perpetrator of the Strathfield Massacre) are some of the more infamous identities Hand encountered during his coronial years. There are the victims of crime and disaster as well, of course. It's impossible to imagine how tough Hand's job must have been at times. He was watching the footy on television one winter Saturday when he was called out to inspect the devastation wrought by Frankum inside Strathfield Plaza. There were seven victims in situ, including Frankum. An eighth died later.

Occasionally we see a lighter side to these tragedies. In 1997, when first alerted by his daughter to the death of Michael Hutchence, which he later investigated, Hand had to ask who Hutchence was. My guess is that he was the only person in Sydney who didn't know the answer to that question.

But the beady eye of the coroner dominates this narrative. It fell to Hand to preside over the investigation into Anita Cobby's murder in February 1986. Soon after the arrests the inquest became a committal. Hand describes his feelings during that hearing thus:

> there were times I would look at the three Murphy brothers sitting there with their friends in the dock and wonder how people came to such violence. However, I couldn't allow myself to start imagining what had turned them into a family who could do this or how you would feel if it was your three sons. In this case, as in all the others that came before me, I was only concerned with the evidence that I heard - and the evidence was overwhelming.

Grissom in CSI could have uttered that last sentence. Yet there's reassurance in it because Hand dealt ably with some of the most confronting situations the real world has to offer. And what a world it is.

Reviewed by Chris O'Donnell

The ambulance chaser

By Richard Beasley
Pan Macmillan, 2004

I wonder how many failed novelists there are at the New South Wales Bar? By that I am not limiting it just to those barristers who have written novels but who have been unable to have them published. I would include all of those who have commenced novels, but have failed to complete the task. Throw in for good measure all of those novels never even started. There must be many in this category – I have not started a couple of hundred novels myself. For a full-time barrister to produce a successful novel must require a lot of discipline.

So I start this review from a position of unqualified admiration, mixed with a healthy dose of envy, for the author of *The ambulance chaser* – the barrister, Richard Beasley.

This is Mr Beasley's second novel; his first, *Hell has harbour views* was a success and is currently being made into a movie. The first novel centred on the angst suffered by a young lawyer, emotionally and professionally compromised by the collision between promises of success in a large law firm and diminishing personal standards. *Hell has harbour views* took a number of tales from contemporary legal gossip, mixed those up with some just-recognisable pen portraits of prominent legal figures and wrapped it all around a barely believable plot.

This second novel follows much the same pattern.

The central character, Chris Blake, is a struck off barrister. The circumstances which led to the striking-off were more the cause of another party, but Blake was sufficiently personally culpable so that his eventual bankruptcy (combined with a bit of drinking and other matters) warranted his removal from the Roll. There are complications in his personal life as well. With his trustee on his back, Blake is compelled to take a job as a claims manager at a new, but startlingly successful, insurance company, South Pacific Insurance.

The senior management of South Pacific are not very likeable people and their management practices (like their advertisements) are questionable. You can see where this is going. Blake finds himself at the centre of a mystery / investigation / adventure. He is (at least by my standards) very brave – maybe foolhardy. He receives some help from unlikely sources. The plot gradually acquires momentum until – well, the denouement I found a little strained – in legal terms, a little far-fetched.

The narrative is chatty and humorous. The central character, Blake is likeable, cynical, self-effacing and complex. I think he is a bit too brave to be a barrister. Many of Blake's observations on his life and on the world made me laugh. The other characters are a little clichéd, although maybe necessarily so given they only provide a backdrop for the insights of the central character. All in all, it is a light and entertaining read.

I think you will enjoy *The ambulance chaser* – I did.

Reviewed by Geoffrey Watson SC

Lady Bradman Cup Cricket

By Andrew Bell

This year's annual match between Edmund Barton Chambers and Eleven Wentworth/Selborne saw the Lady Bradman Cup return to the MLC Centre after a long absence. The match was played on a clear but increasingly chilly late April Saturday at the picturesque Bradman Oval in Bowral. It is the only fixture or event that honours the memory of Lady Bradman who, by good fortune, happened to be at the ground during the playing of the inaugural match.

Sent into bat on an excellent wicket, Edmund Barton amassed 178 for the loss of three wickets, the wickets being shared by Lancaster, Alex Macfarlan (son of Macfarlan QC) and the evergreen Holmes QC. Griffiths SC and Poulos QC sustained their usual injuries.

In reply, Eleven Wentworth/Selborne limped to 140. Alex Macfarlan made a substantial contribution of 35 not out, whilst Bell and Holmes QC scored 18 apiece. Poulos QC, having been dismissed for a duck but having the benefit the local rule allowing a batsman so dismissed to remain at the crease until reaching 10, proceeded to do so with eight singles and a two.

As ever, the match was much enjoyed by all participants.

Victory at last for Hodgson.

Spot the ball

A well -flighted delivery

Edmund Barton Chambers

Athens 2004 Olympic Games

James Poulos QC carries the Olympic torch along Bondi Rd, Bondi, on Friday, 4 June 2004.