# Bar News

The JOURNAL of the NSW BAR ASSOCIATION Summer 2005/2006

## The banality of evil:

Observations of the International Criminal Tribunal for Rwanda

Restricting access to justice

Freezing orders hot up

The Federal Magistrates Court

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Summer 2005/2006



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**Cover**

Genocide memorial site guardian, Danielle Nyirabazungu, close to the skulls of the people killed during the 1994 genocide in the church of Nyamata, Rwanda, where 10,000 people were slain.
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# Contents




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# Charming Provence Retreat

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# Editor's note

The deaths of Justices Bryan Beaumont, Graham Hill and Peter Hely in the five months since the last edition of *Bar News* have rocked the profession. Each, in his own different way, was an outstanding lawyer and dedicated to the profession, the wider community, the Federal Court and the rule of law. Bryan Beaumont's extensive contributions in all of those fields were the subject of an appreciation contained in the last edition of *Bar News*. Graham Hill's contributions (apart from his almost 17 years' service on the Federal Court) were largely but by no means exclusively through his commitment to legal education. He had lectured continuously at the University of Sydney Law School for 38 years far exceeding the length of service of any other permanent or part-time member of the Law Faculty. Having been the beneficiary of a number of university scholarships after his stellar undergraduate career, he was truly one who more than repaid the opportunities which had been afforded to him both by the University of Sydney and the scholarships he was awarded. And then there was Peter Hely. Unlike Justices Beaumont and Hill, who were appointed to the Federal Court in the 1980s, Justice Hely's appointment only came in 1998. Prior to then, he was rightly described as a 'colossus' of the NSW Bar. He was also dedicated to the profession, serving for many years on Bar Council.

With the retirement of Justice McHugh from the High Court, the entire Australian legal community has lost the services of one of its finest judges. From the perspective of the NSW Bar, Justice McHugh was and is held in enormous and genuine affection. He has continued to be, in his 21 years on the Bench, an inveterate supporter of the Bar. He has remained committed to its values and institutions, and has been and, one trusts, will continue to be a popular presence around Phillip Street. In a somewhat surprising 'tradition', the High Court does not honour retiring puisne judges with a farewell ceremony in Canberra. In lieu thereof, an informal farewell occurred on 7 October 2005, the last day on which Justice McHugh sat in Sydney as a member of the full bench on special leave day. His remarks on that occasion together with those of Hughes QC on behalf of the Bar are reproduced in this issue. Interestingly, on that day, two special leave benches were convened in Sydney, an indication of the growing volume of the work of the court. This was a theme touched upon by Justice McHugh in his speech 'Working as a High Court justice' to the Newcastle Law Society and the Women Lawyers' Association of New South Wales on 17 August 2005, available at www.hcourt.gov.au/speeches/mchugh. In an age of transparency, that speech contains the clearest and most candid account of the week to week routine of the High Court, and affords an unprecedented insight into the workings of the court. Insofar as it touched upon the court's workload, it does invite for debate the question of the optimal size of the High Court. That, together with the mode of appointment to the court, is a topic likely to attract attention with the relatively imminent retirements of Callinan J, Gleeson CJ and Kirby J. Solicitor General Sexton SC's paper on appointments provides an interesting historical and comparative focus.

In the current issue, we publish Justice Gummow's Sir Maurice Byers' lecture on 'Statutes', thus ensuring that all lectures in this distinguished series have been published in the Bar Association's official journal of record. We also publish an important opinion piece by Anna Katzmann SC on the subject of 'Restricting access to justice: changes to personal injury laws'. Colin McDonald QC continues in his tradition as our correspondent from the Top End with a feature on Indonesian courts and terrorism. Peter Skinner writes of his visits to Rwanda and the work of the war crimes tribunal. Arthur Moses has also written an informative account of the work (ever-expanding) of the Federal Magistrates Court.

Incoming Bar Association President Michael Slattery QC writes his first column. Slattery QC replaced Ian Harrison SC as president of the association in November 2005. Every member of the association should applaud Harrison's service to the Bar, comprising not only his many years on Bar Council, his 10 years as a member of the executive and his last two years as president, in particular. In what is, in effect, a two year term, few would appreciate the hours of time daily given, without recompense, to the association and the profession. Harrison's speeches, both at swearings in and other occasions, have been a highlight for their combination of humour and sincerity. But members should not overlook the fact that, speech-making apart, there is a vast array of other obligations to which the president must attend. In what is an undoubtedly a position where it is not possible to please all of the people all of the time, Harrison's efforts and dedication to the task are warmly acknowledged.

On a final note, the last edition of *Bar News* carried an opinion piece by Barker QC and Toner SC in relation to the cases of Mamdouh Habib and David Hicks, to which Attorney-General Ruddock responded. It is an objective fact that a further six months have passed and Mr Hicks still awaits a trial in the United States. Whatever the merit or substance of the charges against Mr Hicks, it defies one's deepest sense of justice that the charges are yet to be prosecuted. It is a scandal which only grows larger. The delay (including the lack of apparent activity on the part of executive government) is objectively pernicious in terms of undermining community respect for the rule of law and its institutions. When the next issue of *Bar News* is published in June 2006, it will be interesting to learn what progress (if any) has been made in the Hicks case.

**Andrew Bell**

# President's column

*Michael Slattery QC*

In the last two years Ian Harrison SC has served in the office of President of the New South Wales Bar with great distinction. Ian has given constant assurance to members of his personal concern for their welfare and best interests. He has done so much to strengthen the Bar during this period. The Bar's present stability is very much a product of his commitment.

Ian undertook a very high administrative load as president, including an exceptional number of official and private speaking engagements. In all of these he has been an inspiring and positive public face of the Bar. I am grateful to have the continuing advantage of his experience and judgment to guide me and I am honoured to be elected as Ian's successor.

This first message from the president raises for reflection one public policy question and two Bar issues.

## The Civil Liability and Worker's Compensation Acts

The Civil Liability and the Workers Compensation Acts are now excluding many genuine and serious claims for personal injury from civil redress at common law.

Over the last three years the Honourable J J Spigelman AC, Chief Justice of New South Wales, has given several speeches about this legislation. At least three main themes emerge from those speeches and they are an important guide to the Bar as it formulates reasonable proposals for change.

First the reform of actions for personal injury must be approached in a principled and consistent way rather than by the creation of underwriter driven special liability schemes. The Civil Liability Act is only one of such schemes. The Workers Compensation and Motor Accidents legislation are two of the others. The chief justice warned in 2002:

> An approach that restricts liability and damages in a principled manner is capable of resulting in the same degree of control of insurance premiums as that achieved by the special schemes. Such an approach would, in my opinion, achieve that result in a manner more likely to be regarded in the long term as fair and, therefore, to receive broad community acceptance. [1]

Under the guidance of its presidents at the time, Ruth McColl SC and Bret Walker SC, the New South Wales Bar Association maintained during the debate in relation to the workers' compensation changes of 2001 and the Civil Liability Act in 2002 that only principled reforms should be undertaken. The community's sense of the coherence of the law is diminished by inconsistency between underwriter-driven liability schemes. A key objective in future law reform should be the restoration of consistency across all types of awards of compensation for personal injuries.

Second, legislated thresholds and other restrictions on the award of damages which operate to exclude claims for serious injury are apt to lead to growing community resentment. Two years after these Acts came into operation, the chief justice made the following judgment about their effects:

> In particular, the introduction of caps on recovery and thresholds before recovery – an underwriter driven, not principled change – has led to considerable controversy The introduction of the requirement that a person be subject to 15 per cent of whole or body impairment – that percentage is lower in some states – before being able to recover general damages has been the subject of controversy. It does mean that some people who are quite seriously injured are not able to sue at all. More than any other factor I envisage this restriction will be seen as much too restrictive.
>
> ...
>
> Small claims raise very real issues about transaction costs. Nevertheless, there is likely to be a growing body of persons who have suffered injury which they believe to be significant and who resent their inability to receive compensation. [2]

The present operation of those thresholds and restrictions should now be carefully scrutinised with a view to their improvement. Recent outcomes suggest that adjustment is needed to restore fairness to compensation for personal injury in this state. The enactments of which the chief justice is speaking have in fact operated like a legislative baseball bat. The filings of the District Court of New South Wales have fallen from over 19,000 in 2001/2002 to 5,500 in 2004/2005. Unless one makes the improbable assumption that the difference between these two figures is entirely made up of unmeritorious claims, the excluded claims represent a considerable and growing body of justifiable community resentment.

The third of the chief justice's themes is that legislative changes in New South Wales have given government bodies in this state an almost unique set of immunities from civil liability. In September this year Chief Justice Spigelman said:

> The changes in New South Wales went well beyond what has occurred in other states. That included significant changes that have no implication for insurance premiums paid by individual organisations or companies. The changes in New South Wales have fundamentally altered the ability of citizens to sue the government and its instrumentalities. These changes go well beyond anything that was recommended by the Ipp report. New South Wales is virtually the only state to have gone so far in restricting the liability of government.[3]

It should be a serious question for public debate in New South Wales why only the citizens of this state are now unable to take necessary and meritorious civil action against government bodies.

There is little advantage in now wrestling with the rights and wrongs of the passage of the Workers Compensation and Civil Liability Act changes of 2001 and 2002. Next year, using the chief justice's three themes as a guide, the Bar will put

submissions to the legislature for principled and responsible changes to these and other pieces of scheme legislation.

*Advocacy at the Bar*

One of the Bar's principal claims to provide a specialised service to its clients is through the quality of its persuasive advocacy. This specialty comes in various forms, appellate advocacy, the preparation of written submissions and the art of cross-examination. Over many years our Bar's CPD programs have included presentations on these aspects of court craft. Next year I will ask for a special emphasis on the practical development these skills.

This emphasis could perhaps include a few useful guides derived from classical times that underlie the art of forensic persuasion. Aristotle's *Art of Rhetoric* says that rhetoric may be defined as 'the faculty of discerning the possible means of persuasion in each particular case'. This definition remains a beacon of hope to the advocate who has not yet found a winning argument. There is always a means of persuasion. The skill of the advocate is to keep looking for it and then to find and use it.

*Women at the Bar*

One of our common objectives is the pursuit of excellence as advocates serving the administration of justice. Promoting the finest legal intellects into careers in advocacy is consistent with this objective.

Over the past 15 years women have comprised more than half the graduates and even higher proportions of the honours graduates from most New South Wales Law Schools. These impressive levels of women's achievement at graduation have not been well matched by progress in professional advocacy careers. Over the same period, the total number of women at the Bar has moved from approximately 10 per cent to just over 14 per cent of all barristers in practice. To varying degrees the pattern demonstrated in these figures is replicated in other Australian states.

The independent Bar is an essential community service. It is better able to serve the community if the best and brightest law graduates choose to practise as advocates. The Bar is disabled from doing this if many of our law schools finest graduates are not choosing to come to the Bar and embark on a career in advocacy.

This logic suggests that this issue is not to be viewed narrowly or to be solved in the interests of only part of the Bar. Rather it is an issue for the whole Bar. Unless the Bar attracts and retains significant numbers of women law graduates we will not have the best possible Bar.

The Bar now has an opportunity to enrich our courts with some of the excellent female and male legal intellects graduating from our law schools and commencing practice. I hope to assist the Bar to grasp that opportunity.

1 'Negligence: The last outpost to the welfare state', Judicial Conference of Australia, Launceston, 27 April 2002

2 'The new liability structure in Australia', Address to the Swiss Re Liability Conference, Sydney, 14 September 2004.

3 'Negligence: Is recovery for personal injury too generous', Address to the 14th Commonwealth law Conference, London, 14 September 2005

# Letter to the editor

Dear Sir,

In the winter 2005 edition of *Bar News*, Dina Yehia asserts that I demonstrated a misconception about the evidentiary value of DNA evidence when I delivered the Sir Ninian Stephens Lecture for 2005.

The fallibility of DNA evidence, Ms Yehia posited, was demonstrated in *JR v Bropho* [2004] WADC 182 in which the defence called evidence that the calculation of statistics could produce misleading evidence in cases involving Aboriginal people. She notes that:

> the objection to the DNA evidence was successful…And to think that without the challenge to the DNA evidence by some 'tricky' defence lawyer...we may have continued to rely on statistical interpretation of DNA evidence which is not necessarily reliable…

The case was the trial of a person for sexual assaults upon a 13-14 year old girl resulting in the birth of a child, with the child's paternity at issue.

The postscript to that case is that the National Institute of Forensic Science Standing Committee on Sub-Population Data, convened (as it indicates in the foreword to its report) as a direct result of the *Bropho* ruling, delivered its findings on 7 December 2004. The committee was constituted by three scientists including R John Mitchell, whose evidence that the prosecution DNA evidence may not be reliable was accepted by the trial judge, who then acquitted Bropho.

The report has been independently reviewed and statistically validated outside Australia. Its findings were that the statistical factor used in the *Bropho* calculations is a sufficiently conservative figure to be applied even in relation to Aboriginal sub-populations. The prosecution evidence on DNA in *Bropho* was therefore proved to be correct.

It should now be clear to your readers where the 'fallacy' lies.

**Margaret Cunneen**

# Restricting access to justice

## Changes to personal injury laws: the NSW experience

**In New South Wales during the 1980s and 1990s piecemeal changes dictated by political expediency were made to motor accidents and workplace compensation. In the result, the circumstances in which the injury occurred and the identity of the tortfeasor dictated the amount of compensation that could be recovered and the method of recovering it.**

**It is irrational, if not unjust, to compensate people with similar needs in different ways according to where they happened to be at the time of the injury or the category of tortfeasor.**

**The following is an edited version of a paper presented by Anna Katzmann SC at the Australian Bar Association Conference, Dublin, June 2005.**

> *'We write letters to people. They send us money. It's called insurance.'* [1]

In 2001 a series of events (the collapse of the HIH insurance group, the terrorist attacks in the United States and poor returns on investments from a decline in the Australian stock market) caused premiums for all forms of public liability insurance to rise both rapidly and dramatically.

Pressure mounted in the community for changes to the law of negligence which, it was thought, would make insurance more affordable. Lawyers were blamed. We were an easy target. True it is that in the past courts had taken an expansive approach to the law. However, there was plenty of evidence to show that the trend was in reverse. Yet the political skills were with the insurance industry. The daily newspapers were demanding change.

### What is 'access to justice'?

In this paper I use the phrase 'access to justice' in two senses: access to a judge and access to an equitable or fair and rational system of compensation. I also look at access to legal representation because that is a fundamental feature of our notion of access to justice.

I focus on the NSW changes but they are not atypical.

### Restricting access to judges

Assessments by medical panels have been a feature of impairment assessment under the Workers Compensation Act for a long time. More recently the use of medical assessors in lieu of judges has expanded both in the area of workers compensation and into third party motor vehicle claims assessment.

*Motor Accidents Compensation Act 1999*

*The Motor Accidents Compensation Act 1999* ('the MACA') was introduced with the stated aim of cutting premiums by $100. To achieve this, damages awarded for non-economic loss were to be reduced by $100 million a year and legal costs were to be halved. My premiums didn't fall.

The principal means of reducing damages for non-economic loss was by the introduction of a 10 per cent whole person impairment threshold (s131) and transferring from the judiciary to the bureaucracy the capacity to make important decisions.

It also provided for Regulations to be made fixing maximum costs for legal services. Regulations were passed, the effect of which was to transfer from the insurer to the injured person the burden of paying a substantial portion of the costs of prosecuting a claim.[2]

Before the passage of the MACA all questions in disputed cases remained to be determined in the courts. However MACA changed that. Medical disputes are referred to the Medical Assessment Service (MAS). Other disputes are referred to the Claims Assessment Resolution Service (CARS) unless deemed by a claims assessor to be unsuitable.[3]

An assessment by a claims assessor on liability is not binding on either party but an assessment on quantum is binding upon an insurer. The assessor alone may question the parties and the witnesses unless the assessor grants an application by the party's representative to question the witness and may dispense with an assessment conference altogether and deal with the case on the papers.

If significant evidence (as defined) is adduced in court that was not made available to the claims assessor the court is required to adjourn the proceedings until the party who called the evidence has referred the matter for further assessment and a claims assessor has issued a further certificate: s111.

**The problems about being bound by a determination of a person beholden to the administration should be readily apparent.**

A claimant is not allowed to commence court proceedings unless the principal claims assessor has issued a certificate exempting the case from assessment or a claims assessor has issued a certificate in respect of the claim on both liability (if disputed) and quantum[4] (s108).

The problems about being bound by a determination of a person beholden to the administration should be readily apparent. There has been an increasing number of complaints about the operation of the Medical Assessment Service. They include claims of bias against the injured, substantial delays in the finalisation of claims and complaints that the system is cumbersome and bureaucratic.[5] I give a graphic example in the written paper of bureaucratic meddling in the assessment process which happened to come to light through a subpoena.

*Workers Compensation Act 2001*

The WorkCover Authority, the statutory body charged with the administration of workers compensation in New South Wales, had for some time been in financial difficulty. As a result, in 2001 the Labor government of NSW proposed far-reaching changes to the workers compensation system and common law awards for damages for industrial injuries. The responsible minister assured injured workers that their benefits would actually increase. Yet, the proposals aroused the ire of the trade unions, who obviously didn't believe him. Talks between the Labour Council and the government culminated in some changes being made to the legislation and the sweeping reforms to the common law were put on ice. The government agreed to set up 'a judicial inquiry'. The only thing 'judicial' about the inquiry was that it was chaired by a judge.

The unions and the government were at cross purposes. The unions thought the inquiry would preserve the common law but make changes around the edges.[6] The government, on the other hand, was determined to kill it. It established the inquiry under the chairmanship of the Hon Justice Terry Sheahan, a former attorney general of its own, and gave it terms of reference which included identifying 'ways to reduce the incentive for pursuing common law claims'.

The inquiry came up with a scheme which certainly delivered on that term of reference.

Previously, a worker could recover damages for non-economic loss if she could show that her non-economic loss amounted to about 17 per cent or more of a most extreme case. To recover economic loss it was necessary to achieve a percentage of about 23 per cent. The original amending bill restricted the rights of injured workers to sue for damages by increasing the threshold. The government had proposed a 'serious injury' threshold of whole person impairment greater than 25 per cent and the determination was not to be made by a court but by a medical assessor appointed by the WorkCover Authority, who had no obligation to give reasons and whose decision was binding and conclusive. The proposals mirrored the motor accidents scheme. Organised labour rejected it and settled on the inquiry. Now, however, the legislation based on the recommendations of the Sheahan inquiry provides that no damages are payable for non-economic loss[7]. Neither are they payable for medical, hospital or related treatment or for care or services, including respite care, whether paid or unpaid, home modifications, travel assistance, fund management or anything else. The only damages payable are for economic loss and they are capped. Furthermore, in order to recover those damages it is necessary to show that the injury results in at least 15 per cent whole person impairment calculated in accordance with WorkCover Guidelines.[8] The assessment is made by a medical assessor appointed by WorkCover for the purpose and the certificate of the assessor setting out the assessment is 'conclusively presumed to be correct' if it relates to any one of a number of specified matters each of which affects the capacity of the plaintiff to recover damages.

There is a limited right of appeal against a decision of a medical assessor. The appeal is to an appeal panel consisting of two approved medical specialists and an arbitrator, chosen by the registrar of the Workers Compensation Commission. [9]

There are substantial restrictions on costs. Unlike the motor accidents regime there is no facility for contracting out.[10]

These changes do not apply to coal miners,[11] no doubt due to the superior lobbying efforts of the mining branch of the AMWU.

The legislation, in conformity with recommendations made by the Sheahan inquiry, did remove the obligation of workers to elect whether to recover compensation or damages, reinstating the pre-1987 scheme which simply precluded further payments after a damages award and required compensation already paid to be deducted from the damages and repaid to the person who paid it.[12] This means that a worker can recover non-economic loss in the form of a modest payment for permanent loss or impairment and, if eligible, also for pain and suffering and for care and services and treatment expenses and then sue for damages, provided time limits are met. The real vice, though, and the ultimate disincentive to sue, is that even though damages are not payable for any of those things, compensation for them has to be repaid out of the damages and, of course, none is recoverable for the future.

The legislative changes were not confined to tort law. Substantial changes were made to workers compensation laws, too. Some of these changes visit real injustice upon employers and insurers.

## Limiting damages

*Civil Liability Act 2002*

In April 2002 Chief Justice James Spigelman AC delivered a speech to the Judicial Conference of Australia Colloquium in Launceston entitled 'Negligence: The last outpost of the welfare state'. He posted a copy of the speech and an executive summary on the Supreme Court's web site. It was dutifully picked up by the major Australian newspapers. It heralded a spate of legislative change throughout the country.

The chief justice's thesis was that the existence of different schemes for compensating injured people that depended on the circumstances in which an injury occurred, rather than the need for compensation, was underwriter driven and difficult to justify in principle. In the result, he claimed, it was likely to cause resentment in the community. He proposed 'an alternative model for legislative intervention', which he described as 'principle driven reform'. He suggested a number of changes designed to restrict damages in what he described as a principled way.[13] And he counselled that his model could provide the basis for substantial reform of the underwriter driven schemes.

The New South Wales Government responded swiftly to reduce damages in a range of areas but largely neglected to follow the chief justice's main message. The result is that in New South Wales we now have an even greater proliferation of underwriter driven schemes and the iniquities in the industrial accident and motor vehicle schemes remain in place.

In his second reading speech on the Civil Liability Act the premier of New South Wales, Mr Carr, claimed that 'actuarial advice shows that the threshold will lead to increased general damages for the more seriously injured people. These are the people who have suffered the most and they will get more because of the threshold.' However, as Associate Professor Barbara McDonald of the University of Sydney has pointed out:

> [While] it is true that the maximum amount for non-economic loss is to be indexed to keep up with CPI indexes, it could hardly be accurate to say that the seriously ill benefit because others do not meet the threshold. The true position is that damages for the seriously injured are considerably reduced by this legislation.[14]

The Civil Liability Act applies to all actions for damages in New South Wales for harm resulting from negligence, irrespective of whether the claim is brought in contract or tort or under statute. The only exceptions concern actions for dust related conditions,[15] smoking or tobacco related diseases, industrial injuries and diseases and certain statutory compensation schemes.[16]

*Limits on damages for non-economic loss*

The *Motor Accidents Act 1988*, the *Health Care Liability Act 2001* and the *Civil Liability Act 2002* all impose caps and thresholds for the recovery of damages for non-economic loss.

The caps and thresholds are adjusted each March and October for the CPI. Currently, the maximum sum payable under the MAA is $341,000 and under the CLA $400,000. No damages are payable under the CLA and the MAA where non-economic loss is lower than 15 per cent of a most extreme case (in the case of a motor accident occurring after midnight on 26 September 1995 but before 4 November 1999 when the MACA took effect).[17]

Between 15 and 33 per cent there is a sliding scale so that a person who is assessed at 20 per cent of a most extreme case of non-economic loss does not recover 20 per cent of the maximum but only $12,000 and at 25 per cent $22,000. Even at 30 per cent the figure is only $78,500. The thresholds significantly penalise the elderly because age affects the amount that may be recovered for non-economic loss: *Reece v Reece* (1994) 19 MVR 103.

*Restricting economic loss*

Damages for past or future loss of earning capacity are capped.

No award may be made for future economic loss 'unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's *most likely* future circumstances but for the injury': s13.

If any award is to be made then the court is bound to reduce the amount by reference to the percentage possibility that the events might have occurred anyway.[18] It is axiomatic that this will particularly disadvantage younger plaintiffs, especially infants and young children.

Under both the Workers Compensation and Civil Liability Acts there are limits on the awards of economic loss which affect high income earners of any age. The theory is that they can afford to take out personal accident and illness cover and many do.

The other principal restriction comes in the form of the discount rate.

*The discount rate*

Discount rates are designed to reduce the amount of damages for future losses to take into account early receipt and the ability to invest the sum and earn interest. However, their effect is to reduce damages and under-compensate the injured. Obviously, the higher the discount rate the greater the level of under-compensation.

In the past courts were divided about what was a proper discount rate. In *Todorovic v Waller* (1981) 150 CLR 402 actuarial evidence was called that tended to suggest that the advantage of early receipt of a lump sum was more apparent than real. Views differed on the bench about what was the appropriate discount rate and the majority compromised on three per cent. Sir Ninian Stephen concluded that any 'discount for present payment denies to a plaintiff that measure of compensation for future economic loss to which the law entitles him' and that the range of discounts which the Australian courts were then imposing were unsupportable.[19] Murphy J agreed.

After *Todorovic v Waller* but before the introduction of the *Motor Accidents Act 1988* and the *Workers Compensation (Amendment) Act 1989*, all New South Wales actions were subjected to a three per cent discount rate for future losses. The assumption was that, by investing the sum wisely or conservatively, a plaintiff could earn a return of three per cent after tax and taking into account inflation.

In 1984, because motor vehicle insurance premiums for political reasons had been kept artificially low (with the result that there were inadequate funds set aside to meet the assumed long term liabilities of the scheme), the third party motor vehicle insurance scheme was in financial difficulty. The government responded to the problem, reducing the payouts to injured people by increasing the discount rate to five per cent. At the time inflation was up to about 12 per cent and interest rates exceeded 17 per cent. The minister undertook to review the matter when circumstances changed. Despite the

reduction in inflation and interest rates the rate was never reviewed. When the Motor Accidents Act was introduced in 1988, the five per cent rate was entrenched.

The HCLA and the CLA adopted the five per cent rate despite criticism and notwithstanding the pretence that the seriously injured were not going to be adversely affected.[20] Although a two per cent difference may appear modest, to the severely injured the effect may be devastating. In the written paper I give an example to illustrate this.

Other jurisdictions have also increased the discount rate in order to reduce damages. In Victoria, South Australia, Queensland and the Northern Territory it is five per cent. In Western Australia the figure is six per cent and it is seven per cent in Tasmania. Yet the Ipp Committee recommended the restoration of the three per cent rate.[21] In the UK the Lord Chancellor, Lord Irvine, reduced the rate from three per cent[22] to 2.5 per cent[23] and I understand that recently it has been reduced by a further 1/2 per cent.

Since the stated aim, at least, of the New South Wales Government in introducing its most recent reforms, was to protect the seriously injured, it is difficult to understand why the discount rate was raised.

*Limiting damages for care and services*

Damages for gratuitous attendant care services are limited in the same way as they were under the *HCLA* with the additional requirements (identical to those imposed by the *MAA*) that no damages are payable if the services are, or are to be provided, for less than six hours per week, and for less than six months, and the amount is fixed by reference to the ABS figures for average weekly total earnings of all NSW employees, not (as is the position at common law) by reference to commercial or market rates for such services. For no obvious reason, damages of the kind recognised by *Sullivan v Gordon* (1999) 47 NSWLR 319 are quarantined from the Act.[24]

*Other statutory limits*

There are additional limitations on damages in respect of injuries received while the plaintiff (or the deceased) was an offender in custody and the defendant is the Crown, a government department, a public health organisation or its staff, a public official or a private company or its staff managing a gaol. Ironically, the threshold is the same as that fixed under the Workers Compensation Act for workers injured through the fault of their employers implicitly acknowledging that those benefits are inferior to the assessment of non-economic loss under the CLA.[25] I list the restrictions in the paper.

## Limiting recovery of damages

*The Civil Liability (Personal Responsibility) Amendment Act*

This legislation incorporated the second stage of the reform process the minister foreshadowed in March 2002.

The PRA effected substantial changes to the common law and to legislation affecting claims for damages for personal injury. The Bill was introduced into the Legislative Assembly on 23 October 2002, only three weeks after the publication of the panel's report, and the premier, himself, delivered the second reading speech, this fact in itself highlighting the political gains expected to be reaped from it.[26] Assent was given on 28 November 2002 and the Act commenced on 6 December 2002.

The CLA now restricts access to damages in several ways.

- The test of foreseeability has altered from neither far fetched nor fanciful to 'not insignificant'. That should produce a bit of litigation.
- Changes have been made to the law of causation.

A two stage test for causation has been enshrined in the Act. It requires that the courts consider both whether the injury was a necessary condition of the harm (the but for test, called 'factual causation') and the scope of liability, namely, whether it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (where the Ipp panel believed commonsense had its place). Although some (like Ipp J) have sought to suggest otherwise,[27] it seems that this is a change to the common law as explained by the majority in *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 and a statutory enactment of the views of McHugh J in that case.[28]

Whereas once, in a failure to warn case, a plaintiff was obliged to give evidence that she would have heeded the warning for fear that a causal connection between the damage and the omission of the defendant could not otherwise be proved,[29] now such questions are inadmissible, unless contrary to interest: s5D(3). The apparent justification for this approach is the need to avoid what is commonly referred to as 'hindsight bias'. Recently, I was confronted with an argument in an appeal from such a case. The plaintiff didn't call evidence that he would have heeded the warning. Therefore, it was argued, he was bound to fail because otherwise he couldn't establish causation. The curious feature of the Act is that it provides that 'the matter is to be determined subjectively in the light of all the circumstances' but precludes a plaintiff calling evidence of what his or her subjective response would have been.

With certain exceptions[30] there is no duty to warn of an obvious risk: s5A. An obvious risk is defined as one that would have been obvious to 'a reasonable person in the position of [the plaintiff]'. The question of what is an obvious risk, however, is not easily determined under the Act for, according to s5F 'a risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable'.

Changes have been made to the standard of care professional people are expected to exercise. A modified version of the Bolam test[31] has been introduced.

With some exceptions[32] there is no duty of care owed to a person who engages in a recreational activity[33] to take care in respect of a risk where the defendant (or the occupier where the defendant is not the occupier) gives a warning, even if the injured person did not receive the warning or understood it and even if the injured person was incapable of receiving or understanding it: s5M. The risk need not be specific to the particular risk but can be in general terms wide enough to include the particular: s5M(5). The warning can consist of a sign in a language the plaintiff cannot understand or read. It does not matter if the plaintiff is blind or illiterate, a sign, the terms of which are never brought home to the plaintiff, will absolve a prospective defendant from liability for harm caused by his, her or its negligence. Yet, in the case of a young child or a person whose physical or mental disability means that he or she 'lacks the capacity to understand' the warning, the defendant can only rely on the risk warning if the plaintiff was under the control or accompanied by a capable person who was 'the subject of a risk warning' or the risk warning was given to the parent, irrespective of whether he or she accompanied or controlled the plaintiff. At least on one reading of this provision, the blind and the illiterate would still be caught.

**Will poor playing surfaces become the norm? Can sporting organisations now get away with providing untrained administrators, referees and coaches? Does the law now permit the owner of a shopping mall to avoid liability merely by posting a general warning at the entrance to the mall so that recreational shoppers enter at their own risk?**

'Recreational activity' is defined very broadly to include any sport, pursuit or activity engaged in for enjoyment, relaxation or leisure or any pursuit or activity engaged in at a place (such as a beach park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure (s5K).

The long term consequences of such a reform are not yet known. However, there are plenty of reasons to be concerned. Can the occupier of a place where the activity is being conducted avoid liability for harm caused through the use of the premises by issuing a warning on entry? Will poor playing surfaces become the norm? Can sporting organisations now get away with providing untrained administrators, referees and coaches? Does the law now permit the owner of a shopping mall to avoid liability merely by posting a general warning at the entrance to the mall so that recreational shoppers enter at their own risk? Will a warning on the back of a theatre or cinema ticket now absolve the occupier of the theatre from any liability for negligence? Is shopping for something you don't actually need a recreational activity? If I injured my foot on some defective stairs because I chose not to use the escalator in order to keep fit, could the building owner avoid responsibility by posting a warning on the door before I actually reached it?

Section 5N additionally permits a defendant to contract out of any liability for most harm[34] resulting from a breach of an express or implied warranty that recreational services will be rendered with reasonable care and skill and excludes the operation of any law that would otherwise render the provision void or unenforceable. Section 5(2) provides that no other NSW law should be used to render such a contractual term void or unenforceable. Thus, no recourse can be had to the ameliorating provisions of the *Contracts Review Act 1980* or to the *Fair Trading Act 1987*. In the result, a contractual waiver entered into by a child undertaking a recreational activity appears to be enforceable to exclude any liability. A contractual waiver executed by a parent will excuse the person at fault who causes harm to a child, no matter how gross the negligence.

Section 44 absolves a public authority from liability for a failure to exercise or consider exercising any function of the authority in all cases where the authority could not have required it to act. Public authorities are defined to include government departments such as the Department of Transport (hence responsibility for train crashes), Education (and hence to cover schools), public hospitals and local councils.[35] As if that didn't go far enough, s45 specifically exempts road authorities from liability for non-feasance 'unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm'. However, it is difficult to see how, even in such a case, a plaintiff could succeed because of the operation of s44. In the case of statutory duties or 'special statutory powers' 'of a kind that persons generally are not authorised to exercise without specific statutory authority' there is no liability for a failure to act unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider' it reasonable. See ss43 and 43A. Again, the full implications of these provisions are unclear. However, they are troubling. Notwithstanding the abolition of the immunity in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 road authorities are now immune from liability arising from a failure to carry out or to consider carrying out road work (widely defined) unless they had actual knowledge of the particular risk that materialised in the harm occasioned to the plaintiff, which may

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actually discourage road authorities from carrying out inspections for fear they might acquire knowledge of a risk they won't rectify.

A plaintiff is not entitled to recover damages for a psychiatric condition (called 'pure mental harm') unless she or he witnessed at the scene the victim being killed, injured or put in peril or is a close member of the family of the deceased: s30.

Parents and spouses of negligently killed or injured victims now have to show that the defendant owed them a duty of care, whereas under the *Law Reform (Miscellaneous Provisions) Act 1944* that was unnecessary.

In some respects if the plaintiff is affected by alcohol or drugs, including prescription medications, a defendant may be absolved altogether from liability and contributory negligence is presumed in cases where the harm would have occurred irrespective of the intoxication.

'Good Samaritans' are immune from suit: Part 8. So are volunteers who act in good faith while doing community work on behalf of an organised community group or as an official of one: Part 9. Yet, rescuers who suffer mental harm as a result of witnessing the plight of the injured, lose a proportion of the damages to which they would otherwise be entitled because of contributory negligence on the part of the injured: s30(3).

No damages are payable for the costs of raising a child or for lost earnings during that period in a wrongful birth case: Part 11.[36]

Except where the conduct of the defendant constitutes an offence, s54A precludes anyone who sustains injury, loss or damage from recovering any damages for non-economic loss or 'economic loss for loss of earnings' where the injury, loss or damage occurs at the time of or following conduct that would have constituted a serious criminal offence[37] but for the fact that the person was suffering from a mental illness at the time and the conduct contributed to materially to the death, injury or damage or the risk of it and irrespective of whether the person was in fact acquitted of the offence on the ground of mental illness. This provision, inserted by the *Civil Liability Amendment Act 2003*,[38] arguably represents a gross and unwarranted overreaction to an isolated and unusual case, which generated a furore in the media. See *Presland v Hunter Area Health Service* [2003] NSWSC 754. However, as it transpired, and unless the High Court is asked to decide otherwise, the legislation was unnecessary.[39]

## Changes to consumer protection laws

The Fair Trading Act was amended to exclude actions for damages being brought under that Act in cases where the loss or damage was the death or personal injury of a person. That includes claims for misleading or deceptive conduct, unconscionable conduct and matters of that kind.

In March 2002 the NSW treasurer said that the New South Wales Government had obtained legal advice 'indicating that any change made by the states to tort law for personal injury cases would have only a limited effect unless the Commonwealth amends the Trade Practices Act'. He suggested that the warranty of due care and skill implied into consumer contracts with corporations by s74 of the TPA could allow plaintiff lawyers to frustrate state tort law reform by pursuing a personal injury damages claim under contract law rather than through an action in negligence.

The Australian Parliament answered the call. On 19 December 2002 the *Trade Practices Amendment (Liability for Recreational Services) Act 2002* came into operation. Section 68B now provides that a term in a contract for the supply of recreational services[40] is not void because the term excludes, restricts or modifies the application of the TPA or has the effect of so doing as long as the exclusion etc. is limited to liability for death or personal injury. When the amendments were announced the minister responsible for them told the Senate that 'businesses would have to have in place reasonable risk management plans in respect of any activity to which a waiver can apply'.[41] However, when the government introduced the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002* on 27 June 2002, neither of these safeguards was included and none has subsequently been introduced.

What sort of message does this send out to the community? As Associate Professor McDonald remarked of the protection afforded recreational service providers under the provisions in the PR 'it seems odd and even offensive to the fundamental values of a modern civilised society to include this shedding of responsibility in a 'personal responsibility' program. It is hard to imagine that it will be good for tourism if we get known as a country where there is no responsibility for 'no care', where we add legal dangers to our many natural dangers'.[42]

## Restricting access to legal representation

One way of restricting access to justice is to make it difficult to obtain legal representation. The New South Wales Government set out to achieve this in a number of different ways.

- First, it placed limits on the amount of costs recoverable in personal injury cases.
- Secondly, it introduced penalties for advertising.

Concurrently with the passage of the CLA, amendments were made to the *Legal Profession Act 1987* limiting the amount of costs that can be recovered in 'small' personal injury damages cases.

Subject to certain exceptions, s198D of the Legal Profession Act limits lawyers acting for plaintiffs in personal injury suits to 20 per cent of the amount recovered or $10,000, whichever is greater, in all cases where the amount recovered does not exceed $100,000.[43] The provision is inequitable. It imposes no comparable limit on defendants.

In effect, this means that any action for damages that are unlikely to exceed $100,000 and which is statute barred (and therefore requires an application to be made for an extension of time) could never be brought unless the plaintiff is independently wealthy or the legal practitioner is prepared to do the work for no reward.

An indirect but likely result of these changes is that most, if not all, old age pensioners are unlikely to be able to sue for damages for personal injuries. The threshold and the deductible sums for non-economic loss and the limits on damages for gratuitous care mean that few would recover damages that exceed $100,000.

Yet, the premier, in his second reading speech, said that 'no-one wants to deprive the genuinely deserving of compensation'.[44]

And what about the right to know? One other obvious way of restricting access to justice is to restrict access to legal advice.

In 2001 the government introduced the Workers Compensation (General) Amendment (Advertising) Regulation.

The Regulation made it an offence with a maximum fine of $20,000 for a lawyer or agent to advertise workers compensation services other than by stating name and contact details and area of speciality in certain publications. In other words, the regulation made it an offence for a lawyer or agent to make any statement in writing or electronically which might have the effect of encouraging or inducing a person to exercise his or her legal rights with respect to workplace injuries.

The only apparent mischief to which the Regulation was directed was that advertising encourages people to bring claims and it is expensive to pay claims.

**An indirect but likely result of these changes is that most, if not all, old age pensioners are unlikely to be able to sue for damages for personal injuries.**

In 2003 the parliament went further. It passed the *Legal Profession Legislation Amendment (Advertising) Act 2003* which included a regulation making power to prohibit conduct relating to the marketing of legal services, punishable by a fine of 200 penalty units (or $20,000) and potentially amounting to professional misconduct. In introducing the legislation to the lower house the attorney general asserted that 'the manner in which lawyers' services are advertised and marketed can have a detrimental effect on both the court system and on the availability of affordable insurance'.[45]

Although the Act was expressed very generally, the Regulation that was made related exclusively to advertising 'personal injury legal services'.[46] Clause 139 of what became the *Legal Profession Regulation 2002* prohibits any barrister or solicitor from publishing, causing or permitting to be published any advertisement that includes any reference to or depiction of personal injury or 'any circumstance in which personal injury might occur or any activity, event or circumstance that suggests or could suggest the possibility of personal injury, or any connection to or association with personal injury or a cause of personal injury or any legal service that relates to recovery of money or any entitlement to recover money in respect of personal injury'. An advertisement is defined broadly as 'any communication of information (whether by means of writing, or any still or moving visual image or message or audible message, or any combination of them) that advertises or otherwise promotes the availability or use of a barrister or solicitor to provide legal services, whether or not that is its purpose or only purpose and whether or not that is its only effect'.[47] 'Publish' is defined equally broadly.

Any contravention is declared to be professional misconduct.[48]

There are limited exceptions that permit entries in a practice directory, on an internet website operated by the legal practitioner or a sign displayed at the practitioner's place of business stating no more than the name and contact details and area of practice or specialty. However, the mention of fees would violate the provision.

Legal practitioners who practice in other areas have the right to market themselves but those who have or had the temerity to practise personal injuries litigation will be criminals if they do! If I advertise my services for people with grievances affecting their property or their purse or their reputation I am free to do as I please (subject to the constraints of the Fair Trading Act). Why isn't the person who injures herself or the person responsible for it entitled to have as much information as accessible to her or him as the company or person who is aggrieved in a commercial transaction gone wrong? The 2002 amendments to the Legal Profession Act prohibit a legal practitioner from providing legal services in any claim for damages unless there are reasonable prospects of success.[49] So this ban was designed to thwart access to lawyers by injured people whose claims have reasonable prospects of success. Why was it necessary anyway? After all, the sweeping changes to the law with respect to personal injuries compensation to which I have referred above, dramatically reduced both the potential for and the number of claims in any event. However, it was apparently not enough to reduce rights and to restrict access to the courts. It was also apparently necessary to prevent people from learning about what remained of their rights or how to enforce them. It is a curious and troubling course for a democratic regime in a free market economy.

The irony, of course, is that the Bar, at least, never sought the right to advertise. We were told in 1987 that we were out of step with society because we banned it. We were told that advertising encouraged competition and that competition was to be fostered above all else. Since when is informing citizens about their legal rights so repugnant that it should become an offence?

The Australian Plaintiff Lawyers Association (now the Australian Lawyers Alliance) instituted a challenge in the High Court to these regulations.[50] The case has now been reported.[51] For my own part, whatever view might be taken of the merits of the constitutional challenge, it is difficult to see why, if advertising by lawyers is permissible, and if free speech is to have any meaning, it should be unethical, let alone criminal, to tell someone what you do for a living or what his or her legal rights might be. I have no desire to place an advertisement in the ordinary sense in any publication. I have an old fashioned distaste for it. However, I cannot accept that anyone else who chooses to promote herself in that way should be punished for it as long as she does not make any false or misleading statement and I have a preference for advertisement that do not breach the bounds of good taste.

**It was also apparently necessary to prevent people from learning about what remained of their rights or how to enforce them.**

### Have we gone too far? Who benefits from the changes?

I urge the powers that be to consider a number of questions. What is the overall impact of all these changes on the wider community? Why should recognition of personal responsibility to avoid harm give rise to an abrogation of corporate responsibility? What ever happened to government responsibility? Why should the injured shoulder more of the burden of accidents particularly when they are injured through no fault of their own?

While the full force of the most recent changes is yet to be felt, an increasing sense of disquiet is emerging.

In a recent speech the Hon Justice Michael Kirby AC said:

> Whilst in Australia we roll back the entitlements of those who suffer damage, in the name of 'personal responsibility', we have to be careful that we do not reject just claims and reduce unfairly the mutual sharing of risks in cases where things go seriously wrong.
>
> These are important questions for the insurance industry. It will not thrive if it becomes known, or suspected, that high premiums are paid when its liability is being significantly and constantly reduced. The sharing of risks is the essential brilliant idea of insurance. We must not kill the goose that laid the golden egg.[52]

It is most unlikely that the convergence of factors that arose in 2001-2 will ever again occur at the same time. And times have changed. The Australian insurance market has stabilised post HIH. So, too have international reinsurance markets with many policies now carrying terrorism exclusion clauses. Boom times on the stock markets have again seen insurers making significant profits from their investment divisions.

The *KPMG General Insurance Industry Survey 2004* revealed that the insurance companies surveyed had increased their gross premium income by 12 per cent to $23.58 billion. Underwriting profit before tax increased by a staggering 428 per cent to $1.551 billion. Investment returns added a 73 per cent improvement contributing just over $2 billion.[53] Yet, despite the gift from government and the promises to the contrary there has been no appreciable decline in insurance premiums.

Whilst the profits of the insurance companies have risen beyond expectations, seriously injured people are missing out on compensation.

Is it not time to review the changes and restore some fairness to the process? There is little reason for optimism that, without legislative intervention, insurers will return to any significant extent the benefits they gained from the new laws.

One might be forgiven for thinking that a legacy of the changes to the law relating to the recovery of damages for personal injuries is that insurance companies have been given a legislative licence to print money. What a glorious state of affairs when you can write insurance and rarely have to pay out on a policy. How close are we now in the area of personal injuries to what must surely be the insurer's ideal world - where insurance is compulsory but payment of claims is forbidden? Remember those words attributed to Rodney Adler.

1 An observation allegedly made by a former leading Sydney identity in the insurance industry, currently serving a gaol term for offences of dishonesty arising out of his conduct as a director of the HIH insurance group, in answer to a question about what he did for a living.

2 See the *Motor Accidents Compensation Regulation (No 2) 1999* and Schedule 1 for the costs themselves.

3 An assessor is required to have regard to certain factors in determining whether the matter is suitable for assessment, such as where the matter involves complex questions of fact or law or involves issues of indemnity or insurance or whether other non CTP parties are involved.

4 See s94.

5 Information supplied to the Australian Lawyers Alliance from members.

6 See e.g., *Workers Online Issue No* 97 25 May 2001 http://workers.labor.net.au/97/b_tradeunion_compo.html

7 Except where at least 10 per cent permanent impairment can be established and then only a modest sum.

8 See *Workers Compensation Act 1987* Part 5. Actually the Sheahan inquiry recommended 20 per cent.

9 See WIM Act s327.

10 Section 348 of the Workplace Injury and Workers Compensation Act provides that, to the extent that regulations make provision for the costs payable to a legal practitioner, those regulations displace the provisions of the Legal Profession Act.

11 See Workers Compensation Act Schedule 6 Part 18 clause 3.

12 See Workers Compensation Act s151A (as in force for claims commenced from 27 November 2001).

13 See http://www.lawlink.nsw.gov.au/sc per cent5Csc.nsf/pages/spigelman_270402

14 B McDonald, 'Legislative intervention in the law of negligence: The *Civil Liability Act 2002*: the common law in a sea of statutes', March 2005.

15 As defined in the *Dust Diseases Tribunal Act 1989*. They include any disease of the lungs, pleura or peritoneum that is attributable to dust.

16 See Civil Liability Act s3B.

17 It is nine per cent for earlier injuries subject to the Act.

18 Section 13.

19 (1981) 150 CLR at 438.

20 The CLA provides that a prescribed discount rate is to apply to future economic loss claims and, in default of any such rate being prescribed, a five per cent discount rate applies: s13(3). To date none has been prescribed.

21 *Review of the Law of Negligence Final Report*, Canberra, September 2002 Recommendation 53, p.211.

22 Fixed by the House of Lords in *Wells v Wells* [1999] 1 AC 345.

23 Fixed on 27 June 2001 in the *Damages (Personal Injury) Order 2001* made pursuant to the *Damages Act 1996*, based on what he believed to be the accurate figure for the average gross redemption yield on Index-Linked Government Stock for the three years leading up to 8 June 2001. See http://www.dca.gov.uk/civil/discount.htm

24 See s 15(6). However, they may not survive a High Court challenge in *CSR Limited v Thompson* in which the Court of Appeal declined leave to reargue *Sullivan v Gordon* at (2003) 50 NSWLR 77 but which concerned damages for the care of a spouse whereas *Sullivan v Gordon* concerned the care of children (special leave granted 10 December 2004).

25 It does not however apply if death ensues and the claim is brought under the *Compensation to Relatives Act 1897* or to an award of damages for mental harm to a person who was not an offender in custody at the time of the incident resulting in the harm. See s26B.

26 Indeed, in his speech at the ALP campaign launch for the 2003 state elections the premier declared: 'We are prepared to fight - and fight hard - for the biggest reform to tort law in 70 years: putting commonsense and personal responsibility back into our legal system. These views were reached by talking to the experts. But, above all, by listening to people.'

27 See, e.g. *Harvey & Ors v PD* [(2004) 59 NSWLR 639. Spigelman CJ was a little more guarded about the issue in that case.

28 See McDonald op. cit. at p 30.

29 See, e.g. *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 and *Towns v Cross* [2001] NSWCA 129.

30 They are:

(a) where the plaintiff has asked for information or advice about the risk;

(b) where the defendant is required 'by written law' to warn the plaintiff of the risk; and

(c) where the defendant is a professional and the risk is one of death or personal injury.

31 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 which decided that a doctor is not negligent if he or she acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice.

32 See s5M (6)-(9).

33 One commentator has argued that the definition is so wide that it covers almost all aspects of daily living with the exception of work and sleep. See T Goudkamp, 'Has tort law reform gone too far? a paper delivered a the LawAsia Conference in Queensland, 23 March 2005, p.8.

34 There is an exception for cases where the harm resulted from a contravention of a provision of 'a written law' that established specific practices or procedures for the protection of personal safety. That may include a breach of an Australian Standard incorporated into a regulation.

35 Civil Liability Act s41.

36 Following the outcry in the media after the High Court decision in *Cattanach v Melchior* (2003) 214 CLR 1.

37 Defined as an offence punishable by imprisonment for six months or more.

38 commenced 19 December 2003 and applies to cases whether the cause of action arose before or after the date it was introduced into the parliament (13 November 2003) and whether or not proceedings were already on foot at the time: CLA Schedule 1 cl 15.

39 The Court of Appeal (by a majority, Spigelman CJ dissenting) allowed the appeal and set aside the judgment in favour of the plaintiff: *Hunter Area Health Service & Anor v Presland* [2005] NSWCA 33.

40 Defined to mean 'services that consist of participation in:

(a) a sporting activity or a similar leisure-time pursuit; or

(b) any other activity that:

(i) involves a significant degree of physical exertion or physical risk; and

(ii) is undertaken for the purposes of recreation, enjoyment or leisure.'

41 Senator Hon Helen Coonan, Question without notice: Insurance, Senate, Hansard, 27 June 2002, p.2557.

42 Barbara McDonald, 'Legislative intervention in the law of negligence: *The Civil Liability Act 2002*: the common law in a sea of statutes', a paper delivered to the joint conference of the NSW Bar and the ABA entitled 'Working with statutes', Sydney, 18-19 March 2005, pp.24-5. In its submission to the Ipp inquiry the ACCC voiced its concern that such proposals would result in the risks of recreational and other activities being inappropriately allocated to consumers.

43 Changes to those figures can be made by regulation: s198D(2). The provision does not apply to costs as between the lawyer and her client in cases where a costs agreement has been entered into: s198E or for costs incurred after an offer of compromise has been filed where damages exceed the amount of the offer: s198F. Section 198G also permits a court hearing a claim for personal injury damages to exclude legal services provided to a party to the claim if the legal services were provided 'in response to any action by or on behalf of the other party to the claim that in the circumstances was not reasonably necessary for the advancement of that party's case or was intended or reasonably likely to unnecessarily delay or complicate determination of the claim'.

44 http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20020528026

45 http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA200312030

46 Defined as any legal service that relates to recovery of money, or any entitlement to recover money, in respect of personal injury. See *Legal Profession Regulation 2002* clause 139(1)(c). Gazetted 9 May 2003.

47 *Legal Profession Regulation 2002* clause 38.

48 Clause 139(2).

49 See now *Legal Profession Act 2004* (NSW) s345

50 *APLA Ltd & Ors v Legal Services Commissioner of New South Wales & Anor* (S202/2004).

51 *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 219 ALR 403; (2005) 79 ALJR 1620.

52 http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_23feb05.html

53 See the full report and the executive summary at http://www.kpmg.co.nz

# Aboriginal people and access to civil law remedies

**It is well known that Aboriginal people are over-represented in our criminal justice system. What is less-well recognised, or analysed, is the evidence that they do not access civil remedies as often as other Australians. Norman Laing and Larissa Behrendt, two Indigenous members of the NSW Bar, analyse this phenomenon and its implications for the provision of legal services to Indigenous Australians.**

A Productivity Commission report, *Overcoming Indigenous Disadvantage 2005*, provides a poignant illustration of the disparity between the living standards of Indigenous and non-Indigenous Australians. Amongst data showing lower levels of education, poor quality housing, higher unemployment and over-representation in the criminal justice system, there was clear evidence that standards of Aboriginal health remain poor. We have a life expectancy that is 17-years less than other Australians, whilst our infant mortality rates are 2-3 times higher.

Given these socio-economic indicators, should we be surprised that civil remedies for social security, housing, consumer credit and discrimination aren't employed more often by this most disadvantaged sector of the Australian community?

## An historical context

Misconceptions about Aboriginal people are prevalent in Australian society. There is the belief that most Aboriginal people live in the remote parts of the country (or at least the 'real' ones do). Others include the belief that Aboriginal people living in urban areas have lost their culture; and that the 1967 referendum gave Indigenous people citizenship rights. Of these 'urban myths', the misunderstandings about the effects on the citizenship rights of Indigenous people of the 1967 constitutional amendment seems to be particularly enduring. Those who remember history correctly will recall that the referendum made two changes to the Constitution. The first was to include Aboriginal people in the census, and the second was to give the federal government the power to make laws in relation to Indigenous people.

The 92 per cent of Australian people who voted 'Yes' in 1967 did provide an opportunity for a 'new beginning. The constitutional amendments gave increased power to the federal government over the sphere of Aboriginal affairs and changed the way in which policy was developed and implemented. For example, in 1968, the government established the Council for Aboriginal Affairs, and then the Office of Aboriginal Affairs. When the Whitlam government came to power in 1972, it upgraded the Office of Aboriginal Affairs to a federal department. But despite this increased power and activity, large disparities still remain in the experiences and opportunities open to an Aboriginal child compared to its non-Aboriginal counterpart.

While the referendum may have given additional powers to the federal government, the changes did little to alter many of the dominant and negative views about Aboriginal people that were pervasive in Australian society at the time of the vote. These attitudes, policies and practices were only brought to light with


Shirley Watson with Senator Reg Bishop holding a badge urging people to vote yes in referendum on whether Aborigines should be counted in census in May 1967. Photo: News Ltd Image Library

the publishing of the *Report of the Royal Commission into Aboriginal Deaths in Custody*. The commission highlighted how the events of the last century continued to influence the lives of Aboriginal people today with the commission ultimately finding that most of the 99 deaths that were investigated were, in fact, caused by 'system failures or absence of due care'. These systemic failures once again indicate an under-utilised role for civil remedies.

## Some barriers to accessing civil remedies

In 2004 the Law and Justice Foundation published the *Data Digest*, the first report on its Access to Justice and Legal Needs Program. The report is a compendium of service usage data from NSW legal assistance and dispute resolution services between 1999 and 2002 and identifies a number of interesting points in respect of Indigenous people's access to legal services.

First, it shows that the proportion of enquiries from Aboriginal people comprised four per cent of all those received by duty solicitors at Legal Aid NSW. The equivalent figure at NSW community legal centres was five per cent. Both figures increased steadily between 1999 and 2002. This is disproportionately high for a group that represents just 1.9 per cent of the state's population.

However, inquiries by Indigenous people to the Legal Aid NSW Advice Service were about two per cent of all inquiries, a figure that has not altered significantly since 1999.

The areas of greatest interest with inquiries to the Legal Aid NSW Advice Service were the areas of crime (accounting for 36 per cent of inquiries) and family law (31 per cent of inquiries). However, considering that Indigenous people are over-represented at much higher rates in the criminal justice system and as victims of racial discrimination, Indigenous people should be accessing these services at a greater rate than what these statistics indicate.

In its report on public consultations for the same project, the Law and Justice Foundation identified the following barriers confronting Indigenous people in accessing legal aid services:

- a reluctance to involve outsiders in matters that are considered private;
- a lack of awareness of Indigenous people of the scope and ability of the law to resolve certain types of problems;
- the limited ability of the law and traditional legal approaches to resolve problems that in many cases involve not just legal but also significant political, historical and cultural issues;
- the reliance on documentary evidence to substantiate legal claims and its reluctance to accept or rely on anecdotal or oral evidence by Aboriginal people;
- long term distrust of and previous negative experience with the legal system;
- the formality of the legal system and its services;
- lack of cultural awareness, sensitivity and compassion among justice system staff and legal service providers;
- lack of confidence in confidentiality, support and empathy in accessing Legal Aid NSW services;
- lack of Aboriginal personnel;
- lack of relationship between Legal Aid offices and local Aboriginal communities;
- intimidation in approaching legal services;
- lack of awareness of the services of Legal Aid NSW;
- the need to book Legal Aid services;
- location of Legal Aid offices; and
- lack of public transport to Legal Aid's offices.[1]

**For many Aboriginal Australians, attempts to obtain remedies under the civil justice system have been discouraging.**

The Law and Justice Foundation report also identified civil law areas where Indigenous people find it most difficult to access legal assistance and pinpointed the areas relating to native title claims and intellectual property and cultural heritage issues.[2]

For many Aboriginal Australians, attempts to obtain remedies under the civil justice system have been discouraging. These include high profile cases, such as *Gunner* and *Cubillo*[3], where Aboriginal plaintiffs sought to use tort and equity in seeking reparations for the impacts of the policy of removing Aboriginal children from their families (and were unsuccessful); or the limited parameters of anti-discrimination law, which resulted in only nine cases in which orders were made in the 2003-2004 financial year. Their perceived failures have sown a feeling of distrust among those with little or no understanding of the civil justice system.

Distrust of the legal system is just one barrier to overcome when encouraging Aboriginal people to explore their civil law rights.

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Many do not have adequate education or knowledge of government agencies, whilst others cannot overcome an inherent distrust of public servants.

Facing any legal system and its formalities is a daunting experience for everybody, not just Aboriginal people. However, it becomes yet more frightening for those people who only know of a system involving the police and criminal charges. The fear, and often misunderstanding, by some Aboriginal people that the law is only for responding to police charges leaves our people with many civil law matters being unpursued or unresolved. Civil matters such as welfare rights, housing, discrimination law, consumer rights, credit and debt, employment law, motor accidents compensation, crimes compensation, social security, intellectual property, negligence and family law are just some of the areas of law where avenues for redress are perceived as so far removed from the familiar criminal justice system that they are simply not worth worrying about.

The NSW Legal Aid Commission, community legal centres and the Aboriginal legal services provide a valuable service to our people, often without adequate funding or due recognition. However, when accessing these particular services, Indigenous people are sometimes confronted by a lack of cultural awareness, sensitivity or compassion on the part of the solicitors. Unfortunately, this may get worse before it gets better. It will be exacerbated by the proposed Aboriginal legal services tendering scheme because Indigenous lawyers are under-represented in law firms and community legal centres.

Aboriginal legal services, under-resourced as they are, have necessarily focused their efforts on helping Indigenous people ensnared by the criminal justice system. Many ALS offices simply do not have the requisite knowledge base or resources on hand to assist Aboriginal people in civil law matters - especially in rural and regional areas of the state.

Consequently, an Indigenous family may live with injuries for which they will never be compensated, become involved in unjust financial arrangements, accept racial vilification or suffer under adverse administrative decisions.

Domestic violence, residence and contact disputes and abduction of children are rarely dealt with by the Aboriginal legal services. Whilst the Aboriginal and Torres Strait Islander legal services in metropolitan Sydney employ a family law solicitor from time to time, services in far western NSW and northwestern NSW generally have not had family lawyers and do not usually act in such matters.

At present the Legal Aid Commission has an arrangement with the ALS, whereby LAC officers visit the ALS office at Blacktown to provide advice to clients in civil law matters. These officers attend each fortnight on a Friday and, on average, address inquiries from three Indigenous people per visit.

Unfortunately, these outcomes can be directly attributed to the ALS prioritising their case loads and directing their allocated funding to the high number of criminal law matters that they handle.

## A role for civil remedies

Too many Indigenous people simply do not know anything about potential civil remedies. In the past, Indigenous people were subjected to racist and discriminatory treatment and had no alternative but to accept it. Sadly, this acceptance is intergenerational. Many Aboriginal people today are still unaware that they have equal rights and may have civil remedies available to them.

There are a number of ways highlighted by the Law and Justice Foundation through which all lawyers can help to bring some balance into the civil law arena for Aboriginal people. The first is to rebuild trust and confidence in the legal system generally and the profession in particular. One way to achieve this is to employ more Indigenous lawyers at the front line of the Legal Aid Commission, the community legal centres, the Aboriginal legal services and especially in those law firms who are involved in the legal services tendering process. Education of Aboriginal culture and history needs to go further for the legal profession. Most importantly we all need to ensure that Aboriginal people are themselves educated and are aware that there are civil law services in place available to them.

It has been 35 years since a collective body consisting of both Aboriginal and non-Aboriginal people established the Redfern Aboriginal Legal Service. This group founded the ALS in response to the continual police harassment of Aboriginal people and the lack of legal representation afforded to them. After its establishment, the ALS provided an advocate for Aboriginal people and produced a dramatic shift in the dynamics of the criminal justice system. It provided a substantial reduction in miscarriages of justice but more importantly it provided the initial steps towards equality and Aboriginal empowerment in the NSW justice system. This positive change would not have occurred without the support and assistance of volunteer white lawyers and Aboriginal people working together for a common cause. The injustices and disadvantages faced by Aboriginal people in the criminal jurisdiction motivated and inspired those in 1970 to act and bring about a level of equality. The time has come for our generation to continue that legacy and not let civil law be a casualty of that battle.

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1 Law and Justice Foundation of NSW, *Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW. Stage 1: Public Consultations*. August, 2003, pp.63-64.

2 ibid., pp.65-66.

3 (2001) 183 ALR 249.

# High Court cases

## Chief Executive Officer of Customs v El Hajje (2005) 79 ALJR 1289, 218 ALR 457

The extent to which averment provisions may be used to prove an ultimate fact in issue was considered in this decision. The decision arose from an excise prosecution under the *Excise Act 1901*. Although it deals with the effect of the averment provision in s144 of the Excise Act, the decision will apply to similarly worded averment provisions in other federal legislation, such as s255 of the *Customs Act 1901* and s8ZL of the *Taxation Administration Act 1953*. These three sections provide that averments of fact by a prosecutor shall be prima facie evidence of the matter or matters averred.

The respondent was apprehended in Victoria driving a truck that was found to contain a large quantity of 'cut tobacco' upon which excise duty had not been paid. At the time s117 of the Excise Act proscribed the possession, without authority, of manufactured or partly manufactured excisable goods upon which excise duty had not been paid. The appellant commenced proceedings in the Victorian Supreme Court in respect of the respondent's alleged contravention of s117.

In its statement of claim the appellant averred, amongst other matters, that the appellant 'had in his possession, custody or control manufactured excisable goods, namely a quantity of cut tobacco weighing 691.48 kilograms'. The Victorian Court of Appeal identified this as an averment that the goods fell within a statutory description and held it to be an averment of a question of law, citing the judgment of Fullagar J in *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 at 51. There were no averments of the facts constituting manufacture. Given the court's view that tobacco leaf might be cut for purposes not connected with manufacture into a product suitable for consumption, the court held that this was an averment of the ultimate fact in issue.

The majority of the High Court, comprising McHugh, Gummow, Hayne and Heydon JJ, held that the Victorian Court of Appeal had erred in two respects. First, *Hayes* was a decision about what constituted an appeal on a point of law, and was, therefore, distinguishable. Second, whether tobacco leaf might be cut for purposes other than producing a commodity was beside the point. The term 'cut tobacco' was not defined in the Excise Act and 'tobacco' was defined broadly in the relevant schedule to be tobacco leaf 'subjected to any process other than curing the leaf as stripped from the plant'.

Section 144 of the Excise Act has the effect that averments of matters of fact by the prosecutor in the information, complaint, declaration or claim shall be prima facie evidence of the matters averred. Where a matter averred is a mixed question of law and fact the averment shall be prima facie evidence of the fact only. The majority concluded that there was nothing in the wording of this provision or its legislative history prohibiting its use to aver an 'ultimate fact in issue'. In reaching this conclusion the majority noted that there were a number of elements to a contravention of s117, any one of which, if not admitted by a defendant, might comprise an ultimate fact in issue. Properly analysed, the averment complained of made mixed allegations of fact and law:

> that the tobacco had been subjected to one or more manufacturing processes and, for that reason, fell within the reach of section 117 … The former is an allegation of fact; the latter may be an allegation of law.

In a separate judgment, Kirby J agreed with this conclusion of the majority.

The matter was remitted to the Victorian Court of Appeal for it to consider the question whether, taking the impugned averment into account, the appellant had established the requisite elements of the alleged contravention of s117 beyond reasonable doubt, that being the standard of proof required as a result of the High Court's decision in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161.

**Christopher O'Donnell**

## Fingleton v The Queen (2005) 79 ALJR 1250, 216 ALR 274

In *Fingleton v The Queen* the High Court finally brought to an end the well-publicised criminal proceedings against the chief magistrate of Queensland, Ms Diane Fingleton.

Ms Fingleton was convicted of an offence under the *Queensland Criminal Code* which prohibits unlawful retaliation against a witness. Following the jury verdict an alternative charge of attempting to pervert the course of justice did not require a verdict. Ms Fingleton was sentenced to a term of imprisonment. On appeal to the Court of Appeal of the Supreme Court of Queensland the conviction was confirmed but the sentence was reduced. By the time her case reached Canberra Ms Fingleton had completed her prison sentence.

The case is instructive in many respects, not the least being that the protracted proceedings continued for years before it was noticed around the time of the special leave application that the criminal activity alleged could not be maintained against her. This was because of an immunity provided for in the Criminal Code itself and by extension in the *Magistrates Act 1991* of Queensland.

In the High Court, Chief Justice Gleeson said about this prosecution at [55]:

> The appellant should not have been held criminally responsible for the conduct alleged against her. By statute, she was entitled to a protection and immunity that was wrongly denied to her.

The proceedings revolved around correspondence from Ms Fingleton to another magistrate, Mr Gribbin which it was said gave rise to the alleged offence or the alternative charge of attempting to pervert the course of justice. Mr Gribbin filled a post as a coordinating magistrate and was also an office bearer in the Magistrates Association at some time.

In the course of her work as chief magistrate Ms Fingleton ordered the transfer of a magistrate named Thacker to Townsville. In pursuit of an application by Ms Thacker to have that transfer reviewed by an appeals committee Ms Thacker was in touch with Mr Gribbin. She sought assistance from the Magistrates Association about the history and proceedings surrounding transfers of magistrates.

Mr Gribbin provided an affidavit for Ms Thacker to use in the review proceedings that was critical of Ms Fingleton's approach to transfers of magistrates. He described some of them as 'forced transfers' and said magistrates generally felt 'susceptible to arbitrary, unadvertised, involuntary transfers'.

After becoming aware of Mr Gribbin's affidavit and involvement in the appeal against the transfer of Ms Thacker, Ms Fingleton e-mailed Mr Gribbin calling on him to show cause why his appointment as coordinating magistrate should not be withdrawn. It is that e-mail that became central to the case and its contents are set out at [18].

The email makes interesting reading and is referred to at some length in the judgments of McHugh J and Kirby J.

In effect the chief magistrate was calling on Mr Gribbin to show cause why he should not be removed from his post as coordinating magistrate given that Mr Fingleton was of the view that his action in supplying an affidavit in Ms Thacker's support was 'disloyal' and manifested 'a clear lack of confidence by you in me as chief magistrate'.

McHugh J and Kirby J found that even apart from her protection and immunity by statute, at her trial her defence was not properly put to the jury by the trial judge. Ms Fingleton's evidence was to the effect that she believed that Mr Gribbin was not loyal to her and that she had 'reasonable cause' to call on him to show why he should continue in his post. As a result the Crown needed to prove that her belief did not amount to a 'reasonable cause' for her to be convicted. It is hard to see given the reference throughout the various High Court judgments to the continuing friction between Fingleton and Gribbin and the affidavit in the Thacker incident why she would not have had reasonable cause to act in that way.

### Ali v The Queen (2005) 79 ALJR 662, (2005) 214 ALR 1

*Ali v The Queen* also deals with matters in Queensland, this time involving allegations of flagrant incompetence of counsel.

The appellant and his partner were charged with a number of offences relating to the death of their child. The appellant was convicted of murder and the mother of manslaughter. The appellant also was convicted of improperly interfering with the corpse and concealing the birth of the child.

On appeal to the Queensland Court of Appeal the appellant claimed that his counsel had been incompetent in a number of ways. Some of these revolved around alleged failures to object to evidence. Another related to a theory or alternative hypothesis consistent with the appellant not being guilty of murder that he said his counsel should have put to the jury.

In the High Court, the chief justice was unimpressed by the suggestion that trial counsel should have referred to a particular theory of the case consistent with the appellant's innocence on the murder charge. His Honour referred to what he had previously said in *R v Birks*: (1990) 19 NSWLR 676 and *TKWJ v The Queen*: (2002) 212 CLR 214 regarding alleged shortcomings of trial advocates.

*Birks* is well-known to those who practice in New South Wales, in particular for his Honour's often quoted comment: 'Damage control is part of the art of advocacy'.

As regards the argument of incompetence of counsel in *Ali* at [7] Gleeson CJ had this to say:

Photo: News Image Library

> The adversarial system is based upon the general assumption that parties are bound by the conduct of their legal representatives. Furthermore, that conduct, usually, can only be evaluated fairly in the light of knowledge of what is in counsel's brief, a knowledge that ordinarily is unavailable to an appellate court. An appellate court's speculation as to why a particular line was not pursued in cross-examination, or in address, will often be uninformed and fruitless. So it is in the present case. I can think of no good reason why trial counsel should have advanced the hypothesis in question. I can think of a number of good reasons why he might not have done so. Ultimately, however, I simply do not know. The argument that, because the hypothesis was not advanced, the appellant did not have a fair trial is hopeless.

In *Ali* at [25] Hayne J also dealt at some length with the suggestion that certain objections should have been taken by trial counsel. In that regard he was of the view that:

> the question is whether there could be a reasonable explanation for the course that was adopted at trial. If there could be such an explanation, it follows from the fundamental nature of a criminal trial as an adversarial and accusatorial process that no miscarriage of justice is shown to have occurred.

**Keith Chapple SC**

### McNamara (McGrath) v Consumer Trader and Tenancy Tribunal [2005] 79 ALJR 1789

This case, being an appeal from the New South Wales Court of Appeal, is significant because it concerns the construction of the expression 'statutory body representing the Crown', which is used in a number of NSW Acts, and departs from the reasoning of an earlier High Court decision in which that expression was considered.

The question on the appeal was whether s5(a) of the *Landlord and Tenant (Amendment) Act 1948* (NSW)('the LTA Act'), which provides that the Act does not bind 'the Crown in right of the Commonwealth or of the state', exempted the Roads and Traffic Authority of New South Wales from its operation.

It had been held below that the RTA came within s5(a) by reason of s46(2)(b) of the *Transport Administration Act 1988* (NSW), which provides that the RTA 'is, for the purposes of any Act, a statutory body representing the Crown'.

That conclusion was supported, but not strictly required, by *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376, in which a majority of the court held that the commissioner came within s5(a) of the Landlord and Tenant (Amendment) Act by reason of s4(2) of the *Transport (Division of Functions) Act 1932* (NSW) which provided that 'for the purposes of any Act the commissioner of railways shall be deemed a statutory body representing the Crown'.

However, in this case, a majority of the court held that s46(2)(b) of the Transport Administration Act did not bring the RTA within s5(a) of the Landlord and Tenant (Amendment) Act. McHugh, Gummow and Heydon JJ delivered the leading judgment. Gleeson CJ and Hayne J delivered brief judgments agreeing with them. Callinan J dissented.

McHugh, Gummow and Heydon JJ identified the issue, in broad terms, as whether the application of the Landlord and Tenant (Amendment) Act to the RTA would be, in legal effect, an application of it to the Crown. This depended on a finding that the operation of the LTA Act upon the RTA would result in some impairment of the legal situation of the Crown. Their Honours held that s46(2)(b) of the Transport Administration Act did not lead to such a finding.

In particular, the judgment of the plurality emphasised that the fact that a statutory body is a representative of the Crown is not sufficient to entitle it to the privileges and immunities of the Crown. This view had been proposed by Kitto J as one of the minority in *Wynyard Investments*, and accepted by a majority of the court in *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 79 ALJR 1 at 34-5. Accordingly, s5(a) of the LTA Act would not be invoked merely by establishing that the RTA 'represents' the Crown.

Further, their Honours construed s46(2)(b) of the *Transport Administration Act* to mean that, where a NSW Act uses the expression 'statutory body representing the Crown', this expression encompasses the RTA. An alternative construction, that for the purposes of all NSW Acts, the RTA is a statutory body representing the Crown was rejected.

In both these respects, the plurality departed from the reasoning of the majority in *Wynyard Investments*. Whilst that case, which concerned the construction of s4(2) of the T*ransport (Division of Functions Act) 1932*, did not control the construction of s46(2)(b) of the *Transport Administration Act*, this was not done lightly. In particular, regard was had to:

1. the reluctance of courts, absent clear legislative intent, to extend the immunities and privileges of the Crown to statutory corporations; and
2. the use of the expression 'statutory body representing the Crown' in NSW legislation in a way which did not suggest that reliance had been placed on *Wynyard Investments* in the drafting of that legislation.

In the result, the decision of the NSW Court of Appeal was reversed.

**Matthew Darke**

# Family Relationship Centres

*By Michael Kearney*

## Changes in family law

The attorney-general has recently announced a number of new initiatives in the area of family law as a result of the parliamentary inquiry by the House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*.

The initiatives centrally involve the establishment of a national network of 65 Family Relationship centres over the next four years. The centres are intended to provide information, advice and dispute resolution, case assessment, referral to appropriate services and agencies and assistance with the development of parenting plans. A national advice line and website will be conducted in conjunction with the centres.

The announcement establishing the centres formed part of a broader package which will also include:

- the enactment of legislation following the trial of the Children's Cases Program to provide legislative support for a less adversarial approach to the determination of parenting issues;
- the establishment of a combined registry and single point of entry and forms for the Family Court of Australia and Federal Magistrates Court; and,
- provision of 30 new contact centres.

As a further part of the changes, an exposure draft of the proposed *Family Law Amendment (Shared Responsibility) Bill 2005* was released on 23 June 2005. In summary, the draft provides for:

- subject to some exceptions, requiring a party commencing proceedings to file a certificate by a 'family dispute resolution practitioner' to the effect that the applicant has attended (or attempted to attend) family dispute resolution;
- providing for a rebuttable presumption that parties have joint parental responsibility for their children;
- defining what is meant by major long term issues to include such matters as education, religion, health and issues as to a child's name;
- to require the court to consider making an order that provides for a child to spend 'substantial time' with each parent (which is not taken to mean equal);
- some changes aimed at strengthening the enforcement regime in relation to parenting orders;
- the insertion of sub-division D which will have the effect that most of the rules of evidence in s190(1) of the Evidence Act will not apply in child-related proceedings; and,
- the elimination of the terms 'residence' and 'contact' in favour of phrases such as 'parenting time', 'lives with' and 'spends time with'.


Attorney General Philip Ruddock announces the location of 50 family relationship centres. Pictured at Parliament House, Canberra.
Photo: Kym Smith / News Ltd Image Library

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# 'The Republic is Ours': The Indonesian response to the so-called 'War on Terror'

**Indonesia is no stranger to terrorism. In a true sense Indonesia has been living and dealing with terrorism for much of its life as a republic since 1945. How Indonesia has dealt with terrorists, particularly in recent years, is potentially instructive to us in Australia and the West. In many important respects, the Indonesian approach stands in contrast with the rhetoric-burdened war paradigm of intervention opted for by the United States of America and its allies, including Australia. The following paper was delivered by Colin McDonald QC at the Northern Territory Criminal Lawyers' Conference at the Bali Hyatt Hotel, Sanur, Bali, Indonesia, 4 July 2005.***

There is no other choice. We must
Go on
Because to stop or withdraw
Would mean destruction

Ought we sell our certitude
For meaningless slavery
Or sit at table
With the murderers
Who end each sentence
'As your majesty wishes'

There is no other choice. We must
Go on
We are the people with sad eyes, at the edge of the road
Waving at crowded buses
We are the tens of millions living in misery
Beaten about by flood, volcano, curses and pestilence
Who silently ask in the name of freedom
But are ignored in the thousand slogans
And meaningless loud-speaker voices

There is no other choice. We must
Go on [1]

## Introduction

Whilst the military interventions in Afghanistan and Iraq have left the 'Coalition of the Willing' bogged down defending guerrilla wars with no exit strategies, Indonesia's approach has been to focus internally and use its ordinary criminal justice processes in both detecting and apprehending criminal terrorists and bringing them to open, public justice. In so doing, just as Indonesia has probably been more effective than any other nation in dealing with modern terrorism, it has done so without discarding new democratic values reclaimed with determination in 1998 after the fall of Soeharto.

In this essay, I look at the Indonesian response to the so-called War on Terror by adverting briefly to Indonesia's history and how Indonesia has responded to the phenomenon of extremist terrorism in more recent times since the bombing of the Philippine Embassy and the Jakarta Stock Exchange in 2000. I contrast Indonesia's response, again briefly, with that of the United States, the United Kingdom and Australia. I set out by way of example how the use of open ordinary court processes in the trials of Amrozi and Abu Bakar Ba'asyir has helped win the so-called 'war' in the battle for the hearts and minds of believers. As the prosecutors in the Bali bombing trials readily perceived, the real conflict is the ongoing struggle in Islam between moderate and progressives on the one hand and the fundamentalist extremists on the other.

The Indonesian experience is steeped in a turbulent history. It is helpful to get some sense of this history.

## Background

Soon after the agreement to a ceasefire with Dutch colonial forces on the American ship USS *Renville* in January 1948, militant Islamic guerrillas rallied around a Javanese mystic, S M Kartosuwirjo.[2] Kartosuwirjo had a background of radical political ideas and, when convalescing from serious illness, studied Islam under various mystic teachers. He disliked leftist ideas, distrusted the new republican leaders and became head of a band of Hezbollah guerrillas in west Java. In May 1948, Kartosuwirjo waged the first rebellion against the new Republic of Indonesia. [3]

Kartosuwirjo proclaimed himself *imam* (head) of the new Indonesian Islamic state often referred to by its Arabic name, *Darul Islam* (literally *dar al-Islam*, territory or house of Islam). This *Darul Islam* proclaimed state was based on Islamic law and administered by *kyais* (teachers of Islam) at first in western Java. [4]

Kartosuwirjo was a proponent of the mystical Sufi stream of Islam. Amongst many things, he wrote:

> It seems not enough filth of the world was eliminated and chased away in the First and Second World wars... We are obliged to foment the Third World War and World Revolution (because) God's kingdom does not yet exist on earth.[5]

He went on putting what the choices there were for his Muslim followers:

> Eliminate all infidels and atheism until they are annihilated and the God-granted state is established in Indonesia, or die as martyrs in a Holy War.[6]

Thus, by the logic Kartosuwirjo created, those who fitted into the infidel and atheist categories (necessarily so many unknown persons in the world) were ordained for annihilation. Hatred, intolerance and inhuman sentiment were at the root of this extreme world view.

Much of *Darul Islam's* support was ascribed to the charismatic Kartosuwirjo whose followers believed he had supernatural power. As the years progressed, *Darul Islam* attracted disaffected elements and, contrary to the image of a grand

religious movement, it degenerated into large groups of bandits, extortionists who committed 'terrorism on a grand scale'.[7] They bombed cinemas, poisoned water supplies and engaged in hold-ups. The peasants became the subject of forced exactions.[8] Failure to comply with *Darul Islam's* regulations and demands was met with brutality.[9]

The *Darul Islam* movement spread regional rebellion from West to Central Java, Sumatra and Central Sulawesi right up until 1962 when Kartosuwirjo was captured and summarily executed by republican forces. When Kartosuwirjo was executed in 1962, the *Darul Islam* movement was crushed. The Islamic State of Indonesia collapsed.[10]

However, the execution of Kartosuwirjo proved to be a pivotal event. For a generation of young Muslim activists, including one Abu Bakar Ba'asyir, Kartosurwirjo's execution by the secular Republic was 'a profoundly galvanising event'. Leaving aside doctrinal differences, the dead rebel leader was given martyr status and his movement, *Darul Islam*, was to be an inspiration for Muslim radicals for the next forty years.[11] *Darul Islam's* true and dark history was ignored.

In 1959, supported by the military, President Sukarno dumped the 1945 Republican Constitution and opted for an authoritarian style of government which he termed 'guided democracy'. Part of Sukarno's assertion of authority was the banning of the Muslim party, Masyumi, for supporting regional rebellion. The Republicans were seen by *Darul Islam* members as atheists contaminated by new republican ideas and communism. Sukarno pursued them relentlessly, gaoling *Darul Islam* leaders or forcing others into exile.

The guided democracy experiment failed. An abortive coup led by leftist generals was put down with Muslim political support. The Communist Party was blamed on flimsy evidence and a tragic bloodbath was unleashed across Indonesia. Some of the most senseless slaughter took place a short distance from this room. To quell the crises a new military strongman emerged, Major General Soeharto. Gradually Sukarno was stripped of his powers. An embattled President Sukarno reluctantly handed formal power over to him on 11 March 1966.

The New Order brought in by President Soeharto had initially attracted a new generation of revolutionary youth (*'pemuda'*). They were keen to set aside the guided democracy controlled by the ousted President Sukarno and see a society in which the law would reclaim a role as the 'normative machinery of social equilibrium mediating between citizen and between citizen and state'. [12]

However, these revolutionary hopes were dashed not just with the deaths of hundreds of thousands in that year of living dangerously in Indonesia – 1965. General Soeharto also sustained the model of government initiated by Sukarno in 1959 whereby law was subordinated to executive policy.[13] Political and religious groups were watched closely. Any gathering of a group of more than five people required a permit – as early organisers of this biennial conference well know. There were 'blacklists' preventing movements of Indonesians out of the country and on certain foreigners into the country. Lawyers could be and were arrested and sometimes gaoled in the discharge of their professional duties. Political activists were taken to court. Journals like the prestigious national *Tempo* magazine were banned. Politics of resentment simmered under the surface as did racial and sectarian issues.[14] The idea of an Islamic state (although suppressed) was not extinguished in the minds of some fundamentalist Muslims. Again, to avoid gaol, many zealots fled Indonesia and went into exile in Malaysia.

There being no central organisational authority in Islam, zealots were free to come together and be nurtured in a stream of Islam that hearkened back to Kurtosuwirjo and his philosophy. One very material congregation was the establishment of a *pasantren* (religious school) at Ngruki in East Java by Abu Bakar Ba'asyir. As was revealed in police raids at the school and in neighbouring houses after the Bali bombings, the school provided military training at night and attracted followers from the severe Saudi Arabian imported Wahhabi school of Islam, as well as dissidents involved in sectarian conflict in Sulawesi, East Timor, Ambon and the Moluccas.[15]

In Soeharto's time, the Ngruki school came under official scrutiny. Its founders, Abu Bakar Ba'asyir and Abdullah Sungkah, were arrested along with about 200 others in November 1978. They were accused of plotting to overthrow the government by parading and campaigning for an Islamic state. Ba'asyir and Sungkah were convicted and sentenced to nine years gaol for subversion, which sentence was reduced to three years then months on appeal.[16] To those responsible for maintaining security in the New Order, the human successors to the *Darul Islam* movement had once again been thwarted. Not so!

Students of Muslim cleric Abu Baker Ba'asyir pray at Ngruki boarding school in Solo, Central Java, 2 September 2003. Photo: AAP Image / Susilo Hadi

During the New Order regime, there was a resurgence in Muslim faith across Indonesia. Many were disillusioned with materialism and corruption and the apparent moral depravity of 'the West'.[17] Hard line, self proclaimed clerics, like Ba'asyir, became heroes to some.

Among those who went into exile, some ended up as fighters in Afghanistan inspired by the desire to rid Afghanistan of the infidel Russians. Ironically, the support for the Mujahaddin from over the Islamic world came from the United States at that time caught up in Cold War politics. Those Indonesians who fought in Afghanistan developed links with Arabic groups such as Al Qaeda – a national global network of committed terrorists was rapidly forming.

### The fall of Soeharto and the democracy revolution

On 21 May 1998, President Soeharto was driven from office. Seventy two days later, after his unanimous re-election as president for his seventh term in office, Soeharto resigned amidst the worst rioting seen in Indonesia since the fall of President Sukarno thirty two years earlier. It was the end of the New Order regime in Indonesia.[18] What ensued was a democratic revolution. In the last fifty years there has hardly been a nation where the transition from military dictatorship has been so swift, so determined and so peaceful, where Taufik Ismail's 1966 poem of the justification for change, *The Republic is Ours* was brought out of mothballs and recited publicly again with new hope. The people were reclaiming their republic; they were reclaiming the republic in a manner that had profound implications for the future of Indonesia and its role in the region. The lessons learnt from two previous revolutions and two virtual dictatorships which had spanned almost the entirety of Indonesia's brief political history since 1945 fired a new national resolve for change, democratic change in the world's most populous Muslim nation.

The fall of Soeharto spawned a new, committed democracy movement imbued with new determination. Those who drove the revolution were determined to restore the principle of '*negara hukum*' ('a nation of law'), literally the equivalent of the western concept of the rule of law. Executive power was reigned in. Political power moved from the president to the House of Representatives (the DPR). Indonesia gained a new, more democratic constitution containing a Bill of Rights. The judiciary was restored as a meaningful institution and given real judicial power including the power to review and declare laws invalid.

Law number 14 of 1970, which denied Indonesian courts the power to review the constitutionality of statutes, was rescinded and a new Constitutional Court was given the power to strike down laws on constitutional grounds. Peaceful, genuinely democratic elections occurred across the vast archipelagic country for the national and regional parliaments. Executive power transferred peacefully and today, Susilo Bambang Yudhoyono is the fourth Indonesian president since Soeharto, the third to be democratically elected. Indonesia has re-emerged almost Phoenix-like as the world's newest and certainly one of its most determined democracies.

When Soeharto fell there was not just freedom for those (the huge majority of Indonesians) who championed or supported a *negara hukum* nation. New freedom of expression was also given to those who deplored democracy, who advocated an Islamic state and who harboured violent and passionate ambitions to save Indonesia from the evils of democracy and a secular constitution.

### The bombings in Jakarta 2000

So when the first bombs went off at the Philippine Embassy on 1 August 2000 and at the Jakarta Stock Exchange on 13 September 2000, it was at a time when the nation was focused on forging its new identity and committed to its new democratic direction. And it is remarkable that Indonesia kept this democratic focus despite being beset with so many internal problems: a war in Aceh; sectarian violence in Ambon, Maluku and Sulawesi; endemic corruption; the loss of East Timor; inflation; a sluggish economy; and poverty everywhere. At first there was denial of there being a problem with internal terrorism. Then, there was doubt in many circles as to who were the true culprits. Some blamed rogue elements in the military. Others blamed Acenese separatists. There was a period of indecision.

We in Australia and the West hardly reacted to the first fanatical violence that ripped through Indonesia in 2000 at the cost of so many innocent Indonesian lives – drivers, security guards, cleaners, workers, innocent passers-by. The profound changes taking place next door and the challenges to the *negara hukum* and the secular constitution which the detonations posed went almost unnoticed in Australia. We did not know that we had an enemy and those blasts were harbingers of more to come.


Indonesian bomb squad team looking for clues amidst the debris of a damaged car in front of the residence of Philippine ambassador to Indonesia, Leonides Caday, who was injured in the blast, in downtown Jakarta, 1 August 2000. Photo: AFP Photo / WEDA / News Image Library

Insofar as most Australians thought about Indonesia in 2000, it was, I suggest, at best impressionistic: a 'beaut holiday spot' in Bali, otherwise a primitive country in every sense, without a real legal system and a system of law entirely at the whim of executive government and its cronies. And as with so much of Australia's sense of its northern neighbours, there has been a dangerous disposition to stereotype. One size fits all. The complexities of Indonesia were not understood. Apart from some very gifted Australian academics, expatriates and analysts, the implications of the revolution in post-Soeharto Indonesia did not fully register, if they registered at all among the general public.

As Sally Neighbour's book I*n the Shadow of Swords*[19] reveals, and an interview for *Inside Indonesia* in 2004 with Irfan Awwas, the chairperson of the Executive of the Indonesian Council of Mujahiddin bluntly records – democracy and the secular state were and are loathed by certain Islamic fundamentalists and seen as the biggest obstacles to an Islamic state and the dominance of Islamic law.[20] The fundamentalists included the Jakarta bombers, as was later discovered.

Soon after 11 September 2001, Bush officials and the Australian Government claimed Indonesia as a partner in the struggle against terrorism. Indonesia did not involve itself in any 'coalition of the willing' or approach the issue of Islamic fundamentalist violence as if it could be dealt with by the rules of military engagement. Indonesia was a cautious and necessarily careful ally given that 90 per cent of its 220 million population were Muslim. More importantly, it had an appreciation by reason of its history of the difficulty of battling by conventional war methods, ignorance, hatred and bigotry which was at the core of the fundamentalists credo.

However, even a cursory reading of Indonesian newspapers over the period 2001 to 2004 reveals an active appreciation in the Indonesian Government and intellectual elite that the sources of fundamentalist violence were complex, had historical connotations and had to do with the divisions in Islam itself.

## The Bali bombings

It was not until 12 October 2002, when bombs ripped through the Sari Club and Paddy's Bar claiming the lives of 202 people, including 88 Australians, that the awareness was triggered that terrorism existed inside Indonesia and that fanatical Indonesian nationals were connected to an international terror network.

The bomb blasts in Kuta were evidence that the new democracy movement and the constitutional structure based on a secular state were being challenged. Saturday, 12 October 2002 was a dark day in the history of both Indonesia and Australia. It was nevertheless a day when the nation's respective futures coalesced.

In the week after the bombing, the Australian foreign minister and justice minister were despatched to Jakarta. What followed would have been unthinkable prior to 12 October 2002. Antagonisms arising from Australia's participation in September 1999 in UN intervention in East Timor were set aside. Indonesia welcomed Australian police and intelligence officers to work alongside their own police and intelligence services on Indonesian soil.

A joint police task force was created to investigate the bombings and bring the perpetrators to account. Australia moved, at least in Indonesia, from a military to a civilian, forensic model of counter-terrorism.

Slowly the investigation drew leads, names and faces. Relentlessly, Indonesian police and undercover agents tracked down most of the Bali bombers gaining valuable intelligence in respect of the nature, scope and dimensions of the terrorist network inside Indonesia and beyond. These investigations in turn led to arrests and charges laid against the bombers in Jakarta in 2000.

Under pressure from the West, President Megawati Sukarnoputri decreed anti-terrorist laws that were shortly afterwards passed in the new democratic national assemblies. The laws were designed to retrospectively cover the events at Kuta on 12 October 2002.

Defendants were charged and quickly brought to trial. The criminal procedure in Indonesia from the time of arrest to trial is usually three to four months. The defendants who faced trial for the Bali bombings were numerous. It is instructive to look at the trial of two – Amrozi bin Nurhasyim and Abu Bakar Ba'asyir – for they demonstrate well the Indonesian approach.

## The trial of Amrozi

Whilst in America, citizens are used to televised criminal trials, Indonesia is not. Nevertheless, a component of the lasting notoriety of the trial of Amrozi was that it was televised and had the nation glued to its television sets awaiting daily the presentation of evidence and antics in the Nari Graha courthouse in Denpasar.

The stark simplistic medium of television captured and magnified Amrozi's smile into the homes of Indonesia and the world. Amrozi gained the sobriquets of the 'smiling assassin' and the 'smiling bomber'.

The trial had most of the components that make for famous trials. The nature and enormity of the charges, 202 people killed, 325 wounded and 423 separate properties destroyed or damaged were grisly by any world standard. There was intrigue and treachery, meticulous detective work and a manifest lack of remorse.

The trial was in depth and carefully crafted to make a point to the majority Muslim population in Indonesia.

Beyond the usual ingredients of famous trials, the trial of Amrozi had an extra and compelling element. Like the trial of Eichmann in Jerusalem and the Kosovo trials in the Hague, the trial of Amrozi involved the exposé of the uncivilized devastation of extremism and bigotry. What the trial of Amrozi

did was canvass, sometimes in graphic detail, the major contemporary political issue confronting Indonesia, all modern Islamic nations and the world – the threat of criminals who espouse extremist Islamic views. The trial confirmed that the conflict sparked off by the Bali bombings and the earlier bombings in Jakarta in 2000 concerned itself more with the world of ideas than the battle plans of generals and military interventions.

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

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

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

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

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

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

An appeal by Amrozi and others to the Indonesian High Court failed. Then, appeals were launched in the new Constitutional Court. As events transpired, the first case to get to the Constitutional Court was an appeal brought by another one of the Bali bombers, Masykur Abdul Kadir.

In a majority of 5-4 decision, the Constitutional Court used its review powers and struck down Law No. 16 of 2003. Law number 16 purported to authorize 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 of 2003 and interim Law Number 1 of 2003, which later became Law No. 16 of 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 Number 16 of 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.

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 like Muklas and Samudra fell into this category.

## Bombings in Jakarta 2004

The Bali bombings of 12 October, 2002 were followed by further bombings in Jakarta of the JW Marriott Hotel and on 9 September 2004 outside the entrance of the Australian Embassy. Again, intense detective work and coordinated investigation followed leading to many arrests and trials. It is estimated that in the wake of the Bali and Marriott bombings about two hundred and fifty Jemaah Islamiah ('JI') members were arrested. The rate of arrest dug deep into the ranks of JI

in Indonesia, estimated in May 2004 to have an organisational membership of between 500 to 1000 members. [21]

That JI still had lethal strike capacity was brought home in the second wave of bombs which were ignited in Bali, this time by suicide bombers in restaurants and eating areas of Kuta and Jimbaran on 1 October 2005. The second wave of Bali bombings had a personal message for the Balinese. Unlike the first Bali bombings which were at entertainment venues predominantly patronised by Westerners, the Jimbaran beach restaurant area is heavily frequented also by Balinese and other Indonesian tourists. This was seen as an attack on the Balinese economy as well as the other JI aim of destabilising the secular democratic republic. Thousands soon after demonstrated clamouring for the death penalty, at Bali's Kerobokan Gaol where Amrozi and the after first wave of Bali bombers were being held.

Again the Indonesian Government response was measured, emphasising efficiency and determination to track down the culprits by the normal police criminal investigative. Unlike the Western media response, Indonesian investigators remained unwilling to publicly conclude the motives behind the second Bali bombings.[22] Made Pastika called for calm and reminded his angry ethnic Hindu brothers and sisters not to usurp the state processes and have rule by the mob. He emphasised the need for restraint, patience and to allow the last stages of the first Bali bombers' appeal processes to be completed. General Pastika's message to his fellows was blunt: an unlawful or mob inspired expedition of the death penalty could be disastrous for Bali and turn Amrozi and the others into public martyrs in the huge ranks of Muslim Indonesia.

Like after the first wave of bombs, relentless detective work by police and the newly formed Anti Terror Police Squad ensued. So too, there was Australian Federal Police cooperation. Arrests also followed across Java and a spectacular shoot out in early November 2005 at Batu in East Java where one of JI's leaders and bomb masters Azahari Bin Husin ultimately detonated himself and his colleagues in a police trap.

Again, the ordinary criminal investigative and prosecution processes were followed utilising the existing criminal procedure laws.

### The trials of Abu Bakar Ba'asyir

The trials of Abu Baker Ba'asyir were altogether different trials from those of the Bali bombers. The trials of Abu Baker Ba'asyir also demonstrated the capacity of Indonesian justice to protect openly the interests of the secular state and thereby, Indonesian citizens.

Abu Bakar Ba'asyir's trials have been much misunderstood in the West. The frail, bearded cleric from Solo, east Java with white skull cap and prominent glasses was arrested a week after the 2002 bombings. He was anecdotally linked to Jemah Islamiah, the extremist terrorist group linked to al-Qaeda.

Ba'asyir was accused and detained in connection with not just

Abu Baker Ba'asyir on trial in Jakarta, 28 October 2004. Photo: AFP Photo / Choo Youn-Kong / News Image Library

the 12 October, 2002 Bali bombings, but also the JW Marriott hotel bombings in 2003 and a series of church attacks in Java. However, the cases mounted against Ba'asyir were largely circumstantial. The prosecutors had much less hard evidence to tender at his first trial in 2004.

Defended very ably by Jakarta senior counsel AW Adnan ( better known as Adnan Wirawan) Ba'asyir was acquitted of being JI's spiritual leader. The Indonesian prosecutors had sought and were refused by the United States Government the evidence of captured senior JI figure Hambali. Hambali had been captured in 2003 in Thailand and Thailand had handed him over to the United States Government. Hambali's CIA interrogation material was seen as potentially crucial to Ba'asyirs first trial. Ba'asyir despute his acquittal remained in detention to face other accusations that had been the subject of intense investigation.

In December 2004 Ba'asyir was charged as head of Jemaah Islamiyah inspiring his followers to launch in the 12 October 2002 Bali bombings and the JW Marriott Hotel bombing in 2004. Again the case was largely circumstantial. However, this time prosecutors called evidence from Nasir Abbas a former JI operative who, which not able to give direct evidence relevant to the charges of inspiring followers to perpetrate the bombings, did rail home earlier activities of Ba'asyir as being a leader of Jemaah Islamiyah.

Abbas swore that Ba'asyir 'headed Jemaah Islamiyah' and had sworn him in as a member of the group in Solo in 2000. Abbas's evidence was again used strategically by Indonesian prosecutors to good effect before a huge Muslim television audience. One bracket of evidence, indefensible under the well known criminal laws of Islam exposed Ba'asyir as a fanatic. Abbas swore that Ba'asyir had been asked by a new recruit whether stealing money from non-Muslims was *Halal* or permissible under Islamic law. 'Shedding their blood is *halal*, so of course taking their money is,' Abbas quoted Ba'asyir as saying.[23]

Ba'asyir's credibility as an influential figure in the Muslim community was undoubtedly diminished by his second public trial. This is a fact seemingly not appreciated in Australia or the West.

At the conclusion of his second trial in March 2005, the panel of judges found that, although not involved in the Bali attacks, he had given his approval. Ba'asyir was sentenced to 30 months imprisonment for being part of 'an evil conspiracy.'

The sentence was denounced by senior political leaders in Australia. This criticism was forthcoming in very strident terms. Yet the public trials and gaoling of Abu Baker Ba'asyir and his public humiliation in terms of his credit nevertheless asserted the power and dominance of the secular state apparatus. In every sense, the trial and sentence was a delicate national balancing exercise of bringing a criminal to justice and not making him a dangerous, inspiring martyr. The state prosecutors, although thwarted in making all of their charges stick, had reasserted the Indonesian Republic as belonging to the public and not that of the extremists like Ba'asyir.

The engagement with Indonesia over the two Bali bombings has been in contrast to Australia's other responses to the events of 11 September 2001.

## September 11 and the 'War Against Terrorism'

Even before the events of 11 September 2001, the political conditions were in place in America and Australia for the promotion of policies that were not respectful of international law and established international conventions. Both America and Australia were at loggerheads with the United Nations. To the consternation of each country's neighbours both the president of the United States and the prime minister of Australia espoused the new doctrine of pre-emptive strike.

When a hijacked American Airlines 767 bound for Los Angeles crashed into the north tower of the World Trade Center in New York and then a second United Airlines jet ploughed into the south tower of the center on 11 September 2001, the western world reacted with alacrity to the menace of international terrorism. Under the leadership of US President George Bush, America and its allies, including Australia, committed themselves to a 'war on terrorism'.

The horrible events of 11 September 2001 unleashed an immediate and sustained new language of terrorism – rhetoric that allowed no possibility for analysis and operated almost as a new vernacular. It was a vernacular that preyed on and manipulated community fear and relegated reason. President Bush's description of the 11 September events as 'terrorist acts against all freedom loving people everywhere in the world' left no room for debate. The language of terrorism provided over-simplified choices: 'Either you are with us or you are with the terrorists'24 and 'The nations of the world face a 'stark choice': join in our crusade or face the certain prospect of death and destruction'. The discourse on terrorism fed community fear, anger and the argument that anything is justified in countering terrorism. This language of terrorism paved the way for striking back using Western military might. Operation Infinite Justice and Operation Enduring Freedom followed. But who were we operating against?

The characterisation of the response to the events of 11 September 2001 as a 'war on terrorism' has had the effect of taking deeply evil acts outside of existing criminal laws and into the rules of armed conflict. The response of America and its allies has been that of waging a war – the attack on Afghanistan and the change of regime in Iraq. Stripping aside the rhetoric, the military response has in so many ways rejected the complexity of what gave rise to the dreadful bombings and slaughter of innocent people in New York. The War on Terror option and the language of terrorism set a construct of good against evil and, in doing so, deny not just causal complexities, but also reason. The conviction of the language and the spectre of the war option has allowed for the more ready acceptance of measures that otherwise would have been regarded with deep concern and resistance. Important freedoms and domestic civil liberties have been potentially outflanked.

What has occurred is the development of a type of Western holy war against evil. As Jenny Hocking quotes in her absorbing book *Terror Laws:*

> The notion of a holy war against evil – a war in which normal restraints do not apply – has all but disappeared from international law... But it has had a revival in a special form thanks to the struggle against terrorism. This notion leads, all too easily, to a view that in the struggle between the legitimate authorities on the one hand and terrorists on the other, anything goes: neither ethical nor legal restraints should be allowed to hamper the pursuit and extermination of terrorists.[25]

This notion leads to the normal criminal laws being by-passed, and established international norms, such as the rights of prisoners of war, being relegated or neglected.

The point that concerns Ms Hocking and others is that the evil of terrorism is tackled in a manner that rejects the value and importance of ethical or legal constraint. The appalling degradation of prisoners at Abu Ghraib Prison in Iraq is the tragic, some might say inevitable, result of this approach which relegates the principles and constraints of ordinary criminal laws and international law to the primacy of the pursuit of terrorism.

Tragically, there is evidence that this notion has come to pass. It is evidence that cannot be ignored. Thus, the world's most advanced democracy acting unilaterally and with no international or legal sanction and contrary to the Geneva Convention set up a detention centre at Guantanamo Bay whereby detainees could be held indefinitely and outside the protections of the law. This issue is explored more expertly by other participants in this conference and there is no need for me to descend into too much particularity in this paper on this important issue. However, two references, one from

distinguished Australian senior counsel, Ian Barker QC, and the other from the English Court of Appeal, are apposite in this context.

In the Summer 2003/2004 edition of *Bar News*, Ian Barker QC wrote:

> The US Government, followed by our own government, seeks to justify the process by invoking President Bush's Military Order of 13 November 2002 by which any foreign national designated by the president as a suspected terrorist, or as aiding terrorists, can potentially be detained, tried, convicted and executed without a public trial or adequate access to counsel, without the presumption of innocence, without proof beyond reasonable doubt, without a judge or jury, without the protection of reasonable rules of evidence and without a right of appeal. Whether or not a person detained is tried, he can be held indefinitely, with no right under the law and customs of war, or the US Constitution, to meet with counsel or be told upon what charges he is held.[26]

The second reference I allude to comes from the English Court of Appeal in an application brought by the mother of Feroz Ali Abassi, a British national captured by the United States in Afghanistan.[27] In January 2002, he was transferred to Guantanamo Bay in Cuba, a naval base on territory held on a long lease by the United States pursuant to a treaty with Cuba. By the time the appeal application came to be heard before the court, Mr Abassi had been held captive for eight months without access to a court or any other tribunal or even to a lawyer. The application was founded on the contention that one of Mr Abassi's fundamental rights, the right of not being arbitrarily detained was being infringed. The mother sought to compel the British Foreign Office to make representations to the United States Government or take other appropriate action to have Mr Abassi dealt with and the merits of his situation addressed.

The Court of Appeal dismissed the mother's appeal on grounds relating to the conduct of relations between foreign sovereign states. But the court dismissed the application not without registering its deep concerns: After extensive review of English and American texts and authorities dealing with civil liberty and the writ of habeas corpus, at paragraph 64 of its judgment the court said:

> For these reasons we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'.

At paragraph 107, toward the end of its reasons, the court further said:

> We have made clear our deep concern that, in apparent contravention of fundamental principles of law, Mr Abassi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.

The court also referred to and endorsed the speech (at paragraph 60) of Lord Atkin written in one of the darkest periods of the Second World War:

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. (*Liversidge v Anderson* [1942] AC 206, 245 at p.244).

The plight of Mr Abassi and others at Guantanamo Bay highlight the dangers of dealing with terrorism on a war paradigm or without regard for the ethical and legal rules fundamental to a democracy. The timely historical review of important cases in the history of civil liberties in the United States and the United Kingdom and the expressions of the court's concerns were a contemporary reminder of Albert Einstein's reflection in his old age:

> Democratic institutions and standards are the result of historical developments to an extent not always appreciated in the lands which enjoy them.[28]

The 'war on terrorism' and its war paradigm has led to problematical interventions seeking to strike and eliminate an elusive terrorist enemy. No doubt well motivated, the policy to strike out at this enemy as if he/them were tangible and identifiable warriors or regimes has led many to doubt the efficacy of the 'war' approach. In my own case it occurred when, at a friend's home, I watched and heard the United States Secretary of Defense Donald Rumsfeld describe in confident, serious terms the dimensions of this war on terrorism:

> As we know, there are known knowns. There are things we know we know. We also know there are known unknowns. That is to say we know there are some things we do not know. But there are also unknown unknowns, the ones we don't know we don't know.[29]

Even given the erosion of public language, in modern times, these words from the western world's chief war officer are calculated to leave a deep sense of unease. The jury remains out on whether the West's current leaders fully appreciate the nature and the dimensions of the conflict they are dealing with.

This is why the relevant example of Indonesia can be so important. Whilst there is police cooperation on their ground in Indonesia, at a policy and political level concerning the issue of terrorism, it is as if Indonesia and Australia are moving in opposite directions.

## Conclusion

What Indonesia's history and its response to the bombings inside its national borders since 2000 show is that the violent extremism and fundamentalism demonstrated in the terrorist bombings can be countered only from within the faith of

Islam. No amount of military interventions will roll back the hatred, bigotry and ignorance displayed by Amrozi and his cohorts. Indeed, as we see in Iraq, it can radicalise a community even more.

Indonesia, for all its upsets and political troughs since 1945, has been a Muslim country which as adapted to and embraced new and alien forces – *democracy* is but one of them. In Indonesia, commerce, economics, science and technology, as well as the political constructs of democracy and human rights are dealt with face-to-face in authentic discourse within its Muslim population.

There are rich traditions of scholarship in Indonesia and huge moderate mass movements in Indonesian Islam which have embraced new ideas and sought to interpret the Koran in a way compatible with democracy and human rights and social justice. Indonesia has the tools in its own historical experience to overcome the threat of extreme fundamentalism.

Indonesia's recent history of near dictatorship and the peoples' loss of political power and subjugation has also given Indonesia a passion for democracy of which we in the West need to be reminded. The passion and the good sense of those American founding fathers who wrote *The Federalist* is alive and active in Indonesia today.

The world has been made more complex and potentially unsafe with the emergence of technologies which permit the spread of weapons of mass destruction. Similarly, the world order has had to adjust to transnational terrorist groups capable of posing a potentially global threat. These developments and the number of failed states or rogue states provide challenges to the rules of international law premised on an assumption of sovereign states having a monopoly on the use of force and control over technology. So no-one should deny the enormity or the difficulties facing world leaders. Nevertheless, lessons can be learnt from history.

Both America and Australia have recent experience in costly, ill-considered intervention and war in Vietnam. The practical example of moderate Muslim nations, like Indonesia, in dealing with terrorism comes at a critical time when America and Australia seek to find peace and security. If lessons are not learnt from nations like Indonesia there is a danger of fulfilling by ignorance George Santayana's famous adage: 'Those who forget the lessons of history are bound to relive them'.

* This paper is dedicated to Agus Sardjana, first secretary in the Republic of Indonesia embassy to the European Union and formerly vice-consul in the Indonesian Consulate in Darwin and his example of intelligence, compassion and tolerance – the true enemies of terrorists.

1 Taufik Ismail, *The Republic is Ours*, translated into English by Harry Aveling in *Contemporary Indonesian Poetry*, University of Queensland Press, 1975 Reprinted 1985, p.169.

2 M.C. Ricklefs *A Modern History of Indonesia*, *Macmillan*, 1985, p.215.

3 ibid.

4 ibid. p.215-216.

5 Greg Fealy, '*Darul Islam* and Jemaah Islamiyah: An Historical and Ideological Comparison' ANU 2004, quoted in S Neighbour, *In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia* p.10.

6 ibid.

7 M.C. Ricklefts, op. cit., p.216.

8 G. McTurnan Kahin, *Nationalism and Revolution in Indonesia*. Cornell University 1952, reprint 1970 pp.330-331.

9 ibid.

10 M C Ricklefs, op. cit., pp.215-216.

11 S Neighbour, op. cit., p.11.

12 T. Lindsey, *Indonesian Law and Society*, p.13.

13 ibid.

14 B. Grant, *Indonesia*, p.68.

15 S Neighbour, op. cit., p.1.

16 S. Neighbour op cit. pp16-17.17 This followed a rich world tradition. See Ian Buruma & Avishai Magralit, *Occidentalism: The West in the Eyes of its Enemies*, The Penguin Press, New York 2004.

18 Geoff Forrester and RJ May (eds) *The Fall of Soeharto*, p.1.

19 S Neighbour, op. cit., Chapter 7.

20 Imam Subkahn 'Islam and Democracy Cannot Meet', *Inside Indonesia*, July-September 2004, pp. 4-6.

21 Zachary Abuza, 'Militant Islam in Indonesia' USINDO Open Forum 6 May 2004, Washington DC; http://www.org/Briefs/2004/Zach%Abuza%205-6-04.htm

President GW Bush, 'Address to the joint session of Congress and the American people' 20 September 2001, http://www.whitehouse.gov/news/releases/2001/09print/20010920-8.html

22 *The Jakarta Post*, Thursday, 20 October 2005, p.2.

23 *The Nation*, Wednesday, 22 December 2004, p.7A.

24 President G W Bush, 'Address to the joint session of Congress and the American people' 20 September 2001, http://www.whitehouse.gov/news/releases/2001/09print/20010920-8.html

25 J Hockey, 'Terror laws ASIO counter terrorism and the threat to democracy' p.7, quoting A Roberts 'Ethics, terrorism and counter-terrorism' *Terrorism and Political Violence*, no. 1 January 1989, p.948.

26 Ian Barker QC 'The Guantanamo Bay scandal' in *Bar News*: *The Journal of the NSW Bar Association*, Summer 2003/2004 pp. 21-25.

27 *The Queen (on Application of Abassi & Another) v Secretary of State for Foreign and Commonwealth Affairs and Another* [2002] EWCA Civ 1598 Case No: 2002/0617A; 0617B delivered 6 November 2002 by English Court of Appeal comprising Lord Phillips MR, Waller and Carnwall LJJ.

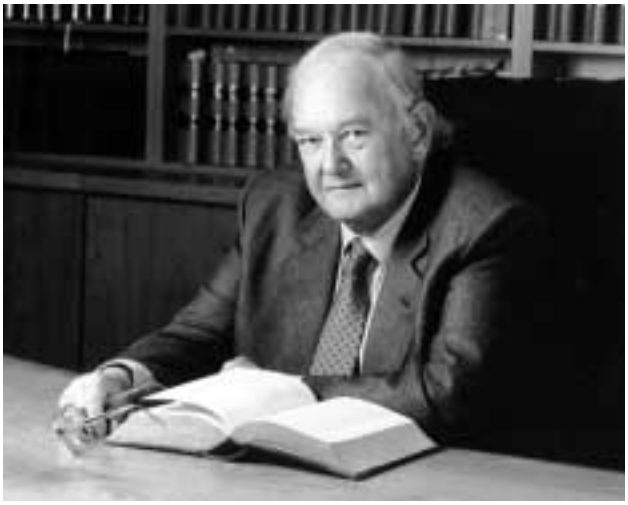
28 *Einstein*: A Portrait, Pomegranate Art Books, Corte Madera, California, USA 1984, p.87.

29 I could not remember the exact words I heard, but mercifully, they are preserved in Don Watson's *Death Sentence: The Decay of Public Language*, at p.45.

# The 2005 Sir Maurice Byers Lecture

## Statutes

*Delivered by the Hon Justice W M C Gummow AC in the Banco Court, Queens Square, Sydney on 17 March 2005.*[#]



Sir Maurice Byers

### What of Sir Maurice?

Sir Maurice, whose service to the law and public life we mark tonight, served as solicitor-general of the Commonwealth between 1973 and 1983. In that time, there were administrations headed by three prime ministers, Messrs Whitlam, Fraser and Hawke, from different sides of politics. Byers QC advised them all, with the objectivity of a leading counsel. This independence (and thus added value) of the office had been an aim of the *Law Officers Act 1964* (Cth).

Sir Maurice Byers, to my observation, was interested in statute law. He spent a good deal of his time as solicitor-general considering existing and proposed legislative measures.

Much of this activity was in preparation of submissions for High Court litigation. The written outline which emerged was always a model of sequential reasoning, designed to point clearly to the desired and apparently inevitable destination. The outline was succinct, with a citation of the minimum compelling authority where it existed. How different from the diffuse position papers which the High Court now receives.

At the heart of much of this litigation was the construction of a law of the Commonwealth as the first step to supporting validity, or of a law of a state as a first step in showing its invalidity, whether for lack of state legislative power or for inconsistency by operation of s109 of the Constitution.

The necessity to connect each law of the Commonwealth sufficiently to at least one head of federal legislative power required a particular skill in drafting. Sir Maurice admired what was then the preferred methods exemplified in the work of Mr Ewens QC during the 1940s, a time of great legislative initiative by the Commonwealth.[1] Mr Ewens had become parliamentary draftsman in 1948. Sir Maurice was struck by what he identified as the crab-wise movement apparent in the structure of a Ewens Bill, as the Commonwealth edged sideways into legislative power.

One example of such a technique will suffice. The power to legislate with respect to trade and commerce with other countries supports a law prohibiting the export of a mineral, with a provision for relaxation of the prohibition by the executive government if there be satisfied criteria (such as the environmental effects of the extraction processes used) which have little or no apparent relevance to the topic of international trade and which themselves are not a head of federal legislative power. The example is taken from *Murphyores Incorporated Pty Ltd v The Commonwealth*,[2] in which Sir Maurice led (successfully) for the Commonwealth.

### Policy into statute

Judges and counsel tend insufficiently to appreciate the great difficulties encountered in the reduction of government policy into legislative form.

Several matters should be borne in mind here. One is the relatively recent emergence of the offices of parliamentary counsel. It all began in the United Kingdom as late as 1869, but even then it was Chalmers, a practising barrister, who drafted the *Sale of Goods Act 1893* (UK).[3]

**Thirty years ago there were still to be found judges whose first and controlling response to remedial legislation was to set out uncovering difficulties in expression which frustrated the otherwise evident scope and purpose of remedial legislation... All that has changed.**

The New Zealand chief parliamentary counsel, Mr Tanner QC, well observed that the drafting of legislation is quite unlike the writing of judgments. He remarked that, whereas legislation has a single objective, the changing of the law, the process of developing the common law involves moving from one precedent to the next and 'a reader sees into the mind of the Judge working through the legal issues before the court'.[4] These thoughts are encapsulated in the observation by Professors Eskridge, Frickey and Garrett[5] that, unlike judge-made law, statute law 'resides in canonical, not discursive form'.

Much is now said in judgments about 'purposive' construction. Certainly there has been a marked change apparent in judicial approaches to statutory construction. Thirty years ago there were still to be found judges whose first and controlling response to remedial legislation was to set out uncovering difficulties in expression which frustrated the otherwise evident scope and purpose of remedial legislation. These judges were encouraged in their efforts by the then understood restraints upon examination of supporting legislative materials. All that has changed, assisted by changes made in the various interpretation statutes.

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But 'purposive' construction does not release the draftsman from the requirements of precision of thought and expression. The editor of *Craies on Legislation*[6] is parliamentary counsel in the United Kingdom. Of reliance on purposive construction as an excuse for imprecision, Mr Greenberg writes:

> First, the main cause of imprecision in drafting is not that the draftsman cannot find or does not wish to trouble to find a precise way of expressing the concept in his mind, but rather that the concept in his mind is not sufficiently precise to admit of clear expression. That principal task in drafting is to refine and analyse the policy to the state of clarity in which the words for its expression suggest themselves naturally. When the draftsman struggles to find the words or structure to express a thought, it is generally time to abandon the struggle and return to analysis or refinement of the thought. All that being so, it is not sufficient to draft imprecisely and hope that the courts will supply the draftsman's deficiencies by adopting a purposive construction... [7]

Secondly, prediction of the likely results of a purposive construction is not a precise science. It will rarely be appropriate for the executive to substitute the certainty provided by a clear and precise provision for the hope that the courts' understanding of the general principles and purpose of the legislative scheme will correspond to the understanding of the executive.'

Further, 'purposivism' cannot provide determinative answers where different purposes, perhaps cross-purposes, are apparent. Professors Eskridge, Frickey and Garrett add:

> Even if there were agreement as to which purpose should be attributed to a statute, the analysis in the hard cases might still be indeterminate. Often an attributed policy purpose is too general and malleable to yield interpretive closure in specific cases, because its application will depend heavily upon context and the interpreter's perspective. [8]

## Finding the statute

In his judgment in *Watson v Lee*[9], Barwick CJ stressed the importance of the principle that the citizen should not be bound by a law the terms of which the citizen has no means of knowing. Thereafter, when dealing with the provisions for prosecution by the Commonwealth director of public prosecutions of offences against what, at that stage, was the national scheme of corporations laws, four members of the High Court said in *Byrnes v The Queen*:

> Bentham viewed with disfavour 'the dark Chaos of Common Law', favouring the prescription of rules of conduct by statute.[10] This, Bentham, said, would 'mark out the line of the subject's conduct by visible directions, instead of turning him loose into the wilds of perpetual conjecture'[11]. By that criterion, the legislative scheme, the subject of these appeals, is a failure. It does not go so far as to bind the citizen by a law, the terms of which the citizen has no means of knowing. That, as Barwick CJ put it in *Watson v Lee*,[12] 'would be a mark of tyranny'. However, the legislative scheme does require much cogitation to answer what, for the citizen, should be simple but important questions respecting the operation of criminal law and procedure. [13]

The court then had to set about revealing what it called the threads leading through the complexity of federal and state (there, South Australian), laws.[14]

More recently, in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*,[15] four members of the High Court, after some puzzling over the reprint of the *Migration Act 1958* (Cth) which appeared to be the relevant one, discovered that an amendment had miscarried by reason of the misidentification of the provision to be amended. Another instance of this appears from Note 2 to Reprint No 4 of the *Civil Aviation Act 1988* (Cth).

**There has been an attitude, which daily life in the courts indicates still strongly persists, that statute law is not only less interesting but also of an intrinsically inferior importance to 'purely' judge-made law... There are few cases that come into the High Court which turn upon, say, tort or contract untouched by statute.**

But at least in these instances a close enough examination of the reprint disclosed what had gone wrong in the law-making processes of the Commonwealth, if not why this had occurred.

It now appears (from recent correspondence with the Office of Legislative Drafting within the Attorney-General's Department, which was initiated by Professor Lindell and others, and is reported in the *Australian Law Journal*[16]) that, while statutes such as the *Superannuation Act 1976* (Cth), the *Patents Act 1990* (Cth), and the *Corporations Act 2001* (Cth), among others, authorise amendments and modifications thereof by subordinate legislation, there is no practice of alerting the reader of reprints, whether by note or other means, to changes so made. Something, surely, needs to be done here.

## Second class law?

In his consideration of the process of statute-making in New Zealand, the chief parliamentary counsel remarks:

> It is inherently more interesting to read a judgment of a court than a statute – or, at least, I find it so. Statutes are limited in the amount of context that they can contain. They represent the outcome of policy decisions. The reasons or policy considerations to which the statute gives effect are seldom explained in the statute. That is in part because, of themselves, they do not create rights or impose legal obligations. A judgment, on the other hand, can discuss the policy underlying the court's decision. While it may be only the decision or legal principle that matters in the end, a judgment contains both elements. [17]

There has been an attitude, which daily life in the courts indicates still strongly persists, that statute law is not only less interesting but also of an intrinsically inferior importance to 'purely' judge-made law. By the latter is meant that case law which is not concerned with statutory construction and which is concerned with legal rights and duties derived and presently applied solely by reference to case law. That, in any event, is a diminishing area. There are few cases that come into the High Court which turn upon, say, tort or contract untouched by statute.

But the old attitude persists. Perhaps its most striking manifestation is in appeals on points of construction of the Criminal Codes in jurisdictions which continue to apply or have adopted Sir Samuel Griffith's Code. Almost invariably counsel take the High Court to the common law on general questions of criminal responsibility, with which the Codes deal specifically and apparently exhaustively.

There is an irony in this. Griffith framed his Code at the end of the nineteenth century. The general questions of criminal responsibility with which he dealt thereafter received considerable attention in common law jurisdictions. Codes tend to freeze further development of principle. In 1935, it was established in *Woolmington v The Director of Public Prosecutions*[18] that, contrary to previous understandings of the common law, on a trial for murder the prosecution bears the burden of proving that the death resulted from an act that was conscious and voluntary (or, in the terms of the Code, 'willed'). Some agility then was required for the High Court to read the Code in a consistent fashion with *Woolmington*. [19]

An attitude to statute law as second class law begins in the law schools. It has a pedigree. Let us take the case of Sir Frederick Pollock, for so long, among other things, editor of the *Law Quarterly Review*. Pollock's recent biographer writes:

> His perspective on legislation is that of the classic Burkean Whig: although 'forced to acknowledge the necessity of legislation, for him the common law – that cautious, organic, accretion of slow-won judicial wisdom – remains the true bedrock of English law.'[20] The common law is a good thing because it nourishes principles where legislation is more likely to stifle them. It is also a good thing because, unlike legislation, it is more likely to promote and protect rather than impede and neglect the liberties of citizens. ... Too often, in short, legislators impose duties on individuals and groups – landlords, mortgagees, whomever – without realizing that the initiative may diminish the liberty of those whose liberty is supposed to be protected. '[M]ost of the grievances of particular individuals or groups can be removed only by measures which create new grievances elsewhere.'[21] The words are Hayek's, but they might easily have been Pollock's. [22]

In 1911, on one of his visits to the United States, Pollock told an audience at Columbia University that they were there 'to do homage to our lady the common law';[23] the secretary of the Editorial Board of the *Columbia Law Review* dubbed Pollock's lectures 'the love story of the common law'.[24]

Sir Maurice would have none of this. What was there to revere in a system which devised the doctrines of common employment and of contributory negligence as absolute defences, allowed no remedy in cases of wrongful death, denied appearance of counsel in many criminal trials, subjected the property rights and contractual capacity of married women to those of their husbands, and in many ways (and unlike equity) preferred form to substance? It was statute which had been needed to place the law in these and other respects upon an acceptable basis.

Writing his addition notes to the second edition of Sedgwick's treatise,[25] published in 1874, Pomeroy (it must be said, an equity lawyer of note) wrote:

> It is a demonstrable proposition, that there is hardly a rule or doctrine of positive practical jurisprudence in England or in the United States to-day, which is not the result, in part at least, of legislation; hardly a rule or doctrine of the original common law which has not been abolished, or changed, or modified by statute. Furthermore, it is conceded that the ancient conception as to the perfection of the common law was absurdly untrue. The great mass of its practical rules as to property, as to persons, as to obligations, and as to remedies, were arbitrary, unjust, cumbersome, barbarous. For the last generation the English Parliament and our state legislatures have been busy in abolishing these common-law rules, and in substituting new ones by means of statutes. That all this remedial work, all this benign and necessary legislative endeavor to create a jurisprudence scientific in form and adapted to the wants of the age, should be hampered, and sometimes thwarted by a parrot-like repetition and unreflecting application of the old judicial maxim that statutes in derogation of the common law are to be strictly construed is, to say the least, absurd. [26]

Moreover, the creation in the United States and Australia of federal bodies politic, with legislatures of enumerated heads of power, encouraged (sooner in the history of Australia than in that of the United States) the notion that in these new societies, fed by large-scale immigration, improvement was to be brought about by legislation to change not replicate the *status quo*.

In 1876, the Supreme Court of the United States declared in *Munn v Illinois*[27] that: 'the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.'

How did this sit with the constitutional guarantees respecting the taking or acquisition of private property for public use or purposes? The answer given in *Munn v Illinois*[28] was that '[a] person has no property, no vested interest, in any rule of the common law.' The distinction was drawn by the Supreme Court as follows:

> Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. [29]

A modern Australian example is the legislative declaration in s6 of the *Diplomatic Privileges and Immunities Act 1967* (Cth) that the statute operates to the exclusion of any rule of the common law that deals with a matter dealt with by the statute.

In this fashion there developed a view of statute law which reflected the importance of federal constitutionalism. But how is it that in *Coco v The Queen*,[30] and numerous other cases, the common law is invoked as part of reasoning that plain words are required for a construction of a statute which abrogates or diminishes what the courts see as basic immunities and fundamental rights of the citizen? The answer was given by Pomeroy in a further passage to that quoted above from his additional notes to Sedgwick. Pomeroy wrote:

> With all the gross imperfection of the common law, it did contain certain grand principles, and these principles had been worked out into many practical rules both of primary right and of procedure, which protected personal rights, – rights of property, of life, of liberty, of body and limb, – against the encroachments both of government and of private individuals. This was the great glory of the common law. Any statutes which should take away, change, or diminish these rights should be strictly construed. To this extent the rule is in the highest degree valuable, not because such statutes 'are in derogation of the common law,' but because they oppose the overwhelming power of the government to the feeble power of resistance of the individual, and it is the duty of courts under such circumstances to guard the individual as far as is just and legal, or, in other words, to preserve the individual from having his personal rights taken away by any means that are not strictly legal. [31]

## Federal constitutionalism

Federalism, with the division of legislative competence, denied the omnipotence of any one legislature at any one time. This also was a brake on too adventurous efforts at legislative improvement. Sir Maurice as solicitor-general was, of course, closely involved in the defence (in very large measure successful) of the legislation of the Whitlam government. Decisions tending to advance federal legislative power, at the time seen as radical, are more or less today taken by federal governments of all complexions as matters of course.

That brings me to the focus of the balance of this paper. My concern is not with the large questions of federal legislative power. Rather, consideration is given to the many ways in which the presence of a written federal constitution influences the form and interpretation of statute law.

I do so with reference to several United States constitutional doctrines and their Australian analogues.

## Extrinsic materials

The first matter concerns the use of extrinsic materials. Speaking of the United States, Professor Eskridge writes:[32]

> During the last one hundred years judicial invocation of extrinsic legislative sources to interpret statutes has bloomed like azaleas in April. For most of the nineteenth century, American courts focused on statutory text, policy, and canons of interpetation. But by the turn of the century a number of American judges and commentators had come to believe that the proceedings of the legislature in reference to the passage of an act may be taken into consideration in construing it. Reliance on such materials grew more widespread in the twentieth century and was well entrenched in the federal and some state courts by World War II. By 1983 Judge Patricia Wald could observe that '[n]o occasion for statutory construction now exists when the [Supreme] Court will *not* look at the legislative history.'[33] (original emphasis)

Since that high-water mark, there has been something of a retreat. The exteme manifestation of this is the attitude of Justice Scalia. His Honour emphasises that the only constitutionally mandated role of the federal courts is to interpret the language used by the legislature, something that does not involve attempted reconstructions of the intentions of legislators. Justice Scalia stresses that par (2) of Art 1 §7 of the United States Constitution provides for the presentation to the president of Bills which have passed the House of Representatives and the Senate and specifies procedures whose operation depends upon the response of the president of their presentation for his signature. The paragraph uses such expressions as 'it shall become a law' and 'shall be a law'.

Section 58 of the Australian Constitution likewise provides for the presentation of 'a proposed law', after its passage through both houses of parliament, for the giving by the governor-general of the queen's assent. No one has, I should think, suggested that this forecloses any particular method of interpetation which may be applied by federal courts and courts exercising federal jurisdiction in dealing with matters arising under laws so made (ss76(ii), 77(i), 77(iii)). However, the conclusion drawn by Justice Scalia from the constitutional text is that legislative history is necessarily irrelevant to the interpretation of the laws made by Congress.

Justice Scalia expresses his position in *Green v Bock Laundry Machine Co:*

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated – a compatibility which, by the benign fiction, we assume Congress always has in mind. [34]

However, in Australia, since amendments made in 1984 to the *Acts Interpretation Act 1901* (Cth), detailed provision is made for the use of extrinsic materials in the interpretation of federal legislation to confirm that the meaning of a provision is the ordinary meaning conveyed by the text and to determine the meaning of ambiguous or obscure provisions (s15AB). It is

assumed that such a provision is a law with respect to matters incidental to the execution of the legislative powers vested in the parliament and thus supported by s51(xxxix) of the Constitution.

In the *Native Title Act Case*[35], there does appear some affinity with Justice Scalia's view of the effect of the separation of powers upon the interpretative role of the courts. Section 12 of the *Native Title Act 1993* (Cth) stated:

> 'Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth.'

The High Court held that provision invalid. The kernel of its reasoning was as follows:

> If the 'common law' in s12 is understood to be the body of law which the courts create and define, s12 attempts to confer legislative power upon the judicial branch of government. That attempt must fail either because the parliament cannot exercise the powers of the courts or because the courts cannot exercise the powers of the parliament. [36]

### *Chevron*

The second matter concerns the *Chevron* doctrine. In Australia, we tend to look on statutes as commands directed to citizens whereas much modern regulatory legislation also is directed to those who, over time, will be charged with the administration of the regulatory scheme. In so doing, administrators may develop formal (for example, by taxation 'rulings') or informal interpretations of the relevant law. There is then what Professor Eskridge has called an issue of 'institutional competence'.[37]

In the era of the New Deal, it appeared that agencies charged with administration of the new legal order and endowed with delegated law-making powers should be allowed a wide leeway to pursue dynamic interpretations of their mandate. This thinking later became associated particularly with its apparent acceptance in *Chevron USA Inc v National Resources Defense Council Inc.*[38] Interpretation of provisions conferring discretionary powers may well involve policy making choices, interpretations may have to change as times change, and the agency, here the Environment Protection Agency ('the EPA') with technical expertise and political accountability was best equipped to make such distinctions. Moreover, to 'reasonable' agency determinations, the courts should display 'deference'.

It is inappropriate here to trace the subsequent development of *Chevron* by the United States Supreme Court. But it is fair to say that there may have been a growing appreciation of the strains *Chevron* places upon the constitutional structure. In *Enfield City Corporation v Development Assessment Commission*,[39] the High Court, in a joint judgment of four members, turned its face against the adoption of Chevron reasoning in Australia.[40] The court referred to the caution by Professor Schwartz[41] that misapplication of its statute by an agency may involve jurisdictional error. The court also referred to the writing of Professor Werhan.[42] He made the point that, before *Chevron*, interpretation of ambiguous laws was classed as a matter of law whereas, after *Chevron*, the task was reconceptualised as a 'policy choice';43 the legal was transformed into the political and so interpretative authority was conceded to the agencies.

The High Court also referred to the detailed discussion by Brennan J in *Attorney-General (NSW) v Quin*.[44] Brennan J stressed that *Marbury v Madison*[45] was concerned not just with questions of constitutional validity of legislation but that the 'grand conception' therein included judicial control over administrative interpretation of legislation. The significance of this notion is considered by Mr Keane QC in his paper, 'Judicial power and the limits of judicial control',[46] which merits close study.

In Australia, any 'deference' reflects different considerations to those expressed in *Chevron*, primarily the basic principles of administrative law respecting the exercise of discretionary powers. Particular provision for judicial review of decision-making under Commonwealth enactments, to be made by the Federal Court, was established by the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Distinct provision for 'merits review' is made by the *Administrative Appeals Tribunal Act 1975* (Cth). There is then an 'appeal' to the Federal Court on a question of law.

Indeed, there is a long history in federal law of legislation in specialist areas of revenue law and intellectual property law which provides for an 'appeal' to a court from decisions within the remit of an administrative body or officer such as the registrar of trade marks and the commissioner of taxation. Questions then arise in the court as to the side of the line on which a particular case falls. In *Enfield*, the court concluded that in such cases:

> [t]he weight to be given to the opinion of the tribunal in a particular case will depend upon the circumstances. These will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning. [47]

## Conclusions

Lawyers tend to look backwards to a past time when the law, particularly that in the statute book, was simpler. They pine for the uniform companies legislation of 1961, the income tax legislation before flow charts and plain English, and even for the *Copyright Act 1968* (Cth), the *Trade Practices Act 1974* (Cth) and the *Family Law Act 1975* (Cth) in their original, much briefer, form.

The truth is that there is not now, and never has been, a golden age in statute law or in anything else pertaining to the legal system. Certainly Sir Maurice, ever an optimist, did not look backwards in that way.

Sir Maurice was admitted to the New South Wales Bar in 1944. He came to occupy a position of pre-eminence at the Bar. Many barristers were (and are) adept at the exercise of mental agility. For them, that was enough. Sir Maurice had that agility, of

course, but was distinguished by an intellectual curiosity and productive intellectual speculation. These attributes were put to good use in what, rather misleadingly, has been described as his conversational advocacy before the High Court.

Sir Maurice, speaking late in his career, observed that it was only when he began to obtain briefs to appear before the High Court,

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then dominated by Sir Owen Dixon, that he felt that he had reached a level where substantial intellectual debate might take place. Sir Maurice put it in more modest terms but that was what he meant.

But he would have thought it pointless and ridiculous to attempt to locate any 'golden age' of the High Court. How could that be, for example, of the Dixon era with its legacies of *Koop v Bebb*[48] *and Dennis Hotels Pty Ltd v Victoria*?[49] For decades, the one bedevilled the Australian choice of law rules in tort and the other the operation of the critical excise provision in s90 of the Constitution. Relief came respectively only with *John Pfeiffer Pty Ltd v Rogerson*[50] and *Ha v New South Wales*.[51]

So it is with statute law. Legislators react to new situations and old solutions require qualification. What is needed more than ever, and what still is lacking in Australia, is a better understanding of statute law, its purposes and processes of creation, coupled with closer analytical skills in working with the results of those creative processes.

1 See Obituary, Mr J Q Ewens, CMG, CBE, QC, (1992) 66 *Australian Law Journal 870*.

2 (1976) 136 CLR 1.

3 Renton, 'The evolution of modern statute law and its future', in Freeman (ed), *Legislation and the Courts*, (1997), 9.

4 Tanner, 'Confronting the process of statute-making', in Bigwood (ed), *The Statute – Making and Meaning*, (2004), 49 at 72.

5 In their excellent joint work, *Legislation and Statutory Interpretation*, (2000) at 3.

6 8th ed (2004).

7 *Craies on Legislation*, 8th ed (2004) at 304 (footnote omitted).

8 *Legislation and Statutory Interpretation*, (2000) at 222.

9 (1979) 144 CLR 374 at 381.

10 Burns and Hart (eds), *A Comment on the Commentaries and A Fragment of Government*, (1977) at 198.

11 Burns and Hart (eds), A Comment on the *Commentaries and A Fragment of Government*, (1977) at 95. See also Schofield, 'Jeremy Bentham: Legislator of the world', (1998) 51 *Current Legal Problems* 115 at 122.

12 (1979) 144 CLR 374 at 379.

13 (1999) 199 CLR 1 at 13 [11].

14 (1999) 199 CLR 1 at 13 [12].

15 (2004) 79 ALJR 94 at 101-102 [38]-[40]; 210 ALR 190 at 200.

16 (2004) 78 *Australian Law Journal* 221-228.

17 Tanner, 'Confronting the process of statute-making', in Bigwood (ed), *The Statute – Making and Meaning*, (2004), 49 at 72.

18 [1935] AC 462.

19 See *Murray v The Queen* (2002) 211 CLR 193 at 206-207 [39]-[40].

20 Munday, 'The common lawyer's philosophy of legislation', (1983) 14 *Rechtstheorie* 191 at 193. See also Burrow, A Liberal Descent: *Victorian Historians and the English Past*, (1981) at 138; also at 105 (on 'the Burkean Whig's conception' of the common law as 'the slow, anonymous sedimentation of immemorial custom').

21 *Hayek, Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, (1982) at i, 144.

22 Duxbury, *Frederick Pollock and the English Juristic Tradition*, (2004) at 173.

23 Pollock, 'The genius of the common law', (1912) 12 *Columbia Law Review* 190 at 191.

24 Black, 'From the archives (such as they are)', (2000) 100 *Columbia Law Review* 1 at 15. See generally, Cosgrove, *Our Lady The Common Law: An Anglo-American Legal Community 1870-1930*, (1987).

25 *A Treatise on the rules which govern the Interpretation and Construction of Statutory and Constitutional Law*.

26 Sedgwick, A *Treatise on the rules which govern the Interpretation and Construction of Statutory and Constitutional Law*, 2nd ed (1874) at 270-271.

27 94 US 113 at 134 (1876).

28 94 US 113 at 134 (1876).

29 94 US 113 at 134 (1876), applied in the *Second Employers' Liability Cases* 223 US 1 at 50 (1912).

30 (1994) 179 CLR 427 at 435-438.

31 A *Treatise on the rules which govern the Interpretation and Construction of Statutory and Constitutional Law*, 2nd ed (1874) at 271.

32 *Dynamic Statutory Interpretation*, (1994) at 207.

33 Wald, 'Some observations on the use of legislative history in the 1981 Supreme Court term', (1983) 68 I*owa Law Review* 195.

34 490 US 504 at 528 (1989).

35 *Western Australia v The Commonwealth* (1995) 183 CLR 373.

36 (1995) 183 CLR 373 at 485.

37 *Dynamic Statutory Interpretation*, (1994) at 161.

38 467 US 867 (1984).

39 (2000) 199 CLR 135.

40 (2000) 199 CLR 135 at 151-155.

41 *Administrative Law*, 3rd ed (1991), §10.36.

42 *'Delegalising administrative law'*, [1996] *University of Illinois Law Journal* 432 at 457.

43 *Chevron USA Inc v* 467 US 837 at 844-845 (1984).

44 (1990) 170 CLR 1 at 35-36.

45 1 Cranch 137 at 177 [5 US 87 at 111] (1803).

46 Published in Cane (ed), *Centenary Essays for the High Court of Australia*, (2004) at 295.

47 (2000) 199 CLR 135 at 154-155 [47].

48 (1951) 84 CLR 629.

49 (1060) 104 CLR 529.

50 (2000) 203 CLR 503.

51 (1997) 189 CLR 465.

# The banality of evil

## Observations of the International Criminal Tribunal for Rwanda

*By Peter Skinner*

**The International Criminal Tribunal for Rwanda has successfully prosecuted persons responsible for genocide and crimes against humanity, committed between April and July 1994. In 2004 Peter Skinner visited Arusha, a city in northern Tanzania, where the ICTR sits. He was fortunate enough to observe a trial in progress and to meet some of the tribunal's personnel. In this article, he tells how, from the vantage point of the public gallery, he observed the 'banality of evil' – 'men in suits' who stand accused of committing unspeakable atrocities.**

The International Criminal Tribunal for Rwanda was established in late 1994 as a result of a decision of the United Nations to investigate and bring to trial the alleged instigators of the massacres that took place in Rwanda from April to July 1994.

Rwanda has a tragic history of conflict between the Hutu majority and the Tutsi minority, going back many decades before 1994. The killings began following the death of the former president, Juvénal Habyarimana, when his aircraft crashed in suspicious circumstances near Kigali airport, on 6 April 1994.

The killings had obviously been planned for some time. A United Nations report concluded that 500,000 people were killed, but this figure may be conservative. A different estimate is reached by deducting the confirmed number of Tutsi survivors from the 1991 census, with statistically valid adjustments. The estimated death toll using this calculation is 800,000 - 850,000 Tutsis, as well as 10,000 - 30,000 Hutu. In other words, the Tutsi population was reduced from approximately 930,000 to not more than 130,000 in the space of 100 days.[1] It is astonishing that such carnage could be inflicted by such crude weapons as machetes.

Although the current government of Rwanda eventually restored order on 18 July 1994 and immediately began using the domestic justice system to bring to trial many of the perpetrators of the massacres, rapes and other crimes, there were too many persons involved to prosecute them all individually. The killings could not have been so thorough, with approximately 10 per cent of the population perishing, without the active participation of much of the other 90 per cent of Rwandans. In any event, the nature of the crimes committed required something more.

Much has been written and otherwise documented about these dark 100 days of human history[2], and this will continue for some time yet. A recent movie *Hotel Rwanda* dramatises established facts. The horrors committed were documented thoroughly in a number of reports commissioned by the United Nations Security Council in 1994. They contain thousands of pages recording the testimonies of survivors and helpless onlookers who witnessed the killings and other crimes, and their scale and brutality. One commentator, John Reader, wrote: 'Page after page, the reports are numbing to the point of disbelief. Inhuman. How could people do these terrible things?'[3]

To speak of these events, people are compelled to use terms such as 'evil', and to invoke the devil. General Romeo Dallaire, the Canadian commander of the small force of 200 UN troops, who was ordered not to interfere with the killings, has said that he was

Jean Kambanda, 42, appearing before the International Criminal Tribunal for Rwanda Thursday 3 September 1998. Kambanda earlier pleaded guilty of 6 counts of genocide, accessory, complicity and incitation to genocide. Kambanda was prime minister of Rwanda during the 1994 genocide.
Photo: AP Photo / Jean-Marc Bouju

an atheist prior to his mission to Rwanda. He was quoted worldwide upon his return as saying: 'I know now that God exists, because I met the devil'.

Alexandra Richards QC of the Victorian Bar has written a fascinating article about her time working as an investigator with the tribunal in Arusha.[4] She quotes General Dallaire, and adds: 'I had to grapple with scenes and knowledge of evil, which I had not previously considered man or woman capable of.' She also explains some of the background to the massacres, and how the United Nations and the rest of the world stood by while the holocaust happened, even though there had been clear warning well in advance that it was about to commence.

Nonetheless, when the slaughter subsided, it was apparent from the scale, speed and ferocity of the atrocities that there had clearly been much organization and planning involved. It was the will of the members of the United Nations that led to the establishment of the International Criminal Tribunal for Rwanda to prosecute the ringleaders – on behalf of the whole of humanity, not just the state of Rwanda – for what were obviously crimes against humanity.

The tribunal was established by UN Security Council Resolution 955 of 8 November 1994, for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda, or committed by Rwandan citizens in the territory of neighbouring states, in the period between 1 January 1994 and 31 December 2004.

The definition of the international crime of genocide is laid down in the Genocide Convention of 1948, and broadly, requires proof that the acts of killing having been committed with 'intent to destroy, in whole or in part, a national ethnic, racial or religious group'.[5] The other crimes charged and tried in the tribunal are 'crimes against humanity', defined as murder, rape and other inhumane or violent acts 'when committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds'.[6]

The tribunal was voted a generous budget by the UN, to enable it to conduct the necessary investigations in Rwanda, and surrounding countries where many of the perpetrators and victims had fled and to apprehend and bring the alleged offenders to trial. There was provision for funding not only the prosecution legal teams but the defence lawyers as well, if the defendants were apparently indigent (as most claim they are), and for the costs of the lengthy incarcerations of any persons convicted.[7]

The investigative arm of the tribunal is based in Kigali, but it was decided that the trials themselves would be conducted nearby, in the Tanzanian town of Arusha. That town had the advantage of being accessible from Rwanda, yet removed from that country's turbulent domestic politics. This is important in a part of the world where there are no railways to speak of, and such roads that do exist are frequently impassable. Even air travel into Rwanda is hazardous, due to the deep, narrow valleys and mountainous terrain. By contrast, several decades as a centre for safari tourism in the vicinity of Arusha had brought with it infrastructure of a standard higher than is usual in Africa. The town is the gateway to the famous wildlife reserves of northern Tanzania; the Ngorogoro Crater, Lake Manyara and the Serengeti Plain. There was even a supply of large, under-utilised Tanzanian Government buildings left over from the central-planning policies of Julius Nyerere.

The final advantage for Arusha was historical symmetry. Negotiations between President Habyarimana's government and the Rwandese Patriotic Front ('RPF') to resolve the armed conflict in Rwanda, which had been going since October 1990, led to the signing of treaties known as the Arusha Accords, in August 1993. Many say that it was the concessions granted by Habyarimana to the RPF in those agreements that led to his apparent assassination the following year and the awful events that then ensued.

## My arrival in Arusha

I was accompanying my daughter Georgina, and a group of students and teachers from New England Girls' School, Armidale. The main purpose of their trip was to visit a school for impoverished children, which was started in a village outside Arusha just over two years before by Gemma Sisia, a former teacher at NEGS.

I was able to organise a semi-official visit to the tribunal, courtesy of a letter of introduction, kindly provided by Harrison SC in his capacity as president of the Australian Bar Association.

To some extent, Arusha fits the description of African cities, penned recently by the travel writer Paul Theroux:

> 'even at best, African cities seemed to me miserable, improvised ant-hills ... a sprawl of shanty towns and poor markets, idle people and lurkers, an appalling vastness and a look of desperate improvisation. [An African city] is in no sense a metropolis but ... a gigantic and unsustainable village.'[8]

Spread everywhere over the fields surrounding the old town limits of Arusha were one-room huts made out of a mixture of mud and cow dung daubed on rough wooden slats, with tin or thatched rooves with no guttering, in groups of ten or so around a shared well and with the surrounding bush for ablutions. Individual clusters are connected by dirt roads and interspersed with desultory open air markets.

I was told that the population of Arusha is now approximately one million people, having grown to that size from a population of approximately 250,000 in only the few years that the tribunal has operated there, since 1995. Clearly this extraordinary growth is largely as a result of the multiplier effect of the money that the UN has poured into the establishment and running of the tribunal, which I was told had a budget for 2004 of some US$70 million. I was told that the multiplier effect was deliberate – it had been part of the reason why the UN had decided to establish the tribunal in Arusha, rather than say in Geneva, or the Hague, or somewhere in South Africa.

Arusha's extravagant growth has strained the infrastructure beyond its capacity. Except for a few tarred kilometres around the town centre[9], where the ICTR and other government buildings were located, and a few highways out of the city to the safari destinations or the neighbouring countries, the roads were dirt, and full of potholes in which you could hide a refrigerator. Naturally, four wheel drive vehicles are the main form of transport, and they require a constant supply of replacement axles, suspension systems, drive shafts, wheels and tyres to keep them running.

Electricity, which comes from a grid which includes Uganda and Kenya, was feeble and intermittent. There seemed to be a permanent state of brown-out for the two weeks that we were in Arusha. The few street lights, mostly confined to the town centre, were very dim. At the school we had to use kerosene lamps after nightfall to supplement the dim electric lights. Travelling around Arusha after nightfall there were small campfires everywhere. On the one night that I was in Dar Es

Salaam, later in the trip, there were no street lights at all in the city centre. To a traveller, this lack of power and lighting at night is a practical demonstration of the difference between developed and developing nations. Dar Es Salaam is a huge city, rivalling Sydney in size, and it was quite disconcerting to be in its dark central business district.

Tanzania contains the southern part of the fertile Rift Valley, which is not too far from Arusha, and the people I saw seemed well fed. But it is a very poor country, like all of sub-Saharan Africa, with the exception of South Africa. There are few natural resources or products that the rest of the world wants, or cannot produce cheaper itself. Unemployment is high, and the economy is unsophisticated, and largely cash based. The taxation base is almost completely reliant on duties and tariffs levied at unavoidable catchment points, such as the border. World economic organisations and informed commentators agree that corruption is endemic in the public sector, and I was informed that public services are essentially provided upon a pay-as-you go basis, and that public servants are used to foraging on their own account to supplement their meagre incomes.

The general mass of people in the crowds in the endless street markets are brightly attired in synthetic materials emblazoned with slogans – the usual East Los Angeles gear, which apparently comes off a delivery line commencing with the used clothing bins of the West[10], and could have originated in Australia or Holland just as easily as in East LA. There were however many traditional Masai, still wearing their vivid red, or purple robes, and their distinctive sandals made from strips of rubber cut from old car or motorcycle tyres.

There is no fixed-line telephone system to speak of. As well as the usual difficulties in cabling for long distances in poor countries, Tanzania has unique hazards for overhead wires. Elephants don't like them at all, apparently, but do enjoy rubbing their tusks on the poles. However, like many less developed countries, modern telecommunications, using internet and satellite technology, has simply leapfrogged over the lack of cables and land line infrastructure, with the introduction of quite a good mobile telephone network.

This development was very much accelerated, I was told, as a result of the UN input into the economy. The tribunal required a workable communications system as quickly as possible. The UN official who had been in charge of setting up and running the tribunal in Arusha, from 1995, told me that when he first arrived, he worked out of one room in the local hotel and for the many international calls he had to make he had to use two operator-connected land line telephones. Quickly, satellite dishes were installed and investment was also made into the wireless infrastructure that the new influx of international workers needed.

There has been a quick pick-up of these new services by the locals as well. When we visited a traditional Masai village on the way back from safari, an impressive warrior came out to greet us, fully kitted out in robes, assegai and short dagger. After introductions, he produced a Nokia and asked whether he could charge it in our vehicle while he showed us around.

Crime is rampant in Arusha. In a country where a skilled tradesman in the building industry earns US$2 a day, petty theft abounds. A taxi I was in ran out of petrol, but the cheerful driver immediately leapt out and began filling the tank with a jerry can that he kept in the boot. When I enquired why he stored his petrol in that manner rather than in the fuel tank, he replied that it was to minimise his risk of petrol theft to only one jerry can at a time.

More serious incidents are an everyday occurrence also. On a trip to the local food market for daily supplies for the girls back at the school, I witnessed a commotion as a crowd chased a youth, 13 or so by the look of him, who evidently had moments before perpetrated a snatch-and grab. My driver hastily insisted that we get out of there as fast as we could, which we did as the crowd caught the boy and the commotion increased and the dust rose. I heard the next day that the boy was kicked to death, there and then.

Casting his shadow over a projected map of Rwanda, the former commander of the United Nation force in Rwanda during the country's 1994 genocide, Canadian Gen. Romeo Dallaire, returns to his seat on the witness stand at the International Criminal Tribunal for Rwanda, in Arusha, Tanzania, Wednesday, February 25, 1998. Photo: AP Photo / Brennan Linsley / AAP Image

I was told that such events are not uncommon, and this was confirmed when a few days later I read an article in the national newspaper that the government was starting a publicity campaign to try and convince Tanzanians to not commit such acts of mob justice, but to rely more on the police.

As for the police, later that week we had to prevent the girls going to the Post Office to send their postcards, when it was reported back by an earlier visitor that the bullet-riddled body of a bank robber had been propped in the foyer. Apparently, this was a part of a 'Police Targeting Bank Robbers' campaign, Tanzanian style. The message on a sign around his neck explained that he had been shot by the police during an unsuccessful heist.

I did get the feeling that the rule of law was a little fragile in other ways as well. The school where we stayed was within a compound and armed watchmen with dogs patrolled it at night. Travel after dark was strictly in vehicles only.

AIDS, like everywhere in Africa is at astounding epidemic proportions in Tanzania. I was told by an international health worker that in some areas of East Africa well over 30 per cent of the population is HIV positive. Many of the children at the school were HIV positive, and had lost one or both of their parents. We organised a soccer tournament for the kids one day. They were fabulous players with amazing skills, and tore into each other with enthusiasm. We had to impose a blood bin rule.

The water is poisonous, particularly to someone not used to it. It is full of parasites of one form or another and requires sterilisation by some reliable method – not just whisky. I discovered the latter salient fact after a great evening at the

Greek Club[11] in Arusha, where I went to watch a live telecast of the Euro 2004 soccer final between Portugal and Greece. Shortly after arriving back at the school it was brought home to me most powerfully that I should have cross-examined the bar-tender in greater detail as to the provenance of the ice cubes he put in my drink.

Malaria is so rife it is like a public servant getting a cold in the Canberra winter. Three of the girls and one of the teachers in our thirteen person group contracted it. This was despite the fullest medical precautions being taken on this very well planned and run school trip. It was a mild form thankfully, but still extremely debilitating for several days.

Despite all these difficulties, the infrastructure of and around Arusha is improving, the economy is expanding, Gemma's school is thriving[12], and the International Criminal Tribunal for Rwanda has successfully investigated, arrested and conducted criminal trials of persons charged with the international crimes of committing genocide or crimes against humanity.

## Visiting the tribunal

When I visited, the tribunal had secured the arrest of 61 individuals accused of the genocide or crimes against humanity. Some nine trials, most of them of several accused at a time, had been completed, including through the appellate process. One accused was acquitted. Six convicted persons were serving lengthy sentences in Mali, including Jean Kambanda, the prime minister of Rwanda at the time of the atrocities, who is the first head of government convicted of such crimes. Twenty-two detainees were on trial, and the remainder were in custody awaiting trial. As well as the trials of the ringleaders of the actual massacres, both civilian and military, one of the most important trials running was the 'media' trial, where the accused were running a radio station and broadcasting messages of hate and invocations to killing.

The tribunal has developed a jurisprudence that will serve other international criminal tribunals and, it is hoped, other domestic courts all over the world. The co-operation of not only the neighbouring African countries but also of the wider international community has been substantial in the daunting tasks of investigation, the arrest and detention of suspects, the travel of witnesses to the trials in Arusha, and the provision of experienced prosecutors and defence lawyers and of judges at trial and appellate level

The well known phrase '*the banality of evil*'[13] was brought home to me in Arusha as I watched one trial. Through the glass separating the body of the court from the public gallery I saw men in suits, not devils. But the facts and the statistics speak for themselves, and although a revisionist of the likes of David Irving may in years to come seek to dispute them, the historical record and the body of jurisprudence created by the tribunal, and the will in the international community to extend the rule of law into even the most inaccessible and intractable places on the planet, will not go away.

After a morning in the tribunal, talking to some of its personnel and observing some of the trials, I would return to the little school founded by Gemma and her now registered charity, the East Africa Fund, the motto of which is 'Fighting poverty through education'. I would meet my daughter and her friends, with their wide eyed optimism about the world and their energy to do something worthwhile, and I would roll my sleeves up and go back to painting a classroom. Gemma Sisia and people like her will change Africa, and change the world. And I agree with what Nicole Kidman's character in *The Interpreter* says at the end of that movie – the United Nations, for all its limitations, is still the best hope for humanity.

1 See *The Rwanda Crisis 1959-1994. History of a Genocide*, Gerard Prunier, London, Hurst, 1995, cited in *Africa – A Biography of a Continent*, John Reader, Vintage Books, New York, 1999, at p 676.

2 See e.g. Prunier, above; or *We Wish to inform you that tomorrow we will be killed with our families – Stories from Rwanda*, by Philip Gourevitch, Picador, 1998.

3 Reader, ibid, p. 677.

4 See the Spring edition of the *Victorian Bar News*, at 33.

5 *Basic Documents* for the International Criminal Tribunal for Rwanda, No 1, August 1999, p. 12.

6 Ibid, p. 14.

7 The United Nations cannot support capital punishment within the terms of its Charter. Also, although it could, and did in the case of Rwanda, set up a temporary police force to investigate and bring offenders to trial, and a judiciary to try them, it did not wish to create an international prison system. Thus, persons convicted by the ICTR will serve their terms of imprisonment in neighbouring countries agreeing to participate in that regard.

8 *Dark Star Safari*, Penguin Books 2003, which is about his trip through Eastern Africa from Cairo to Capetown.

9 such as it was – think the main street of Gloucester, or Booroowa, or Condoblin, or Dungog, or any number of very small Australian towns.

10 Theroux writes about this as well.

11 Like much of the city, it had certainly seen better times. Apparently there was once a large and thriving Greek community in Arusha, constituting much of the business class, but the collapse of the economy as a result of the incompetent central planning of the Nyerere government led to the community's disintegration and diaspora.

12 There is a queue of eager and bright students and the school is quickly expanding in numbers and size. It is all fully funded by donations, including the sponsorship of the children, mostly from Australians in the Armidale area. Anyone interested to help with donations or even hands-on volunteering (I painted a class-room when I was over there) should see the recent documentary on Gemma and her school, broadcast on ABC Story, 15 August 2005.

13 Which Hannah Arendt coined in 1963 when reporting on the trial of Adolf Eichmann in Jerusalem.


# Appointments and disappointments:

## The High Court and the US Supreme Court over the last century

*By M G Sexton SC, Solicitor-General of New South Wales*

Justices of the High Court are formally appointed by the governor-general on the advice of the Executive Council. This means in practice that the appointments are made by the Cabinet. It would be normal for the attorney-general to make a recommendation to the Cabinet but, in the case of appointments to the High Court and, no doubt, some other significant public offices, this recommendation may not always be accepted. It would appear that on at least some occasions in recent years it has not been.

Over the last three decades all appointments to the High Court have been persons who have spent their entire professional life at the Bar and/or on the bench. In earlier years, however, quite a number of the court's members had broader experiences of public life – somewhat akin to the more varied backgrounds of justices of the United States Supreme Court.

The first five justices of the High Court were all former politicians. When the court assembled for the first time on 6 October 1903 it had three members only – Sir Samuel Griffith, a former premier and then chief justice of Queensland; Edmund Barton, first prime minister; and Richard O'Connor, a senator and also a minister in the first Commonwealth parliament. In 1906 the court was made up to five members with the appointments of Isaac Isaacs, then the Commonwealth attorney-general, and Henry Bourne Higgins, a former Commonwealth attorney-general. All of these five judges had been active in the conventions of the 1890s that produced the Constitution. There was no love lost between some members of the court. Barton wrote to Griffith about Isaacs and Higgins: 'You will see how little decency there is about these two men. All the same, I think they hate each other, although they conspire.'

The first real controversy over an appointment to the court took place in 1912 when O'Connor died. A B Piddington, a Sydney barrister and non-Labor member of the NSW Parliament, was appointed after being questioned by the Commonwealth attorney-general – W M Hughes – about his views as to questions of Commonwealth and state powers. Meetings of barristers in Sydney and Melbourne condemned the appointment and Piddington resigned without ever sitting. He was replaced by a Melbourne barrister, Frank Gavin Duffy, and two further appointments to make the bench up to seven – Charles Powers, the Commonwealth crown solicitor (the only person not a member of the Bar ever appointed) and George Rich, a Sydney barrister.

The next major controversy came in 1930 and was precipitated by the resignation in 1929 of Chief Justice Adrian Knox and Justice Powers. At the federal election late in 1929 the Scullin government took office. Isaacs was appointed chief justice but soon afterwards was appointed governor-general. Gavin Duffy, although 78 years old, became chief justice. This still left two vacancies but Scullin and his attorney-general, Frank Brennan, decided that they should not be filled for the time being. These two then set sail for London where they were to have a series of meetings with British officials. In their absence the Cabinet proposed to fill the two vacancies. Scullin and Brennan sent cables telling them not to do so. They were ignored. The two appointments were Herbert Vere Evatt, 36 years old, who had been a Labor back-bencher in the NSW Parliament in the 1920s and Edward McTiernan, 38 years old, who had been NSW attorney-general in the 1920s and was at this time a Labor member of the House of Representatives. There was a storm of criticism from the Opposition, and from some sections of the press and the legal profession but both appointees took their seats on the court.

In 1935 Gavin Duffy resigned as chief justice and his place was taken by Sir John Latham, who had left the Commonwealth Parliament the year before and who had been Opposition leader there in the early 1930s. In 1940 the mercurial Evatt reversed this exercise when he stepped down from the court and stood successfully for a seat in the House of Representatives and became – shortly afterwards – attorney-general and minister for external affairs in the Curtin and Chifley governments. Evatt returned to the court as counsel to argue the bank nationalisation case in 1948 – and again in the Privy Council in 1949 – a case that resulted in 35 days of argument in the Privy Council but a judgment of only 31 pages in the law reports.

There were a number of resignations from the court in the early 1950s – Hayden Starke, who was 78, and Rich who was 87. They were replaced by Wilfred Fullagar from the Melbourne bar and Frank Kitto from the Sydney Bar. In 1952 Latham stepped down and was replaced by Sir Owen Dixon, who had been on the court since 1929. His vacancy on the court was filled by Alan Taylor of the Sydney Bar.

Over the next 50 years all appointments to the court – with two exceptions – have been members of the Bar and/or the bench for almost all of their professional life – and almost all of those from the Bar and Bench in Sydney or Melbourne. There have been two Western Australians – Wilson and Toohey – and three Queenslanders – Gibbs, Brennan and Callinan. The two exceptions were Sir Garfield Barwick and Lionel Murphy. Barwick was minister for external affairs when he was appointed chief justice in 1964, although he had previously been attorney-general and had come to politics relatively late after a hugely successful career at the Sydney Bar. Murphy was Commonwealth attorney-general at the time of his appointment in early 1975 and had a lengthy career at the Sydney Bar. He had, however, been a highly controversial

character in the Whitlam government and a meeting of Victorian barristers was specially convened to consider a motion expressing regret at this appointment on the basis that he was not 'pre-imminent within the legal profession' and that his fitness for office was 'a matter of public controversy.' The motion was lost by 188 votes to 64. When Barwick's advice to Sir John Kerr in November 1975 was made public, Murphy wrote to Barwick – who was sitting just down the corridor presumably – to say: 'I disassociate myself completely from your action in advising the governor-general and from the advice you gave.' Barwick responded, also in writing:

> I note your remarks. I fundamentally disagree with them, both as to any legal opinion they involve and as to any matter of the propriety of my conduct. I see no need to discuss with you either question.

The current court seems a more peaceful place. It is to be joined by Justice Crennan, who, except for the fact that she is only the second woman appointed to the court, essentially matches the background and profile of the other members of the court and almost all of the appointments made over the last fifty years.

Although welcomed as a good appointment, there have been some criticisms of the process by which it occurred. Some commentators have proposed a committee of commission that would make recommendations to the government. Such a proposal was first made by Sir Garfield Barwick in 1977, perhaps as a response to the Murphy appointment. But, as already suggested, an analysis of the appointments over the last half century strongly suggest that there would have been very little, if any, difference if these had been filtered through a commission. As it is, of course, the Australian Government receives formal recommendations from the states and informal recommendations from the various legal professional bodies.

In the case of the US Supreme Court, Article 2, Section 2 of the Constitution provides that the president 'shall nominate, and by and with the advice and consent of the Senate, shall appoint …judges of the Supreme Court.' In the first century of the republic this power of rejection was frequently used. The first nominee was rejected in 1795 when John Rutledge was nominated to succeed the first chief justice, John Jay. The Reconstruction period following the Civil War was particularly stormy. During the presidency of Ulysses S Grant – 1868-1876 – one nominee was voted down and three nominees – two of them for chief justice – were forced to withdraw their nominations.

Photo: AFP Photo / Mandel Ngan / News Image Library

Over the twentieth century there were relatively few rejections, although some extremely hard fought contests. The first appointment of the century – which did not involve a contest – was that of Oliver Wendell Holmes, who was nominated by President Theodore Roosevelt in 1902. He was to remain on the court for thirty years. The first great contest came in 1916 when President Woodrow Wilson nominated Louis Brandeis, a Boston attorney who had introduced social and economic issues into constitutional cases before the court. The American Bar Association bitterly opposed the nomination but Brandeis was confirmed by a vote of 47-22 in the Senate. It was also in 1916 that Justice Charles Evatt Hughes stepped down from the court to run against Wilson as the republican candidate in the presidential election. He lost very narrowly and then returned to the court in 1930 as chief justice. His predecessor as chief justice was William Taft – the only person to have held the offices of president (1908-1912) and chief justice (1921-1930). And, most importantly of all, he had also been solicitor general!

The first nominee in the twentieth century to be rejected was John Parker, a federal judge from North Carolina who was rejected by 41-39 votes in 1930 after a strong campaign by labor and minority groups who were opposed to his judicial record. A number of the court's great names were appointed in the 1930s, including Benjamin Cardozo, Felix Frankfurter and William O Douglas who was to become the court's longest serving judge. Frankfurter was only the second nominee who was requested to appear and testify before the Senate Judiciary Committee. Since 1955, however, all nominees have appeared and testified before the Judiciary Committee.

It was also in the 1930s – in 1937 – that President Roosevelt put forward a radical plan to shift the balance of power on the court. He asked Congress for power to name an additional justice for each of those over 70 who did not resign – up to a court of 15 judges. At this time six justices were over 70. The proposal stalled in Congress – one of Roosevelt's rare failures to achieve a publicly-announced goal. But over the next four years seven members of the court were replaced so Roosevelt had the most complete opportunity to change the complexion of the court of any president.

It was Frankfurter who gave some evidence – not publicly, of course, at the time – of the tensions that are bound to exist between some members of a court. When Chief Justice Fred Vinson died in 1953 – shortly before the continuation of

argument in *Brown v Board of Education* – Frankfurter, who was an agnostic, said: 'This is the first indication I have ever seen that there is a God.' Vinson was replaced by Earl Warren, who had been governor of California in the 1940s and the vice-presidential candidate on the Republican's losing ticket in 1948.

It was 38 years since the last Senate rejection when President Lyndon Johnson nominated Abe Fortas, who was already an associate justice of the court, to succeed Warren in 1968. By this time, however, Johnson had said that he was not standing for re-election in the presidential election scheduled for November of that year. Fortas was known to be extremely close personally to Johnson and his financial affairs were, while legal, rather convoluted. The Republican senators launched a filibuster and, when it became clear that the debate could not be ended, Fortas asked Johnson to withdraw his nomination. As a result, the Johnson administration did not get to fill the vacancy for chief justice and this was done by the new Nixon administration in the form of Warren Burger, who was to remain in that position for seventeen years.

Then came, however, two rejections in rapid succession. In 1969 Nixon nominated Clement Haynsworth, a South Carolina appeals court judge. In the wake of the Fortas debate, the Democrats in the Senate opposed the nomination on the basis of financial conflicts of interest. There was also strong opposition from labour and civil rights organisations. The nomination was finally rejected by a vote of 55-45. Nixon then nominated a Florida appeals court judge, Harrold Carswell, but he too was rejected by a vote of 51-45, largely on the basis of his undistinguished record. Nixon's third choice – a Minnesotan appeals court judge, Harry Blackmun – was then unanimously approved by the Senate.

Although Warren Berger had been appointed by Nixon, he presided over what was still largely the Warren court. He was one of three dissenters in the Pentagon papers case in 1971 when the court refused to injunct publication by the *New York Times in the Washington Post* of internal government documents concerning the Vietnam War. He joined, however, in a unanimous opinion of the court in 1974 upholding a federal court subpoena to President Nixon to produce the Watergate tapes, which precipitated Nixon's resignation two weeks later. In 1973 the court decided a case that is still the subject of intense political controversy – *Roe v Wade* which held that, for at least the first three months of pregnancy, any decision on abortion cannot be regulated by state law.

In 1986 William Rehnquist, who had been appointed to the court in 1971, was confirmed as chief justice. The following years, however, there was a spectacular contest over the nomination of Robert Bork. Bork was at that time a federal appeals court judge and had been a prominent academic lawyer. He was, however, best known for his role in the so-called Saturday night massacre in 1973. Archibald Cox, who had been solicitor general in the Kennedy administration and who probably would have joined the court if Kennedy had lived, had been appointed as the special prosecutor in the Watergate case. Nixon proposed to dismiss him and asked Attorney General Elliot Richardson, to do so. Richardson refused and resigned. Deputy Attorney General William Ruckelshause also refused and resigned. Then Bork, as solicitor general, accepted the order and dismissed Cox. This was what really cost Bork a place on the Supreme Court. His nomination was rejected by a vote of 58-42.

The nomination of Clarence Thomas by President George Bush Snr in 1991 was also the subject of a fierce conflict in the Senate but the nomination was ultimately confirmed, although very narrowly by a vote of 52-48. As everyone will be aware, John Roberts was confirmed as chief justice a little over a month ago. The nomination of Harriet Miers to fill the vacancy created by the resignation of Justice O'Connor was withdrawn without being voted on by the Senate. In place of that nomination, President Bush has sent to the Senate the name of Judge Samuel Alito, who has been for some years a member of the Federal Appeals Court for the 3rd Circuit, which is based in Philadelphia.

It is evident that the last three decades of the twentieth century have produced some of the most widely publicised and acrimonious confirmation hearings in the court's history. This is to some extent caused by the realisation that the Bill of Rights means that many of the questions before the court are essentially political ones and that the judges can therefore have a significant political impact through their decisions. This point was underlined by the role of the court in effectively determining the result of the 2000 election by a vote of 5-4 along party lines.

There is an on-going debate in Australia about the merits of a Bill of Rights at the federal level but one factor – it is only one factor – to be taken into account is the long-term consequences of involving the judiciary in what are basically political controversies. This may have an effect not only on how judges are appointed but also on how they are regarded by the general community.

Photo: Courtesy of the High Court

# The Federal Magistrates Court: A successful experiment

*By Arthur Moses **

## Introduction

> The (Federal Magistrate Court) deals with shorter and simpler matters in federal jurisdictions, and, in the short time since it was created, it has become even more apparent that since it was created, it has become even more apparent that there is a great deal of work suitable for its attention. The court now receives 40 per cent of all family law work, and most bankruptcy cases. It now deals with migration cases. The court has recently been invested with copyright jurisdiction.
>
> I expect that, in time, it will become one of Australia's largest courts.[1]

The Federal Magistrates Court was established by the *Federal Magistrates Act 1999* (Cth) and commenced operation on 23 December 1999. The first sittings took place over five years ago, on 3 July 2000 in Adelaide, Brisbane, Canberra, Melbourne, Newcastle, Parramatta, and Townsville.

The objective of the court has been 'to provide the Australian community with a simple and accessible forum for the resolution of less complex disputes' within its jurisdiction.[2] The creation of the court was not without controversy. In 1999, the Law Council of Australia strongly opposed the Federal Government's plan to establish a Federal Magistrates Court. At this time, a number of concerns about the operation of a Federal Magistrates Court were raised. For instance, it was said that the funding earmarked for the establishment of the Federal Magistrates Court could be better spent on more judicial resources within the current court structures. It was also asserted that the establishment of the Federal Magistrates Court may result in court procedures which did not adequately protect the fundamental principles of our legal system. (Australian Lawyer, October 1999).

This brief paper demonstrates the ways in which the court has achieved that objective. The Federal Magistrates Court is well on the way to realising Chief Justice Gleeson's prediction in 2001 that 'within the next 20 years, it will become one of the largest courts in Australia'.[3]

## The constitutional basis of the Federal Magistrates Court

The Federal Magistrates Court is a Chapter III court, and consequently the types of questions that have historically been raised about the status and independence of state magistrates do not arise.[4] As a Chapter III court it must be, and be seen to be, independent and impartial:[5] The rule of law depends on it.[6] Federal magistrates are justices of the court.

## The jurisdiction of the Federal Magistrates Court

Jurisdiction is conferred on the court pursuant to the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth). It presently has jurisdiction:[7]

- To determine civil claims under Divisions 1 and 1A of Part V of the *Trade Practices Act 1974* (Cth), to a limit of $200,000[8];
- Concurrently with the Federal Court in bankruptcy matters, with the exception of jury trials under s30(3) of the *Bankruptcy Act 1966* (Cth)[9];
- Concurrently with the Federal Court to enforce decisions of the privacy commissioner pursuant to s55A of the *Privacy Act 1988* (Cth);
- To determine complaints terminated by the president of the Human Rights and Equal Opportunity Commission, under ss46PE and 46PH of the *Human Rights and Equal Opportunity Commission Act 1986*[10] (Cth);
- To provide relief in relation to complaints under the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth),[11] *Disability Discrimination Act 1992* (Cth) and the *Human Rights and Equal Opportunity Commission Act 1986*[12] (Cth);
- Under the *Administrative Decisions (Judicial Review) Act 1977*, except for matters arising under the following Acts, or Regulations made under these Acts – *the Australian Citizenship Act 1948* (Cth), the *Immigration (Guardianship of Children) Act 1946* or *the Migration Act 1958* (Cth);
- To determine appeals from the Administrative Appeals Tribunal that have been transferred to the court by order of the Federal Court (subject to certain restrictions arising under s44A of the *Administrative Appeals Tribunal Act 1975)* (Cth);
- In respect of matters arising under Part VIII of the *Migration Act 1958* (Cth) (including increased jurisdiction to accept matters by way of remitter from the High Court)[13];
- In property proceedings pursuant to s39(1A) of the *Family Law Act 1975* (Cth) if the total value of the property exceeds $700,000 and the parties do not consent to the court proceeding[14];
- In children's matters the court has the same jurisdiction as the Family Court, by virtue of s69H(4) of the *Family Court Act 1975* (Cth);
- Concurrently with the *Family Court under the Child Support (Assessment) Act 1989* (Cth) and *Child Support (Registration and Collection) Act 1988* (Cth);
- In copyright cases pursuant to ss131D, 135ARA, 195AZC(5) and 248MA of the *Copyright Act 1968* (Cth)15.

The court also has associated and accrued jurisdiction[16] like the Federal Court.[17]

The Howard Government's 'WorkChoices' proposal has also foreshadowed the addition of a significant industrial jurisdiction to the court.

## Practice and procedure in the Federal Magistrates Court

The Federal Magistrates Court can use a variety of dispute resolution mechanisms, including mediation (conducted by registrars, or private persons at the election of the parties). The court has self-consciously acknowledged the influence of the

Australian Law Reform Commission's report on *Managing Justice*,[18] and the conclusion of numerous government inquiries[19] that access to justice has required improvements.

To that end, the Federal Magistrates Rules, which took effect on 30 July 2001,[20] provide for two basic forms, 'Applications' and 'Responses', which can incorporate cross-claims, and are filed with an affidavit.[21] Substantial compliance with the forms is sufficient.[22] If the Federal Magistrates Rules are regarded to be insufficient or inappropriate, the Family Law Rules and Federal Court Rules as appropriate can be applied.

The court has adopted flexible procedures to accommodate litigants and practitioners including decreased emphasis on discovery and interrogatories (leave is required) and the use of an individual docket system (except in bankruptcy matters).[23] The docket system enables judges of the federal magistracy to limit the range of issues that can be traversed in hearings and the number of occasions when the parties and their representative have to come to court.[24]

As the court was created relatively recently, it has been able to maximise the use of technology to enhance litigant and practitioner amenity, including the use of audio links for mentions and directions hearings and urgent applications, and video links for other hearings.

The court also quickly developed a circuit arrangement to accommodate litigants and practitioners in Coffs Harbour, Dubbo, Lismore, Wollongong, Bendigo, Shepparton, Geelong, Morwell, Warrnambool, Devonport, Hobart, Cairns, Rockhampton, Bundaberg, Mackay, Berri, Port Lincoln, Whyalla, Alice Springs, Toowoomba, Maroochydore, South Port, Ballarat, Castlemaine, Dandenong, Hamilton, Traralgon and Perth.[25]

### Workload of the Federal Magistrates Court

The court has a significant workload in family law (particularly Form 3F and Form 49 applications), bankruptcy and migration matters. As at 30 June 2002, the court heard:

- 65 per cent of all divorces;
- 28 per cent of all ancillary family law applications;
- 84 per cent of bankruptcy matters;
- 90 per cent of unlawful discrimination matters;
- 65 per cent of all migration applications; and
- an increasing proportion of the Federal Court's workloads in the other areas listed above.[26]

More recent statistics also show a steady rise in the court's workload in family law and bankruptcy matters from 03/04 to 04/05, with a slight drop off in migration matters.

**TABLE A**

Number of federal magistrates by registry, as at September 2005

| | |
|---|---|
| Adelaide | 2 |
| Brisbane | 4 |
| Canberra | 2 |
| Dandenong | 0 |
| Darwin | 1 |
| Hob/Launceston | 1 |
| Melbourne | 8 |
| Newcastle | 2 |
| Parramatta | 3 |
| Sydney | 12 |
| Townsville | 1 |
| **Total** | **36** |

**TABLE B**
Number of family law applications filed by registry, 2003-2004

| | Divorce | Divorce granted | Child support | Final orders | Interim orders | Total |
|---|---|---|---|---|---|---|
| Adelaide | 3981 | 3649 | 133 | 641 | 718 | 9122 |
| Brisbane | 10255 | 9216 | 90 | 2008 | 1466 | 23035 |
| Canberra | 1638 | 1557 | 35 | 568 | 581 | 4379 |
| Dandenong | 3291 | 2988 | 51 | 1065 | 1038 | 8433 |
| Darwin | 434 | 407 | 33 | 318 | 322 | 1514 |
| Hob/Launceston | 1415 | 611 | 22 | 285 | 267 | 2600 |
| Melbourne | 8702 | 8061 | 148 | 2349 | 2508 | 21768 |
| Newcastle | 2926 | 2966 | 27 | 829 | 899 | 7647 |
| Parramatta | 5365 | 4427 | 118 | 1384 | 1248 | 12542 |
| Sydney | 7264 | 6769 | 0 | 45 | 336 | 14414 |
| Townsville | 2108 | 1408 | 23 | 373 | 305 | 4217 |
| **Total** | **4739** | **42059** | **680** | **9865** | **9688** | **109671** |

**TABLE B**
Number of family law applications filed by registry, 2004-2005

| | Divorce | Divorce granted | Child support | Final orders | Interim orders | Total |
|---|---|---|---|---|---|---|
| Adelaide | 4064 | 3915 | 104 | 1020 | 1097 | 10200 |
| Brisbane | 10139 | 9976 | 32 | 2559 | 1853 | 24559 |
| Canberra | 1651 | 1619 | 2 | 623 | 620 | 4515 |
| Dandenong | 3591 | 3460 | 07 | 1160 | 1133 | 9351 |
| Darwin | 488 | 497 | 20 | 279 | 306 | 1590 |
| Hob/Launceston | 1392 | 1372 | 12 | 318 | 260 | 3354 |
| Melbourne | 9357 | 9071 | 41 | 2589 | 2599 | 23657 |
| Newcastle | 2895 | 2825 | 10 | 953 | 965 | 7648 |
| Parramatta | 5438 | 5363 | 66 | 1290 | 1337 | 13494 |
| Sydney | 7400 | 6978 | 4 | 73 | 338 | 14793 |
| Townsville | 2160 | 2008 | 22 | 516 | 403 | 5109 |
| **Total** | **48575** | **47084** | **320** | **11380** | **10911** | **118270** |

**TABLE C**
Number of general federal law applications filed by registry, 2003-2004

| | Admin law | Bankruptcy | Consumer protection | Copyright | Human rights | Migration | Total |
|---|---|---|---|---|---|---|---|
| Adelaide | 0 | 255 | 1 | 1 | 15 | 14 | **286** |
| Brisbane | 12 | 624 | 5 | 2 | 6 | 4 | **653** |
| Canberra | 3 | 32 | 3 | 0 | 2 | 3 | **43** |
| Darwin | 1 | 8 | 0 | 0 | 1 | 1 | **11** |
| Hob/Launceston | 1 | 57 | 0 | 0 | 1 | 2 | **61** |
| Melbourne | 17 | 979 | 60 | 7 | 19 | 613 | **1695** |
| Perth | 2 | 163 | 9 | 0 | 6 | 8 | **188** |
| Sydney | 14 | 1262 | 14 | 8 | 48 | 2386 | **3732** |
| **Total** | **50** | **338** | **92** | **18** | **98** | **303** | |

**TABLE C**
Number of general federal law applications filed by registry, 2004-2005

| | Admin law | Bankruptcy | Consumer protection | Copyright | Human rights | Migration | Total |
|---|---|---|---|---|---|---|---|
| Adelaide | 0 | 258 | 1 | 1 | 12 | 16 | **288** |
| Brisbane | 16 | 729 | 5 | 0 | 12 | 32 | **794** |
| Canberra | 4 | 27 | 4 | 0 | 5 | 12 | **48** |
| Darwin | 0 | 11 | 0 | 1 | 2 | 1 | **15** |
| Hob/Launceston | 3 | 79 | 0 | 0 | 1 | 4 | **87** |
| Melbourne | 6 | 1118 | 46 | 12 | 15 | 427 | **1624** |
| Perth | 2 | 214 | 11 | 2 | 3 | 7 | **239** |
| Sydney | 3 | 1427 | 15 | 12 | 41 | 1946 | **3444** |
| **Total** | **34** | **386** | **82** | **28** | **91** | **244** | |

Chief Federal Magistrate Pascoe told *Bar News*, he has been impressed that federal magistrates are able to deliver a great number of decisions expeditiously, despite a very heavy caseload. This has contributed significantly to the success of the court.

Chief Magistrate Pascoe also said a specialist panel system had been established in order to ensure that federal magistrates had appropriate knowledge and experience in specific areas of general federal law. The panel system would resemble that of the Federal Court of Australia.

## Appeals

The full court of the Federal Court of Australia has jurisdiction to hear and determine an appeal from a judgment of the Federal Magistrates Court. However, s25 (1A) of the *Federal Court of Australia Act 1976* (Cth) provides:

> The appellate jurisdiction of the court in relation to an appeal from a judgment of the Federal Magistrates Court is to be exercised by a full court unless the chief justice considers that it is appropriate for the appellate jurisdiction of the court in relation to the appeal to be exercised by a single judge.

The discretion of the chief justice to allocate an appeal from a federal magistrate to a single judge of the Federal Court rather than the full court of the Federal Court is unfettered and not subject to review. The parties do not have the right to be heard as to whether an appeal will be heard by a single judge or the full court of the Federal Court. However, parties may be required to make submissions at a directions hearing on whether an appeal from a federal magistrate is suitable for hearing by a single judge.

The jurisdiction exercised by a single judge of the Federal Court in relation to an appeal from a federal magistrate, is the appellate jurisdiction of the full court of the Federal Court. Accordingly, any appeal from the judgment of the judge is to the High Court of Australia and not to the full court of the Federal Court: see sections 24 (1AAA) and 33 (2) of the Federal Court of Australia Act.

The nature of appeals from the Federal Magistrates Court to the Federal Court was discussed by Justice Kenny in *Farrington v Deputy Commissioner of Taxation* in terms worth setting out at length:[27]

> ... it may be helpful to describe the nature of an appeal to this court from a judgment of the Federal Magistrates Court. The jurisdiction of this court to hear and determine an appeal from a judgment of the Federal Magistrates Court is conferred by s24(1)(d) of the *Federal Court of Australia Act 1976* (Cth) ('Federal Court of Australia Act'). Pursuant to s25(1A) of the Federal Court of Australia Act, the chief justice directed in this case that the matter be heard and determined by a single judge.
>
> 4 An appeal from a judgment of the Federal Magistrates Court is not an appeal by way of a hearing de novo, nor is it an appeal in the strict sense: cf *Low v Commonwealth of Australia* [2001] FCA 702, per Marshall J at [3]. Such an appeal is conducted as a re-hearing. On an appeal by way of re-hearing, the powers of an appellate court are exercisable only if the appellant can demonstrate that, having regard to the evidence before the appellate court, the judgment under appeal is a consequence of some legal, factual, or discretionary error: see *Allesch v Maunz* (2000) 173 ALR 648, at 653-4 per Gaudron, McHugh, Gummow and Hayne JJ; *Minister for Immigration and Multicultural and Indigenous Affairs v Jia* (2001) 178 ALR 421, at 439 per Gleeson CJ and Gummow J; and *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585, at 590 per Gleeson CJ, Gaudron and Hayne JJ.
>
> 5 On an appeal to this court from the Federal Magistrates Court, this court may receive evidence that was not adduced below. It may also draw inferences of fact from the evidence that was received below: see Federal Court of Australia Act, s27. The nature of the discretion under s93A(2) of the *Family Court Act 1975* (Cth) 'to receive further evidence upon questions of fact' (which resembles the discretion under s27 of the Federal Court of Australia Act) was considered in *CDJ v VAJ* (1998) 197 CLR 172 ('CDJ v VAJ'). McHugh, Gummow and Callinan JJ, at 203-4, said:
>
> > The failure to have adduced the evidence before the primary judge will be a variable factor, the weight of which will depend upon all the other factors pertinent to the case. Where the evidence has been deliberately withheld, the failure to call it will ordinarily weigh heavily in the exercise of the discretion. In other cases, the failure to call the evidence even if it could have been discovered by the exercise of reasonable diligence may be of little significance. No invariable rule concerning the failure to call the evidence can or should be laid down in view of the wide discretion conferred on the court by the section.
>
> See also Gaudron J, at 185-8, and Kirby J, at 233-6."

The appellate jurisdiction was also extensively and comprehensively analysed by Justice Branson in a recent part of the *Australian Bar Review*.[28]

## Conclusions

The Federal Magistrates Court has accepted and managed many new challenges in its brief history.

It cannot be doubted that the former chief federal magistrate, Diana Bryant QC (now chief justice of the Family Court of Australia) and the current chief federal magistrate, John Pascoe AO, have managed the resources provided to the court in an effective manner which has delivered one of the most efficient jurisdictions in Australia.

There are still a significant number of self-represented litigants in proceedings in the court, particularly in family law proceedings, where one or both parties are not represented in some two-thirds of all cases. However, despite such challenges, the Federal Magistrates Court has assumed the lion's share of responsibility in three significant, high-volume jurisdictions: family law, bankruptcy and migration matters. It has increased its workload at a remarkable pace and has managed to ensure that the vast majority of its cases are resolved within six months. Importantly, independent analyses including interviews with practitioners have indicated a high degree of support for the Federal Magistrates Court.[29]

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* The writer wishes to acknowledges the co-operation of John Mathieson (the Chief Executive Officer of the FMCA) and Geoff Whelan (the Policy Manager of the FMCA) in providing statistical information sought for this article.

1 Gleeson, the Hon AM, 'The state of the judicature' (Paper presented to the 13th Commonwealth Law Conference, Melbourne, 17 April 2003).

2 Williams, D., 'Federal Magistrates Service', (2000) 11(1) *Public Law Review* 3-6.

3 Gleeson, the Hon A M, 'A changing judiciary' (Paper presented at the Judicial Conference of Australia, Uluru, 7 April 2001) 1, 1.

4 See for example *Macrae v Attorney-General (NSW)* [1987] 9 NSWLR 268 at 278, contrast Golder, H., *High and Responsible Office: A History of the NSW Magistracy*, Sydney University Press, 1991.

5 *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 163-164; *Universal Declaration of Human Rights*, Art 10; *International Covenant on Civil and Political Rights*, Article 14(1); *Beijing Statement of Principles of the Independence of the Judiciary*, Art 4; see also Briese, C., 'judge or Magistrate' (1988) 7 *Commonwealth Judicial Journal* 19, 21.

6 See Debelle, The Hon Bruce, 'Judicial independence and the rule of law' (2001) 75 *Australian Law Journal* 556, 558-561; Nicholson, the Hon R.D., 'Judicial independence and accountability: Can they co-exist?' (1993) 67 *Australian Law Journal 404*, 407; Keyzer, P., 'Judicial independence in the Northern Territory: Are undisclosed remuneration arrangements repugnant to Chapter III of the Constitution?' (2004) 32 *University Of Western Australia Law Review* 33.

7 This list was substantially compiled by McInnis, M., in 'The Federal Magistrates Court Practice and Procedure', a paper presented to a meeting of Perth practitioners held on 20 November 2001 at the Commonwealth Law Courts, Perth, pp.3-7.

8 *Trade Practices Act 1974* (Cth), s86AA. For a critical analysis see Zumbo, F., 'The Federal Magistrates Court and the Trade Practices Act: current and possible future directions', (2003) 11(1) *Trade Practices Law Journal* 46-50.

9 For a useful analysis of the recent amendments to bankruptcy affecting family law practice see Hartnett, N., '*The Bankruptcy Act 1966* and family law', a paper delivered to the Victorian Bar Compulsory Continuing Legal Education Program.

10 See further McInnis, 'Human rights and the Federal Magistrates Court of Australia', paper delivered to the 13th Triennial Conference of the Commonwealth Magistrates and Judges Association, Lake Malawi, Malawi, 24-29 August 2003.

11 *Gardner v National Netball League Pty Ltd* (2001) FMCA 50.

12 See further Raphael, K., 'Review of discrimination matters in the Federal Magistrates Court', 2003 Administrative Law Forum, a paper which provides a helpful summary of a number of cases in these areas, including reflections on particular decisions regarding the award of damages and costs in these jurisdictions.

13 For further details see Fraser, R., 'Developments in administrative law', (2005) No 45 AIAL Forum 1-19, 1-2.

14 See further 'When to transfer proceedings from the Family Court to the Federal Magistrates Service', (2001) 15(4) *Australian Family Lawyer* 23-25.

15 Analysed by Esser, K., 'The copyright jurisdiction of the Federal Magistrates Court', (2004) No 57 *Intellectual Property Forum* 46-48.

16 Pursuant to s18 of the Federal Magistrates Act.

17 As to which see s32 of the Federal Court of Australia Act, considered in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457.

18 Report No 89.

19 'Access to justice' has been the specific focus of numerous federal inquiries including: Senate Legal and Constitutional Affairs Committee, *Inquiry into Legal Aid and Access to Justice*, 2004; *Report of the National Pro Bono Task Force and Recommended Action Plan*, 2001; Commonwealth Attorney-General's Department, *Legal Assistance Needs* Project, Rush Social Research Agency and John Walker Consulting Services, Commonwealth Attorney-General's Department, Barton ACT, 1999; Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, Report No 78, Canberra: AGPS, 1996 (hence ALRC 78); Australian Law Reform Commission, *Who Can Sue?*: A *Review of the Law of Standing*, Canberra: AGPS, 1995; Australian Law Reform Commission, *Who Should Pay?: A Review of the Litigation Costs Rules*, Report 67, Canberra: AGPS, 1995; Commonwealth Attorney-General's Department, Access to Justice Advisory Committee, *Access To Justice: An Action Plan*, AGPS: Canberra, 1994; Administrative Review Council Report to the Attorney-General, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act* Report No. 32 (Canberra: AGPS, 1989); Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27, Canberra: AGPS, 1985; Australian Law Reform Commission, Discussion Paper No. 4, Access to the Court – *Standing: Public Interest Suits* (1977); *Legal Needs of the Poor Inquiry*, 1975, Cass, M. and Sackville, R., AGPS, Canberra, 1975.

20 Statutory Rules 2001, No 195.

21 Rules 28.01 to 28.04, and 4.05.

22 See ie. Rule 2.04.

23 McInnis, M., 'The Federal Magistrates Court practice and procedure', a paper presented to a meeting of Perth practitioners held on 20 November 2001 at the Commonwealth Law Courts, Perth, p.1.

24 Draft submission of the Federal Magistrates Service to the review of the court's operation to 30 June 2002, p.14.

25 *Ibid*. For further information on their operations in Perth see 'The Federal Magistrates Court in WA', (2003) No 30(2) *Brief* 12-14.

26 *Ibid*., p.52.

27 [2002] FCA 1013 at [3]-[4] (13 August 2002).

28 Branson, the Hon C., 'Appeals in the Federal Court of Australia', (2005) 26 *Australian Bar Review* 242, 245-246

29 Cooper, D., 'When Rolls Royce and Holden collide: An analysis of the operation of the Federal Magistrates Service in Queensland in the family law area', (2003) 3(2) *Queensland University of Technology Law and Justice Journal*, at n 154 and accompanying text.

# Commonly asked questions about the Federal Magistrates Court of Australia

**Who is the chief federal magistrate?**

**Mr John Pascoe AO**

Mr John Pascoe was sworn in as chief federal magistrate on 14 July 2004.

Mr Pascoe was managing director in the national law firm, Phillips Fox and has been a solicitor whose practice has been in insurance law, risk management and government regulations.

John Pascoe is a graduate of the Australian National University and, after admission as a solicitor, became a partner in the legal firm, Stephen Jaques & Stephen in 1977. He joined the board of George Weston Foods Limited in 1981 and became CEO of that company in 1985, a position he held until his appointment as non-executive chairman in 2000. He was also chairman of the Board of Management of Centrelink and chairman of Sealcorp Holdings Limited from 2000. He was a director and chairman of Aristocrat Leisure Limited from 2001.

**How many federal magistrates are there in Australia?**

There are 36, including the chief federal magistrate.

**Who are the federal magistrates that sit in NSW?**

The federal magistrates that sit in NSW are (with selected biographies):

- Newcastle: FM Giles Coakes and FM Kevin Lapthorn
- Parramatta: FM Judy Ryan, FM Warren Donald and FM Robyn Sexton
- Queens Square, Sydney: FM Rolf Driver, FM Kenneth Raphael and FM Shenagh Barnes
- John Maddison Tower, Sydney: FM Stephen Scarlett, FM Michael Lloyd-Jones, FM Matthew Smith, FM Nick Nicholls and FM Sylvia Emmett

**FM Michael Lloyd-Jones**

FM Michael Lloyd-Jones holds, among other qualifications, Master of Laws, Bachelor of Science and Bachelor of Business degrees. Mr Lloyd-Jones was appointed as a notary public in 1995. In March 1996 Mr Lloyd-Jones was appointed general counsel of Seven Network Limited. In this capacity he supervised a team of lawyers engaged in a wide range of activities including contractual negotiation and documentation protection of intellectual property dispute resolution advising on pre-broadcast and broadcasting issues and employment law. Mr Lloyd-Jones was employed by the Ten Network from 1990-95 first as network solicitor and then as general counsel and company secretary. FM Lloyd-Jones was appointed as a federal magistrate in 2004.

**FM Matthew Smith**

FM Matthew Smith holds Bachelor of Arts and Law (Hons) degrees from the Australian National University. He was admitted to the Bar in New South Wales in 1975 and commenced practice

in 1976. Mr Smith's early practice was in general civil litigation, family law and Local Court criminal matters. For the last 20 years of his practice at the Bar, he specialised in administrative law, appearing in the Federal Court, the Supreme Court of New South Wales, and the AAT, appearing primarily for private parties, but on occasions also representing government bodies. He was the editor of the *Administrative Appeals Reports* from 1984, and held part-time positions as a lecturer at the University of NSW and as a judicial member of the NSW Administrative Decisions Tribunal. He was appointed as a federal magistrate in 2004.

**Where does the Federal Magistrates Court sit in NSW?**

Sydney, Parramatta and Newcastle. The court also undertakes circuits through Lismore, Coffs Harbour and Wollongong.

**Does a panel system exist for the allocation of cases?**

Specialist panels exist only in the Sydney registry of the Federal Magistrates Court. They exist for the allocation of matters to dockets to specialist general federal law jurisdictions. Panels exist in the areas of administrative law, trade practices, human rights and copyright

**Are counsel required to robe for appearances?**

No, though robes and wigs are generally worn for ceremonial occasions.

**Do the federal magistrates robe?**

Yes. The robes of the federal magistrates consist of a black square, made of Australian wool with seven vertical 'tucks' to be symbolic of federal jurisdiction and seven horizontal 'tucks' to suggest the breadth and scale of the court's concerns as well as its geographical reach.

**What are federal magistrates referred to in court?**

The federal magistrates are justices of the court. Accordingly, federal magistrates are referred to in court as 'Your Honour'.

**What is the web site for the Federal Magistrates Court?**

www.fmc.gov.au. It is an impressive web site which contains important information on the jurisdiction of the court, court forms and fees for matters the court can hear, the links to judgments of the court, information on primary dispute resolution, locations of where the court hears matters and how the court works.

**Where are decisions of the Federal Magistrates Court reported?**

Decisions of the Federal Magistrates Court are reported from time to time in the *Australian Law Reports, Federal Law Reports* and *Family Law Reports*. As noted in 9 above, unreported decisions of the Federal Magistrates Court may be accessed at www.fmc.gov.au.

**Is there a loose leaf service for the Federal Magistrates Court?**

Yes. *Federal Magistrates Court Practice and Procedure* – LexisNexis, *Federal Magistrates Court Practice* – CCH and *Federal Magistrates Court Guidebook* – Thomson Lawbook Company.

# 25th anniversary of the Land and Environment Court

**On Thursday 1 September 2005, a dinner was held in the Strangers Dining Room, Parliament House, to mark the 25th anniversary of the Land and Environment Court and the Environmental Planning and Assessment Act. The dinner was organised by Justice McClellan who, earlier that day, had completed his short but dynamic tenure as chief judge of the court before taking up his position as chief judge of the Common Law Division of the Supreme Court. Brian Preston SC was sworn in as the new chief judge of the Land and Environment Court on 12 November 2005. A full account of his Honour's swearing in will be contained in the next issue of *Bar News*.**

**At the dinner, speeches were delivered by the Hon Neville Wran AC QC who had been premier of the state at the time of the court's inception and former chief judge, the Hon Commissioner Cripps, who has held most judicial posts in New South Wales. The commissioner recorded the fact that, in 2000, a Cambridge University study which had focused on planning merit appeals in six European countries, New Zealand and three Australian states concluded that the NSW Land and Environment Court was the model frequently cited by other jurisdictions as the one that should be followed.**

Mr Wran observed that the Land and Environment Court Act provided a number of key features:

> Firstly, it established a specialist court to deal with questions of law and merit, consisting of both judges and expert commissioners. As a specialist court it enabled the development of a specialised environmental jurisprudence. … Without the benefit of a separate court to develop environmental law I doubt whether the significant advances in environmental jurisprudence, which have occurred in the last quarter of a century, would have ever occurred in New South Wales.
>
> Secondly, the court involved a novel amalgam of a traditional court with an administrative review tribunal providing a blend of legal and technical skills to provide a single point of appeal dealing with issues of law and merit. It provided a framework for developing user friendly, accessible and timely determination of appeals and environmental disputes.
>
> Thirdly, when combined with the abolition of requirements for *locus standi* in the enforcement of breaches of environmental law under section 123 of the Environmental Planning and Assessment Act, it enabled citizen and community groups to take an active role in the enforcement of environmental law, irrespective of any private interests affected. The decision to permit open standing taken in the Environmental Planning and Assessment Act in 1979 reflected the important contribution of citizen enforcement of environmental laws in the United States particularly under the *National Environmental Policy Act 1970*, where liberal approaches to standing requirements by United States courts provided the real teeth in enforcing the need for environmental impact statements.

L to R: Austin QC, Judy Jacovides, the Hon N K Wran AC QC

> Fourthly, the Land and Environment Court provided an opportunity for objector appeals against the merits of planning decisions. The provisions in section 98 of the Environmental Planning and Assessment Act provided a right for objectors to appeal against the merit decisions of development applications for designated development, providing the first broad provisions for third party merit appeals in New South Wales, other than the narrow rights of appeal in relation to residential flat buildings formerly existing under section 342ZA of the *Local Government Act 1919*. I think it's fair to observe that in the 25 years since the commencement of operations of the court, the provisions for open standing and third party merit appeals have neither opened the flood gates to litigation nor have they resulted in any adverse effects upon the administration of the planning and development system.
>
> Fifthly, the court was designed to provide a credible forum of appeal for applicants dissatisfied by the determination of local councils on development applications. Regrettably local government is not always the haven of rational decision making and the applicants and community need to have confidence there exists an informed, rational, considered but expeditious method of appeal on the merits of council decisions on development applications. That credibility did not exist in the former appeal system. Such credibility cannot be created by statute, but can only be earned through confidence of all stakeholders in the dispute resolution system.

Mr Wran concluded by observing that 'If environmental law descends into technicalities, timidity and narrow mindedness it will put at risk the achievements of the last 25 years. That is the challenge for the court and practitioners for the next 25 years.'

Commissioner Cripps delivered a reflective and entertaining romp through the court's quarter century in his own inimitable style. Parts of his speech are extracted below:

L to R: the Hon Mahla L Pearlman AO, the Hon Justice Wilcox , the Hon Justice Cowdroy OAM

Although the court was given a wide ranging jurisdiction (for example the function to hear and determine compensation and valuation cases and, as well, to enforce legislation creating environmental crimes) its principal function concerned the administration of the Environmental Planning and Assessment Act. There was nothing new about providing for merit planning appeals from local government decisions on development and building applications. But, has been pointed out by others, the Planning Act changed the nature and scope of planning itself by integrating environmental and conservation objectives with development objectives and providing for extensive public participation in the system.

Of singular significance, so far as the court was concerned, was the inclusion in the planning legislation of Part V. Part V was modelled on the provisions of the *National Environmental Policy Act 1969* and Regulations passed by the United States Congress. It required government instrumentalities to prepare and exhibit formal environmental impact statements and have regard to public submissions before undertaking projects that were likely to significantly effect the environment. Most of the wording of Part V came directly from NEPA.

In my opinion it was a pity that the courts when interpreting and applying Part V did not follow the American judicial system. The remedies provided by the American courts when a breach was established did not include declarations of invalidity and voidness. Rather they moulded an appropriate remedy. Once a breach of legislation is established the court necessarily has a wide discretion as to what orders it makes. But it was not I think, until the mid eighties and after the decision of *Hannon* in Court of Appeal that the significance of the legislation was fully realised. Regrettably the invitation extended by the court and in particular the observations of the chief justice, Sir Lawrence Street, and Justice McHugh were not I think fully taken up. I can afford to make this criticism because *Hannon* and post-*Hannon* occurred during my tenure as chief judge. ….

NEPA legislation was aspirational. It mandated, amongst other things, that government authorities 'examine and take into account to the fullest extent possible all matters effecting or likely to effect the environment by reason of the proposed activity.' The American view appeared to be that although we may not be able to reach the stars we profit from being aware of their existence.

Moreover the local legislation provided, section 123, that any person could bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act. Until the 1970s and probably as a hangover from the World War II, it was generally the judicial view that decisions of government departments and local councils should be accorded a respect that sometimes bordered on the subservient. The court would not intervene unless the person asking for intervention had a special interest or unless the attorney-general granted his or her fiat - and even then courts were slow to supervise or interrupt government activities.

The common laws rules concerning standing to challenge government decisions were restrictive. A few months before the legislation commenced the High Court had determined that the Australian Conservation Foundation had no standing to maintain an action challenging the legal correctness of a Commonwealth decision to approve a tourist resort development in an environmentally sensitive area in Queensland.

Although there were the beginnings of some form of public participation at the local level, the general view of government departments was that the views of members of the public were not welcome. In the early days of the court there were many challenges by way of judicial review to decisions made by government instrumentalities. There were cases against the forestry commission with respect to logging, against Elcom with respect to the construction of power lines, against the water resources commission with respect to the building of dams to name but a few. The challenges were by people who, under the common law, may not have had the standing to commence proceedings. Interestingly enough the department charged with the function of administering the planning legislation would not take proceedings against other government departments even though their breaches could only be described as egregious.

Although most judicial review work was directed to process and not to merit that was not the perception of members of the public including politicians and journalists who should have known better. Partly because the legislation was new and partly because of the misconceptions I have previously referred to in the early days the court's decisions attracted front page news and frequently editorial comment. A decision to halt logging because there had been no adequate EIS prepared and published did not mean that the court had

pronounced upon the merits of logging or not logging a given area. The decision merely meant that mandated process had not been observed. I remember one occasion when logging was halted because no EIS had been prepared when plainly it should have been. A politician was reported on the radio as saying that the Land and Environment Court had thrown 3000 people out of work because it was opposed to logging. ….

The planning legislation and the enforcement of it by members of the public took many government departments by surprise. Many believed that if forced to comply they could no longer function. The court was not popular with barristers because it was not part of the Supreme Court and, in those days, it was to some extent distrusted by some members of the Supreme Court because a significant part of the Supreme Court's jurisdiction had been removed and given exclusively to the Land and Environment Court. Many lawyers including judges had some difficulty in comprehending how a legal system could work if it permitted any person to take proceedings against decisions made by government and local government unless that person had a special interest over and above any other member of the public or unless the attorney-general granted a fiat.

The disbelief of what was intended by the legislation was illustrated by a number of early submissions put to the court. For example, it was submitted that the words 'any person' in s123 could not possibly mean what those two words plainly meant. It was submitted by an eminent barrister who later became a judge and whose identity I will not reveal – not so long at all events as he remains chief judge in Equity, that the words 'must be read down to mean any person with a recognisable special interest.' Where it otherwise it was submitted the court might be flooded with litigation commenced by a deranged Norwegian sailor jumping ship in New South Wales and rampaging through the state seeking to strike down environmental decisions of every kind. I have often wondered why Norwegian sailors were singled out for this discriminatory submission but I suppose it was because in those pre-equal opportunity and multi-cultural days their supposed activities could be seen as more plausible than that, for example, of Nigerian midwives.

The Hon Justice Cowdroy OAM and Angela Pearman

Environmental groups for their part seized on the aspirational language of the legislation and claimed that because the language mandated assessment 'to the fullest extent possible' an environmental impact statement was deficient because, for example, it failed to address the consequences of a proposal to a small colony of mosquitoes. There were heady proposals to incorporate trees and for the law to recognise that 'rocks had rights'.

Eventually, of course, things settled down and government departments and local councils accepted the new legislation and the role of the court.

In my opinion the survival of the court's jurisdiction owed a great deal to the extra judicial activities of its first chief judge, Jim McClelland. Jim was the chief judge for the first five years. His appointment like almost every other aspect of his public life was surrounded in controversy. First, he was opposed by the bar because he had not been a barrister. Second, he had been a controversial political figure in the Whitlam government. In 1980 at the time of his appointment the words November 11th and maintain the rage were apt to raise in the bosoms of some, rather deepish emotions. But whatever expectations some may have had concerning Jim's appointment both the government and the profession were in for a surprise. While Jim would be the last person to have claimed to be the spiritual heir of St Thomas A'Beckett it cannot be denied that his acceptance of the office triggered within him a determination not to allow the law and the court to be sidelined or undervalued.

The contribution he made to the court's continued existence cannot it think, be overestimated. The brush he took to deal with problems with government may have sometimes have been a great deal broader than that which would have been taken by a more conservative lawyer such as myself but one must say that meticulous attention to the law was never one of Jim's weaknesses. Jim brought to the court a healthy robustness which he expressed in one of his first speeches when he said, as many of you here now know, that he saw the role of the court to stand somewhere between people who wanted to throw up high rise in Hyde Park on the one hand and those who wanted to turn Pitt Street into a rainforest on the other.

He tended to write his judgements in the same racy way he wrote articles in his fourth professional life as a journalist. In the course of allowing a development in Kings Cross and dismissing local opposition to its architectural style he wrote 'it is true that few people will think this building was

The Hon Justice P D McClellan and the Hon Mahla L Pearlman AO

designed by Frank Lloyd Wright. But to the residents it will be an improvement on the can and condom littered moonscape upon which they presently gaze'. In another judgement he described a well-known environmental activist as the 'Founding mother and guiding spirit of the resident action group whose function it was to act as some sort of environmental posse to flush out dark doings in the neighbourhood'. ….

There were two actions of government in the early days that brought steam to Jim's nostrils. The first was the government passing legislation to avoid the consequences of a decision of the Land and Environment Court and the Court of Appeal that there had been inadequate environmental assessment of a stadium proposed to be erected at Parramatta in Australia's second oldest park.

The second was the termination of litigation that was being heard before me concerning the Pagewood site. The day before that case was due to commence lawyers retained by the government asked me to adjourn the proceedings because the government proposed to introduce legislation into the parliament removing the dispute from the Land and Environment Court. I declined to do so on the ground that I took orders from parliament but not from government. The next day when the litigation was to commence Mr McHugh QC for the government passed me an Act of parliament which had been rushed through both Houses and made legal that which was claimed to be illegal.

Rather sulkily I then said I would still have to determine who should bear the costs and that in turn might mean I had to decide who would have won had the government not legislated. Mr McHugh said no more than would I mind turning over the page of the Act he had handed up which I did and found that the court's jurisdiction to award costs had also been removed. I was not prepared to more closely examine the legislation fearing that if I did I might find I had been removed from office or even perhaps sentenced to death.

Jim McClelland responded magnificently to the challenge and delivered a series of much-publicised broadcasts about the government undermining the authority of the court and the effect that had on the perceived independence of the judiciary. There were people who criticised Jim for the political approach he took but what I say is thank god he did because without it I doubt whether the legislation (and hence the court) would have survived its infancy notwithstanding the wholehearted support it had from Premier Wran and Mr Landa. …

I have spent a little time on Jim's period as chief judge. I have done so for two reasons. First, because I do not think his contribution to the court can be overestimated. Secondly, in recent times, and long after his death, his reputation has been attacked and allegations have been made which I believe to incorrect. It would seem to me therefore that, on an occasion such as this, full recognition should be given to him for the part he played in the advancement of environmental law.

Apart from myself, the other early judge of the court was Ted Perignon. Ted's appointment was not the subject of any controversy. He bought to the court an immense amount of learning and experience acquired over many years at the Bar and his acceptance of office considerably added to the status of the court. …

At the time I left the court there had been four other judges Neil Bignold, Joe Bannon, Noel Hemmings and Paul Stein. Neil is the only one of the original court left standing. He was originally the senior assessor and he is now the senior puisne judge. Environmental law has been Neil's life. He and John Whitehouse were the founding fathers of the legislative package passed by the parliament in 1979. Neil represents the corporate memory of the court. His knowledge of case

The Hon J Cripps QC

law is encyclopaedic. If I asked him if he knew any cases on a particular subject matter, he would say 'I think you will find this matter dealt with in some detail at page 11 of 118 *Commonwealth Law Reports* starting on the third paragraphs of that page'. He was always right. Neil told me he does not propose to continue remaining on the court until reaching retirement age and it is highly probable that he will have retired no later than 2050.

Noel Hemmings bought to the court a vast amount of knowledge of planning and compensation law. However he finally succumbed to those 'headhunters' who lured him away from court to the big end of town where he remains to this day wallowing, as he himself puts it, in his millions.

Paul Stein doggedly tracked my footsteps at least for a certain distance. He was a District Court judge, became a judge of the Land and Environment Court and was later appointed to the Court of Appeal. Paul told me that if there was one aspect of his character that he thanked god for it was his humility. As evidence of this he told me, in the strictest confidence, that he had never yet resolved the conundrum that faced him, which was, did God make him brilliant so he could doggedly follow in Jerrold Cripps' footsteps or did God make him follow in Jerold Cripps' footsteps because he was brilliant.

Joe Bannon, after a successful barristerial career, came to the court to replace Noel Hemmings. He was on the court for a few months before I left. There are some who say Joe was probably the only true radical on the court and probably owed his appointment to the perceived need for someone to counteract the dangerously reactionary views of Paul Stein.

There are now no commissioners who were the original assessors when the court was created. When I left the court in 1993 five of the original assessors were there. They were; Trefor Davies, Bryce O'Neile, Ken Riding and Joe Domicelji. There are three there now who were there when I left the court. They are; Tony Nott, Stafford Watts and Trevor Bly.

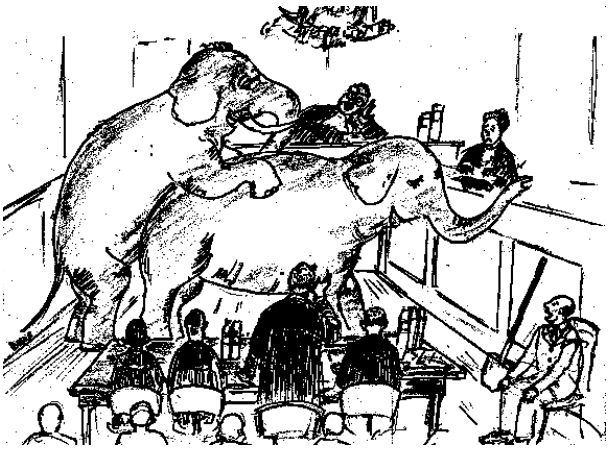
The Hon N K Wran AC QC

After I left Mahla Pearlman became the chief judge. Mahla had been a singularly successful and eminent solicitor and had the distinction of being the first woman chief judge in NSW. She led a Court of Justices Bignold, Talbot, Lloyd, Cowdroy, Sheahan and Pain and Commissioners Roseth, Nott, Watts, Bly, Hoffman, Hussey, Brown, Tuor, Murell and Moore – each of whom has advanced the learning and erudition of the court. …

When the court was first created, it was suggested by some that it should become part of the Supreme Court. When I was a member of the court and its chief judge, I was unashamedly a supporter of the separate existence of the Land and Environment Court. After I had left and had the opportunity to view the matter more objectively I was more committed to the view that the court should remain a separate court and not become part of the NSW Supreme Court.

A leading proponent of amalgamation throughout my period on the court was, as many here would know, Peter McClellan its present, until this time tomorrow, chief judge. It was Peter's view, sincerely advanced but I am sure he would now concede to be erroneous viz, that unless the court was part of the Supreme Court it might not attract people of the appropriate calibre. It is, of course possible, that Peter prior to his appointment as chief judge had an absurdly modest assessment of his own legal calibre but if he had it was a view uniquely held by him.

# Elephants and the law



'This is all very interesting, Dr Griffiths, but how do you propose it should be recorded in the transcript?'

**Four members of the New South Wales Bar, two appearing pro elephanto, participated in a hearing before the Administrative Appeals Tribunal recently in relation to the proposed migration of elephants to Taronga Zoo. The case did not escape the attention of Poulos QC, *Bar News*'s unofficial court illustrator.**

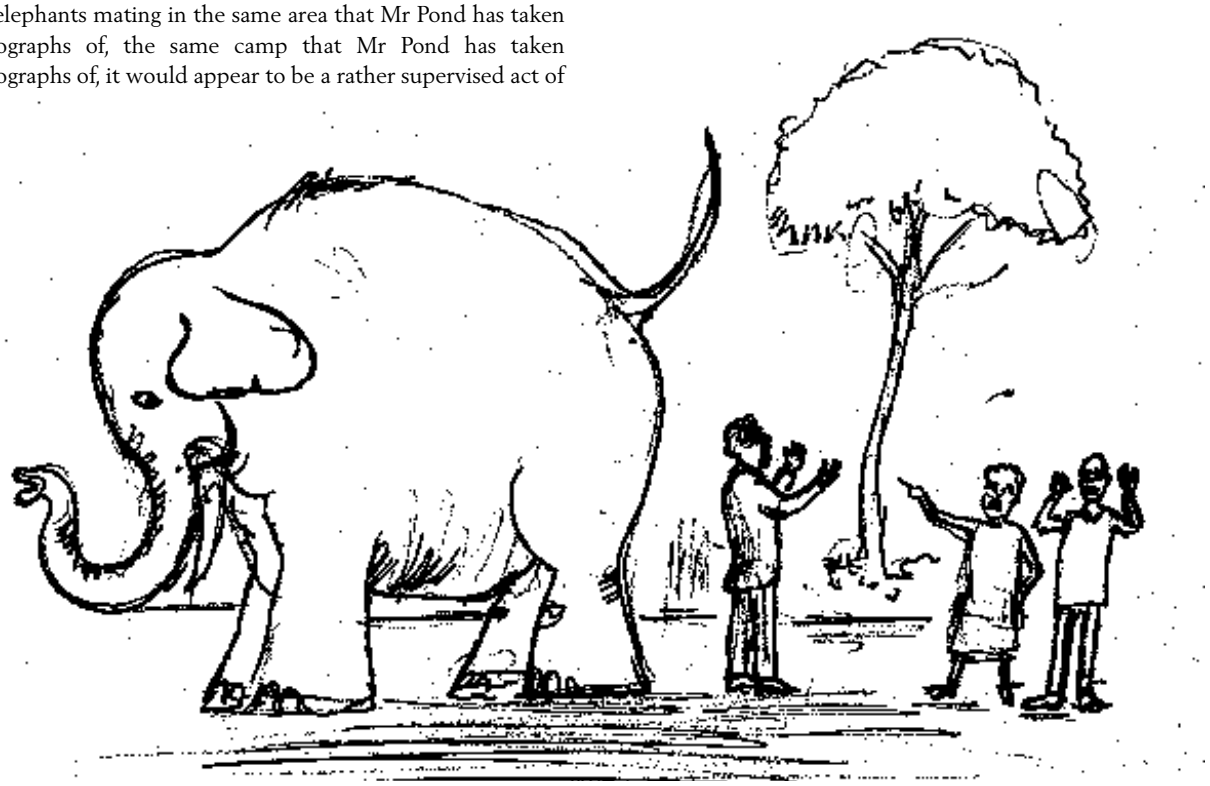
**Dr Griffiths:** That is what I wanted to ask you about because what we see here which I understand to be a photograph of two elephants mating in the same area that Mr Pond has taken photographs of, the same camp that Mr Pond has taken photographs of, it would appear to be a rather supervised act of copulation because there are three mahouts here surrounding it and presumably they were involved some way or another in this activity.

**Prof. Cheeran:** When in captivity an elephant is allowed to mate and it is quite natural that mahouts are around the animal. It is just quite natural that they would be around. Not only here, in my place also when an elephant is mating, the mahouts of the cow and the mahouts of the bull will be somewhere around because if something goes wrong there should be somebody to hold them back. It is not controlling them, it is just having a passive observation.

**Dr Griffiths:** Could I ask you whether or not, it's not evident from this photograph, but do you have any recollection as to whether or not the cow elephant was chained or tethered when this photo was taken?

**Prof. Cheeran:** I don't think so because, the elephant is chained, a cow elephant is chained, hardly they would get a chance because the female genitalia is situated in such a way that it's at the very bottom of the area, so the cow has to cooperate so much, so that - the penis goes up like a cobra ..... locate the extremity genitalia, so the elephant, cow elephant just stand like erect. A practical person cannot take this elephant, unlike in cow or other quadrupeds go forward like that.

**Dr Griffiths:** I don't think I want to take that topic any further. Perhaps I could change the subject



Dr. Griffiths expounds on the powers of the Minister...

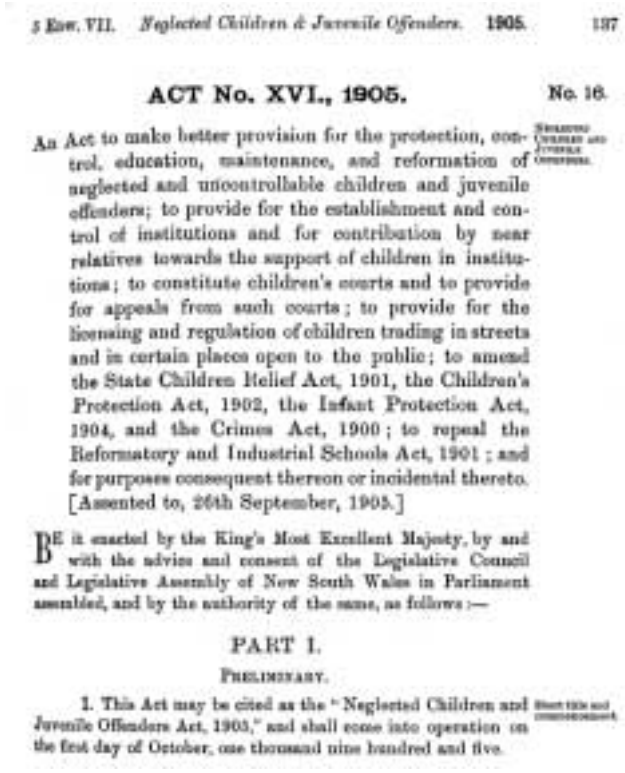
# A century of change at the Children's Court

**Prior to the creation of a separate Children's Court, the treatment of children was similar to that of adults, and punishment was the primary focus of sentencing. During the course of its one hundred year history, the court has responded to the changing needs of children in both the care and criminal justice systems. The following is an edited version of a speech delivered by Attorney General Bob Debus at a ceremonial sitting on 5 October 2005.**

It is my great pleasure to be asked to speak on this occasion, the centenary of the Children's Court of New South Wales. While we are here to celebrate this important milestone, I wish to reflect on the origins of the court and the landmark legislation that established it.

The *Neglected Children and Juvenile Offenders Act 1905* was assented to on 26 September 1905. This legislation provided for the Children's Court to have jurisdiction over both care and offending. Indeed, its main aims were:

- protection, control, education, maintenance and reformation of neglected and uncontrollable children and juvenile offenders;



5 Edw. VII. *Neglected Children & Juvenile Offenders.* 1905. 137

**ACT No. XVI., 1905.** No. 16.

An Act to make better provision for the protection, control, education, maintenance, and reformation of neglected and uncontrollable children and juvenile offenders; to provide for the establishment and control of institutions and for contribution by near relatives towards the support of children in institutions; to constitute children's courts and to provide for appeals from such courts; to provide for the licensing and regulation of children trading in streets and in certain places open to the public; to amend the State Children Relief Act, 1901, the Children's Protection Act, 1902, the Infant Protection Act, 1904, and the Crimes Act, 1900; to repeal the Reformatory and Industrial Schools Act, 1901; and for purposes consequent thereon or incidental thereto. [Assented to, 26th September, 1905.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

PART 1.

PRELIMINARY.

1. This Act may be cited as the "Neglected Children and Juvenile Offenders Act, 1905," and shall come into operation on the first day of October, one thousand nine hundred and five.

- establishment and control of institutions; and
- contributions by near relatives towards the support of children in institutions.

The first children's courts were proclaimed in New South Wales at Sydney, Newcastle, Parramatta, Burwood and Broken Hill on 29 September 1905.

In Sydney, the court commenced sitting at Ormond House, Paddington, in October 1905. Two 'special magistrates' were appointed from the ranks of existing magistrates. It moved to new premises in Albion Street in 1911. This court came to be known as the Metropolitan Children's Court and also housed the Metropolitan Shelter for Boys. Female detainees continued at Ormond House until 1923 when the Metropolitan Girl's Shelter was opened at Glebe.

In 1920 there were still only two special magistrates appointed in NSW. Further legislative changes were made in the 1920s and 1930s, but the law remained relatively static for the next 30 years.

However, forces for change were building. Groundbreaking research in 1962 changed the focus of protection from the rebellious or neglected young adolescent to babies and toddlers.

## The 1970s

The 1970s heralded many changes. For instance, legislative amendments afforded additional protection for child offenders while they were being interviewed in police stations and the minimum age of criminal responsibility was raised from eight to ten years of age.

In 1975 the Law Society of New South Wales created a roster of private practitioners for legal representation of children. In 1979 the scheme was taken over by the Legal Aid Commission. Since that time, most children before the Children's Court have been legally represented, with their costs being met by the state.

In 1979 we celebrated the International Year of the Child, which heightened public awareness of children's issues generally.

## The 1980s

In 1980 the position of senior special magistrate was created and in 1982 the Local Court Act removed the system whereby special magistrates had been placed on a lower grade than magistrates presiding on the general bench in the metropolitan area.

In April 1983 the Metropolitan Children's Court at Albion Street, which had served the community for 72 years, closed and the Bidura Children's Court was constructed. The Bidura

Remand and Assessment Centre (that was originally intended to hold in custody those male offenders formerly on remand at Albion Street) now only holds in custody those appearing in court that day.

In 1987 a suite of legislative reforms was introduced to create Acts which separated the concepts of welfare and delinquency. Young people were no longer to be 'saved' from a life of crime by being removed from their circumstances, and opportunities for rehabilitation were to occur through new programs aimed at encouraging responsibility of the young person, families and the community.

The *Children's Court Act 1987* provides, amongst other things, for the appointment of a senior children's magistrate (with the status of deputy chief magistrate) by the chief magistrate, and for reports to be submitted to the attorney general on the activities of the court.

### The 1990s

The 1990s saw many changes, most notably the introduction of the *Young Offenders Act 1997*. This Act provided for the first time a hierarchy of increasingly intensive sanctions for dealing with young offenders, starting with warnings and cautions, and progressing to youth justice conferencing and court attendance. It also provided an opportunity to divert less serious and first time offenders from the Children's Court, and established a range of options that require active participation by young offenders.

Successive studies of the Young Offenders Act have endorsed this approach for dealing with juvenile offenders. In particular, the use of conferences has been shown to have a significant impact on both offenders and victims.

### Today

I am sure that those involved in the drafting of the 1905 legislation and the establishment of the first Children's Court would be proud of the evolution of this jurisdiction over the last 100 years.

Geographically, the Children's Court operates from Nowra in the south, north to Maitland, and west to the lower Blue Mountains. The bulk of other matters in the country continue to be heard by Local Court magistrates, but all now have experience of the Children's Court. Children's magistrates also undertake special fixtures in rural areas.

There are currently 13 specialist children's magistrates hearing matters at such places as St James, Lidcombe, Campbelltown, Werrington, Port Kembla, Woy Woy, Wyong, and Toronto.

The Legal Aid Commission provides representation to children charged with criminal offences through its specialist Children's Legal Service. The commission also operates the statewide telephone advice service, known as the Youth Hotline.

There are a number of specialised programs for offenders such as the innovative Youth Drug and Alcohol Court that provides a specialised justice service closely tailored to the needs of children and young people affected by an addiction to drugs or alcohol.

The Children's Court now has its own dynamic web site, publishes a monthly newsletter and provides a mentoring program for solicitors representing children in care and protection matters.

In addition, the Children's Court Clinic makes a wide range of expert clinicians available to the court to undertake assessments and reports.

Children's registrars, with expertise in care and protection matters now attend rural courts to provide support and advice.

Today's Children's Court is also aided by technology that permits children and young people in custody to attend court via video link and for evidence to be given from distant locations.

This important work is assisted by the Children's Court Advisory Committee, comprised of members from all stakeholders within the Children's Court, which performs an important communication and advisory role.

### The future

I look forward to the completion of the new Newcastle Children's Court due to open in the first half of 2006 and the six- court Metropolitan Children's Complex that is now being built at Parramatta. These state of the art, purpose built facilities will enhance the operation of the Children's Court.

The Children's Court continues to professionally and efficiently dispose of criminal proceedings against juvenile offenders. It has maintained its strong links with its origins as a summary court, while maintaining its distinct identity. It has adapted to the changes in society and has been given the flexibility to assess an individual's requirements for rehabilitation that would be unimaginable 100 years ago.

The Children's Court has continued to respond to the special needs of children in both the care and criminal justice system. For all the challenges it has faced, the Children's Court continues to be one of the primary and most enduring institutions in New South Wales.

# Freezing orders hot up

*By Peter Biscoe* QC

This year marks the thirtieth anniversary of the creation of the Mareva order which has been famously described as one of the law's *'two nuclear weapons': Bank Mellat v Nikpour* (1985) FSR 87 (CA) at 92 per Donaldson LJ. Its object is to prevent the frustration of a money judgment or order which the applicant hopes to obtain or has obtained, by restraining the respondent from removing assets from the jurisdiction or dissipating assets. Thus, it freezes assets. The order is typically made ex parte in the first instance, and even before service of originating process.

The order has attracted several names. In the eponymous way favoured by some lawyers, the name 'Mareva' derives from the second English Court of Appeal case in which the jurisdiction to make the order was upheld: *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, [1980] 1 All ER 213. More self-explanatory names have emerged. The order is now called a 'freezing order' in the English Civil Procedure Rules 1998 and has been called an 'asset preservation order' by the High Court of Australia: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, *Pelechowski v Registrar,* Court of Appeal (NSW) (1999) 198 CLR 435.

The High Court of Australia has upheld the jurisdiction in no less than six cases: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, *Reid v Howard* (1995) 184 CLR 1, *Witham v Holloway* (1995) 183 CLR 525, *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Services Union of Australia* (1998) 195 CLR 1, *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 and *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435. In five of these cases, the appeal was wholly or partly successful. See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 243 [94], 311-312 [282-286].

The Mareva order has been responsible for leading cases in more general areas of the law such as contempt of court (*Witham*, *Pelechowski*, above), the privilege against self-incrimination (*Reid v Howard*, above; *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436, CA) and the plaintiff's duty of disclosure on ex parte applications (*Behbehani v Silem* [1989] 1 WLR 723, CA).

Originally, the freezing order jurisdiction had a transnational focus because it focused on restraining foreigners from removing assets from the territorial jurisdiction. It was seen as a way of combating potential judgment debtors who make themselves judgment proof by taking or sending their assets abroad. The jurisdiction grew to encompass restraining apprehended dissipation of assets within the territorial jurisdiction; that is, dealing with them in artificial or unacceptable ways. In the end, the distinction that has been drawn is between transfer of assets out of the jurisdiction or their dissipation which may be restrained, and normal activity including unprofitable trading which may not be restrained.

In Australia, unlike England, the freezing order has been freed from the shackles of case-bound law relating to injunctions by *Cardile* (above). The High Court emphasised that it is not an injunction and that the need to exercise the power in such a fashion as to avoid abuse is not facilitated, and may be impeded, by continued attempts to force it into the mould of injunctive relief as administered under that description in equity.

Three important aspects of freezing orders have recently been undergoing development. They are:

- the formulation and harmonisation of court rules, practice notes and precedents throughout the various Australian jurisdictions and New Zealand;
- transnational freezing orders; and
- the privilege against self-incrimination.

## Formulation and harmonisation of court rules, practice notes and precedents

The freezing order is invasive. It strikes without warning because it is usually granted, initially, without notice to the respondent. It often affects third parties. It may affect assets and persons abroad. The application is often made urgently. Disobedient respondents have been imprisoned or otherwise punished before there has been any final hearing, and at a time when liability on the substantive issues may be hotly contested. The form of order is important if it is to achieve its objective whilst providing reasonable safeguards for the protection of the respondent, and is therefore fairly complex.

For such reasons, it is desirable that the general principles and practice which govern freezing orders should be clearly stated and quickly accessible in court rules, practice notes and precedents which permit flexibility to meet the circumstances of a particular case and do not inhibit further development of the law. It is also desirable that such court rules, practice notes and precedents should be uniform throughout Australia so that, in this invasive area of the law, all Australians are treated equally.

At present, the situation is unsatisfactory for two reasons. First, rules of court or legislation which refer to freezing orders exist only in Queensland, South Australia, Victoria and New South Wales and differ substantially, and no practice notes or example forms have been published by any Australian court. In New South Wales, r 25.2.1(c) of the recent *Uniform Civil Procedure Rules 2005* simply provides that in an urgent case, the court, on the application of a person who 'intends to commence

proceedings' may grant any injunctive relief, including relief in the nature of Mareva relief or an Anton Piller order. Secondly, differences or inconsistencies, mostly inadvertent, as to the relevant principles have emerged in the Australian case law.

In a remarkable development, the Council of Chief Justices of Australia and New Zealand has appointed a committee of judges representing all Australian and New Zealand superior courts to investigate and, if thought fit, make recommendations for the harmonisation of court rules, practice notes and precedents relating to Mareva and Anton Piller orders ('Harmonisation Committee'). The Harmonisation Committee met in Sydney in April and August 2005 for two full days and has also, of course, worked on this project outside its formal meetings. Lindgren J of the Federal Court of Australia is the convenor of the committee (which the writer has been assisting). The Harmonisation Committee's formulation of draft uniform court rules, practice notes and precedents is well advanced and has reached the stage where review by the rules committee of each court has commenced or is imminent. It is likely that they will be finalised and adopted throughout Australia and New Zealand by mid 2006. The participation of New Zealand (through Baragwanath J) in this endeavour is a valuable precedent for closer co-operation between the courts of the two countries.

The Harmonisation Committee's draft uniform rules follow the *English Civil Procedure Rules 1998* in adopting the name 'freezing order' in preference to 'Mareva order' or 'asset preservation order'.

The Harmonisation Committee's draft uniform rules would resolve the different formulations of one of the threshold requirements for a freezing order expressed in the leading NSW case of *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 and would resolve the inadvertent inconsistencies on this aspect which have crept into some Australian cases. In *Patterson*, Gleeson CJ, with whom Meagher JA broadly agreed, said at 321:

> the remedy is discretionary, but it has been held that, in addition to any other considerations that may be relevant in the circumstances of a particular case, as a general rule a plaintiff will need to establish, first, a prima facie cause of action against the defendant, and secondly, a danger that, by reason of the defendant's absconding, or of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the plaintiff, if he succeeds, will not be able to have his judgment satisfied.

However, the third judge, Rogers AJA, preferred the English test of a 'good arguable case' rather than 'a prima facie cause of action'. In *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 408 the joint judgment referred to a 'reasonably arguable case on legal as well as factual matters'.

The Harmonisation Committee's draft rules adopt the 'good arguable case' test. A good arguable case 'is one which is more than barely capable of serious argument, and yet not necessarily one which the judge considers would have better than a 50 per cent chance of success': *Ninemia Corp v Trave Schiffahrtsgesellschaft, GmbH ('The Niedersaschen')* [1983] 2 Lloyd's rep 600 at 605; [1984] 1 All ER 398 at 404 per Mustill J. This is a lower standard than a prima facie case which means that 'if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief': *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622. A good arguable case is a higher standard than the 'serious question to be tried' test applicable in applications for interlocutory injunctions: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 217-218 [13] per Gleeson CJ citing *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 151. One consequence of a freezing order not being a species of injunction is that the court does not operate in the conceptual frame appropriate to decisions about whether to grant an interlocutory injunction of asking whether there is a serious question to be tried, and, if so, where the balance of convenience lies: *Davis v Turning Properties Pty Ltd & Turner* [2005] NSWSC 742 at [37] per Campbell J.

So far as third parties are concerned, the draft uniform rules adopt, in a non-exhaustive way, the principles in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 405 [57] where it was said:

> What then is the principle to guide the courts in determining whether to grant Mareva relief in a case such as the present where the activities of third parties are the objects sought to be restrained? In our opinion such an order may, and we emphasise the word 'may', be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which: (i) the third party holds, or is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including 'claims and expectancies' (the phrase used by Deane J in Jackson v Sterling Industries Ltd (1987) 162 CLR 612 at 625), of the judgment debtor or potential judgment debtor; or (ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.
>
> It is that principle which we would apply to this case. Its application is a matter of law, although discretionary elements are involved.

While the criteria specified in the draft uniform rules may be sufficient to attract jurisdiction in most cases, the draft uniform rules make it crystal clear that those criteria are not exhaustive and are not set in stone. That is crystal clear from the additional provisions of the draft uniform rules that the court may also make a freezing or ancillary order wherever the interests of justice otherwise require it and that nothing in the rules affects the court's inherent or implied jurisdiction. In this way, flexibility is maintained and development of the law is not inhibited.

Another significant development in the draft rules is that they would permit a freestanding ancillary order, such as an asset disclosure order, to be made without a freezing order necessarily being made at that time. This may be important where the respondent's assets are all or mostly out of the jurisdiction. In this situation a freezing order may be essentially ancillary to a disclosure order (rather than vice versa), for the disclosure order should result in disclosure of the foreign jurisdictions in which the assets are located thereby enabling the applicant to apply in those jurisdictions for more effective freezing orders or alternative relief. This is what happened as a result of the disclosure of assets order in *Republic of Haiti v Duvalier* [1990] 1 QB 202.

Three controversial constraints on the grant of a Mareva order in *The Siskina* [1990] AC 210 would be swept away by the Harmonisation Committee's draft rules. The unjust consequence of those constraints in *The Siskina* was that the defendant, a Panamanian company sued by the plaintiff abroad (because of a choice of forum clause in the contract between the parties), was able to remove moneys from England into a black hole beyond the reach of any judgment that the plaintiff might obtain in the foreign proceedings.

The first of *The Siskina* constraints is that the plaintiff must establish that it has a pre-existing cause of action; i.e. that the plaintiff's cause of action has accrued. The troublesome consequence is exemplified by the case of a debt which does not fall due for payment until next month but the debtor is about to export all its assets and thereby frustrate any judgment which the creditor obtains against it. The draft uniform rules of court would do away with this constraint as a jurisdictional obstacle and would be consistent with a number of Australian cases which have proceeded on the basis that the Siskina constraint is not an invariable requirement: *Coxton Pty Ltd v Milne* (CA/NSW, 20 December 1985, unreported); *Deputy Commissioner of Taxation v Sharp* (1988) 82 ACTR 1; *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 379 (CA) per Rogers AJA; *Chew v Satay House of WA Pty Ltd* (SC/WA, 29 October 1997, unreported); *Official Receiver of State of Israel v Raveh* (2001) 234 WAR 53.

The second of *The Siskina* constraints, upheld in *Mercedes Benz AG v Leiduck* (1996) AC 284 (PC), is that a freezing order can only be granted in protection of a cause of action which the court has jurisdiction to enforce by final judgment. Consequently, the court could not grant a freestanding freezing order where a foreign court (and not the local court) had jurisdiction over the cause of action. That was reversed in England by s25 of the *Civil Jurisdiction and Judgments Act 1982* as amended in 1997, which gives the English Court power to grant freestanding interim relief in aid of foreign proceedings anywhere in the world.

**Three controversial constraints on the grant of a Mareva order in *The Siskina* [1990] AC 210 would be swept away by the Harmonisation Committee's draft rules.**

In Australia, the Harmonisation Committee's draft uniform rules of court contain a provision which would achieve a similar result. A similar solution, limited to the Australia-New Zealand context, has recently been proposed in a public discussion paper of August 2005 entitled *Trans-Tasman Court Proceedings and Regulatory Enforcement* by the Trans-Tasman Working Group of the Australian Attorney-General's Department and the New Zealand Ministry of Justice. Their proposed solution at p.21 is that: 'Appropriate Australian and New Zealand courts should be given authority to grant interim relief in support of proceedings in the other country's courts'.

Such court rules or legislation would supplement the recent landmark judgment in *Davis v Turning Properties Pty Ltd & Turner* [2005] NSWSC 742, where Campbell J held that the Supreme Court of NSW has inherent jurisdiction to make a free-standing order in aid of the enforcement of a foreign judgment in Australia, whether that judgment has yet been obtained or not. His Honour accepted as correct a suggestion to that effect by Biscoe, *Mareva and Anton Piller Orders* (Butterworths 2005) at paras [5.36] to [5.49]. The Supreme Court of the Bahamas had made a worldwide freezing order against one of the respondents, Mr Turner. Subsequently, Campbell J made a free-standing freezing order in respect of the assets in NSW of Mr Turner and of a related NSW third party company (under the *Cardile* principles). On the evidence, there was a powerful case that Mr Turner had defrauded the plaintiff. No substantive relief was sought in the Bahama or NSW proceedings, but Campbell J was satisfied that it was likely that substantive proceedings would be begun. It did not matter that the precise causes of action that would be relied on could not yet be stated with certainty. Campbell J ordered that the foreign plaintiff's undertaking as to damages be secured.

The third of *The Siskina* constraints is that the long-arm service rules of court do not permit service of a freestanding freezing order application on a respondent outside the jurisdiction even though the respondent has assets within the jurisdiction. Of particular relevance is the typical long-arm rule of court permitting service out of the jurisdiction which, in NSW, is expressed as follows: 'If the proceedings are for an injunction as to anything to be done in New South Wales or against the

doing of any act in New South Wales, whether damages are also sought or not': UCPR Part 11 and Schedule 6 para (n). In *The Siskina* [1979] AC 210, the House of Lords decided that proceedings solely for a free-standing Mareva 'injunction' were not proceedings for an injunction within the meaning of the equivalent English rule. Their lordships followed old authority that such a rule of court does not empower the court to grant an interlocutory injunction except in aid of a substantive legal or equitable right. The interpretation of the English rule of court, as expressed in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 302, was that it 'is confined to originating documents which set in motion proceedings designed to ascertain substantive rights'.

A solution in the form of a new long arm service rule which would permit service of an application for free-standing Mareva relief in aid of foreign proceedings where the respondent has assets within the jurisdiction is provided for in the Harmonisation Committee's draft uniform rules.

**Where an order is made which freezes the respondent's assets abroad, there may be problems in relation to third parties outside and not subject to the jurisdiction of the Australian court, such as the respondent's foreign bank.**

## Transnational freezing orders

By sweeping away the second and third constraints in *The Siskina*, the draft uniform court rules of the Harmonisation Committee would liberate the transnational freezing order.

Freezing orders have transnational elements in two situations. First, where the respondent or the assets the subject of the order or affected third parties (such as banks) with notice of the order are physically located abroad. Secondly, where the order is sought in aid of foreign proceedings in relation to assets in Australia.

The transnational freezing order is significant because of transnational business activity, the multinational corporation and the ease with which persons and assets can now move or be moved between nations. In *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 33D Kerr LJ said:

> some situations, which are nowadays by no means uncommon, cry out – as a matter of justice to plaintiffs – for disclosure orders and Mareva type inunctions covering foreign assets of defendants even before judgment. Indeed that is precisely the philosophy which ... has been applied by the development of the common law in Australia.

The courts of different countries can and should assist each other in this context without forcing their co-operation on foreign courts who do not welcome it. This was emphasised by Millett J in the freezing order case of *Crédit Suisse Fides Trust S.A. v Cuoghi* [1998] QB 818 (CA) at 827G:

> In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention. International fraud requires a similar response. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.
>
> In the present case it is the disclosure order which is the most valuable part of the relief granted by the judge. Without it, C.S.F.T. would be unable to apply to the local courts for effective orders against assets abroad. Mr Cuoghi makes much of the fact that the order extends to assets in Switzerland, and submits that this is an unwarranted interference with the jurisdiction of the court trying the substantive dispute. The short answer to this is that the terms of the order will not allow it to be directly enforced in Switzerland without an order of the Swiss courts. We do not seek to force our co-operation on those who do not welcome it.

Transnational freezing orders extending to assets located abroad are routinely made in England, and increasingly in Australia, where the respondents are within the court's personal jurisdiction, particularly in cases of international fraud, subject to limitations and safeguards which have become standardised in England.

Where transnational elements are present it is necessary to address three questions. First, whether the court has personal jurisdiction over the respondent. Secondly, if so, whether there is jurisdiction to make a freezing order. Thirdly, if so, whether there are difficulties of conflict of laws, comity or enforceability which affect the discretion whether to make the order or the form of the order.

On the first of these transnational questions, the court has personal jurisdiction over anyone served in Australia or who consents to the court's jurisdiction or who is served out of Australia under the long-arm authority of the rules of court (in NSW, see UCPR Part 11 and Schedule 6).

On the second transnational question referred to earlier, the courts have jurisdiction to make freezing orders and ancillary orders against anyone over whom they have personal jurisdiction even if they reside overseas and even in relation to overseas assets: *Lord Portalington v Soulby* (1834) 40 ER 40 at 41-42; *Baroda (Maharanee of) v Wildenstein* [1972] 2 QB 283; *National Australia Bank Ltd v Dessau* [1988] VR 521 at 526-527; *Derby & Co Ltd v Weldon* (No. 6) [1990] 1 WLR (CA) at 1149-1150; *Agar v Hyde* (2000) 201 CLR 552 at 570-571.

On the third transnational question referred to earlier, the manner in which the court should exercise its discretionary power has been worked out through the cases, particularly the English cases.

Where an order is made which freezes the respondent's assets abroad, there may be problems in relation to third parties outside and not subject to the jurisdiction of the Australian court, such as the respondent's foreign bank. One problem is that the imposition of liability upon third parties for contempt, where they have been notified of a freezing order but failed to act to prevent its breach by the respondent, would be extraterritorial. Another problem is if the law of the foreign country where assets are located requires them to be dealt with in a different way from the freezing order. If the third party in the foreign country obeys the freezing order it may breach the foreign law. If it obeys the foreign law, it may breach the freezing order. Here a third party such as a foreign bank with a branch in Australia is in a potentially invidious position because it is subject to the jurisdiction of the foreign court and the Australian court.

A solution has been found in the inclusion of provisions in worldwide freezing orders which are now to be found in the example form in the English Practice Direction – Interim Injunctions developed by the English Court of Appeal in the following cases: *Babanaft International Co SA v Bassatne* [1990] Ch 13, *Republic of Haiti v Duvalier* [1990] 1 QB 202 and *Derby & Co Ltd v Weldon* (No. 1) [1990] Ch 48, *Baltic Shipping & Translink Shipping Ltd* [1995] 1 Lloyd's Rep 673 and *Bank of China v NBM LLC* [2002] 1 WLR 844, [2002] 1 All ER 717, [2002] 1 Lloyd's Rep 506. The provisos now state that:

> The terms of the order do not affect or concern anyone outside the jurisdiction of the court except the following persons in a country or state outside the jurisdiction of the court:
>
> - the respondent or his officer or agent appointed by power of attorney.
> - any person who:
>   - is subject to the jurisdiction of the court,
>   - has been given written notice of the order at his residence or place of business within the jurisdiction of the court, and
>   - is able to prevent acts or omissions outside the jurisdiction of the court which constitute or assist in the breach of the terms of the order, and
>   - any other person only to the extent that the order is declared enforceable by or is enforced by a court in that country or state.
>
> Nothing in the order shall, in respect of assets located outside the territorial jurisdiction of the court, prevent any third party from complying with:
>
> - what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and a respondent; and
> - any orders of the courts of that country or state, provided that reasonable notice of any application for such an order is given to the applicant's solicitors.

The Harmonisation Committee's draft uniform example form of freezing order includes provisions which are closely modelled on these English provisions.

These English provisions, with a qualification, were recently adopted in Australia in *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 399. In that case, freezing orders were made against a number of respondents. One of the respondents was an Australian bank which operated a branch in Fiji where accounts were maintained into which moneys were placed pursuant to the conduct which was the subject of complaints against other respondents. The bank sought and was granted protection based on the usual provisions in the English worldwide orders. Allsop J decided to add a qualification as follows:

> The [Bank] shall exercise all reasonable endeavours to notify the applicant's solicitors in writing (in advance, if possible) of any occasion whereby it, that is, the Bank, reasonably believes that its obligations, contractual or otherwise, under the laws and obligations of the Republic of Fiji or under the proper law of any contract between the fifth respondent and the ninth respondent require it to pay out from or deal with the account.

This was an order against a bank which was subject to the court's jurisdiction and imposed a significant obligation on the bank. An Australian court would not seem to have jurisdiction to make such an order against a foreign bank in the more usual situation where the foreign bank is not subject to the Australian court's jurisdiction and has not appeared in the proceedings. In that more usual situation the applicant should seek to make the freezing order as effective as possible by serving a copy of it on the foreign bank.

### The privilege against self-incrimination

Disclosure of assets orders against individuals are subject to the privilege against self-incrimination. The privilege is not available to companies either at common law or under s187 of the uniform Evidence Act to the extent that the Act has been adopted in various Australian jurisdictions: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. The privilege against self-incrimination 'protects the witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure which may lead to incrimination or to the discovery of real evidence of an incriminating character': *Reid v Howard* (1995) 184 CLR 1 at 7 citing *Sorby v Commonwealth* (1983) 152 CLR 281 at 310. Reid was a freezing order case.

Paradoxically, the more criminal a respondent's behaviour seems, the greater his claim to the protection of the privilege against self-incrimination.

In the Mareva context, it has been held that the court should not require compliance with an asset disclosure order until after any claim to the privilege has been decided by the court: *Ross v Internet Wines Pty Ltd* [2004] 60 NSWLR 436 (CA); *Pathways Employment Services Pty Ltd v West* (2004) 186 FLR 330, (2004) 272 ALR 140, [2004] NSWSC 903.

The principle that no person ought be obliged to incriminate himself means that in some cases justice cannot be done between the parties to a civil action. That is because an individual litigant (as distinct from a corporation) can claim the privilege to refuse to provide relevant or even vital information or documents (including existing documents).

In the context of Mareva disclosure orders there has been much appellate litigation about the effect of the self-incrimination privilege on disclosure orders (e.g. *Reid v Howard* (1992); *Ross v Internet Wines* (2004)). In the Anton Piller context the problem is at least as great but tends to be ignored notwithstanding the House of Lord's restrictive judgment in *Rank Film Distributors* (1982).

In Australia the problem can only be addressed through legislation, as *Reid v Howard* makes clear. There have been quite a few calls by judges for legislative reform. The legislature has intervened in Australia and England. But the intervention has been inconsistent. There have been ad hoc abolitions of the privilege in specified situations. There has also been legislation designed to get privileged information into evidence in civil proceedings while affording the respondent a measure of protection in criminal proceedings.

Four specific legislative approaches may be noted.

First, for present purposes, the most notable ad hoc abrogation of the privilege in England has been its abolition in intellectual property and passing off cases, which are the Anton Piller order heartland: s72 of the *Supreme Court Act 1981*.

Secondly, in Australia s128 of the Uniform Evidence Act is designed to abrogate the privilege in civil proceedings while protecting the respondent in criminal proceedings by a rather cumbersome judicial certificate procedure. The recent NSW *Uniform Civil Procedure Act 2005* s87 extends this certificate procedure to interlocutory proceedings. A state court certificate does not, however, provide perfect protection. That is because it is no protection against criminal proceedings in another Australian state or territory.

Thirdly, the pending New Zealand Evidence Bill appears to do two things:

- it abolishes the privilege so far as it relates to existing documents or things: see clauses 56 and 47(3). This is consistent with the view of the House of Lords in *Istel v Tully* [1993] AC 45 that there is illogicality in protecting existing documents and things under the privilege. Indeed, when the leading cases in the Mareva area are looked at closely, it can be seen that the real or central concern has been with an order requiring the respondent to create a document (such as a disclosure affidavit) as distinct from producing existing documents. So, in New Zealand it is proposed that the New Zealand privilege should be limited to oral evidence and new documents and things.
- in relation to Anton Piller orders only, in respect of other information, the bill requires a judge to order that the information is not to be used in any criminal proceedings against the respondent (if the judge is satisfied that self-incrimination is reasonably likely). The New Zealand bill contains no equivalent protective provision in relation to Mareva disclosure orders which seems illogical. It is understood that this is likely to be rectified.

Finally, the Australian Law Reform Commission, the NSW Law Reform Commission and the Victorian Law Reform Commission are jointly reviewing the Uniform Evidence Act. Their recent discussion paper proposes abrogating the privilege in civil proceedings and that the information provided in the civil proceedings could not be used in criminal or civil penalty proceedings other than in respect of perjury or the like: ALRC Discussion Paper 69, July 2005, pp.420-423, 559-561. There are a number of problems with the ALRC proposed draft legislation and the Harmonisation Committee has made submissions to the ALRC in that regard.

An important submission was that Australia should follow the New Zealand Bill in that the privilege should not apply to documents which pre-existed the making by the court of an order for disclosure. It should apply only to documents which are brought into existence in obedience to the order.

## Conclusion

Anyone wishing to make suggestions or comments on the Harmonisation Committee's proposals outlined above, may direct them to the writer who will pass them on to the committee.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# Legal Profession Act 2004

## Complaints procedures and show cause requirements

*By Carol Webster*

This article[1] provides an overview of the provisions of the *Legal Profession Act 2004* (LPA 2004) dealing with complaints and what are now termed 'show cause events', updating an article published in the Summer 2004/2005 *Bar News*. That article and the CPD paper which preceeded it dealt with three topics, only the first and third of which are considered in this article:

- the procedures that apply to conduct complaints;
- matters to bear in mind when responding to conduct complaints[2]; and
- the procedures that apply to notification matters – that is the disclosure/notification requirements introduced in April 2001 by the *Legal Profession Amendment (Notification) Regulation 2001*, requiring barristers to report certain bankruptcy events and offences to the Bar Council.

### Implementing the National Legal Profession Model Provisions

The LPA 2004 wholly repeals the *Legal Profession Act 1987* (LPA 1987). It was passed in December 2004[3] and before its commencement on 1 October 2005[4] had been amended by three separate pieces of legislation.[5]

The LPA 2004 adopts National Legal Profession Model Provisions which are designed generally to achieve greater consistency and uniformity in the regulation of the legal profession on a national basis. The model provisions were developed through the Standing Committee of Attorneys-General. There were also some changes to provisions carried over from the LPA 1987 to address problems identified in the operation of some of the discipline and complaint related provisions.

### Terminology changes

There are a significant number of defined terms (generally indicated *thus* in this article) in the LPA 2004. Some make substantial changes in the descriptions used in the current legislation. Note in particular:

- 'local lawyer' is a person who is admitted to the legal profession under the LPA 2004. An 'Australian lawyer' is admitted under the LPA 2004 or a 'corresponding law'. An 'interstate lawyer' is admitted under a corresponding law but not under the LPA 2004: s5. Separate reference to the position of 'local', 'interstate' and 'Australian' legal practitioners and lawyers is generally omitted in the balance of this article;
- 'admission to the legal profession' means admission by the Supreme Court under the LPA 2004 as a lawyer (or under a 'corresponding law'), *not* the grant or issue of practising certificate: s4;
- reversing the present situation6, a 'local legal practitioner' is an Australian lawyer who holds a current 'local practising certificate' (a practising certificate granted under the LPA 2004): s6. After the commencement of the LPA 2004, barristers and solicitors enrolled as legal practitioners under the LPA 1987 are taken to have been admitted by the Supreme Court as lawyers under the LPA 2004 on the date of original admission: clause 6 of Schedule 9[7];
- a 'barrister' is a local legal practitioner who holds a current local practising certificate to practise as a barrister; a 'solicitor' holds a current local practising certificate to practise as a solicitor and barrister: s4;
- 'law practice' means an Australian legal practitioner who is a sole practitioner (engages in legal practice on his or her own account) *or*: a law firm, a multi-disciplinary partnership, an incorporated legal practice or a community legal centre: s4. That is, references to a law practice *include* barristers.

The LPA 2004 frequently refers to 'the relevant council', being the Council of the Law Society in relation to solicitors or the Bar Council in relation to barristers. This article is only concerned with barristers and the Bar Council but the provisions discussed generally apply also to solicitors and the Council of the Law Society.

### Complaints procedure

The LPA 2004, like the LPA 1987, makes detailed provision for the handling of complaints. In general terms, complaints – the subject of Part 10 of the LPA 1987 – are dealt with in Chapter 4 of the LPA 2004, ss494 to 609.

The Bar Council and the commissioner must make information about the operation of the complaints and discipline scheme established by Chapter 4 and procedures adopted in relation to it readily available to members of the public and to legal practitioners: s593(1) and (3) of the LPA 2004. The commissioner and Bar Council must provide assistance to members of the public in making complaints: s593(2).[8]

The procedures for making a complaint are largely unchanged. Complaints are to be made to the legal services commissioner: s505, unless the complaint is made by the commissioner or by the Bar Council.[9] Any complaint made directly to the Bar Association, and a copy of a complaint made by the Bar Council, must be forwarded to the commissioner: s505(2) and (3). As was the case under the LPA 1987, there is no obligation under the LPA 2004 for the commissioner to advise the Bar Council of all complaints against barristers made to the commissioner.

The provisions about investigation of complaints are largely unchanged. The commissioner may investigate a complaint

himself under s526 or refer a complaint about a barrister to the Bar Council. Bar Council must, subject to s527, conduct an investigation into each complaint referred to it by the commissioner or made by it. The commissioner monitors investigations by the Bar Council into complaints: ss529, 530, 526 of the LPA 2004. A complainant may be required to give further information about the complaint and verify the complaint and any further information by statutory declaration: s507.

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. The PCCs are, in formal terms, delegates of the Bar Council[10] for the purposes of investigating complaints and making a recommendation to the Bar Council as to the resolutions the Bar Council could make to deal with the matter.

As soon practicable after a complaint is made about a legal practitioner the practitioner must be given a copy of it and, unless the complaint is to be summarily dismissed under s511, the practitioner must be given written notice of the right to make submissions to the commissioner or the Bar Council, specifying the period within which the submissions are to be made: s508. Notice to the practitioner *may* be postponed if the commissioner considers that giving notice may prejudice the investigation of the complaint, a police investigation, place the complainant or another person at risk of intimidation or harassment, or prejudice pending court proceedings: s508(3) and (4). A complaint may be made and dealt with even though the Australian legal practitioner concerned is the subject of proposed or current criminal or civil proceedings relating to the subject matter of the complaint: s600.

Section 591 of the LPA 2004 is new. It provides that the rules of procedural fairness apply in relation to the investigation of complaints, and procedures of the commissioner and the Bar Council under Chapter 4. The Bar Council and the commissioner have a duty to deal with complaints and investigations 'as efficiently and expeditiously as is practicable': s592.

Sections 722 and 723 create offences of disclosing information obtained in the exercise of powers or functions under the LPA 2004 or the administration of the LPA 2004, other than as reasonably required to perform duties or exercise functions under the LPA 2004. The equivalent section of the LPA 1987 was s171P, which expressly referred to Part 10 and Division 1AA of Part 3.

## Conduct that may be the subject of a complaint

Chapter 4 generally applies to the conduct of an Australian legal practitioner occurring in NSW: s501(1). Sections 499 and 500 extend the reach of Chapter 4 in specified circumstances.

Chapter 4 expressly applies to conduct of a local legal practitioner where there is a 'conviction' for a 'serious offence', a 'tax offence' or an offence involving dishonesty, conduct of the practitioner 'as or in becoming an 'insolvent under administration' and 'in becoming' disqualified from managing or being involved in the management of a corporation under the *Corporations Act 2001*: s502(1). Relevant definitions to be considered include:

- 'serious offence' – an indictable offence, whether or not it may be dealt with summarily: s4. There is no definition of 'indictable offence' in the LPA 2004. However, s21(1) of the *Interpretation Act 1987* (NSW) 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 summarily.[11]
- 'tax offence' – any offence under the *Taxation Administration Act 1953*, whether committed in or outside NSW (to the same effect as the definition in s3(1) of the LPA 1987): s4;
- 'conviction' – defined in s11(1) of the LPA 2004, to include a finding of guilt, or the acceptance of a guilty plea, *whether or not* a conviction is recorded. The reference to acceptance of a guilty plea is new. Subsections (2) and (3) deal with the quashing of a conviction;
- 'insolvent under administration' includes an undischarged bankrupt, a person who has executed a Part X *Bankruptcy Act 1966* deed of arrangement or whose creditors have accepted a composition: s4. Contrast the broader scope of 'show cause events' discussed below.

## Summary dismissal

Section 511 of the LPA 2004 largely carries over the summary dismissal power under s139(1) of the LPA 1987. The commissioner or the Bar Council may dismiss a complaint if the complainant does not give further information as required or if the complaint is vexatious, misconceived, frivolous or lacking in substance (note the additional bases for summary dismissal in s511(1)).

Section 155A of the LPA 1987 allowed the commissioner or the Bar Council to dismiss a complaint before, during or after investigation if satisfied that it is in the public interest to do so. This is picked up in s511(1)(g) of the LPA 2004.

## Obtaining information from legal practitioners

Section 152 of the LPA 1987 provided that the Bar Council or the commissioner could require a legal practitioner to provide information, produce documents or assist in, or co-operate with the investigation of a complaint. The section was not limited to the legal practitioner the subject of the complaint. Failure to comply with an s152 notice, without reasonable excuse, is professional misconduct.

This is dealt with differently in the LPA 2004. Section 660(1) of the LPA 2004, in Chapter 6, provides that for the purpose of carrying out a 'complaint investigation' in relation to an Australian lawyer, an 'investigator' may by notice served on the lawyer, require the lawyer to produce specified documents, provide information and assist in, or co-operate with the investigation of the complaint.

An 'investigator' may be appointed under s531 of the LPA 2004 to investigate a complaint as the agent of the commissioner or the Bar Council. The powers of investigators generally are dealt with in Chapter 6. Under s531A the commissioner or the Bar Council may appoint 'authorised persons' for the purposes of Part 4.4 who may exercise any or all of the functions of an investigator. The executive director, the director, professional conduct and each of the deputy directors have been appointed as 'authorised persons' by the Bar Council.

Section 660(2) allows also an investigator to require 'any associate or former associate of the lawyer or any person (including for example an ADI, auditor or liquidator, but not including the lawyer) who has or has had control of documents relating to the affairs of the lawyer' to give the investigator access to the documents or information relating to the lawyer's affairs reasonably required by the investigator. 'Affairs' of a law practice, 'accountant', and 'ADI' are defined in s4. The new concept of law practice has already been noted. The 'affairs' of a law practice are broadly defined. 'Associate' is defined in broad terms by s7. The terms of the definitions are not set out here but should be carefully considered. They appear to reflect a desire by the drafters to deal uniformly with barristers and solicitors and to cover the various ways in which solicitors can practice, including incorporated legal practices and multi-disciplinary partnerships.

It is an offence to fail to comply with a requirement under s660(1) or (2): s660(3).[12] Obstructing or misleading an investigator exercising a power under the LPA 2004, without reasonable excuse, is an offence: s674.[13] It is professional misconduct for an Australian legal practitioner to fail to comply with any requirement made by an investigator in the exercise of powers conferred by Chapter 6 s671(1). It is also professional misconduct for an Australian lawyer whether or not the subject of the investigation concerned, to mislead an investigator or the Bar Council in the exercise of any power or function under Chapter 6, or to fail, without reasonable excurse, to comply with a requirement under s660: s676.

### Mediation

As under the LPA 1987, the commissioner or the Bar Council may suggest to the complainant and the Australian legal practitioner concerned that complaints that are or involve 'consumer disputes' are referred to mediation. A consumer dispute is a dispute about conduct of a practitioner that does not involve an issue of 'unsatisfactory professional conduct' or 'professional misconduct': s514. A complaint that involves both a consumer dispute and an issue of unsatisfactory professional conduct or professional misconduct may be mediated so far as the consumer dispute is concerned *and* investigated under Chapter 4 so far as it involves an issue of unsatisfactory professional conduct or professional misconduct: s516.

The commissioner now has the power to *require* the complainant and Australian legal practitioner to mediate a consumer dispute under s517 of the LPA 2004. Failure by a practitioner to comply with the terms of a mediation notice given by the commissioner is capable of being unsatisfactory professional conduct or professional misconduct: s517(3).

### Options available to Bar Council to deal with complaints

This topic is dealt with in several sections of Part 4.5 of the LPA 2004. The relevant section of the LPA 1987 was s155.

Section 538 of the LPA 2004 is new. It permits the commissioner or the Bar Council to commence proceedings in the tribunal in relation to a complaint without commencing or completing an investigation, where the commissioner or council is 'satisfied that, having regard to the nature of the subject matter of the complaint and the reasonable likelihood that the tribunal will find that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, action should be taken under the section'. There is no further guidance in the section as to when the section would apply. Section 538(3) requires the commissioner's concurrence for the Bar Council to commence proceedings pursuant to the section.

Section 538 aside, after investigating a complaint the commissioner or the Bar Council must determine whether he or it is 'satisfied that there is a reasonable likelihood that the practitioner will be *found by the tribunal to have engaged in* unsatisfactory professional conduct or professional misconduct'. If not so satisfied, under s539(1)(a) the commissioner or the Bar Council may dismiss the complaint in whole or in part. The test under s155 of the LPA 1987 was phrased 'satisfied that there is a reasonable likelihood that the legal practitioner will be *found guilty by the tribunal of* unsatisfactory professional conduct or professional misconduct.'

The commissioner or the Bar Council may dismiss a complaint under s539(1)(b) if satisfied that it is in the public interest to do so. A compensation order may also be made under Part 4.9: s539(2). Under s540, if the commissioner or council is satisfied that:

- there is a reasonable likelihood that the practitioner would be found by the tribunal to have engaged in unsatisfactory professional conduct (but *not* professional misconduct);
- the practitioner is generally competent and diligent; and

- 'having regard to all of the circumstances of the case (including the seriousness of the conduct concerned) and to whether any other substantiated complaints have been against the practitioner', that taking action under s540 'is justified'

the commissioner or council may do any or all of the following under s540(2):

- caution the practitioner;
- reprimand the practitioner;
- make a compensation order under Part 4.9 if the complainant had requested one.

The taking of action under s540(2) is an end to the matter: s540(4).

This does not precisely repeat s155(3) of the LPA 1987. The options under s155(3) were reprimand the legal practitioner *or*, if satisfied that the practitioner is generally competent and diligent and that no other material complaints have been made against the practitioner, dismiss the complaint.

The power to 'caution' is new. A caution is specifically excluded from the kinds of disciplinary action required to be published under Part 4.10 of the LPA 2004, although a compensation order made after summary dismissal of a complaint is to be published.

Under s155(5) of the LPA 1987, if the council or commissioner decided to dismiss a complaint or to reprimand under s155(3) and a compensation order had been requested, the payment of compensation or successful mediation of the consumer dispute could be required before the dismissal decision takes effect. Failure to comply with a compensation order made by the commissioner or the Bar Council is professional misconduct under s574(2). Such a compensation order may be filed in the Local Court and then enforced as if it were an order of the court.

A practitioner does not have to consent to a reprimand: s540(5).[14] There is however a right to seek review by the tribunal of a decision to reprimand or make a compensation order under s540. Failure to attend as required by the commissioner or the Bar Council to receive a caution or reprimand is capable of being professional misconduct: s540(3)

Where the commissioner or council is satisfied that there is a reasonable likelihood that the practitioner will be found by the tribunal to have engaged in unsatisfactory professional conduct or professional misconduct, unless s540 applies the council or commissioner must commence proceedings in the tribunal with respect to the complaint: s537(2).[15]

## Unsatisfactory professional conduct and professional misconduct

'Unsatisfactory professional conduct' and 'professional misconduct' are defined, for the purposes of the LPA 2004, in ss496 and 497. Section 127 of the LPA 1987 defined those terms for the purposes of Part 10 of the LPA 1987.

Unsatisfactory professional conduct *includes* conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of public is entitled to expect of a reasonably competent Australian legal practitioner: s496. Taking into account that 'conduct' means conduct whether consisting of an act or omission: s495, this definition is the same as that in s127(2) of the LPA 1987.

Section 497(1) provides that 'professional misconduct' includes both:

- unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence – this mirrors s127(1)(a) of the LPA 1987, although 'or maintain' has been added; and
- conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice – leaving aside the change in terminology, 'fit and proper to engage in legal practice', this is broader than s127(1)(b) of the LPA 1987. That referred to 'conduct ... 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 ...'

Section 498 provides that the following conduct is *capable* of being unsatisfactory professional conduct or professional misconduct:

- contravention of the Act, the regulations or the legal profession rules (whether or not the person is also convicted of an offence in relation to the contravention), failing to comply with the requirements of a notice under the Act or the regulations (other than an information notice);
- charging excessive legal costs;
- conviction for a 'serious offence', a 'tax offence', or an offence involving dishonesty and being or becoming an 'insolvent under administration' or 'disqualified from managing' or being involved in the management of any corporation under the *Corporations Act 2001* (see the definitions noted under the heading 'Conduct that may be the subject of a complaint').

In finding that an Australian legal practitioner is not 'fit and proper', regard may be had to the matters that would be considered under ss25 or 42 if the practitioner were an applicant for admission to the legal profession under the LPA 2004 or for the grant or renewal of a local practising certificate – 'suitability matters' – 'and any other relevant matters': s497(2).

### Suitability matters

The matters that would be considered under s25 or s42 are suitability matters. Section 25 deals with admission as a lawyer under the LPA 2004. Section 42 applies for the purposes of s48 (grant or renewal of a local practising certificate) and any other provision of the LPA 2004 where the question of whether a person is a fit and proper person to hold a local practising certificate is relevant. Section 42(2) provides that the Bar Council may take into account any suitability matter relating to the person, and any of a series of factors including contravention of a condition of an Australian practising certificate, the LPA 2004 or a corresponding law, the regulations, the legal profession rules or an order of the tribunal. The matters set out in ss25, 42 and 497(2) are clearly not intended to be exclusive, as the Admission Board, council or tribunal may at each stage consider any other 'relevant' or 'appropriate' matters.

Suitability matters are defined in s9 of the LPA 2004 in a comprehensive way. The section should be read carefully. Suitability matters include:

- good fame and character;
- convictions (note the extended definition of conviction in s11);
- being or having been an insolvent under administration;
- practising in contravention of any condition applying to any present or previous admission to practice; and
- past or pending disciplinary action.

### Right to review for complainants

As under the LPA 1987 [16], complainants may apply to the commissioner for a review of the Bar Council's decision to dismiss a complaint, caution or reprimand a practitioner or omit matter which was originally part of the complaint from the allegations particularised in a disciplinary application made to the tribunal in respect of a complaint: s543, in Part 4.6. The commissioner has broad powers on a review, set out in s545. They include confirming the decision of council, reinvestigating the matter or directing the council to do so, cautioning or reprimanding the practitioner and commencing proceedings.

### Conditions

Section 50 of the LPA 2004, in Part 2.4, is new. Under s50 the Bar Council may impose conditions on a local practising certificate when it is granted or renewed, or – in accordance with s61 – during its currency. Consent is not required. Section 61 is a statutory procedural fairness regime which applies where the Bar Council believes grounds exist to 'amend' a practising certificate (where amend includes impose conditions on, suspend or cancel).

Conditions imposed under s50 must be reasonable and relevant. Such conditions may for example require the holder of the certificate to use the services of an accountant or financial specialist in connection with his or her practice, or to provide the Bar Council with evidence as to any outstanding tax obligations of the holder and as to the provision made by the holder to satisfy any such outstanding obligations: s50(3)(f) and (g).

### Transitional provisions

As would be expected, there are detailed transitional provisions regarding pending complaints and complaints made after the commencement of the LPA 2004 about conduct which occurred before 1 October 2005 (Schedule 9 clauses 15 to 17):

- where proceedings have been instituted under the LPA 1987, the complaint is to be dealt with as if the LPA 2004 had not been enacted;
- if a complaint had been made under the LPA 1987, but proceedings had not been instituted before 1 October 2005, the complaint is to be dealt with as if the LPA 2004 had not been enacted *except* in relation to proceedings in the tribunal. That is, the Bar Council or commissioner would determine the complaint under s155 (or ss139 or 155A) of the LPA 1987, but any proceedings would be commenced under the LPA 2004. The Tribunal may not, however, make any determination or order of a disciplinary nature against the legal practitioner that is 'more onerous than could have been made under' the LPA 1987;
- 'old conduct' may be the subject of a complaint made under the LPA 2004, and that complaint will be dealt with under Chapter 4 of the LPA 2004. The commissioner, the Bar Council or the tribunal may not make any 'more onerous' determination or order of a disciplinary nature against the legal practitioner.

### Tribunal hearing

Proceedings in respect of a complaint are commenced in the tribunal by filing a 'disciplinary application': s551. Under the LPA 1987, proceedings were commenced by the filing of an information: s167(1).

Section s560 of the LPA 2004 creates a presumption that all hearings will be open to the public, unless the tribunal decides to make an order under s75 of the *Administrative Decisions Tribunal Act 1997*. This is new. Under s170(1) of the LPA 1987, a hearing relating only to a question of unsatisfactory professional conduct was held in the absence of the public unless the tribunal directed otherwise.

### Penalties

The tribunal's power to make orders if it is satisfied, after a hearing, that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct are broader under s562 of the LPA 2004 than under s171C of the LPA 1987. Section 562(1) of the LPA 2004 provides that the tribunal may make such orders as it thinks fit, *including* any one or more of the orders specified in the section. Subsections (2) and (4) provide that the tribunal may make orders of the following kinds:

- removal from the roll;
- suspension of a local practising certificate;
- reprimanding the lawyer;
- imposing a fine – the maximum fines have been increased, to $10,000 in the case of unsatisfactory professional conduct not amounting to professional misconduct and $75,000 in the case of professional conduct: s562(7) ($5,000 or $50,000 respectively under s171C(1)(d) of the LPA 1987);
- imposing conditions on a local practising certificate;
- requiring the lawyer to complete a specified course of further legal education;
- requiring the practitioner to use the services of an accountant or other financial specialist in connection with the practitioner's practice.

The tribunal has an expanded power to make costs orders under s566 of the LPA 2004 compared with s171E of the LPA 1987.

Failure by a person to comply with an order of the tribunal under the LPA 2004 is capable of being unsatisfactory professional conduct or professional misconduct: s596(1). A person who fails to comply with an order of the tribunal is not entitled to apply for the grant or renewal of a local practising certificate while that failure continues: s596(2). A compensation order made by the tribunal is enforceable under s87 of the *Administrative Decisions Tribunal Act 1997*.

### Show cause events

The 'notification' obligations are now found in the LPA 2004, rather than considering both the 2002 Regulation and the LPA 1987. The LPA 2004 introduces the concept of 'show cause event'. In relation to local practising certificates, s65 defines 'show cause event', in Division 7, to mean:

- becoming bankrupt or being served with notice of a creditor's petition,
- presenting a debtor's petition or giving notice of intention to present such a petition,
- applying to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounding with creditors or making an assignment of remuneration for their benefit, or
- being 'convicted' of a 'serious offence' or a 'tax offence', whether or not in New South Wales and whether other persons are prohibited from disclosing the identity of the offender (see the definitions noted under the heading 'Conduct that may be the subject of a complaint').

The first three bullet points largely carry over the definition of 'act of bankruptcy' in s3(3) of the LPA 1987. There is a change in that s65 refers to being *served with* the creditor's petition rather than being *the subject* of a creditor's petition under the LPA 1987 definition. This avoids the difficulty that theoretically arose under the LPA 1987, if a creditor's petition was presented but not served, where an 'act of bankruptcy' as defined would be committed before a person could reasonably be expected to have known. The notification requirements under Part 3 Division 1AA of the LPA 1987, ss38FA – 38FJ referred to 'indictable offences' and 'tax offences'.

As under the former provisions, ss66 and 67 of the LPA 2004 deal separately with an application for the grant of a local practising certificate and a show cause event happening in relation to a holder of a local practising certificate.

### Applying for a practising certificate

Section 66 of the LPA 2004 requires an applicant for the grant of a local practising certificate to provide to the Bar Council a written statement about a show cause event which has *happened* in relation to the person explaining why, despite the show cause event, the applicant considers himself or herself to be a fit and proper person to hold a practising certificate: s66(2). That statement must be provided as part of the application: s66(2).

Contravention of s66(2) is professional misconduct: s66(3). No statement need be provided under s66(2) if a statement under the section has been provided previously or if a notice and statement have been provided under s67(2).

Regulation 11 of the 2005 Regulation sets out what must be included in an application for the grant or renewal of a local practising certificate. Under clause 11(1)(j) the application is to 'provide or be accompanied by' the nature of any *offence*[17] of which the applicant has been convicted, other than an 'excluded offence'. Clause 11(2)(b) expressly provides that clause 11(1)(j) applies to a conviction even if other persons are prohibited from disclosing the identity of the offender. Clause 11(1)(k) requires details of a show cause event that has happened in relation to the applicant and clause 11(l) requires details of a 'pre-admission event' that has happened in relation to the applicant. Pre-admission event means a show cause event before the applicant was admitted to the legal profession in NSW or another jurisdiction: s4.

These sub-clauses are to the same effect as clause 7 of the 2002 Regulation, in particular sub-clauses 7(1)(g) and (h). Clause 7(1)(g) of the 2002 Regulation referred to offences of which the practitioner had been found guilty, and applied 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 identify of the offender: clauses 7(2)(b) and (d).

## Continuing disclosure obligations

*Notification under Division 7*

Section 67(2) of the LPA 2004 requires a barrister to provide the Bar Council with both:

- written notice that a show cause event *happened*, within seven days of the *happening* of the event; and
- a written statement explaining why, despite the show cause event, the person considers himself or herself to be a fit and proper person to hold a local practising certificate, within 28 days after the *happening* of the event (not the giving of notice under s67(2)(a)).

Contravention of s67(2) is professional misconduct: s67(3).

*Statutory condition regarding offences*

A number of statutory conditions are imposed on practising certificates. It is an offence for the holder of a current local practising certificate to contravene a condition to which the certificate is subject: s58(1).[18]

Section 55(1) imposes a statutory condition that a holder must notify the appropriate council – within seven days of the event, and in writing – that the holder has been:

- convicted of an offence that would have to be disclosed under the admission rules[19] in relation to an application for admission to the legal profession under the LPA 2004; or
- charged with a serious offence.

Giving notice in accordance with Division 7 in relation to a conviction for a serious offence satisfies the condition.

*Comparison with Part 3 Division 1AA of the LPA 1987*

Clauses 133 and 134 of the 2002 Regulation required notification of the finding of guilt of an indictable offence or tax offence or commission of an 'act of bankruptcy' within seven days. Section 38FB of the LPA 1987 then required a legal practitioner applying for, or the holder of, a practising certificate to 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 considered that he or she is a fit and proper person to hold a practising certificate. A finding of guilt had to be notified whether or not the court proceeded to conviction for the offence and even if other persons are prohibited from disclosing the identity of the offender: s38FB(7)(b) and (e), clauses 7(2)(b) and (d) and 133(2)(b) and (d) of the 2002 Regulation.

Clause 135(2) of the 2002 Regulation required the s38FB(3) written statement by the holder of a practising certificate to be provided within 14 days of the 'appropriate date', that is the (first) date on which the act of bankruptcy was committed or finding of guilt made: clause 135(3). An s38FB(1) statement by an applicant for a practising certificate was required within 14 days after making the application for a practising certificate: clause 135(1).

The requirement for notification of the happening of the event within seven days has been maintained, but the holder of a practising certificate now has 28 days after the happening of the event to give the Bar Council a s67(2)(b) statement whereas an applicant for a practising certificate must provide a written statement under s66(2)(b) as part of the application.

## Investigation of show cause events

Part 4.4 (Investigation of complaints) and the provisions of Chapter 6 relevant to Part 4.4 apply to a matter under Division 7 as if the matter were the subject of a complaint under Chapter 4: s77(1). In practical terms, that allows the issue of an s660(1) notice by an authorised person.

## Determination by council

Section 68 of the LPA 2004 provides for investigation and consideration of a show cause event by the Bar Council. On 'becoming aware' of the happening of a show cause event in relation to an applicant or a holder, council must investigate, and within the 'required period' determine, whether the applicant or holder is a fit and proper person to hold a local practising certificate.

'Required period' is defined in s68(5), as the period of three months commencing on the earliest of receipt by council of a written statement under ss66 or 67 in relation to the show cause event or the issue of a notice under s68(2) to the applicant or holder by the council. The period may be extended by one month by the commissioner. The LPA 1987 provided that the determination was to be made within the 'relevant period', defined in s38FA in similar terms to s68(5). However, although s68(5) of the LPA 2004 refers to receipt of a written statement under s67, it will be recalled that a holder is required to give both *notice* of the happening of the event under s67(2)(b) and an explanatory *statement* under s67(2)(b). Under s38FA of the LPA 1987, time began running once the Bar Council received notification of the commission of an act of bankruptcy or finding of guilt, which may suggest that the reference to written statement under s67 should be to written notice under s67(1)(a).

Section 68(2) requires that within 28 days of becoming aware of the happening of a show cause event, the Bar Council must give notice in writing to the applicant or holder dealing with the following matters:

- if the Bar Council has not received a statement under s66 or 67 in relation to the show cause event, requiring the applicant or holder to provide the required statement, and
- informing the applicant or holder that a determination in relation to the matter is required to be made under Division 7, of the required period in relation to determination of the matter (and that the applicant or holder will be notified of any extension of the period) and of the effect of the automatic suspension provisions in s70 if the matter is not determined by the Bar Council or the commissioner within the required period.

Under s 38FC(2) of the LPA 1987, council was required to give notice of those matters set out above within 14 days of becoming aware of the event.

Section 68(3) of the LPA 2004 provides that the Bar Council must determine the matter by:

- deciding that the applicant or holder *is* a fit and proper person to hold a local practising certificate;
- deciding that the applicant or holder *is not* a fit and proper person to hold a local practising certificate; or
- deciding that the applicant or holder *is* a fit and proper person to hold a practising certificate *but* that it is appropriate to impose conditions on the applicant's or holder's local practising certificate for a specified period.

Section 38FC of the LPA 1987 provided that Bar Council must refuse to issue or must cancel or suspend a practising certificate if council considered that the relevant act of bankruptcy, indictable offence or tax offence was committed in circumstances that show the applicant or holder is not a fit and proper person to hold a practising certificate.

If the Bar Council or the commissioner determines that an applicant or holder is not a fit and proper person to hold a local practising certificate, it or he may also decide that the applicant or holder is not entitled to apply for a grant of the local practising certificate for a specified period not exceeding five years: s74. The equivalent provision of the LPA 1987 was s38FF.

The Bar Council may renew a holder's local practising certificate when the end of the financial year for the current practising certificate is imminent and the Bar Council has not yet made an s68 determination: s69. The equivalent provisions of the LPA 1987 were s38FC(3) and (4).

Section 68(4) of the LPA 2004 provides that in investigating and determining a matter under s68 council is not limited to investigating and making its determination on the basis of just the show cause event, and must have regard to the facts and circumstances that surround, arise in connection with, relate to or give rise to the show cause event concerned. This is more broadly drafted than the words in s38FC(1), 'the circumstances in which' the act of bankruptcy, indictable offence or tax offence was committed.

Determining a matter by *imposing* conditions under s68(3)(c) is new. The power to impose conditions is found in s50 of the LPA 2004, in Division 5 of Part 2.4. Although s50(1)(b) refers to the Bar Council imposing conditions on a local practising certificate 'during its currency (in accordance with s61 . . .)', s61 cannot apply to Division 7 matters. Section 61 is in Division 6 and s59 provides that Division 6 does not apply to Division 7 matters.

### Implementation of decisions

Section 72 provides for the implementation of decisions under Division 7. If the Bar Council decides that the applicant or holder is not fit and proper person to hold a local practising certificate it must refuse the grant of, or immediately cancel or suspend, the person's local practising certificate. If the Bar Council decides that it is appropriate to impose conditions, it must give effect to that decision by imposing the conditions, under s72(3). A cancellation or suspension of, or imposition of conditions on, a local practising certificate takes effect when the Bar Council gives notice in writing of it to the holder, under s72(8).

If the Bar Council or the commissioner decides under Division 7 that the applicant or holder is a fit and proper person to hold a local practising certificate, subject to the LPA 2004 the Bar Council must grant a practising certificate or lift any suspension, under subs (5).

The contravention of a condition imposed on a practising certificate under Division 7 without reasonable excuse is professional misconduct, and under s73(1) the Bar Council may, by written notice to the holder, cancel or suspend the local practising certificate.

The council may also make a complaint in relation to the matter under Part 4.2, or institute proceedings under Part 4.8 as if the matter had been the subject of complaint and investigation under Chapter 4: that is, the bypassing the complaint and investigation process. Council must notify the commissioner if such proceedings are instituted, under subs (2).

### Summary determination

Sections 66(7) and 67(6) provide that the Bar Council may refuse to issue, or may cancel or suspend, a local practising certificate if the applicant or holder:

- is required to provide a written statement about a show cause event and has failed to provide the statement in accordance with the section; or

- has provided a written statement in accordance but, in the opinion of the Bar Council, has failed to show in the statement that the applicant or holder is a fit and proper person; or
- has failed without reasonable excuse to comply with a requirement under Chapter 6 made in connection with an investigation of the show cause event concerned or has committed an offence under Chapter 6 in connection with any such investigation.

These sections are the equivalent of s38FE of the LPA 1987, described in *New South Wales Bar Association v Murphy*[20] as a 'summary procedure', distinct from the informed procedure envisaged under s38FC.

### Failure to notify

A failure to provide a written notice about a show cause event or a written statement explaining why the person is still a fit and proper person to hold a practising certificate as required under s66(2) or 67(2) is professional misconduct.

Failure to notify a conviction of a serious offence or tax offence, or being charged with a serious offence, is also a breach of a statutory condition of a practising certificate, itself an offence.

There is no direct equivalent in the LPA 2004 of ss38FB(2) and (4) of the LPA 1987 requiring an applicant or holder to provide a written statement showing why the person is a fit and proper person to hold a practising certificate despite a failure to notify, nor of s38FD permitting the Bar Council to refuse to issue, cancel or suspend a practising certificate if the applicant or holder failed, without reasonable cause, to notify a matter where the failure was declared by the regulations to be professional misconduct. That is, failure to notify, without reasonable cause, a finding of guilt of an indictable offence or tax offence or an act of bankruptcy as required by clauses 7(1), 133 or 134: clause 137(1) of the 2002 Regulation. Clause 137(2) provided that a failure to notify, without reasonable cause, information in relation to a finding of guilt of the commission of an offence not being an indictable offence or tax offence as required by clause 7(1)(g) or clause 133 is *capable of constituting* professional misconduct or unsatisfactory professional conduct.

It could be argued that a failure to notify within the time required could be considered by council investigating and determining a matter under s68 of the LPA 2004, in that council is not limited to just the show cause event. As s68(4)(b) relates to the matters already set out relating to the event itself rather than things the applicant or holder has subsequently done or failed to do, the better view may be that the failure is not be taken into account in making the s68(3) determination. However, s77(2) expressly provides that nothing in Division 7 prevents a complaint being made under Chapter 4 about a show cause matter. Accordingly, a complaint of professional misconduct could be made in relation to a failure to provide a show cause statement under s66 or 67 at all (which could in any event have summary consequences), or a failure to provide it within the time required.

### Statutory suspension where no determination within the required period

Section 70 of the LPA 2004 provides that if council has not determined a show cause matter under s68 within the required period, the commissioner must take over determination of the matter from the council, and, if the matter concerns the holder of a local practising certificate, the local practising certificate of that person is suspended. The equivalent provisions of the LPA 1987 were s38FH and s38FG.

A holder whose local practising certificate is suspended under s70(1)(b) may make an application to the tribunal to remove the suspension under s70(3). Previously, an application for removal of a statutory suspension was to be made to the Supreme Court, under s38FH of the LPA 1987. Unless the tribunal orders its removal, the statutory suspension under s70(1)(b) remains in force until the commissioner decides that the holder is a fit and proper person to hold a local practising certificate or the council has given the effect to any other decision of the commissioner as required by s72.

### Right to review by the tribunal

Section 75 of the LPA 2004 provides for a right of review by the tribunal for an applicant or holder dissatisfied with a decision of the Bar Council or the commissioner under Division 7. The person asserting their fitness has the onus of establishing that they are a fit and proper person under s75(3)(a). An application to the tribunal for a review of a decision referred to in s72 does not of itself affect the operation of the decision: s72(9). The tribunal may make any order it considers appropriate on a review under s75.

### Transitional provisions

Clause 11 in Schedule 9 of the LPA 2004 deals with notification matters under consideration as at 1 October 2005. Generally, sub clause (3) gives the commissioner or the Bar Council an option as to whether the existing matter is continued under Division 1AA of the LPA 1987 (if the LPA 2004 had not been commenced), or under Part 2.4 Division 7 of the LPA 2004, although sub-clause (2) applies the LPA 1987 provisions to a pending application for a practising certificate.

### Other action regarding practising certificates

Section 37(1)(a) of the LPA 1987 provides that the Bar 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 a period specified by the council, to give an explanation satisfactory to the council.

Section 60 of the LPA 2004 in Part 2.4, Division 6, sets out grounds on which a local practising certificate may be suspended or cancelled, which include that the holder is no longer a fit and proper person to hold the certificate. The procedural fairness requirements of s61 of the LPA 2004 apply where the Bar Council is contemplating amending, suspending or cancelling a local practising certificate (amending includes imposing conditions under s50).

Under s105(1) of the LPA 2004, council may require an applicant or holder to give it specified documents or information, be medically examined by a nominated medical practitioner or co-operate with enquiries considered appropriate, to help the council consider whether or not to grant, renew, suspend or cancel a local practising certificate, or impose conditions on a local practising certificate (similar to s37(1)(b) of the LPA 1987). A failure to comply with a notice under s105(1) within the time and in the way required is a ground for council making an adverse decision in relation to the action it is considering: s105(2). Section 105 is found in Division 12 (Miscellaneous), of Part 2.4.

### Immediate suspension

Section 78 of the LPA 2004, in Division 8, allows the Bar Council to immediately suspend a local practising certificate on a ground on which the certificate could be suspended or cancelled under Division 6, the happening of a show cause event or any other ground council considers warrants suspension of the local practising certificate in the public interest, whether not action has been taken or commenced under Division 6 or 7.

Under s108 of the LPA 2004 there is a right of appeal to the Supreme Court against a decision of the Bar Council to grant or refuse to renew a local practising certificate, or a decision to amend, suspend a local practising certificate except in respect of a decision made under Division 7, where there is a right to seek review by the tribunal. Lodging an appeal does not, of itself stay the effect of the council decision.

1 An edited version of a Seminary Paper presented to members of the Bar Association's Professional Conduct committees in September 2005.

2 In respect of these first two issues particularly, the earlier article drew heavily on an article by Jeremy Gormly SC, 'Conduct of complaints against barristers' which appeared in the Spring/Summer 1994 issue of *Bar News*; subsequently republished in the February 1998 edition of *Stop Press*.

3 Date of assent 21 December 2004.

4 The LPA 2004 and the *Legal Profession Regulation 2005* were gazetted on 19 August 2005.

5 The *Courts Legislation Amendment Act 2005* assented to 15 June 2005; the *Legal Profession Amendment Act 2005* assented to 23 June 2005 and the *Statute Law (Miscellaneous Provisions) Act 2005* assented to 1 July 2005.

6 That is, a person is enrolled by the Supreme Court as a legal practitioner; a barrister or solicitor is a legal practitioner holding a current practising certificate.

7 The second 'roll-over' for those who had been enrolled by the Supreme Court as barristers or solicitors as at 1 July 1994: Schedule 8 to the LPA 1987 had provided that a person who had been enrolled as a barrister or solicitor was taken to be enrolled as a legal practitioner on the date of the original admission.

8 The commissioner's functions specifically include assisting and advising complainants in making and pursuing complaints: s688(1)(b).

9 The latter are 'official complaints': s495.

10 Bar Council has a power of delegation under s696(2) of the LPA 2004.

11 This includes, for example, common assault under s61 C*rimes Act 1900* (NSW).

12 Maximum penalty: 50 penalty units, that is $5,500.

13 Maximum penalty: 100 penalty units, that is $11,000.

14 This was also the position under s155(6) of the LPA 1987.

15 This was the effect of s155 of the LPA 1987.

16 Division 6 in Part 10, ss158-161 of the LPA 1987.

17 Clause 11(5) provides that 'offence' includes a tax offence.

18 Maximum penalty 100 penalty units, that is $11,000.

19 That is, the rules made under Part 2.3 by the (new) Legal Profession Admission Board. Clause 23A in Schedule 9, the Savings and transitional provisions of the LPA 2004, provides that the rules made by the Legal Practitioners Admission Board constituted under the LPA 1987 are taken to have been made under Part 2.3 of the LPA 2004, and have effect 'with any necessary adaptations'. The present rules do not make specific provision regarding the offences which must be disclosed. At the time of writing the prescribed Form 10 refers to 'an act of bankruptcy' and being found guilty of 'an indictable offence or tax offence', which were the terms used in clauses 133 and 134 of the 2002 Regulation and s38FB of the LPA 1987.

20 [2002] NSWCA 138; (2002) 55 NSWLR 23 at 49 [98].

# Readers 01/05

**Back row:** Christian BOVA, Lisa BOSTON, Halil ALTAN, Timothy RICKARD, David HIRSCH, Adrian WILLIAMS, Peter KULEVSKI, Michael O'MEARA, Ian NASH, Guy DONNELLAN, James GIBSON

**Fourth row:** David RICHARDS, Erik YOUNG, Katrina DAWSON, Patrick FLYNN, Leo GOR, Peter KLOMP, Mark HAY, Kyle OLIVER, Mark BRADY, Steve ROBSON

**Third row:** Elizabeth RAPER, Tony SAUNDERS, Ian WYLIE, Craig FRANKLIN, Sacha MORAN, Nicolette BEARUP, Lynda YOUNG, Michael KING, Simon BLOUNT, Donna WARD, Teni BERBERIAN

**Second row:** Chris D'AETH, Vanessa WHITTAKER, Susanne LLOYD-JONES, Christine ALLAN, Elliot HYDE, Michelle MATTAR, Scott ASPINALL, Nathan STEEL, Tamir MALTZ, Maria GERACE, Lisa CSILLAG, Phil GREENWOOD SC

**Front row:** Cynthia COCHRANE, Laura DIVE, Derek HAND, Louise GOODCHILD, Steven GOLLEDGE, Juliana FRIEDLANDER, Ross FOREMAN, Kellie EDWARDS, Terry LEIBMAN, Cleopatra SCLAVOS, Matthew EIRTH

# Readers 02/05

**Back row**: Geoff PULSFORD, Mario LICHA, Matthew BRACKS, Richard POTTER, Jill MCINTOSH, Les NICHOLLS, Craig BISCOE

**Fourth row:** Stuart LOWE, Marcus JUHASZ, Stephen HURLEY-SMITH, Andrew MARTIN, Derek SHRIDHAR, Michael IZZO, Greg DREW, Justin RAINE

**Third row:** Amendra SINGH, Craig MULVEY, Richard TRIPODI, Richard O'GORMAN-HUGHES, Andrew COMBE, Kylie DAY, Bradley JONES

**Second row:** Quang NGUYEN, Justin DOYLE, Craig CARTER, Michael SMITH, Esther LAWSON, Penny THEW, Luisa EVANS, Llewellyn JUDD

**Front row:** Emily ITO, Vicki HOLLINS, Jennifer SINGLE, Angelina GOMEZ, Opal KIANG, Olga ASSABGY, Alexandra RYAN

# Retirement of the Hon Justice Michael McHugh AC

**Friday, 7 October 2005 marked the final sitting day of Justice Michael McHugh AC as a member of the full bench of the High Court. Notwithstanding its unpublicised nature, the court room was packed and privileged to hear Hughes QC pay a tribute to the judge who, since his appointment to the High Court in 1989, has participated in approximately 1000 decisions in addition to an even greater number of special leave applications. His Honour's written judgments and oral interventions in the course of argument are universally recognised as having been of the highest calibre. Few could match his almost photographic knowledge of the *Commonwealth Law Reports* or grasp of the law's historical evolution. He has made significant individual and collegiate additions to the former and has continued the latter in the tightly reasoned, incremental tradition of the common law.**

**McHUGH J:** Do you move, Mr Hughes?

**MR T E F HUGHES QC:** May it please your Honours. I have the honour, by kindly presidential delegation from my learned friend, Mr Ian Harrison, to make some valedictory remarks on behalf of the Bar about your Honour Justice McHugh to mark the impending expiry of your Honour's commission as a Justice of this court.

This event is an occasion for regret. It is the inexorable result of an arbitrary age limit, the product of an anachronistic misconception that people who have led an active and useful life are over the hill at age 70; that they have reached, as it were, the bank of the river Styx to be ferried over to the other side. What nonsense.

You leave the Bench while at the prolonged apogee of your intellectual powers. Your Honour's career at the Bar was stellar. You were as at home in a murder trial as in a complicated equity suit. One of my fond recollections is that our numerous forensic contests were never marred by personal antipathy or personal difference.

Like F E Smith, your career at the Bar had a provincial genesis; in his case, Liverpool, England, in your case, Newcastle, New South Wales. You moved to Sydney at the wise and timely instigation of J W Smyth QC who made a sound judgment about your potential. Your practice took off. In the course of that process, you underwent the educative experience as a frequent junior to Clive Evatt QC of seeking to moderate his forensic enthusiasms.

**This event is an occasion for regret. It is the inexorable result of an arbitrary age limit, the product of an anachronistic misconception that people who have led an active and useful life are over the hill at age 70 ...What nonsense.**

Your Honour's judicial career started 20 years ago in the Court of Appeal. You came to this court in 1989. Your judgments will

live because in them you have combined a formidable grasp of legal principle with powerful felicity of expression.

The Bar wishes your Honour well on your compulsory retirement from this court. It is a safe prediction that this will be but a step in an ongoing career of service in and to the law. The Bar holds you in genuine respect and warm affection. May your future be as happy as it deserves to be. If the court pleases.

**McHUGH J:** Thank you for those kind remarks, Mr Hughes and I thank all those attending here today to mark my last day of sitting as a member of the full bench of this court. As you know, the traditional practice of the High Court is that there is no farewell ceremony for justices of the court other than chief justices. In the case of ordinary justices, the tradition has been for the chief justice of the day to say a few words, usually kind words, about a justice upon his or her death. That ensures that the justice does not get a right of reply, at least in this world.

As I found out yesterday, this may not be my last sitting day on the court. To my surprise – amazement may be a more appropriate description – I found that Chief Justice Gleeson intends to get the last pound of my flesh by making me the duty justice for my last week on the court, which happens to be the week my colleagues will be enjoying the pleasures of the court's annual visit to Perth, while I will be here in Sydney.

It has been a great privilege to have served on this court for almost 17 years. It is, of course, one of the three arms of

government in this country. Arguably, it is the most important. It not only declares the law for the nation, but it has the vital role of ensuring that the legislatures and executive governments of Australia act in accordance with the law and within the powers and functions allotted to them by the Constitution.

It is therefore of the greatest importance that the High Court should enjoy the confidence and respect of the people of Australia. Maintaining confidence in and respect for the court is primarily the responsibility of the justices of the court themselves and, as Chief Justice Dixon said on his appointment as chief justice, respect for the High Court, and indeed for all the courts of this country, must depend upon the wisdom and discretion, the learning and ability, and the dignity and restraint which the judges exhibit.

The date of my retirement from the court on 31 October will be exactly 21 years from the day I was appointed as a judge of the Court of Appeal of New South Wales. It is therefore a matter of especial pleasure to me that Justice Kirby, who was sitting with me on that day in October 1984 when I first sat as a judge, is now sitting with me on what is certainly my last day of sitting as a member of the full bench of the High Court. His Honour and I have often disagreed on the outcome of cases, but we have remained firm friends throughout.

During my 21 years as an appellate judge I have done my best to maintain confidence in and respect for the courts of which I have been proud to be a member. To what extent I have succeeded is a matter for others to judge. Mr Hughes, your kind words this morning indicate that to some extent at least, I may have succeeded.

You do not have to sit in this court for long before realising how central to the work of the High Court and all courts is the contribution of the practising Bar and advocates such as yourself, Mr Hughes. Few people of my age still have heroes. The experience of a long lifetime teaches that most heroes turn out to have, if not feet of clay, at least serious flaws that ultimately diminish their stature in the eyes of their worshippers. But, since I was a young man, Sir Owen Dixon has been and remains my judicial hero and his view about the contribution of advocates to the administration of justice is identical with mine. I should like to quote what he said about the importance of advocacy on the occasion when he first presided as chief justice at Melbourne. He said:

> For my part, I have never wavered in the view that the honourable practice of the profession of advocacy affords the greatest opportunity for contributing to the administration of justice according to law. There is no work in the law which admits of greater contribution. A community owes a duty to a Bar composed of men –

I interpolate 'and women' –

> who being conscious of the dignity of the profession of advocacy and possessing a proper legal equipment, conduct causes before the courts of justice from the high and very firm ground on which it is the tradition of an independent Bar to stand.

**I have devoted all my adult life to the study and practice of law. Never for a moment have I regretted the choice of becoming a lawyer or practising the law**

I firmly believe that what the chief justice said on that occasion is completely accurate in every respect.

If there had been no constitutional bar to my remaining a member of the court, I would have continued to serve on this court for as long as I believed I had the capacity to perform the heavy – bordering on the oppressive – workload of the court. The compulsory retirement age of 70 for federal judges no doubt seemed sensible in 1977 when it was introduced with bipartisan political support. But given the increasing longevity of Australians, I doubt if it is now.

One rationale for the amendment was that some federal judges continued to remain on the Bench after it appeared they were no longer capable of performing judicial work adequately. The real difficulty these days, however, is not to get judges to leave a court, but to stay on until 70. Apart from the three chief justices of this court, I will be the first justice of the court to serve to the age of 70 since the constitutional amendment was introduced in 1977. All other justices have retired some years before reaching the age of 70.

Mr Hughes, I have devoted all my adult life to the study and practice of law. Never for a moment have I regretted the choice of becoming a lawyer or practising the law, although of course, on some occasions, other occupations and professions seemed alluring and enticing. It should be unsurprising, therefore, that, although in a few days I must retire from this court and despite the attractions and pleasures that total retirement could give, I will almost certainly continue to study and keep abreast of the law and continue to serve it in some capacity or other.

# The Hon Justice Susan Crennan

On 8 November 2005, the Honourable Susan Maree Crennan was sworn in as a justice of the High Court of Australia, becoming the forty-fifth person to be appointed to the court.

Crennan J completed a law degree at the University of Sydney and was admitted to practice at the Bar in February 1979. Her Honour was resident in Sydney during her first year at the Bar, and read with the current Commonwealth solicitor-general, before moving to Melbourne with her family at the end of that year.

A person of great industry, prior to these events Crennan J had obtained a Bachelor of Arts degree in English literature and language, and had worked as both a trade mark attorney and teacher. Subsequently, her Honour obtained a post-graduate diploma in history from the University of Melbourne, receiving first class honours for a thesis on aspects of Australian constitutional history.

At the Bar, Crennan J had a broad practice with a focus on commercial, constitutional and intellectual property matters. Her Honour took silk in 1989. In 1993 she was elected chairman of the Victorian Bar Council. In 1995 she became president of the Australian Bar Association. Amongst other appointments, Crennan J has also served on the Human Rights and Equal Opportunity Commission, the Board of the Victorian Legal Aid Commission and the Law School Foundation of the University of Melbourne.

In 2003, her Honour was appointed a judge of the Federal Court of Australia.

The speakers at her Honour's swearing in as a justice of the High Court were Commonwealth Attorney-General Philip Ruddock, Mr John North, President of the Law Council of Australia, Mr Glenn Martin SC (representing the president of the Australian Bar Association) and Ms Kate McMillan SC, Chairman of the Victorian Bar.

Of her Honour's practice at the Bar, the attorney made the following remarks:

> Within weeks of completing your law degree your third and final career change took place when you were admitted to practice in February 1979. From the beginning you kept very good company, reading with the present Commonwealth solicitor-general, Dr David Bennett, QC, who is also in court with us today. Your Honour proved to be talented, energetic and extremely hardworking and also very fast on your feet. The solicitor-general recalls an occasion when you attended six mentions across five courts in one morning.
>
> At the end of that year your Honour returned to Melbourne with your family and began to practise at the Victorian Bar. Your Honour built a successful broad-based practice developing particular expertise in commercial, constitutional and intellectual property law. You were regularly briefed by the Commonwealth and a number of instrumentalities as well as appearing for numerous other parties of different persuasions.

Photo: News Image Library

> You also had the distinction of being led by successive Commonwealth solicitors-general, commencing with Sir Maurice Byers QC. Your Honour appeared before this court as a junior on a number of occasions, including for the Victorian Government in the landmark section 92 case of *Cole v Whitfield*. You have also written widely on a range of subjects. Your Honour's dissertation on the commercial exploitation of personality was widely recognised as an engaging and instructive account of Australia's approach to intellectual property.
>
> In 1989, only 10 years after becoming a barrister, your Honour was appointed queen's counsel, a well-earned endorsement of your talents and ability. Within a year your Honour was appointed senior counsel assisting the Royal Commission into the collapse of Tricontinental, a $2 billion corporate disaster. The issues were particularly complex and difficult. However, your hard work and intellectual and administrative ability and your skills at cross-examination were widely recognised. One key figure in another corporate collapse from the same year likened being cross-examined by your Honour as going up against some of the all time greats of Australian Rules football. It is a bit like being picked for a fullback against Gary Ablett, he said at the time.

Of Crennan J's contribution to the wider Australian community and her family life, the attorney said the following:

> Just two years ago, in recognition of your ability, your Honour was appointed to the Federal Court where you have served with distinction. The leadership and community spirit you first demonstrated at school has continued throughout your professional life. Your Honour has served on numerous legal and community based committees. In 1993 you were elected chairman of the Victorian Bar Council, the first women to chair any Bar Council in Australia. One of your most notable achievements was to establish a formal pro bono scheme with the co-operation of the Law Institute and the Victorian Government. The following year your Honour became the first woman president of the Australian Bar Association.

You have also served on the Human Rights and Equal Opportunity Commission, on the Board of the Victorian Legal Aid Commission. Your Honour has maintained close ties with the University of Melbourne. You have served as a member of its Law School Foundation and you have championed the scholarship scheme for indigenous people.

Despite the demands of your legal career you and your husband, Michael, have raised three children, Daniel, Brigid and Kathleen, and share the love of travel, music, art and literature. I know Michael, also a distinguished Victorian silk in your family, and your granddaughter, Hannah, are here with you today. They must be justly proud of your achievements.

I understand that your mother, Marie Walsh, who unfortunately passed away only recently, knew of your appointment to the High Court and was justly very proud.

I know that your Honour's experience, expertise, wisdom and compassion will ensure that you carry out your new duties with distinction. My belief is endorsed by one who has known you for more than 45 years, Sister Bonaventure, also known as Sister Mary, one of your former school teachers at Our Lady of Mercy Convent in Heidelberg.

Sister Mary set and marked the exam which you won a scholarship to the school. She said your success had not surprised her. Her Honour was, as she said only a few days ago, an outstanding student, and she also had a strong sense of justice and would champion the cause, is what she says of you. If something needed to be put right, she would put it right, to the best of her ability.

On behalf of the government and the people of Australia I extend to your Honour warmest congratulations on your appointment and very best wishes for a satisfying term of office.

In response to the attorney's and other speeches, Crennan J made the following remarks about the work of the High Court:

This court is an integral part of the life of the nation with the responsibility of maintaining the Constitution and interpreting it in accordance with what Alfred Deakin called 'the needs of time'. The court is also the final court of appeal in criminal and civil matters, determines disputes between citizens and government and between governments within our federal system. Because judicial power must be exercised in accordance with judicial process, it is the final protector of the rights of citizens. It is impossible not to feel the weight of the responsibilities involved.

Alfred Deakin introduced the Judiciary Bill into parliament on 18 March 1902 with a perfect sense of the distribution of sovereignty under the Constitution and within our democracy. He said of the Constitution:

'the statute stands ... but the nation lives, grows and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present is the judiciary of the High Court of Australia.'

He compared changes to the Constitution which could be affected by a referendum with developments by this court and he said:

'the court moves by gradual, often indirect, cautious, well considered steps that enable the past to join the future, without undue collision and strife in the present.'

Half a century later on 7 May 1952, on the occasion of first presiding as chief justice of this court in Melbourne Sir Owen Dixon said, as Mr North remarked today, that the High Court had always administered the law 'as a living instrument not as an abstract study'. When I first took judicial office I remarked that a living instrument has a past, a present and a future and encompasses both continuity and change.

Now, over a full century later, which has seen the abolition of appeals to the Privy Council in 1986, the High Court has had the ultimate responsibility for the development of Australian common law matching a conception of Australia's history and nationhood in which all Australians can expect justice according to law.

Over time, particularly the last two decades, there have been many changes in the practices of the court, the work which comes before it, and the variety of the legal issues of public importance in respect of which special leave is granted. Those developments have occurred against a background of significant social change and major shifts in public and private values, but the images to which I have referred of a judiciary which transfuses fresh blood into our polity and of the law as a living instrument conjure up the human qualities needed for the impartial dispensation of justice according to law.

It has been the high reputation and abilities of the judges of this court which have commanded the confidence of the Australian community which in turn is so essential to the authority of the court and to the maintenance of our civil society. I am conscious of such matters and the responsibilities they entail and in that connection I am especially conscious of the loss to the court of my predecessor Justice McHugh. He had a commanding presence and a powerful voice on the court. He always showed an acute understanding of the way history illuminated the principles of the law and could guide the resolution of a legal problem. He made a great and I am sure enduring contribution to the development of the common law.

With the support of my colleagues, who have all given me a most cordial welcome, and of the profession, and encouraged by the trust and goodwill expressed today, I look forward to discharging my responsibilities as the 45th Justice appointed to this court.

# The Hon Brian Preston

## Chief Judge, Land and Environment Court

**Brian Preston SC was the dominant silk in the land and environment jurisdiction since his elevation to silk in October 1999. Prior to that, he was the leading junior in the jurisdiction. His appointment as chief judge of the court had an inevitability about it of the best kind – the natural progression of a leader of the Bar in his field to be the leader of a court whose work is of immense importance to this state. At his swearing in ceremony on 14 October 2005, the Hon Bob Debus MP, Attorney General of NSW, said:**

It is my great pleasure to congratulate you on your appointment as chief judge of the Land and Environment Court of New South Wales.

You have distinguished yourself in your practise of the law in this state. I am confident that you will continue to serve the legal community and the people of New South Wales as an outstanding chief judge. Your Honour's appointment comes at a particularly important time in the relatively brief history of this court. Under the leadership of your predecessor, his Honour Justice McClellan, the Land and Environment Court has undergone significant reform.

We have now reached the stage where I provide an attorney general's version of 'This is your life'. This variant of that outstanding piece of commercial television is mercifully free of obscure friends you wished never to lay eyes on again rushing on stage seeking a warm embrace. That is the kind of thing I hope to incorporate in next year's swearing in ceremonies. But I digress.

You graduated from law with first class honours from Macquarie University in 1981. Following your admission as a solicitor in 1982, you began your career in legal practise with Stephen Jaques & Stephen, in the firm's resources group. You then became associate to Mr Justice O'Leary of the Supreme Court of the Northern Territory.

Following this, you were the inaugural principal solicitor at Australia's first specialist environmental legal centre, the Environmental Defender's Office. After establishing that office, you returned to private practice as a senior litigation solicitor. In 1987, you moved to the NSW Bar, and you were appointed senior counsel in 1999. Although you developed a large practice in planning and environment law, your time at the Bar also saw you engaged in the areas of administrative law, commercial law, equity, and building & construction.

You have contributed significantly to the development of the jurisprudence of planning and environmental law in NSW. Some of the important cases in which you have acted include:

- *Bankinvest v Seabrook*
- *Legal and General Life v North Sydney Council*
- *Jarasius v Forestry Commission of NSW*

You have also been a significant commentator on environmental law. You have published a text-book and authored numerous conference papers and articles on environmental law, a number of which have been published in journals such as the *Environmental and Planning Law Journal*, the *Australian Law Journal* and *Business LawAsia*.

Your travels as a student, teacher and advocate of the law have been extensive and benefited many. A small sample warrant mentioning:

- You established a course in biodiversity law at the University of Sydney in 1992, before undertaking a lecture tour on environmental dispute resolution in Buenos Aires in 1995.
- You were a member of a consultancy team to the World Bank in 1995 and 1996 that was briefed to draft National Parks and Wildlife conservation legislation for Trinidad and Tobago; and
- From 1999 until 2004 you were a member of the teaching faculty for the Indonesian Environmental Law and Enforcement Training Programme for the Indonesian judiciary.
- In 2003 you convened a tour to World Heritage sites in north-eastern New South Wales (particularly, the Central Eastern Rainforest Reserves), and Fraser Island.
- You have just returned from another study tour of World Heritage sites in Ecuador, Peru, Bolivia, Chile and Argentina, where you visited wetlands protected under the RAMSAR Convention on Wetlands and UNESCO Biosphere Reserves.

Given all of your outstanding achievements so far, I am sure that you will fulfil the duties of chief judge admirably. I congratulate you again on your appointment.

**In replying to the attorney, Chief Judge Preston made an important statement as to the role of the court in society. Part of his remarks are set out below.**

The court is a special part of the judicial system of New South Wales. Its unique jurisdiction and structure and its performance have earned it plaudits in this state, within Australia and internationally. It has been the reference point and model for judicial institutions elsewhere in Australia and overseas.

The work of the court has been and will continue to be of importance to present and future generations in a number of ways.

First, the court was established with, as one of its aims, the development of environmental jurisprudence. Over the past 25 years, the court has, in certain areas, performed that task. But the task is not- and perhaps never can be- complete. The development of environmental jurisprudence is of importance because it affects the environment and the society in which we live.

The famous architect, Frank Lloyd Wright pithily observed that 'You will find the environment reflecting unerringly the society'.

We are not placed into our environment: we and our environment grow together into an interlinked whole. A careful look around us will tell us who we are. The landscape of our cities and countryside tells us from where we have come and how far we have to go.

Edward Schumacher noted that in the simple question of how we treat the land our entire way of life is involved. Schumacher was an economist. His famous book *Small is Beautiful* was subtitled 'a study of economics as if people mattered'. He saw economics as a way of sustaining, restoring and maintaining the immense diversity and complexity of the biosphere in addition to nourishing, nurturing and fulfilling appropriate human needs. In short, economics is to serve people and planet. For Schumacher, care for the land and for the soil was fundamental to caring for the whole natural world, as well as a way of creating a just and equitable society.

Secondly, the court can play a role in developing mechanisms for foreseeing and forestalling environmental degradation and for the adaptive management of the environment.

Rachel Carson dedicated her classic book, *Silent Spring*, to Albert Schweitzer, the Nobel Prize laureate and doctor. She quoted Schweitzer's pessimistic statement 'man has lost the capacity to foresee and forestall. He will end by destroying the earth'. Of course, Carson's book itself was an attempt to warn society about and to forestall the adverse effects of pesticides on the environment.

Here too we can see a role for the court in foreseeing and forestalling environmental degradation.

Garrett Hardin spoke of the tragedy of the commons. The commons is any ecosystem, lake, estuary, grassland or even ocean or atmosphere. Hardin argued that a commons subject to communal and unregulated use is at risk of tragic ecological collapse because of self-interested human behaviour. Hardin's view assumes the operation of self interest only; that there are no community feedback mechanisms for assessing the condition of the commons and acting upon those assessments.

But the court can itself be a mechanism and can articulate other mechanisms for undertaking that assessment and giving the requisite feedback to stakeholders with the capacity to act and avoid ecological collapse.

Thirdly, the court has a role in shaping concepts of justice. In particular, it can develop a concept of environmental justice.

The protection of the marginalised, the poor and the disenfranchised in society is a feature of the law. In an environment context, these sectors of society suffer disproportionately from environmental pollution and other environmental degradations. Addressing these issues delivers justice to these sectors.

The court can explore the concept of poverty in the environmental context. Poverty is not just an economic condition; it is an environmental one. It is a state of defencelessness against the forces of assault and expropriation. The court has a role here too.

Fourthly, in developing environmental jurisprudence and in delivering environmental justice, the court can also play a more far-reaching role in developing key concepts in the law. The court's contribution is not then limited to a segregated area of the law; it develops the law itself.

We have seen examples in other courts of how the resolution of environmental disputes has influenced the wider development of the law. In constitutional law, well-known cases such as *Murphyores* concerning the export of mineral sands from Fraser Island, and the *Tasmanian Dams* case have established precedents on the nature and scope of the Commonwealth's constitutional powers. In administrative law, numerous cases including *Peko Wallsend*, *Mt Isa Mines*, *Timbarra* and *Enfield Corporation* have established principles of judicial review of administrative action.

Fifthly, a pressing challenge facing the court now is to engage with and to explicate emerging international concepts and principles. In matters concerning the environment, the slogan 'Think globally, act locally' is apt. There is an obvious interdependence between local and global processes.

The best illustration of an international concept that has taken root locally is that of 'ecologically sustainable development' (ESD). The ESD principles are hortatory but lack precision. The challenge is to articulate mechanisms for translating these laudable principles into specific actions. The court has a role to play in this task. The court has begun the task in a few cases but more work still needs to be done.

In doing so, the court can instil a sense of realism and strike a balance between extremes. The court needs to propose workable solutions. As Australian philosopher John Passmore has noted in his book *Man's Responsibility for Nature*, workable solutions must steer between primitivism and despotism: between wholesale rejection of a concern for economic progress and material welfare and the unconstrained, short-sighted pursuit of such goals. Such solutions require the application of scientifically and technologically informed cost-benefit analysis of our present practices and the alternatives to them, together with a judgement on the political viability and moral acceptability of these alternatives.

In performing the tasks I have outlined, the court can be assisted by thoughtful academic study and discourse. I would encourage the universities to foster the study of environmental jurisprudence as a subject at university.

I come to a court in good shape. The court and the people of New South Wales have been fortunate to have had the benefit of hard working and able judges. My predecessors in the office of chief judge, Justices McClelland, Cripps, Pearlman and McClellan have each made their own valuable contribution. So too have the other judges and commissioners and court staff. I am fortunate to be able to benefit from their legacy.

# The Hon Justice Peter Graham

On 24 May 2005 the Hon Justice Peter Graham was sworn in as a judge of the Federal Court of Australia.

His Honour was a student at Sydney Church of England Grammar School as well as Sydney and Harvard universities. He graduated with the degrees of Bachelor of Arts and Bachelor of Laws from the former university in 1959 and 1962 respectively. He completed a masters degree in law at Harvard University in 1964.

Having served as associate to Manning J of the NSW Supreme Court, and after working as a solicitor with Allen Allen & Hemsley for a short period, Graham J came to the Bar in 1966. He was appointed queens counsel in 1982. His Honour's practice was remarkably broad and predominantly concerned with commercial matters.

At Graham J's swearing in, the Commonwealth attorney-general spoke on behalf of the government, Ross Ray QC for the Law Council of Australia and the Victorian Bar, Ian Harrison SC for the NSW Bar and the Australian Bar Association and Gordon Salier for the solicitors of NSW. Graham J responded to these speeches.

The attorney spoke of Graham J's contribution to legal education and his mentoring of junior barristers:

> Throughout your career your Honour has acted as mentor to others, being particularly encouraging to juniors at the Bar, and maintaining close ties with the academic institutions you attended. In your early years you worked as a part-time tutor at Sydney University. More recently your Honour has served as president of the University Law Graduates Association and you continue as president of the Harvard Law School Association of Australia, a position you've held since 1966. Your Honour has lectured in Bar practice courses for the New South Wales Bar Association since 1988.

Of Graham J's practice at the Bar, Ray QC said:

> Your Honour's manner and advice were always professional, astute, dispassionate and highly valued by those you represented. Your Honour expected your instructor to be prepared. You were sometimes used to break in over-confident young solicitors, and they would return to the office from a conference with more humility, resolved never to be less than prepared in the future. To those who measured up, your Honour was charming and generous. One former instructor speaks of your Honour's extraordinary generosity in encouraging his ambition to come to the Bar, introducing him to other solicitors who instructed you and recommending him for junior work.

Harrison SC said:

> When you took silk in 1982 after 16 years at the Junior Bar your reputation as a powerful advocate had already been established. You practised widely in commercial matters with an emphasis on equity and probate. You developed extensive experience in arbitrations and mediations. You made significant contributions to Corporations Law and to the work of the Australian Securities and Investment Commission. Your name is, of course, synonymous with the ninth floor of Wentworth.

Also acknowledged were his Honour's interest in and contribution to issues of corporate governance. As Ray QC said:

> Your Honour's directorship of the Australian Shareholders' Association mentioned by the attorney reflects a commitment to the principle that companies need to be held to account in the matters of fairness to individuals as distinct from institutional shareholders. That commitment continued long after you left the board of that association. For example, you spoke out publicly about the machinations and the restructuring of BHP and Elders Holdings in the 90s. That same ability, determination and tenacity that has brought you success in your profession you have also brought to bear for the public good, both formally on committees and boards and informally in the press.

Graham J said the following about his appointment to the Bench:

> As I move from the ranks of the Bar to join the Bench, I am reminded that one of the bulwarks of our society is having a free and independent judiciary. We often think of barristers as being free and independent, and indeed, they are. They are not beholden to anyone and may speak out fearlessly in

support of causes. No doubt this explains why they are sometimes feared by politicians.

For judges, freedom and independence is quite a different thing. The essence of freedom and independence for a judge is freedom and independence from the executive and legislative arms of government, including economic independence.

When one assumes judicial office, one has to forego the freedom of expression that barristers enjoy and adopt a much more neutral position in society. For me this will mean no more letters to the editor of the *Sydney Morning Herald*, although I don't consider the last one I wrote to have been all that controversial. It was one sentence in length, and simply asked 'Is the water that has been leaking into the southbound carriageway of the Sydney Harbour Tunnel for the last couple of months fresh water or salt water?' I never received a response but did notice that it was only a matter of days before the carriageway in the tunnel was dry once again.

Another freedom that I, personally, will now forego is the opportunity to attend meetings of listed public companies and express opinions as to how their standards of corporate governance might be improved. I fancy that a few company chairmen may breathe a sigh of relief.

I guess I must qualify as the most senior member of the legal profession ever to be appointed to this court, at least since its formation. I am most grateful for the honour and the privilege that has been afforded to me, and trust that I may bring a youthful enthusiasm to the tasks that lie ahead. Russell Fox QC, who moved my admission as a barrister, was, of course, one of the leading members of this court from its inception. He set a fine example for me to follow.

# The Hon Justice Richard Edmonds

The Hon Justice Richard Edmonds was sworn in as a judge of the Federal Court of Australia on 5 May 2005.

Edmonds J was educated at Trinity Grammar School in Sydney and at Sydney University, graduating from the latter with a Bachelor of Arts degree in 1967, a Bachelor of Laws degree in 1970 and a Master of Laws degree in 1979. His Honour was a solicitor at and later partner of Allen Allen & Hemsley between 1970 and 1985. He was admitted to the Bar in 1985 and was appointed senior counsel in 1995. As both solicitor and barrister, his Honour was one of Australia's leading taxation lawyers.

Attorney General Ruddock spoke on behalf of the Australian Government, John North for the Law Council of Australia, Tom Bathurst QC for the New South Wales Bar and the Australian Bar Association and John McIntyre for the solicitors of NSW. Edmonds J replied to these speeches.

Of two themes which dominated the addresses, one was His Honour's career as a rugby prop.

On this theme, Bathurst QC had the following to say:

> Your Honour studied law at Sydney University where I am told you devoted 30 per cent of your time to your studies, 50 per cent to rugby and 20 per cent to miscellaneous activities which probably shouldn't be dealt with at the present time. Your Honour played first grade rugby for a period of eight years. That was despite an early setback when as a young

> prop for St George you travelled to Manly Oval and came across the famous, or perhaps notorious, Manly prop forward Tony Miller. Mr Miller at least had the charity to tell you to look after yourself. I am told you didn't and you don't remember anything of the game after the first scrum.

The other dominant theme was his Honour's excellence as a legal practitioner, particularly in the area of revenue law.

On that theme, the attorney observed:

> During your years as solicitor and then barrister your Honour established a reputation as one of this country's leading authorities in the area of taxation law. Described by colleagues as incredibly thorough and hard working you have been involved with a number of landmark taxation cases before the High Court. Your expertise in the field has earned you a large and varied client base. You have appeared on behalf of the commissioner of taxation as well as for a number of influential, often high-profile private clients.
>
> Your Honour has also made a major contribution to taxation policy development through a number of professional appointments. In 1979 you acted as external legal adviser to the Australian delegation negotiating the Hague Convention on Trusts. In the early 1980s your Honour served on the *General Counsel* of the Taxation Institute of Australia. Later your Honour served for four years on the Business Law Committee of the Law Council of Australia. Your Honour remains highly active and influential in the legal community having been involved with various committees of the New South Wales Bar Association since 1990.

Bathurst QC said:

> At the height of your prowess as a solicitor your Honour came to the Bar. As always, and indeed perhaps surprisingly for a former prop forward, your Honour's timing was exquisite both in the short, medium and long term. In the short term you immediately commenced a case with David Bloom which he at least tells me, and I've got no reason to doubt him, that you won. He didn't tell me whether it was due to his efforts or yours.
>
> In the medium term your arrival coincided with the elevation of Justice Hill to this court and the appointment of David Bloom as queen's counsel. You ably filled the gaping hole that was left as a result of those two appointments.
>
> In the long term your Honour's timing was exquisite. The Income Tax Assessment Act, as I understand it, has almost tripled in size and quadrupled in complexity. That led, of course, to an increasing demand for your services as a barrister both in and out of court. You appeared regularly in this court both at first instance and in the full court.
>
> So far as the High Court is concerned a consideration of the *Commonwealth Law Reports* of the last 10 years show that you featured in a great number of tax cases that that court heard. Your last appearance in that court was in *Commissioner of Taxation v Hart* where you valiantly but unfortunately unsuccessfully sought to uphold a decision of the full court of this court in favour of the taxpayer. When you are not in court the Sixth Floor waiting room was packed with hordes of anxious solicitors and accountants seeking advice on their clients tax liability. Sometimes they came away happy, sometimes disappointed, but only as to the terms of the advice never as to its quality.

In reply, Edmonds J had the following to say about his new responsibilities:

> I am conscious that my appointment comes close on the heels of the retirement of Bryan Beaumont and insofar as I am seen as replacing him on this court then they are huge shoes to fill. I will endeavour to do my best. I sincerely hope that those who appear before me will find me courteous, decisive and fair. There will always be a propensity for a difference of view on the last criterion from parties of opposing interests, however, if I satisfy both of the first two criteria the more likely it is that the third will be perceived to be satisfied.
>
> I would also like to be known, like so many of my new colleagues are known, as a hard-working judge and one who exhibits a sense of balance and intellectual integrity. The reputation of this court deserves no less and I will endeavour to continue to enhance that reputation.

# The Hon Justice Paul Brereton

On Monday, 15 August 2005, the Hon Paul Le Gay Brereton was sworn in as a judge of the Supreme Court of New South Wales. His father, the Hon Justice Le Gay Brereton, had been a judge of the same court between 1952 and 1972.

Brereton J graduated from Sydney University, with the degrees of Bachelor of Arts and Bachelor of Laws. He was admitted as a solicitor in 1982, called to the Bar in 1987 and appointed senior counsel in 1998. Among the remarkable features of his Honour's practice at the Bar was its breadth, ranging as it did across commercial law, equity, family law, professional negligence, professional discipline, immigration and criminal law at both trial and appellate levels.

At his Honour's swearing in the Hon Bob Debus MP, Attorney General of NSW, spoke on behalf of the Bar and the president of the Law Society of NSW, John McIntyne, spoke on behalf of the solicitors of NSW. They were followed by Brereton J himself.

Of Brereton J's practice at the Bar, the attorney observed:

> Demonstrating your belief that everyone deserves a fair hearing, you have also stepped forth where others may have feared to tread, representing those of your colleagues alleged to have engaged in misconduct. You have also diligently represented other clients involved in some of this country's greatest medical controversies. It is a fundamental tenet of the rule of law that even those who may be viewed unfavourably by the public should be allowed an opportunity to fully defend themselves before an impartial adjudicator. You have proved yourself willing to assist all those who come before our courts without fear or favour, regardless of their public popularity or of their position on the scale of culpability.
>
> It is not just your Honour's technical argument and advice which has stood out in your practice, but also your amenable disposition. Your colleagues advise that regardless of the number of briefs you have been running at any time, you consistently delivered exemplary service.
>
> Similarly, you have made your services available to the disenfranchised and marginalised throughout your career. You have acted pro bono on many occasions, particularly for former servicemen and other individuals or organisations lacking financial resources such as – dare I say – student groups.

Mr McIntyre also commented on his Honour's practice as follows:

> Your areas of practice at the Bar were extraordinarily varied and extensive. You could in fact be described as the true embodiment of the cab rank rule. You have appeared in many courts and jurisdictions and for a wide cross selection of our state's well known personalities and identities, even having a bob each way with Bob Carr and Robbie Waterhouse, when each of them was in dire need of your services for different reasons and, I might add, in different jurisdictions.
>
> You will, however, be most acutely remembered by the Law Society as a formidable advocate who possessed a unique combination of all of the legal skills necessary to develop and present a winning argument.

Of the Bar, Brereton J conveyed the following recollections and views:

> In this state we have had the good fortune, at least since 1825, to have a fearless independent bar. A courageous bar I think is as essential an instrument in the attainment of justice and the safeguarding of civil liberties as an impartial judiciary. It is only while lawyers of ability and conviction can and will fearlessly act for unpopular causes that our adversarial system can produce just results.
>
> An early example was set in this state by the man who became our first primary judge in equity, Roger Therry. As a barrister in the 1830s, in the face of strong contrary public opinion, he defended convicts who escaped the service of barbarous masters to whom they had been assigned, and then he prosecuted the squatters ultimately convicted of the Myall Creek massacre.
>
> There is never a greater need for fearless independent advocacy than in times such as the present, when the perception of threats to public safety may be thought to justify restrictions of private rights.

If I do have a regret about the Bar it is at not having played a greater role in its corporate governance; as things have transpired, and some of you have said, my role has become that of being the loyal opposition of the Bar Council and the Law Society Council in the disciplinary tribunals, where they have been my regular adversaries over several years. That makes all the more moving the tributes you have offered this morning. But I have also been touched by the private thanks I have received from many that I see here today of the profession who have come to me in their times of need and who, I hope I have been able to help. We would, after all, not be much of a profession if we could not look to each other for help in our times of need.

His Honour concluded as follows:

Although he died when I was young my father has been a great and lasting influence. I have been greatly moved by the references today and elsewhere to his example. In my early years I met two of his closest friends, CLD Meares, Queens Counsel, then leader of the bar and later to become a judge of this court who was my godfather, and WRD Stevenson, a distinguished solicitor, senior partner of Allens and President of the Law Society who was always called and later, upon marrying Robin, became, an uncle.

Surrounded from that age by judge, senior counsel and solicitor, perhaps a legal career was a little inevitable.

The first ceremonial sitting of this court I attended was on the occasion of my father's death in 1974, then in the old Banco Court in St James Road. It was a 'black' court, the judges having discarded these resplendent robes for their more sombre, everyday court dress. It was about a decade later that I made my first tentative appearances here, by kind leave of Mr Justice Young, and if, as a young solicitor purporting to appear in the Supreme Court I was then not only heard but sometimes listened to, I am sure it was at least partly in remembrance of one whose words once carried weight here.

The ceremonial robes which were first worn by him have since passed through the hands of several distinguished judges. They have learned some equity from Mr Justice Waddell, they were worn by Justice Blanch when he was a judge of this court, and they have been exposed to professional negligence by Justice Sperling. If they have absorbed a fraction of the wisdom of the wise judges who have previously worn them, and any of that can rub off in turn on their new incumbent, I will be fortunate indeed.

The judicial oath which I have taken this morning is an ancient one, and the standards demanded by the obligation which it imposes are exacting. I first heard of it in 1969, when Mr Justice Meares was sworn in as a judge of this court. Though I was not there, in those days the court was much smaller than it is today, and swearing-in ceremonies were newsworthy. It was reported in the papers that on that occasion the new judge's response was: 'I will do my best'. I can improve neither on his spirit, nor on his words, which I gratefully adopt. I, too, will do my best.

# Eulogy to the Hon Bryan Beaumont AO QC

**The Hon Bryan Beaumont AO QC died on Sunday 12 June 2005.**

**A thanksgiving service for the life of Bryan Beaumont was held at St Mary's Cathedral on Friday 17 June 2005. The following eulogy was delivered by the Hon. Justice R V Gyles AO.**

There is much sadness, and grief, at the loss of Bryan Beaumont. We will each reflect upon that during this service and later. However, this is a service of thanksgiving and I will deliver this eulogy in that spirit. My privilege is to honour Bryan Beaumont.

I knew Bryan for close to 50 years. We were contemporaries. We were at university together. We shared chambers as barristers. We played in the same cricket and tennis teams. We and our families shared farms together with our great mutual friend Colin Davidson and his family. I appeared before him as a barrister and then we were close colleagues on the Federal Court. Personal memories flood back. But rather than dwell on those I will concentrate on some wider aspects of Bryan's life. He was a devoted family man with close friends from many walks of life but he was much more than that.

I would like to say something of his achievements. He received great public honour in the last few months – he became an officer of the Order of Australia and an honorary doctor of laws at his alma mater, Sydney University. He was given a public farewell upon his retirement from the Federal Court. But few of us have a full picture of what he achieved. Many in the profession were hardly born when Bryan Beaumont was appointed to the Bench and have no idea of his period at the Bar.

I would suggest that the threads of service to the wider community and loyalty to the institutions with which he was associated run through his career.

Bryan was born late in the vintage year of 1938 – Chief Justice Gleeson at least would concur in that description. After completing schooling at Sydney Boys' High School, Bryan achieved an honours degree in law at Sydney University including the Pitt Cobbett Prize for federal constitutional law – an interest he maintained all his life – and the Peden Prize for property, equity and private international law, despite being an articled clerk during the whole of his course. He later shared his knowledge by teaching part-time at Sydney University for some years in federal constitutional law, bankruptcy and company law. He was also a member of the Joint Examinations Board of New South Wales.

After a period as a solicitor he became the associate to Justice Bruce McFarlan, one of the earliest of the commercial judges of the New South Wales Supreme Court. Upon admission to the Bar in 1965, Bryan Beaumont was fortunate to read with Bill Deane (as Sir William then was) which resulted in continued professional collaboration and a lifelong friendship. After a short period elsewhere, Bryan had the good sense to join the tenth floor of Selborne Chambers where he remained for the whole of his time at the Bar.

He quickly built up an enormous practice as a junior in commercial and constitutional cases. I can vouch for that. I watched with some envy a stream of solicitors accompanied by moguls of industry or senior bureaucrats wear out the carpet in our joint middle room. He was junior of choice in difficult cases for luminaries such as Maurice Byers QC and Andrew Rogers QC. Reference to the law reports of those days corroborates my memory of his appearances in the Supreme Court, the High Court and the Privy Council. He and Bill Deane were also heavily involved in advising the government of Papua New Guinea on matters to do with impending independence. After only 13 years as a junior, Bryan took silk in 1978 and was an instant success. He was leading counsel in many important cases, not the least of which was *Cambridge Credit*. He was chairman of the Royal Commission into the Tasmanian Constitution.

Notwithstanding the demands of his practice, he was a director of Counsels' Chambers Ltd, the company that administered Wentworth and Selborne Chambers (which in those days housed much of the Bar) for over 10 years. He was elected to the New South Wales Bar Council in 1981 and remained a member until his appointment to the Federal Court in 1983. At his swearing in, Michael McHugh QC, then president of the New South Wales Bar, paid particular tribute to Bryan's pioneering work in relation to the education program then being developed by the Bar. So, at the age of 44 years, with a great and lucrative career ahead of him at the Bar, Bryan accepted appointment to the Federal Court, undoubtedly influenced by a sense of duty.

Ahead lay a very fruitful period. He was able to influence the progress of the court which was still in its infancy. He did the

hard yards in long trials such as *Arnotts* and *Amann Aviation* and over the years he contributed greatly to the jurisprudence of the court through his work on the full court. He was very active in the administration of the court. He became an elder statesman of the court before his time and certainly became the senior Sydney shop steward. He acted as chief justice on many occasions. He led the way in co-operation by Australia in the administration of justice in Asia and the Pacific and sat as a judge in a number of Pacific jurisdictions. He became chairman of the Australian Institute of Judicial Administration. He was a member of the working party to implement the Closer Economic Relations Protocol with New Zealand. He was a distinguished foreign member of the American Law Institute. He was twice a visiting fellow of Wolfson College Cambridge.

But Bryan was no narrow technocrat. He was a member of the Council of Governors of Ascham School. He was a member of the Council of the Women's College at Sydney University. He was a trustee of the Ensemble Theatre Foundation and much more. In all of his activities Jeanette was an ever-present support. They made a great team.

Bryan was a lover of music, film, good wine and sport of various kinds, particularly tennis. He was a voracious reader with a particular appetite for current affairs in the wider sense. He peppered his friends with cuttings from obscure newspapers and journals on all manner of topics, legal and otherwise.

But nobody is perfect except, so it is said by rugby people, for John Eales. Perhaps, after this week, rugby league people would add Andrew Johns. Bryan had one great fault. He could not lose his temper. That was infuriating. He might disagree, because he was a man of many opinions, but he would never lose his equanimity. I don't know how Jeanette put up with it. I often saw him tested. I recall that on one occasion he was bowling his looping leg spinners at Acron Oval, St Ives. As he commenced an over Graham Reed from I Zingary had scored 50 runs. Bryan bowled that over. There was an over from the other end (I think bowled by Brian Malpass) and during Bryan Beaumont's next over Graham Reed reached his century. Bryan showed bemusement but not annoyance.

Bryan Beaumont was universally regarded as a good bloke. He was the sort of fellow that would call his opponent's forehand drive in when it was out rather than out when it was in. He was a great friend. He was a great contributor to the community. His was a good and productive life.

# Terence Francis Keaney (1959 - 2005 )

Terence Francis Keaney, a member of the NSW Bar, died on 24 July 2005. Terry was a devoted husband and father who was known as a gentle and caring man. He had a distinguished career as a criminal defence lawyer.

In 1983 Terry graduated with a Bachelor of Arts and Bachelor of Laws from the University of Sydney. He was admitted as a solicitor on 24 June 1983 and later commenced work as an editor in the publishing industry. Terry commenced employment in 1986 as a solicitor with the then Australian Legal Aid Office and subsequently worked with the Legal Aid Commission of NSW from 1987. Terry worked exclusively in criminal law within the Commission until he was admitted to the NSW Bar in February 2002. Terry practised from Frederick Jordan Chambers until 17 July 2005 when he left to take up his appointment as an acting public defender. Sadly, he died a week later.

Throughout his career, Terry was committed to defending individuals who could not afford legal representation other than through legal aid. Terry believed that any person charged with a crime was entitled to a fair trial with proper representation regardless of their economic status.

Terry was much loved and is fondly remembered by many members of the legal profession who appeared with him and against him. Terry is survived by his wife Vijaya and his two daughters Jaya, 13 and Asha, 10.

# Anthony John Enright (1945 – 2005)

So soon after the shock and sadness of Peter Hely's death, we have lost yet another respected, valued and loved member of our legal community, Anthony Enright. I have never encountered a person who was so welcoming of death as he was but, as he said, if I had been in his circumstances I would have felt the same way.

Anthony was born in Maitland on 25 August 1945, the second of five children. He attended Marist Brothers' Primary School in Maitland and, for his secondary schooling, Saint Ignatius' College, completing the Leaving Certificate in 1962. He commenced a BA at the University of Newcastle in 1963, after which, in 1964, he entered the Jesuit Seminary at Watsonia in Victoria. He left the Jesuits at the end of the year, returning to Sydney University where he continued to read for the BA LLB. He had a year at St John's College in 1965, where we became friends. In 1966, in his first year at law school he met Paulyne Williams and they married in August 1967. In their early married life they lived at Kirribilli, a bottle throw from Admiralty House. During these years he was associate respectively to Judge Perrignon in the Crown Employees' Appeal Board and the NSW Racing Tribunal and to Nagle J (as he then was) in the Supreme Court.

On graduation he was admitted as a solicitor and joined his father's firm, W J Enright & Sons, in Maitland. The firm had been established by his grandfather in 1896. He remained with the firm as a solicitor until, in May 1978, he went to Darwin where he joined the magistracy, presiding over a wide variety of coronial, criminal and civil work. One case always at the forefront of his recollections involved an assault between neighbours, apparently caused by a sleep-depriving, squawking parrot, silenced when the head of the victim's parrot had 'just came off' in the assailant's hands. The breadth of Anthony's experiences in Darwin proved a metaphor for his practice at the NSW Bar. In February 1980 he was admitted to the Bar, where he practised until his death.

In his 25 years at the Bar he practised in a variety of fields and jurisdictions – common law, equity (property and commercial), criminal law, family law, building and construction, at all levels from local courts to the Court of Appeal. He practised both in Sydney, and in the country where he was a frequent contributor to the Forbes, Griffith and Maitland Supreme and District Court sittings.

Initially he occupied chambers at Edmund Barton, level 44 MLC Centre. Over time he moved to Ground Floor Windeyer in Macquarie Street where his chambers were furthest from the entrance, uncontaminated by natural light and with a respectable atmosphere of disorganisation, (some) dust and paper mayhem. The state of his chambers, and his handwriting, although small, persuaded me that I was dealing with a person who was not, and would never be, anal, lacking the qualifications for it. But, ironically, his drafting of affidavits and conscientious attention to detail in the conduct of his cases suggested otherwise.

He had an impressive armoury of qualities as a human being which reflected in the practice of his profession – temperance, patience, thought-before-speech, persistence, understanding and a generosity for others. He had a well grounded spirituality and a strong moral sense – a foundation for his discipline. (He used alcohol not only for medicinal purposes, but also to liberate the senses).

Wrapped around these qualities was his style. His humour was larrikin, ranging from sardonic to irreverent wit and he did not shrink from 'taking the piss'. His style in speech was laconic, modest, understated and devoid of pomp or arrogance. He was streetwise. He was a shrewd and able judge of people. He was measured, restrained and humble, making him an effective and persuasive advocate. He was an enthusiastic and very good raconteur. He often looked at you out of the corner of his eye with provocative humour, perhaps a relic of that past time in his life when he drew on a cigarette in the same corner of his mouth. He was avuncular in appearance and presentation – you always wanted to put your arm around him. His dress was sometimes challenged. On occasions he could have been committed for 'unkempt of court' (it was not a question of his carelessness: rather one of priorities…) His walk, somewhat of a plod, belied his athleticism and interest in sports. He was passionate about cricket, and a keen tennis, squash and touch football player until, one by one, these activities became beyond him in the last few years. His attitude to sport and to the practice of his profession reflected his love of a contest – he applied himself as an energetic and tenacious opponent in any such contest (even with his daughters). Just causes tended to attract more energy than he had to spare. When the contest, of whatever nature, had

concluded, he accepted its outcome without rancour or regret and no revisiting, beyond his propensity to be hard on himself for any error he had made.

He combined a number of admirable qualities as a barrister – economy of presentation, ease of expression, candour with the Bench, a keen, alert and compassionate listener (where appropriate), enthusiasm for the law and a robust promoter of his clients' interests. His enthusiasm for a conference with his solicitor (and its subject matter) led him on one occasion to counsel his anxious instructing solicitor not to worry about the fire alarm and to continue with the conference, which was only ultimately interrupted by an engine operating near to or outside Anthony's chambers. Anthony stopped, innocently asking what the noise was. In the absence of a response that satisfied him, he and the solicitor opened the door to find the fire brigade pumping out smoke from the entire Chambers, after extinguishing a fire in another room.

The age of hi-tech didn't touch him; he refused to own a mobile phone but, like cigarettes, he bummed them. One solicitor recalls that Anthony gave out the solicitor's mobile number to the list judge when contact details were required for the allocation of cases. On one occasion the solicitor was contacted by a judge's associate to say that the judge was ready to hear the case but unfortunately he wasn't briefing Anthony, knew nothing about the case and was sitting in his law office in Liverpool! Anthony did not embrace the computer, even for dealing with the GST – he simply squeezed another column on to his exercise book.

A chorus of his instructing solicitors said he was a great barrister – reliable ('never let you down'; 'prepared to accept a broad range of work and…the perfect barrister for a suburban legal practitioner'), solid in legal principle and courteous, punctual and patient with clients. All of those who instructed him regarded him with great affection. Tellingly, he had long associations with all of them. All grin and laugh with pleasure at the mention of his name. All trusted him and his judgement – one describes him as a 'mentor'. Others regard themselves as beneficiaries 'of his wise counsel'. A date set for a brief in his diary stayed there – never flicked. These relationships were achieved not only through his results, but also because of his dignified and respectful manner. Briefed to confirm an opinion already given to the client by his instructing solicitor, Anthony began his advice: 'With respect to my instructing solicitor's well reasoned and cogent advice…I must regretfully come to a different conclusion'.

A verbal advice on evidence to solicitors was often accompanied by a cocked eyebrow and a 'Can you make a few discreet inquiries?' This turned back on Anthony on his deathbed when he was asked by one of his instructing solicitors whether, in the Hereafter, he could make a 'few discreet enquiries' about future winning Lotto ticket numbers back on earth. In hospital at the end, he frequently requested that 'a discreet enquiry' be made about the whereabouts of his medicine, or a bottle.

As a colleague, I worked with him on a number of cases – always a pleasure because he worried about the case, the result and, on appeals, his performance in the trial court. In most of the cases on which I worked with him, any success was substantially due to his enthusiasm and industry. He put up with my anxieties about issues, did more than he was asked to do, created an easy and productive environment for client, solicitors and counsel to interact and always had a valuable and insightful perspective on how a case should be fought, how a witness should be dealt with or how a judge could best be appealed to. This attribute earned him the respect of the Bench as well. Briefed to appear at Eden Local Court to defend a Fisheries Act prosecution with a defence based on his instructing solicitor's absolute confidence that the legislation upon which the prosecution was based was unconstitutional, notice of the point was required to be given to the several Commonwealth and state attorneys-general. The learned presiding magistrate was confronted by the appearance in his court of Leslie Katz, the then solicitor-general for NSW. As Mr Katz proceeded to expound on applicable constitutional principle, Anthony discerned that his Worship may have been awed, if not overwhelmed, by the occasion. In an admirable display of forensic opportunism, Anthony interrupted to suggest that his Worship might be assisted by written submissions, a course with which his Worship enthusiastically agreed. The hearing ended. Anthony's written submissions ultimately conceded that the position of his opponent for the state of NSW was correct. The outcome for the client was that his Worship found the offence as proved but declined to enter a conviction. It is easy to imagine that, from the perspective of the Bench, Anthony was viewed as an able, sensitive and trustworthy advocate, worthy of great respect.

His colleagues at the Bar viewed him in the same way – convivial, generous with his time and library, astute with his counsel and indefatiguably conscientious with his work. As an advocate he was not fazed by the aggression or hubris of an opponent, not deterred by unfavourable or 'quicksanded' facts or complex legal principles and not intimidated by the odd outburst of judicial indignation. Late nights at the desk were not uncommon. Nor were late night celebrations after a win. He was no stranger to Chinese restaurants.

His clients were worried about and were made to feel worried about, even in unconventional ways. On one occasion Anthony was conducting a 'test' case in the Supreme Court for a public authority, much hanging on the result from the client's perspective. The conference with the client before the 10:00 am hearing was accordingly and understandably tense. The tension continued until 9:30 am when Anthony began to ask his instructing solicitor (of Italian descent) what part of Italy his family had come from and how he made his pasta sauce (although not, I suspect, totally concerned about the subject matter of his enquiry…). After the conversation, client, solicitor and Anthony went off to court, edified and confident. After

another conference in an equity case, he thanked his client for being so frank and honest with him and for her preparedness to trust him with some of the hurtful and very personal details of her life.

In his last days he worked up until the October long weekend, at which point he was unable to continue. He had worked effectively and with great success for seven years after diagnosis of his terminal illness. His courage shamed our petty preoccupations. He was determined to live a normal life up until this time, to visit as little a burden on his family as possible, to give his youngest daughter Abby away in marriage on 17 September and to see his first grandchild Tzipporah ('Zippie'), born 29 September. He did not fight for life, but fought to leave it, constrained by his strong religious principles…how we all wanted his pain to end, but he faced it with courage and enthusiasm for its conclusion! He was as easy with death as he had been with life although he was, for once, uncomfortable in his own skin. He talked of his death and its timing as if it were a court hearing, scheduled for a couple of weeks hence. ('They're saying November'; 'I'd rather die at home as long as I can use the toilet'). In the Sacred Heart Hospice he had declined to take any food or nourishment, to hasten his end. I was shocked at his courage. But men of the spirit have no fear. Even at the end he maintained his sense of humour. As I sat by his bed he apologised for his falling asleep during our conversation. He was extremely weak and unable to maintain concentration for any length of time. He looked at me with a dulled twinkle, mentioned that he had been unable to maintain a conversation with friends who had visited him in the previous few days and said 'it is to their detriment that I can't talk to them', giving me a waggish look. I had to agree with him.

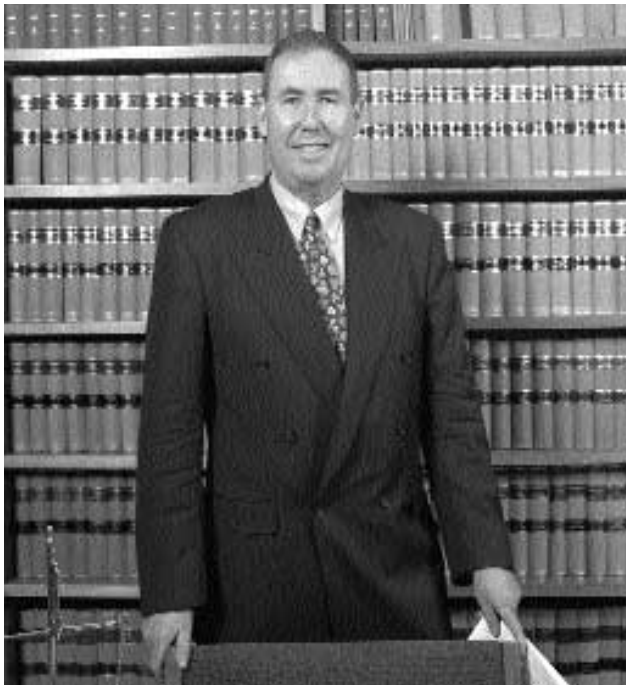
His younger brother, the celebrated Australian playwright Nick, died on 31 March 2003 and Anthony attended him over the last period of his life. His father, Walter Anthony died on 17 January 1991.

He is survived by his wife Paulyne, daughters Jane, Rachel and Abby, his mother Joan, his sister Helen, brother Chris (senior lecturer in law at ACU) and brother Ian (a partner at Ebsworth & Ebsworth).

He has made arrangements with a lot of people to meet them in the Hereafter: not all of us will make it, at least to his exclusive address. But it is nice to have been asked. Ave Atque Vale Anthony.

**John Timbs QC**

# The Hon Justice Graham Hill (1938 - 2005)



**A memorial service for the Hon Justice Graham Hill was held on 1 September 2005 at St James Church, King Street, Sydney. The following address was delivered by The Hon Michael Black AC, Chief Justice of the Federal Court of Australia.**

With the untimely passing of Justice Graham Hill last week, on Wednesday 24 August, the Australian judiciary lost one of its outstanding legal minds. We in the Federal Court lost a superb judge and fine colleague whose contribution to the work of the court judicially and extra-judicially was quite exceptional.

In paying tribute to Graham, it is a daunting task to convey, in brief remarks, an adequate idea of the richness and diversity of his work and his service to the community: as a lawyer, a scholar, a teacher, a leader, a mentor and a member of our court. I can do no more than give an outline of the *public* side of a remarkable life – a life to be celebrated.

Donald Graham Hill was born in Sydney on 1 November 1938. He received his secondary education at Fort Street Boys' High School where, in brilliant company, he was an outstanding student. He then studied arts and law at Sydney University, beginning an association that continued for the rest of his life. Again he showed himself to be an outstanding student. He also became closely involved in the life of the university.

In April 1962 he graduated in law with first class honours. In a remarkably strong final year, he topped the honours list and was awarded the University Medal in law.

Later that year he went to the United States, to Harvard University where he studied for the degree of Master of Laws, supported by a Fulbright Scholarship, a Ford International Fellowship and a graduate scholarship from the University of Sydney. At Harvard he studied tax law under Dean Erwin Griswold, regarded by many as the foremost tax professor in the United States at that time and subsequently solicitor-general. One of his fellow students at Harvard, later to become a judicial colleague on the Federal Court recounts how, on his way there, Graham 'jumped ship' (as he put it) in Panama and gradually worked his way up through Central America to arrive in Boston in time for the September 1962 term. His love of travel began at that time.

From Boston he travelled to London and the London School of Economics where he was a postgraduate scholar.

On his return to Sydney he joined the firm of Parish Patience & McIntyre, becoming a partner in 1965. In 1970 he became a partner of Dawson Waldron where he built an enviable reputation as a tax lawyer. He left the firm in 1976 to practise at the NSW Bar where he had the good fortune to read with Richard Conti. At the Bar, he quickly gained a formidable reputation – and soon a national reputation – in the fields of tax, public law and commercial law. He was appointed queen's counsel in 1984, after only eight years at the Bar. He wrote many learned papers and wrote the standard text on stamp duties.

This hardly does justice to a very distinguished career as a solicitor and then as a barrister, but I need to pass on to his time as a judge of the Federal Court of Australia, to which he was appointed in February 1989.

**...he had a research and publication record of which a full-time academic could be proud.**

As a judge of the Federal Court, Graham Hill showed once again his exceptional talents as a legal scholar. He quickly showed his new talent as an outstanding judge. He wrote many fine judgments in the field of taxation and in related areas, but his judicial work covered, with equal distinction, the whole range of the court's trial and appellate work. His work in all fields was, and is, widely respected and frequently quoted. He has left us with an impressive body of jurisprudence.

Whilst a judge of the court he maintained his connection with Sydney University. He taught there continuously in a part-time capacity as the Challis lecturer in taxation from 1967 until the day before he died – a period of nearly 40 years. He was the longest serving teacher in the faculty. He was also a mentor to many academics and younger practitioners in the field of taxation.

In May 2002 the University of Sydney honoured Graham by awarding him the degree of Doctor of Laws *(Honoris Causa)* for his outstanding all round contribution to the university and the law. It was observed by the chancellor that he had a research and publication record of which a full-time academic could be proud. His valuable contribution as patron of the Australasian Tax Teachers' Association was also acknowledged.

There was a charming and appropriate reminder of his work with the Australasian Tax Teachers' Association in the obituary published last week in the *Australian Financial Review.* The author quoted Ms Coleman, who invited him to be the patron as saying:

> He came to every conference, he gave a fabulous technical talk, and he always said 'put me up in the cheapest accommodation so I can meet the most people' – he made himself available to everybody.

I quote this because it reveals one side of the essential Graham.

Graham's contributions to the academic world extended beyond Sydney University. He was also a great supporter of the teaching of law at Flinders University, where he had spent time as a judicial fellow. I received this morning a request from the Dean to convey the condolences of all to Justice Hill's family and his judicial colleagues. There was an added note from the staff and students. Graham was also the chair of the Law Faculty Advisory Committee of the University of Wollongong.

I return now to his work as a judge of our court, which I need hardly add, was undiminished by his contributions in other fields. He was a remarkably hard worker and exceptionally fast and efficient in his writing.

Two areas require special mention. The first is judicial education.

Judicial education was one of Graham Hill's great interests and it was an area in which he made a massive contribution to the Federal Court and to the judiciary generally, here and overseas.

For many years, Justice Hill was an energetic convenor of the Federal Court's Education Committee. That committee has produced outstanding programs for the entire court twice yearly, in conjunction with our annual judges' meetings and equally outstanding seminars in conjunction with the Law Council of Australia every year immediately following the March meeting. Graham was personally involved in a leadership role in all these activities. The seminars held with the Law Council, and indeed some of our own internal workshops, were attended by some of the most eminent people in their fields, here, in the United States and in the United Kingdom. More recently, the role of Graham's committee expanded to encompass two other activities. The first was the training of our own registry and chambers staff and the second was the work presently undertaken by the court in other regional countries in the areas of judicial and administrative training. Justice Hill worked in both of these areas.

His activities were not confined to Australia. He was involved with the Commonwealth Judicial Education Institute and more recently was appointed to the Board of the newly formed International Organisation for Judicial Training. He accepted my nomination as alternate representative, later to become primary representative, of the Federal and Family courts on the Council of the National Judicial College of Australia.

His international work was recognised this week by the head of the Commonwealth Judicial Education Institute who wrote saying that Justice Hill was an outstanding man and that his passing would be a great loss, not only to his family but to the international community where, she said, 'His intellect, accomplishments, learning of compassion for others, were well known and valued'.

Similar sentiments were expressed in a message of condolence from judges of the Central Tax Court of Thailand. They expressed their profound sorrow and grief, and recognised his contributions to Thailand. His work in the field of the development of tax law extended to the People's Republic of China where, as part of a program funded by the Australian Government, he outlined the significance of the rights of appealing taxation rulings and assessments to independent courts, and – his great passion – the rule of law.

**He felt deeply about the rights of the individual and he felt deeply about the role of the judge as ensuring that the law was obeyed in cases affecting a citizen.**

I have focussed upon his work in the field of education for which the court has had most contact and I should also recognise his work with the Taxation Institute and the education of tax lawyers.

I keep coming back to tax. That, of course, was his primary field, but as I hope will become apparent, his work extended throughout the whole field of law and legal and judicial education.

Another area in which Graham Hill made a huge contribution to the court was technology. Graham Hill was a member of the Federal Court's Information Technology Committee for some 16 years, and for 14 years – until last month – he was its convenor. This is not the occasion to detail the achievements of that committee but it should be said that the court, and through it the legal community and litigants, have had the benefit of nearly all the advances in information technology as it affects courts as and when they have taken place. Since those years were times of momentous and rapid technological change – as indeed is still the case – and since our progress in this area has avoided the pitfalls, cost blowouts and general disasters too commonly associated with these projects, we have much to be grateful for. More than that, since the Federal Court is entirely self-administered and since its administration rests on collegial foundations, Graham Hill's leadership in this risky area was indispensable. Difficult decisions needed to be made that required his leadership and his knowledge of a very technical field, but they were the right decisions. The court, and through it the public, was exceptionally well served by Graham's work in this field.

It is said of Graham Hill that he had a passion for justice, and so he did. This appears from his writings, especially his extra-judicial writings. In his judicial writings, it is plain that his passion for justice did not lead him to be unfaithful to his judicial oath to do justice according to law. Plainly, though, he felt deeply about the rights of the individual and he felt deeply about the role of the judge as ensuring that the law was obeyed in cases affecting a citizen.

Graham Hill had a nice sense of humour. It was not of the boisterous type and one would hardly imagine that it could be. But it appeared from time to time in a way that many of us found charming. He did have his idiosyncrasies, as I suppose do we all. It is true that if one commented to Graham that it was a fine day, the chances were that this would be qualified by reference to other matters such as humidity or even the possibility of rain. His somewhat distinctive approach to these matters did nothing to diminish our affections for him.

In the occasional address Justice Hill delivered in the Great Hall of the University of Sydney upon the conferral of his honorary doctorate he made several observations which are revealing of the fine person that he was.

I would like to quote two of them, using his own words for the first.

He said:

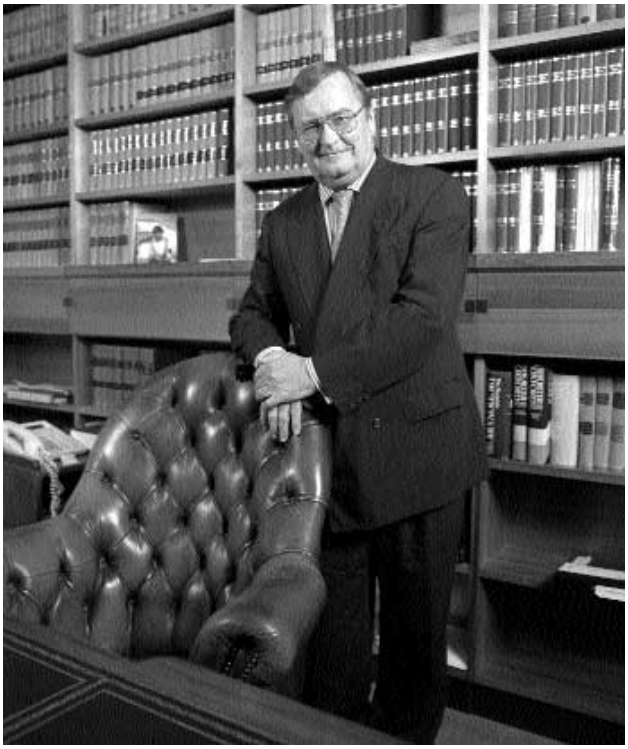
> Some years ago at a function where judges mingle with students I remember a student asking me whether I had had, when I was at law school, the ambition to be a judge. I thought the question was rather amusing, probably because at the time I was a student the possibility would have seemed unattainable. But I am proud that this is where I have ended up. I have always enjoyed my life in the law, whether as a solicitor, a junior barrister, queen's counsel, judge or as a lecturer, even if part time, at the law school. Indeed, I have been very fortunate. As a postgraduate student in London I visited the Soviet Union and met Russian students in the then Leningrad. They refused to believe that a student from Australia whose parents had not been rich and who had died long before I had graduated could have gone to university and studied not only in my own country, but also in America and England. It conflicted with the communist propaganda that they had been fed. I am really grateful for the many opportunities I have had.

He then made some powerful observations about the rule of law, but it is his conclusion that I wish to use to conclude my own tribute to him – a tribute made on behalf of his judicial colleagues in the Federal Court. He referred to a very close friend, then long dead, who was always helping those who were less fortunate. The reward of this friend, he said, was to see that those who were helped would later help others. He said: 'My friend was a very happy person, for it was true.' He exhorted the students to help the future generations of students and said that that would surely bring them rewards.

As well as being an exceptionally fine judge, scholar and teacher, Graham was indeed a helper and an inspiration to many.

We shall all miss him very much indeed but we are all richer for his work. To his family and friends, the judges of the Federal Court offer their deepest sympathy. For those of us in the court – and the staff of the court as well – his many contributions will be enduring.

# The Hon Justice Peter Hely (1944 - 2005)



**Amongst commercial barristers and other lawyers, the late Justice Peter Hely had a universal reputation as an outstanding advocate and an excellent judge. Justices Gummow and Heydon of the High Court of Australia read with him, as did a number of other judges and leading counsel. His funeral service at St James' Church, King Street, on 14 October, overflowed with his friends, colleagues and many admirers. Two of the eulogies were delivered by Justices Heydon and Jacobson. They are reproduced below. Justin Gleeson SC, as one of the members of the Bar who had the privilege frequently to appear as his junior, has also penned an appreciation of Peter Hely, focussing on his forensic powers and unrivalled skill as an advocate in commercial causes**

## Eulogy by the Hon Justice J D Heydon AC

We know that the Bar is a career open to talent. Peter Hely certainly showed that. He came to the Bar at the age of 25 with no advantages of birth or wealth or connections. He did come with some solid assets – his own admirable mental and moral equipment, a sound secondary and university education, and, by a stroke of good fortune, the experience of having been articled to Mr W J Sinclair.

Within a few years of his call in 1969, before he was 30, he had achieved a great reputation as a highly capable junior. By 1981, aged 37, he had taken silk. At once he moved to the centre of the equity/commercial bar.

What brought this speedy success? He worked hard, long and fast, both on weekdays and at weekends. On weekdays he habitually came to chambers very early each morning. Usually each day began with a conference or two unrelated to the case being heard later in the day. After the hearing was over two or three more conferences would be held before an evening's work on that day's case began. He often made himself available at short notice for these conferences. The atmosphere in them could be very tense: the clients were usually desperate men in immense difficulties, some near ruin. Each conference tended to involve murky facts and complex bodies of law. Each was conducted under the stresses caused by the case of the day and the need for constant changes of mental gear. Yet he was always punctual, always prepared, always able to remember the detail of what he had been told and had advised at earlier conferences. He resisted all temptations or urgings to hold out false cheer or flattery. His stock in trade was precise and crisp realism. Written opinions were delivered quickly and expressed trenchantly.

While in court he was aided by an excellent general knowledge of every field of law he practised in, but before each case he would again examine the law carefully. He would write down a list of all the legal propositions likely to come up, favourable or not. Each of the favourable ones would be supported by one compelling authority – not so that it could be thrust on the court, but in case the court asked for it. Each unfavourable proposition would be assigned an authority persuasively explaining its limitations. He also wrote down a list of facts which would have to be proved if the favourable legal propositions were to be triggered or the unfavourable ones deflected. He noted how these facts were to be proved from his own witnesses and documents. He thus worked out what he would have to establish by cross-examination of the other side's witnesses. He would also assemble and master a small bundle of key documents from the mass usually dumped onto his desk. By these simple methods he created a blueprint for the case. In court he only took notes when some significant piece of evidence was given. Later the transcript reference to that evidence would be fitted into the blueprint or the blueprint modified to accommodate the evidence. His skill was usually vindicated by events: few authorities or documents or evidence references were needed beyond those he assembled in these ways.

He planned the tactics to be employed in the courtroom with great care. The plans of barristers, of course, tend not to survive contact with the opponent and the judge any more than the plans of generals survive contact with the enemy. But his plans usually needed little modification, no matter what forensic vicissitudes took place. He had an unsurpassed capacity to elicit evidence in chief clearly and without surplusage, and to extract evidence from the most unpromising witnesses by shrewd cross-examination. With him there were no wasted words, no false starts, no rejected questions. His addresses of all kinds were concise but forceful. He became involved in long cases, but their excessive length was not his doing. He worked very closely with his juniors. He was courteous and loyal and

grateful to them – as to his staff. But, whether or not he actually needed help from juniors, he expected it, and was disappointed if it was not given.

Under the intense pressures of this existence, he rarely cracked. In court he was calm, imperturbable, impassive, dignified, unflurried. He never blustered or exaggerated. The closest he would come to passion would be when an unsatisfactory witness stirred him to an urbane ferocity, or when a professional opponent, slow or shifty about making a just concession, suddenly received a sharp and aggressive bite.

His genius for the solution of legal problems lay in identifying and simplifying the issues, marshalling the relevant factual and legal materials, and analysing those materials imaginatively, lucidly and precisely. In him those qualities were as fully developed as they were in the late John Lehane. To say that is high praise, but not false praise.

He had immense style. That style did not lie in flamboyant flourishes or glittering phrases or suave insinuations or melodramatic oratory. He was never blatant or triumphalist. Although in private he was witty, and although he responded to comedy in court while trying to suppress mirth, he himself rarely strove for epigrammatic or humorous effect. His style was classical, in the sense that everything he did was precisely and economically adjusted to the necessities of the occasion. He never struck a false note. He achieved an effect of sinewy elegance, of supple grace, of serene clarity, of simple beauty. Yeats would have said of him that he had:

… a mind
That nobleness made simple as a fire,
With beauty like a tightened bow, a kind
That is not natural in an age like this,
Being high and solitary and most stern …

By these means, in the decade between the late 1980s and his appointment to the bench in the late 1990s he became the leading equity/commercial practitioner in Australia. Indeed he had high claims to being considered the leading Australian barrister of his generation.

When he laid down the mantle of an advocate and donned the robe of a judge, only one thing changed. Zeal for a client went; impartiality as between the litigants replaced it. He was old fashioned in approach. Evidentiary objections were ruled on at once; no argument was invited, no reasons were given. He treated the most incoherent and vulnerable of unrepresented claimants for refugee status as carefully and fairly as he treated well-represented litigants of great wealth or power. If he reserved, he reserved only briefly. Losers who appealed from his orders were almost always sent empty away. He quickly came to occupy a position among the judiciary approaching that which he had achieved at the Bar.

What, then, were the keys to Peter Hely? Conscience. Rectitude. Sincerity. Honour. He lent himself to nothing shabby or shoddy or meretricious or conformist or selfish. There was a reckless magnificence in the way he sacrificed his interests to the claims of professional duty and then judicial duty. He never skimped a job.

To many lawyers, he was as a craftsman and as a man, an exemplar of high virtue – to be pondered, to be admired, if possible to be emulated. Over the last melancholy fortnight, they could have applied to him the words Walter Scott wrote on the death of Pitt the Younger:

Now is the stately column broke,
The beacon-light is quenched in smoke,
The trumpet's silver sound is still,
The warder silent on the hill.

If lawyers can be great, he was great. He was a giant – a mighty man, a man of renown.

His departure is a national tragedy – for the early loss of a great judge is a terrible national loss. Much greater is the personal loss – to all his friends, but most grievously to his beloved family. To them goes our deepest sympathy.

### Eulogy by the Hon Justice Jacobson

In a case called *Lockwood v Doric*, the High Court described Peter Hely's judgment at the trial in words to the effect of 'sculptured, economical and speedily delivered'.

That I think is an apt description of his work both on the Bench and in his former incarnation as a leading member of the New South Wales Bar.

He was a master craftsman in the practice and application of the law. But he was much more than that. He was an unsurpassed intellect with an extraordinary warmth of personality.

He had a mischievous sense of humour which bubbled to the surface through his large body in almost every situation. He was a source of immeasurable intellectual and personal support to all of his colleagues and friends.

And, of course, he conferred unstinted love and affection on Jane, Ben and Katherine. He was especially proud of Ben's achievements in the law and of Katherine, as a fine young woman.

Peter's life was too short, but like his judgments and his opinions he compressed everything to its very essence. He achieved and did more in 61 years than most of us will see in 120.

He was born in Cronulla on 26 March 1944 and he attended Sydney Boys' High School. He was a year ahead of me, but I did not know him then. Someone mentioned that he may have been in the Sydney High Cadet Corp. If he was, it must have been as a punishment for having been caught smoking at the GPS Head of the River.

He was fortunate to serve his articles of clerkship with Sinclair & Leahy where he came under the tutelage of Mr William

L to R: Michael Henry, Georgina Henry and Peter Hely

James Sinclair who was his master solicitor. Bill gave Peter a first class grounding in the essential attributes for the practice of law.

On the occasion of his swearing-in on 2 October 1998, mention was made of the loyalty, admiration and unbounded respect for Peter of all those who had worked closely with him, whether as barristers, solicitors or clients. And of the complete trust reposed in him by judges. He was indeed a towering junior and a dominant silk at the Sydney equity commercial Bar, and elsewhere. He practiced nationally and internationally.

I had the good fortune to read with him over 25 years ago. I remember in my early days at the Bar I went to his chambers shortly after 6pm to discuss a brief. I made the egregious error of describing it as a lay down misere.

Son, he said, rolling his eyes back, slinking down in his chair and pouring himself a drop of whiskey, there are three rules of litigation. First, there is no case that can't be lost. Second, anything worth saying can be written down on a page and a half of paper. The third is, don't you mess it up. Those were not his exact words. But they were to that effect.

He displayed the first of his rules of litigation in an advice in the Cambridge Credit auditors' negligence proceedings. Hely was briefed as second silk with RJ Bainton for the auditors. Bainton had written an opinion in his inimitable style, stating that the auditors could not possibly lose. Hely added a PS: 'If we are wrong, the damages will be enormous.'

They had to put the advice in writing because no one could hear them in conference where the advice was delivered in whispered tones over the incessant whir of an ancient air conditioner.

That advice, and many others, was delivered to the cream of Sydney's solicitors. They dealt with the hardest of cases. Solicitors waited for him to return from court at 4:15pm. Conferences might finish at 7pm. If they were going to win, Peter told them clearly and succinctly why. If they were going to lose, they were satisfied that every issue had been more than fully dealt with. Then he would return to the day's case.

Promising juniors vied for the opportunity to read or appear with him. Sometimes I may have been more hindrance than help. But two of his readers now sit on the High Court of Australia.

It was the sheer captivating force of his advocacy that made him great. He cast a hypnotic spell over witnesses and judges alike. Innate ability and total mastery of the case enabled him to do it.

In one case, he was not the leader, having been briefed as second silk. The witness was an elusive company director. Peter's leader, no slouch in the art of cross-examination, was having difficulty obtaining the witness's assent to a proposition. Hely wrote out a question in his distinctive hand on a post-it note. His leader asked it: 'Do you usually vote in favour of a resolution the practical effect of which you are unaware?'

There was grace and style in the question but it conveyed an implied threat. You have two choices, acceptance or annihilation.

I appeared as his junior in a series of cases in the 1980s, *North Sydney Brick & Tile v Darvall*. The company was engaged in what TEF Hughes would call an ocean of litigation. Peter wanted to refer to the background in opening one of the cases. Most barristers would have described the details of the many proceedings that were on foot. Peter merely said: 'The defendant, which formerly carried on business part time as a brickmaker, is now engaged full time in the business of litigation.'

His practice was not confined to the commercial division or the warm cocoon of equity. He appeared in a wide variety of fields and jurisdictions from administrative law to white collar criminal trials.

On the Bench, he heard cases, both at first instance and on appeal, in practically every area of the Federal Court's jurisdiction. He wrote authoritative judgments in many fields including corporations, tax, trade practices, administrative law, admiralty and patents. He was truly a leader of the Federal Court. When a hearing finished, he sat in his chambers writing his judgment. He barely got up from his chair until the judgment was completed.

Peter enjoyed reading and he found time to read some good books, to travel, to spend a little time at Wagstaff and to enjoy

a meal with family and friends. One of the few occasions on which he would raise his voice was in a restaurant when the food or wine was not to his liking. Even more so if there was a delay in producing it.

I recall on one occasion ordering the wine and tasting it. I rejected it as not cold enough but only after my glass had been filled and before the others were poured. He was not pleased. But there was laughter.

In the late 1980s, I was sitting with Peter and Jane and my wife on McMaster's Beach. I was wearing an oversized tee-shirt which Marlene had bought for me. It had an illustration of some Sumo wrestlers on it. A M Gleeson, who was then chief justice of New South Wales, saw us on the beach and came over to say hello. He took one look at me and said: 'Are you wearing Hely's t-shirt?'

Peter was strong and forceful. But he was also a loveable teddy bear. I am privileged to have been a friend. We are all privileged to have been associated with him, whether closely or less so.

I used to ask him to vet my speeches and I would ask two questions: 'Have I gone too far – and have I forgotten anyone?' As to the first, if I have, I apologise. As to the second, I'm sorry Bertie.

'Bertie'

Hely with friends from Seven Selborne, including Oslington QC, Smith SC and Whitford SC

## In memory of Peter Hely

by Justin Gleeson SC

In my early years at the Bar I (like many others) was fortunate to have the rich experience of appearing with Peter Hely QC and writing joint opinions with him.

All that has been said about his concision is true. A nervous junior could bring to him a much worked over draft opinion, only to see him briefly read it and raise a questioning eyebrow. He would then hunch over his pad and, after interrogating the junior, write out in short numbered propositions the essential facts, questions and opinion to be delivered. A commercial case listed for weeks could be reduced to a few short issues on a single page. After one trial which ran for months, he, as an exception, permitted his junior a written submission extending to 50 pages.

Peter worked hard, probably too hard, at the Bar. He would regularly hold several conferences before and after court, as well as conducting a major trial during the day and carrying out preparation into the early evening. Sundays were often spent in intense preparation for a trial. His chronologies, usually written out by hand, condensed a vast morass of material into logical order which was then the foundation for skilful cross-examination.

By the time I appeared with him, his voice was already strained. By report, this made his cross-examination only more terrifying than before. His questions commanded assent from witnesses and few dared dispute them. He cross-examined largely for admissions. It was not a formalistic closing of the gates but rather the putting of a logical series of propositions, moving from the general to particular, each of which seemed inescapable to the witness.

Peter was very good to juniors, introducing them to solicitors and quality work. He corrected the work of juniors without harshness or superiority. Speaking roles were often extended to

the junior in court and, in a manner Gyles QC would have considered excessively generous, he would even give a short period of advance notice. He would always interrupt what he was doing to give a young barrister advice on ethical issues, advice which was invariably sound. He believed in the camaraderie of the Bar and would willingly offer a whisky in the evening to his junior, or his opponent, or both at the same time.

In the 1990s Hely returned to the Bar Council, not through desire for advancement but to answer a request from Coombs QC. He expressed his views with wisdom and authority and, like Bathurst QC does now, lent great strength to the Bar Council. He rose to be junior vice president. As chair of PCC3, he ensured all reports were of a very high quality and delivered quickly to minimise the anxiety of both the barrister and the customer about resolution of the complaint. But for the manoeuvrings of some, he should have been president of the Bar Association.

Some wondered whether Peter should have been appointed to the Equity Division or Commercial List of the Supreme Court, rather than the Federal Court. Had he been given a full companies list, he would have delivered a larger corpus of corporate law judgments to match that of Sir Laurence Street sitting at first instance. His love of a hard and difficult commercial trial may have been better met in the commercial list. Nevertheless his impeccable judgment of fact and law was well demonstrated across the range of federal matters he decided, and on the Australian Competition Tribunal.

Shortly after he was appointed I called into the back of his court to see a nervous young barrister presenting a migration case. The barrister sought to distinguish a recently delivered judgment of Hely J. The barrister acknowledged the force of the judgment, describing it as the leading statement in the field. Hely looked bemused to think he had now become the leading authority on an Act which several weeks before he had never read. He heard out the barrister politely then followed his previous decision.

He did enjoy sitting on the Competition Tribunal, together with economists and business persons. He explained to me how it gave a different perception on the role of the Bar. His fellow decision makers warned him that he had to be pretty careful about arguments coming from these barristers. In one case, I was having difficulty obtaining a short and direct answer to my question from an expert witness. I attempted to bring the witness to heel in my best imitation of what Hely had always done with such ease at the Bar. Hely immediately intervened and admonished me. He said with barely a smile that the tribunal was much assisted by explanations being given by the economists and barristers would do well not to interrupt them. He could be mischievous indeed.

We all miss you Peter.

The New South Wales Bar Association

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The New South Wales Bar Association announces:

**The 2006 Bar Association Media Awards** for excellence in journalism related to law and justice. **There are two categories: Print Media and Electronic Media. Each award is worth $2,500.**

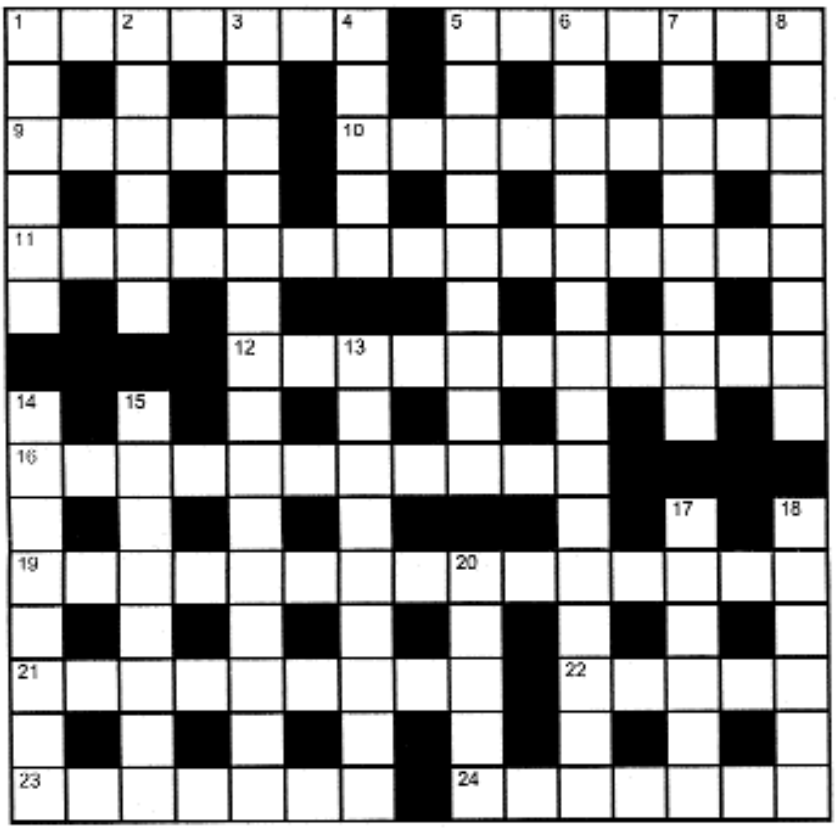
The awards will be given to media professionals who are judged to have given readers / viewers / listeners the best understanding of important legal principles, the legal profession or the operation of a particular facet of the justice system in Australia.

The awards apply to work published, broadcast or televised between 1 March 2005 and 28 February 2006.

Journalists may enter themselves or be nominated by a member of the judging panel or by a third party.

An entry / nomination form is available from the Bar Association web site at **www.nswbar.asn.au** under 'Media resources'.

**The closing date for entries is 5.00pm on Wednesday, 1 March 2006.**



**Across**

**1** See 20 Down

**5** A martyred archbishop, after a very quite clap. (7)

**9** Movie loses thunderbolt (and distance) leaving illumination. (5)

**10** Former magistrate gives order to "Give order!" (5,4)

**11** A microscope for enlarging the author of "Discord within the Bar" and "Sherman for the Plaintiff". (10,5)

**12** Hiding Sir by the result of crossing classes? (11)

**16** Reinstate. Reinstate. "Get retainer" (11)

**19** Army surveys coarse canniness dubiously. (15)

**21** Wildly feistiest witness gives evidence. (9)

**22** Stop about comport. (5)

**23** A payment to the parson by a dead parishioner, in his minority? (7)

**24** Gran eager for yellow cloth trousers. (7)

See page 108 for solutions

**Down**

**1** Whiteanted by its fifth, or bemused by its eighth? (6)

**2** To take on with a view to marriage. (6)

**3** In spite of no right to be heard. (15)

**4** Very worried after noon, and anxious. (5)

**5** Like silver in a country enjoined from crying for its leader. (9)

**6** Rifle range ponce scatters a powerful bird, or an immigrant in an Oz Car? (9,6)

**7** The redness got from getting madder. (8)

**8** Clothes cling to the era of equine deportment. (8)

**13** Bald aegis set to rights homeless women. (3,6)

**14** Recent Supreme Court appointment rent robe? Questionable! (8)

**15** See without a point, and add a point, to get the sound of the sea? (8)

**17** Violently vocate seven degrees of separation from a note, at half or twice the frequency. (6)

**18** Hear a hardback? (6)

**20** (Also 1A). Before former CJ leaves British capital, Victorian leaves a Cairns viscount converted, a new appointment.

# Callaghan's Diary

*Edited by J M Bennett AM*
*The Francis Forbes Society for Australian Legal History, 2005*


Young, poor and inexperienced, Thomas Callaghan arrived on 13 February 1840, to try his lot at the Sydney Bar. Within a fortnight and a day, he was experiencing the delights of its open-door policy: Roger Therry, later a Supreme Court judge, 'was friendly enough and went away with one of my best books – *Chitty on Contracts* – under his arm'.

The diary runs from Callaghan's arrival until 1845. The young barrister attends Dr Bland, no doubt just as barristers today may attend a doctor's rooms in the William Bland Medical Centre on Macquarie Street. He celebrates the anniversary of the founding of the colony not on the nearest Sunday, but when it should be, 26 January. He records the arrival of that enigmatic albino barrister Robert Lowe (although no record is made of the later's major contribution to Australia, the finishing of Bronte House).

Callaghan reads and, on the whole, enjoys *Nicholas Nickleby*. He meets, but blows hot and cold over, Caroline Chisholm. What Callaghan would have made of Mrs Jellyby, reputed to be based on Chisholm, we do not know, as the last instalment of *Bleak House* was only published in September 1853, and the diary runs only until 1845. And, on matters chancery and delay, it is an excellent thing to find that a vessel of the 1840s was named 'Lord Eldon', a Lord Chancellor to be elsewhere described as equity's 'great cunctator'.

By April 1840, Callaghan has attended what would now be a professional conduct committee, ten barristers meeting to consider allegations of want of financial probity in respect of William Hustler, a barrister late of Ireland. His description of a meeting in the following year makes even the most stridently independent among the modern Bar understand why the formalisation of an association and a council may have been desirous: it was about the circuit fees, 'but, after some talk and some squabbles about seniors and juniors, we separated without deciding anything'.

Money, or lack of it, takes up much of Callaghan's time, and in the interesting context of his religion. He is a practising Roman Catholic, and in an age of preferments, he is sensible of his occasional omission therefrom. In this context, there is continual reference to fellow Catholics Therry and Plunkett, both of whom seem to have suffered for their religious beliefs. For one brief at Windsor – 30 guineas, no less – the attorney said that 'no-one should have it but a Protestant!!!'

The diary closes with the hope that a work recently taken on, a consolidation of the Acts in council, would provide a base for professional advancement. Seemingly it did, for in 1847 reference is made in the third edition of Plunkett's *Australian Magistrate*, to 'Mr Callaghan's useful work'. Indeed, Callaghan lived to become a foundation judge of the District courts, although he died at 48 years, from a horse kick.

Dr Bennett has transcribed and edited the original journal, and has provided notes and an index for readers. The work is an invaluable record of daily life of a Sydney resident. Publication details of *Callaghan's Diary* and how to order, can be found at the web site of the publisher, the Francis Forbes Society for Australian Legal History, which has had a recent flurry of works about the presiding chief justice for much of the period, Sir James Dowling. After dipping into the diary, readers may know him better as 'Blowhard', but he has his soft side, as shown when Callaghan must have drawn the short straw, and ends up next to him at a Bar dinner. Far from being remote, the young man records, '[h]e was very hospitable and Plunkett made a good speech. The other speeches were all drivelling nonsense'.

**Reviewed by David Ash**

## Verbatim

*Combet & Anor v Commonwealth of Australia & Ors* [2005] HCATrans 650 (30 August 2005)

**Gummow J:** What follows if you are wrong?

**Mr Gageler:** I have two other somewhat less technical arguments, your Honour.

**Gummow J:** Well, it is no good to denounce it for being technical. That is what politicians say when they find the Constitution prevents something.

**Kirby J:** We all have to get used to this new jargon.

**Mr Gageler:** Yes. Your Honour, I try not to contemplate being wrong. It seems to be the - - -

**Gummow J:** Just contemplate being subtle, that is all.

*Paua Nominees Pty Ltd v Miller* [2005] HCATrans 774 (28 September 2005)

**Gummow J:** It is a common law case.

**Mr Maconachie:** Indeed. The undertaking - - -

**Gummow J:** I did not mean that as a term of approbation.

…..

**Hayne J:** How else are you going to get up there, Mr Maconachie, except externally?

**Mr Maconachie:** From the inside.

**Hayne J:** Yes, if you are very thin when the last plate is going on.

**Mr Maconachie:** That would exclude me, your Honour, but the question of how it was to be done – I can say this in a dozen different ways – was for the employer.

# Court Reporting in Australia

*By Peter Gregory*
*Cambridge University Press, 2005*


'The best at our craft should be able to speak with anyone from the chief justice to the cleaner and treat them with civility.'

A book about the shortfalls of some legal practitioners, perhaps? Not at all. This book is aimed at another species in the fish tank called the courtroom, the journalist. The author is Peter Gregory, chief court reporter for *The Age*. It is a text, a book directed to journalists and students of journalism.

Which is all the more reason why the book is of value to barristers. It is about the courtroom from a different view, for a different audience. Gregory doesn't preach. Each person in the courtroom has a job, and he explains his. Nor does he condescend. His newspaper may be doing a more highbrow job on a particular story; that doesn't mean that a tabloid, or a radio, or the television, can't be dictated by the realities of their different markets.

Gregory opens with the disarmingly simple proposition that courts are 'a public mechanism for controlling behaviour and resolving disputes.' The barrister is focused only on two things here, the controlling and the resolving. After all, the craft of the barrister is advocacy, his or her participation in those things. The journalist's focus is on the counterparts, the behaviour and the dispute, for these are the things which will first attract the public eye. The public, as Gregory says, is interested in a good story. And so murder trials, as Gregory admits, are the 'bread and butter' of the court reporter's job.

Indeed, Gregory is so fair-minded that I found myself asking at times, well, how *do* you excuse the fact that some journalists behave with appalling indifference to the consequences of their actions? But then I reminded myself that this is only a textbook, and that people have wallowed in the misery of others since the Book of Job.

The court reporter's greatest enemy is time. The book gives a good flavour of the tensions that can arise during a working day, for example when a competitor is missing from the courtroom? Where are they? What story are they on? The last chapter, headed 'An atypical Friday at court', tracks a hypothetical day in court for representatives from a daily tabloid and broadsheet, television and radio reporters from the ABC and the commercials, and a team from a wire service. Gregory asked colleagues from these backgrounds to help put together an hour-by-hour timeline. Those barristers who have from time to time ended up with too many Friday court mentions in too many courts will relate.

One difference between the barrister and the court reporter is that there is nothing between the barrister and their audience, while for the court reporter, there is the office. Gregory – with 23 years of experience behind him – may be a tad optimistic in telling prospective journalists to 'assume you are the only grown-up working for your organisation and try to help everyone else associated with your story'. Or maybe not. It is the journalist's byline, after all.

Is court reporting simplistic exploitation? It's certainly preferable to the alternative of no court reporting, and short of abolishing the general public or jailing the prurient, I'm not sure what's left. Gregory waves no magic wand. He merely stresses for his students that courtesy, diligence and respect can't be jettisoned for the deadline, rather, they are part and parcel of meeting it.

**Reviewed by David Ash**

*Park & Anor v Brothers* [2005] HCATrans 773
(27 September 2005)

**Gummow J:** I do not think the judge cracked.

**Mr Hughes:** He did not. I do not have to show that he cracked and, as one would expect, his Honour did not.

**Gummow J:** Yes, exactly.

**Mr Hughes:** But he said at page 215, line 5:

> That has absolutely nothing to do with it. I have the distinct impression you are seeking to waste the time of the Court.

Page 217, line 15:

> His Honour: This is ridiculous. I will not put up with this sort of cross-examination. It is a complete waste of time. If you would ask some relevant questions, you may go ahead. I want to make it perfectly plain, your Honours, that I am not making any criticism whatsoever of the somewhat stringent observations.

**Hayne J:** They might have been provoked just a little by the questions that preceded them:

> **Q.** What type of lambs were they?
> **A.** Four legged.
>
> **Q.** Designed for wool?

**Gleeson CJ:** I think they represent what I once heard you describe as "tentative asperity".

**Mr Hughes:** Yes. Perhaps it is a little more than tentative but even if it was only tentative...

# Jurisdiction in International Litigation

*By Mary Keyes*
*The Federation Press, 2005*

Dr Mary Keyes, Senior Lecturer in Law at Griffith University, Queensland, has written an excellent book on the Australian law relating to jurisdiction in (private) international litigation. Building, one suspects, on a doctoral thesis, the book contains a combination of theory and various proposals for reform with a detailed technical exposition of the law in this increasingly important area. With Sykes & Pryles' *Australian Private International Law* (1991) now hopelessly out of date, and Nygh and Davies' *Conflict of Laws in Australia* (2002) focussing on much more than jurisdiction, Dr Keyes' identification and analysis of recent Australian case law will be very useful for practitioners. (The discussion extends well beyond the significant brace of recent decisions by the High Court in this area.) So too, fresh insight may be gained from the way in which familiar material is conceptually organised. For example, there is a short but particularly useful discussion (at 63-67) in relation to the assertion of jurisdiction over corporations including the assertion of jurisdiction over a foreign parent carrying on business through a local subsidiary.

The technical discussion is largely contained in the chapters entitled 'Establishing jurisdiction in principle', 'Declining jurisdiction in principle' and 'Declining jurisdiction in practice' which together comprise almost half the book. One is reminded, in reading the first of these chapters, of the fact that the rules of the various Supreme courts (as well as the Federal Court) in relation to the bases for the assertion of jurisdiction over a foreign defendant are by no means uniform. Some care is required in drawing on interstate decisions. In the second of these chapters, Dr Keyes is critical of the 'looseness' of the Australian test for granting a stay of proceedings established in *Voth v Manildra Flour Mills Pty Ltd* (1991) 171 CLR 538 whereby proceedings will only be stayed if the Australian court is shown to be a 'clearly inappropriate forum'. She astutely observes (at 120) that:

'Personal and juridical advantages are capable of being manipulated by the plaintiff and reference to these advantages may be seen as a tacit approval of forum shopping. Although personal and juridical advantages must be 'legitimate' in order to be considered, the Australian cases provide no criteria to determine whether an advantage is legitimate.'

The chapter entitled 'Declining jurisdiction in practice' contains an empirical analysis of outcomes in jurisdictional disputes in Australia in the 10 year period from the landmark decision in *Voth*. One particularly interesting statistic is that, of the 24 cases decided which included a foreign exclusive jurisdiction clause, a stay of proceedings was only granted in slightly over 50 per cent of cases. Of the 71 cases considered containing no jurisdiction clause, a stay was granted and/or service was set aside/leave to proceed refused on the basis that the forum court was a 'clearly inappropriate forum' in just under 25 per cent of cases with no striking difference as between cases where the plaintiff was an individual as opposed to a corporation.

In various parts of the book, Dr Keyes advances a sustained criticism of the High Court's decision in *Akai Pty Limited v People's Insurance Co. Limited* (1996) 188 CLR 418, a case involving the interaction of a foreign exclusive jurisdiction and choice of law clause and a domestic statute (the Insurance Contracts Act) the operation of which was held by the majority to override the parties' contract as a mandatory law of the forum. Dr Keyes argues forcefully in support of the minority judgement of Dawson and McHugh JJ which gave primacy to the parties' contractual bargain. In an interesting footnote to this litigation, soon after the People's Insurance Company had failed in its attempt to have proceedings in New South Wales stayed by reason of the English exclusive jurisdiction clause, it obtained in both Singapore and England anti-suit injunctions restraining the continuation of the litigation in Australia, thus wholly undercutting the effect of the majority decision in the High Court.

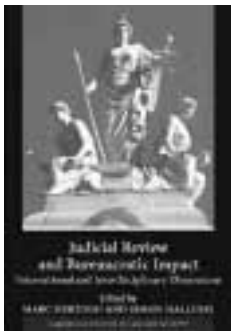
Where exclusive jurisdictions clauses are contained in contracts of adhesion, however (and unlike the *Akai* case), Dr Keyes advances the interesting argument that they should be regarded as functionally equivalent to an exclusion clause in a domestic contract and that, whilst such clauses do not in terms purport to exclude the liability of the business, this will almost invariably be their practical effect because it will not be practically possible or economically feasible for a typical consumer to litigate abroad. This interesting contention has not, thus far, been recognised in Australian case law and, in light of decisions such as *Toll (FCGT) Pty Limited v Alphapharm Pty Limited* (2004) 79 ALJR 129, it is unlikely to find favour in the near future.

The book is neither a text book nor a practitioner's work insofar as it does not simply set out in a structured way the law relating to the establishment and exercise of jurisdiction. That is not to say that any student, academic or practitioner interested in these topics will not find an illuminating discussion of them in the work. They will. In this, they are assisted by a very good index.

**Reviewed by Andrew Bell**

# Judicial Review and Bureaucratic Impact

*By Marc Hertogh and Simon Halliday (eds),*
*Cambridge University Press, 2004*



Judges and legal practitioners involved in judicial review of administrative action must often wonder what impact judicial review has on the bureaucracy, not only generally but also specifically in relation to individual cases. Where an administrative decision is remitted for reconsideration because of reviewable error, does the fresh decision involve a more favourable outcome for the affected individual? This is one of the primary issues which are explored in this book. It takes as its starting point, 'the awkward position of judicial review set as it is between high expectations and sometimes disappointing reality'.

The book is a collection of papers written primarily by legal academics and political scientists. It draws together international and interdisciplinary perspectives on the impact of judicial review. The relationship between judicial review and bureaucratic decision-making is explored in three separate Parts of the book. Part one deals with conceptual and methodological issues. It contains a stimulating article by Professor Peter Cane from the Australian National University on the topic 'Understanding judicial review and its impact'. By an analysis of models of judicial review of administrative action in England, the United States, India and Australia, Professor Cane highlights how those models differ in terms of the functions and objectives of judicial review. He places particular emphasis on the differences which have emerged between the English and Australian models, which are largely attributable to the fundamental importance in Australia of the constitutional separation of powers (a consideration which has been given particular emphasis in recent High Court decisions such as *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [72]-[77] per McHugh and Gummow JJ and *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59).

Part two will be of particular interest to sceptics who think that judicial review is frequently an exercise in futility even in cases where a reconsideration is ordered by the judicial review court. It contains of a series of case studies set in various countries examining the practical impact of judicial review. The experience in the United Kingdom, Canada, Israel and the United States is covered. Australian readers will also be particularly interested, however, in chapter six, which is entitled 'The operation of judicial review in Australia'. The chapter was written by Professor Robin Creyke and John McMillan (the current Commonwealth ombudsman, and formerly professor of law at the Australian National University). This chapter presents the findings of research conducted by the authors at the ANU. The research covered a 10-year period (1984 – 94) and focused on Commonwealth judicial review litigation which resulted in the Federal Court making a decision favourable to the applicant. Commonwealth agencies who had been involved in such litigation were asked to respond to three basic questions, namely :

a) was the applicant's case reconsidered in accordance with the order of the Federal Court?

b) if so, what was the final outcome?

c) was there any change in the law or in the agency's practice that flowed from the decision?

The survey produced a very high response rate from public agencies and the results are quite revealing. Not only were administrative decisions reconsidered in accordance with judicial rulings in virtually all cases, but those considerations resulted in a favourable outcome for the judicial review applicant in approximately 60 per cent of cases. Those figures certainly call into question any intuitive belief that judicial review frequently involves a pyrrhic victory even in those cases where reviewable error is established.

The survey is also significant in revealing the extent to which judicial review litigation often has an impact on law and government that extends far beyond the circumstances of an individual case. It emerged that individual cases often provide a catalyst for the instigation of specialist training for bureaucratic decision-makers or in the publication of revised instructions or guidelines on how the law is to be applied and decisions are to be made. In other instances, individual cases lead to legislative amendments. The authors conclude:

> Anecdotal belief has long held that successful judicial review action would most likely be followed by an agency remaking the same decision, though taking care to avoid the earlier legal error. That belief has now been disproved, at least in Australian judicial review in the period covered by this research project. If theories are built upon facts, then the value of judicial review in producing a favourable outcome to an applicant has been demonstrated. It was admittedly a minority of cases in which an applicant was successful at trial, yet the alternative interpretation of that fact is that applicants were mistaken in those cases in believing they were the victim of legal error. When their belief was more soundly based, judicial review was a promising mechanism for rectifying both the error and its impact.

Part three of the book deals with the future of judicial review and bureaucratic impact. Emphasis is given to the desirability of continuing and improving judicial impact studies and the importance of such studies being conduct within a broader academic framework than previously.

The book provides a stimulating contribution to an aspect of judicial review which hitherto has received scant attention in Australia and many overseas jurisdictions. The Australian-based material will be of particular interest, but the value of the book extends beyond that. Anyone interested in deeper issues concerning the role, functions and value of judicial review of executive administrative action will find plenty of stimulating and interesting material.

**Reviewed by John Griffiths SC**

# How Judges Sentence

*By Geraldine Mackenzie*
*The Federation Press, 2005*

Few events in the legal process seem to cause as much controversy as the sentencing of high profile offenders.

During the sentencing hearing judges and counsel know only too well the complicated steps involved. Competing interests have to be balanced in an attempt to reach a stage where 'all will come right if we all work together to the end' as Churchill once said. But how do we achieve that end?

To start with, it is not just a matter of working out figures.

In *R v Bezan*: (2004) 147 A Crim R 430 a decision of the New South Wales Court of Criminal Appeal the former chief judge at Common Law said that when dealing with the repeal of s16G of the *Crimes Act 1914* it was inappropriate in the sentencing exercise to use 'a broad arithmetic approach' or 'some bare arithmetic formula'. Hayne J in *AB v The Queen*: (1999) 198 CLR 111 was clear that sentencing an offender is not some 'mechanical or mathematical process'.

Exactly what approach to adopt still appears to be a matter of debate at the highest level.

Recently in *Markarian v The Queen* (2005) 79 ALJR 1048 McHugh J and Kirby J discussed the relative merits of the 'two-tier' approach and the 'instinctive synthesis' approach to sentencing. McHugh J at [51] described the two approaches in this way:

> By two-tier sentencing, I mean the method of sentencing by which a judge first determines a sentence by reference to the 'objective circumstances' of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused. This is the second tier. By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.

It seems fair to say that McHugh J favoured 'instinctive synthesis' and Kirby J the 'two-stage approach'. The fact that there were competing views is a matter of record. In 2002 Kirby J indicated that:

> In this court, there has been something of a controversy about whether it is appropriate, in sentencing, to proceed explicitly by way of a 'two-stage' approach or not.

A somewhat novel approach to the whole sentencing procedure has been taken by Professor Mackenzie in her book *How Judges Sentence*. Following a promise of anonymity the author conducted interviews with 31 judges of the Queensland Supreme and District courts about their experiences with sentencing. It is a process that could usefully be repeated in many of the other jurisdictions in Australia. The results of the authors work do indeed provide insights into sentencing practice and she sets out with a great deal of success to examine judicial perceptions, methodology and attitudes towards the sentencing process as seen through the eyes of these judges.

The book came out before the judgments in *Markarian* were published so obviously there is no reference to it. However the author does deal with the 'instinctive synthesis' approach and its origins apparently in Victoria in *Williscroft* (1975) VR 292 at 300 where the full court of the Supreme Court of Victoria said:

> Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process.

Interestingly enough the author tells us that a search of databases in Queensland in 2004 failed to locate any use of the term 'instinctive synthesis' in reported sentencing judgments. However, six of the judges she interviewed actually used terms reflecting such a view when they referred to either an intuitive or instinctive process that they follow, as in: 'In sentencing, there is room for an intuitive view. Sentencing is not solely science, art or intuition'.

Throughout the work we have some at times remarkably frank and revealing comments made by the various judges. For example, some judges were in favour of communicating themselves with the offender in court. They appear to see that as the court considering the sentencing and its impact on the offender.

Clearly there was a great deal of concern about the conditions and lack of rehabilitation generally in the prison system. Availability of illicit drugs and often unavailability of therapy for addicts were raised as well. The rising Queensland prison population was also referred to by a number of judges: it being described as '… something like the fastest rate of increased incarceration in western countries'.

In Queensland, the *Penalties and Sentences Act 1992* sets out the purposes of sentencing and is mirrored in legislation in many other jurisdictions. Some of the judges apparently did not see the purposes set out in the sentencing legislation as new or innovative. Some even described the purposes as obvious without the need for legislation and referred to them as 'motherhood statements'. This seemed to be criticism of an attempt to put well-known principles of sentencing in an overly formal way.

It is difficult to do some of the topics justice without going into detail but a few examples will give the flavour:

- Half a dozen judges were critical of the lack of evidence from the Crown when it was asserting that various offences were prevalent.

- Deterrence as a principle, and whether it only applied to geographical locations or certain groups, reveals some very careful thinking about the difficulties involved with such concepts.
- The judges seemed to be very frank about the fact that public opinion influenced sentencing albeit subconsciously.
- There was also some concern expressed about the difficulties raised by community involvement in sentencing, particularly the media and so-called law and order champions.
- Some judges saw a positive role for the media in disseminating information about sentences.
- Generally speaking, the judges tended to rely on submissions from counsel to settle the proper range of sentences.

This is a very interesting book and well worth reading, especially for the large number of quotes from the judges.

It struck me when I reached the end of Professor Mackenzie's work that there was an even bigger book in this. Interviewing everyone involved in the sentencing process, including the offenders and counsel would give us a pretty good idea if it really did come right in the end.

**Reviewed by Keith Chapple SC**

# International Sales Law: A Critical Analysis of CISG Jurisprudence

*By Larry DiMatteo, et al*
*Cambridge University Press, 2005*


The United Nations Convention on Contracts for International Sale of Goods (CISG) was adopted on 11 April 1980 and entered into force on 1 January 1988. As at February of this year, 64 countries had adopted the CISG as their international sales law. Within Australia, the convention has been implemented municipally by each of the states: see, for example, *Sale of Goods (Vienna Convention) Act 1986* (NSW). The *Trade Practices Act 1974* (Cth) also provides, in section 66A, that:

> The provisions of the United Nations Convention on contracts for the International Sale of Goods, adopted at Vienna, Austria, on 10 April 1980, prevail over the provisions of this Division to the extent of any inconsistency.

To date, state legislation enacting CISG has not given rise to much case law in Australia. Nor do the important provisions of this legislation attract much attention in leading Australian texts on contract law.

The broad approach of this book, written by predominantly American academic lawyers, is to track through the CISG (which is reproduced in an appendix), dealing, in turn, with writing requirements, offer and acceptance rules, obligations of buyers, obligations of sellers, common obligations of buyers and sellers, breach of contract by seller and buyer, damages, excuse and preservation. It draws together and analyses decisions from a range of jurisdictions with published arbitration awards involving the interpretation of the CISG. As such, it is an extremely valuable collection of multiple-jurisdictional material that may otherwise not be available or, at least, not available in distilled form to practitioners. (For those interested in the area, one important qualification to this statement is the Pace Law School web site (http:\\cisgw3.law.pace.edu\\cisg) which is a web site specialising in CISG jurisprudence.)

As with many international conventions, the language employed in many sections of the CISG is open ended, no doubt reflecting compromises necessary in the drafting of the convention to permit it to be brought to fruition. Such open ended language, however, opens up the possibility of varying interpretations which is anathema for a Convention which was adopted to promote uniformity and certainty in an important are of commercial law. The scope for varying interpretations is all the greater, of course, given the absence of an international court empowered authoritatively to pronounce on the meaning of the various articles of the convention. As one example, the authors observe (p.75) that:

> A review of CISG jurisprudence involving the battle of the forms scenario finds courts struggling to devise a unified framework for applying CISG rules. Most troubling is that courts seldom use cases from other contracting states.

On the other hand, the authors conclude that:

> CISG jurisprudence has done more good than harm in removing legal obstacles to international trade. It has helped to overcome what Franco Ferrari has called the problem of 'nationality of law'. Although it has not yet attained critical mass, CISG jurisprudence has grown significantly. As it has grown, greater uniformity of application has been evidenced.

The authors draw attention to the problem of 'homeward trend' viz. the demonstrated tendency of a forum court to favour its own, local principles as at least informing the text of an international convention. Recent decisions of Australian courts on other conventions such as the Warsaw Convention (see *Qantas Airways Ltd v Povey* (2005) 79 ALJR 1215) have emphasized the need for the internationalist interpretation of legislation which implements an international convention: see also the decision of the NSW Court of Appeal in *British American Tobacco (Investments) Limited v Eubanks for the United States of America* (2004) 60 NSWLR 483 dealing with the Evidence on Commission Act implementing the Hague Convention on that subject.

One of the reasons for a homeward trend, it may reasonably be surmised, is the perceived relative lack of availability in accessible form of the jurisprudence of other jurisdictions in relation to the convention. The current text goes a long way to overcoming that problem. Whilst not an annotated commentary on the convention, it provides an extremely useful survey of decisions in the area. It also contains an extremely detailed table of authorities and cases, secondary materials and arbitration decisions from a range of jurisdictions.

Aspects of the convention may surprise conventional contract lawyers. Thus, the convention has been interpreted in certain signatory countries as permitting evidence of the parties' subjective intent with regards to the contract in dispute, even in the absence of ambiguity. One of the most important provisions of the CISG is article 38 which provides that the buyer 'must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.' Article 39 provides that the buyer loses the right to rely on a lack of conformity of the goods if he or she does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he or she has discovered it or is or ought to have discovered it. These two articles provide classic examples of open ended language being used by the drafters of the CISG. The authors point out, by reference to case law gleaned from different jurisdictions, differences of approach in this area. In the context of determining "reasonable time" for sending a notice of non-conformity under article 39 of the convention, for example, the authors (at 164) draw attention to a Swiss decision where the court observed that:

> Whereas jurisdictions of the Germanic legal family demand an immediate notice …in Anglo-American and Dutch law the notification …of defect given several months after discovery of the defect is deemed to be within an appropriate time limit.

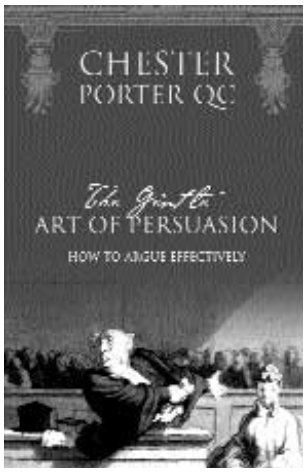
The Swiss court in that case adopted a medium time frame of one month as a compromise.

The primary value of this book to practitioners is its clear and systematic run through of the key provisions of the CISG together with an identification of the case law, an identification which, because of the nature of the beast, is not readily available elsewhere. In drawing attention to different interpretations of various provisions by different national courts, the text usefully highlights the substance of those competing interpretations. As noted above, it does so in the context of a general plea for a more internationalist approach by national courts interpreting the CISG, that is to say an approach which devotes more attention to decisions by other national courts on articles under consideration. The book will be very useful for those called upon to advise in relation to any dispute concerning the international sale of goods. That is scarcely an area which could be described as narrow in an era of liberalised trade.

**Reviewed by Andrew Bell**

# The Gentle Art of Persuasion: How to Argue Effectively

*By Chester Porter QC, Random House, 2005*




The only time I saw Chester Porter QC in action in court was during a special leave day in the High Court in Sydney. Porter's client had been found guilty of sexual assault. Porter began his argument by stating that the case was, 'one of the many of this type involving one person's word against another…but …'. Having cleared the decks of that major impediment to his cause, Porter successfully, and in a few short and clear sentences, obtained special leave on a day when getting to the full High Court seemed harder than finding ice in the Simpson Desert.

Porter's brief speech had obviously been carefully prepared, but was delivered with the mixture of humility, freshness and deadly aim many would be familiar with. Those qualities set him apart and, no doubt, justified his nickname 'The Smiling Funnel web', although rumour has it that a Perspex encased funnel web – a gift from a solicitor – sat on his chambers desk. What I saw that day was a fine example of what Porter calls the 'gentle' art of persuasion. The whole courtroom sat up and listened and Porter achieved his goal, it seemed, without any effort or bluster at all.

Advocates will find this a very useful book indeed. It is pitched at a more human and less technical level than many other advocacy texts. Some of the suggestions may seem obvious. For example: keeping language simple and clear. Yet it's always useful to be reminded to avoid calling a spade a 'handheld digging implement'. Many of the suggestions are very insightful and subtle:

- avoid the use of euphemisms, which are 'dangerous to use in serious efforts to persuade' and disliked by juries;
- play the trump card (if you have one) early in a speech or cross-examination lest it lose its force after negative material;
- after a victory ask yourself why you succeeded – don't reserve self-examination for failure alone;
- prepare the object and theme of a speech before writing it; and
- never talk down to a jury.

The book is not confined to advocacy. As the sub-title suggests, it considers the art of persuasion in the broader context of argument generally. Few could disagree with Porter's opening statements: 'Much of life is spent arguing … Most arguments are futile, a waste of time … Yet intelligent argument is often the only sensible way to advance our many causes, to spread knowledge and to achieve progress.' There are many tips that those who attend meetings or who are involved in business, politics and community organisations will find of value. The simple technique of allowing an opponent to talk herself out – 'to let the other party have his or her complete say' – obviously requires patience. But, as Porter points out this strategy is less likely to lead to confrontation and more likely to lead to persuasion because 'To persuade another, you must have regard to what he or she thinks.'

This being a book about argument, I cannot say that I agree with everything Porter writes. For example, his statement: 'One act of hatred leads to another, and this is especially so in many Green agitations for environmental causes. Confrontations, breaking the law and dangerous stunts usually only operate to swing public opinion against the cause advocated, and to strengthen the opposition.' The successful protests to save the Franklin River in the early nineteen-eighties and the more recent tree-sitting action in the Styx River Valley were not acts of hatred but involved aspects of civil disobedience that attracted wide public support and, ultimately, government support for the causes advocated. Still, it would be a dull book about argument if a reader agreed with everything in it.

**Reviewed by Christopher O'Donnell**

# The chief justices of New South Wales

**In recognition of the High Court's centenary year, the winter 2003 issue of *Bar News* carried clerihews of appointments through to its jubilee year, 1953.**

**The clerihew, readers will recall, is the creation of Edmund Clerihew Bentley, and is professedly biographical, with two couplets. It can be used to illustrate the paradox of humorous utilitarianism, as another author's efforts show: 'John Stuart Mill / By a mighty effort of will / Overcame his natural bonhomie / And wrote 'Principles of Political Economy'.'**

**It can also be used to trace this state's chief justices. More useful may be Dr Bennett's Portraits of the Chief Justices of New South Wales, 1977, Ferguson. A copy is in the Bar Library.**

James Jacob Spigelman,
Sir Thomas More's dragoman,
Whether the former finds for the latter's repentance,
May one day be found in a guideline sentence.

Anthony Murray Gleeson,
Dispatched reason,
Now further elevated, to chief of our chief Chapter III court,
He administers with authority, thus not as executor de son tort.

Laurence Whistler Street,
Well-suited to the family seat,
After giving much to that station,
Now finds force in mediation.

John Robert Kerr,
One must concur,
Gave with exuberance to the law of the state,
But gave to the nation a greater debate.

Leslie James Herron,
Thrived in the sportsman's cauldron,
A man of practical perspective,
He eschewed (in)judicious invective.

Herbert Vere Evatt,
Legal gigawatt,
Scholar, jurist, statesman in his time,
Sadly illness in this office found him past his prime.

Kenneth Whistler Street,
A feminist in Jessie did meet,
Here an expert in Pepys's bon mots,
There swapping with Jordan Latin notes.

Frederick Richard Jordan,
Law's wealth, a just warden,
In private, convivial, one of humour's lords,
In public, limited to a 'few well-frozen words'.

Philip Whistler Street
(The first Street the state's Bench did meet),
Kicked off a law student's state constitutional Eden,
By sitting a five-bencher in *Trethowan v Peden*.

William Portus Cullen,
Outside the law, returned for Camden,
As university chancellor, a record term for robes worn,
But, pertinent here, the first chief justice Australian-born.

Frederick Matthew Darley,
Originally Irish (and so with blarney?),
As the colony's administrator at federation,
He received Lord Hopetoun as governor-general of a nation.

Julian Emanuel Salomons,
Whose appointment caused palpitations,
One suspects prejudice on the question of race,
Whatever, he resigned without hearing a case.

James Martin,
Never Spartan,
In public life a pioneer,
Our only CJ and premier.

Alfred Stephen,
Not uneven,
An extraordinary ability to judge and to administrate,
With thirty-four years a judge of what now is our state.

James Dowling,
Has happified historians trawling,
He left cogent notes of his judicial thoughts,
Which now make a volume of law reports.

Francis Forbes,
A fortunate choice for the first in robes,
Independent, able, conscientious, and liberal,
An excellent mix for the chief justice, inaugural.

# Wentworth Wombats tour England

*By Andrew Bell*

At least they looked good – Wentworth Wombats at Keble College, Oxford

In early July 2005, a team of NSW barristers (with the occasional solicitor ring-in) embarked on an ambitious cricketing tour of England, determined to leave all in their wake and set a precedent for the national team in its then forthcoming Ashes defence. Unfortunately, it did.

The touring team, known only as the 'Wentworth Wombats', was led by Holmes QC, international arbitrator, Olympic judge and henceforth styled (affectionately) 'Captain Wombat'. The team ranged in age from 25 to 75. It was subsequently described by a member of the Australian Cricket Board as 'possibly the worst touring side ever to leave these shores'. Such criticism was harsh, especially given that the ACB member (Collins QC) was himself a Wombat. During the course of the tour, other descriptions were proffered, including the equally hurtful 'a team of arthritic garden gnomes'. Injuries of one kind or another were sustained by most Wombats on tour. As with the dramatic Ashes series, most of the matches were close. It is not inaccurate to say that the Wombats were undefeated until the final ball of the first match. Thereafter followed a series of close losses in Oxford and the Cotswolds, with a fortuitous draw at Hambledon, and a one-sided affair (trouncing) in Cambridge under the leadership of Griffiths QC at the college where he was once a don. *The* Don was required in all the circumstances. A declaration by the home side at 1 for 310 after 35 overs was sporting. By that stage of the tour, however, half of the team was injured and the other half had returned home or gone to Dublin.

The tour started brightly enough, however, with a match against a team of London barristers styled 'The Refreshers', under the leadership of London family law silk, Philip Cayford QC. With the score board showing 0-30 after three overs, confidence was high and the Wombats looked set for a flashing start to the tour. Unfortunately, the scoring rate slowed alarmingly. The ever Christian Poulos QC observed that 'Hodgson held up the middle order'. A total of 6-154 with 28 apiece from Bova and Bonnell (solicitor) assisted by a late burst from McLeod (36) looked competitive. By the time The Refreshers came into bat, however, the pitch had dried out and our opening bowler (Geoff Pike of Sparke Helmore with 260 first grade wickets to his name) was injured taking a short single before bowling a ball on tour, with the result that our total was overhauled in sufficient time to enjoy pre-dinner drinks for a good hour and a half. At the bowling crease, Sullivan (lacking any support from either of his dodgy knees) secured 2-9. These figures do not reflect the quality of his bowling.

The closest match on tour was against the Rhodes Scholars XI at Magdalen College Oval. By a stroke of good fortune, this match clashed with the 'Varsity Match', meaning that three of their team were unable to play. As one of those scored 263 in that match, this was probably a good thing. The Rhodes Scholars, sent into bat on a wicket that appeared to have been 'dropped in' from the subcontinent, scored 9-206 from their 35 overs. The Wombats came desperately close to this total, scoring 8-198 (Bova and Bunting (solicitor) 42 apiece, Bell 24, Sullivan 16, Bonnell 32). Hodgson did not play and thus cannot be blamed for the run rate. Mater's failing eyesight was the only explanation for an outrageous and possibly significant umpiring decision. Poulos was 'run out' for four but the description of his mode of dismissal should not be understood literally. P. Greenwood failed to contribute significantly with either bat or ball. On a brilliantly sunny day, however, the opposition bowler requested a sight screen *behind* the batsman and wore dark glasses when bowling to him.

The third tour match was against 'The Emeriti', a team of Oxford dons. This match, played at Christ Church ground, was played to a 20/20 format commencing at 6.00pm. The short form of the game did not suit the more traditional Wombats. Hodgson again held up the middle order. Mater grabbed two wickets and Holmes secured an unlikely LBW. Contributions at the crease were from Bell 26, McLeod 25 and Poulos 10 (again 'run out').

The town of Hambledon in Hampshire is widely regarded as the 'cradle of cricket'. Here, the Wombats took on a team of

Holmes QC and Hodgson

fellow tragics, known as the Broad Halfpenny Down Brigands XI. The Wombats won the toss and batted, reaching 9-182 with contributions from Collins 47 not out, Hodgson 31, Bonnell 22, Bell 18 and Poulos 9 (run out). In retrospect, the excellent lunch provided by our hosts was plainly designed to slow the Wombats down in the field. Their efforts were probably unnecessary. The injury list had grown and, although the match may have been won, a halt to play by rain with the Brigands at 3-130 permitted an early and welcome adjournment to the historic Bat and Ball Hotel.

Sir Peter Gross is an English High Court judge. He is also a cricket tragic and friend of Captain Wombat. Thus it was that the Wombats found themselves, in their penultimate match, playing on a 'flattish' paddock, freshly mown, in the village of Nether Westcote in the Cotswolds. The field was conspicuous for its clump of trees located at short fly slip and in relation to which a set of complex local rules had been developed. With a score of 158 off 35 overs (McLeod 33, Bell 23, Bova 18), the Wombats were competitive but, again, the tactic of an excellent afternoon tea with a barrel of beer from the local brewery ensured a tense finish. With 9 wickets down (with 5 for Bova) and an over to spare, the village scraped over the line. Magnanimity in defeat was required yet again! For most Wombats, however, results were a secondary consideration. It is not expected that many changes will be made for the next tour.

Collins QC at Hambledon

# Barristers' hockey 2005

*By Ed Muston*

The run on team (back row) Larkin, Anonymous Victorian (ring in), Anonymous Victorian (ring in), McManamey, Gunasan Narianasamy (ring in), Scotting, Pritchard (front row) Jordan, Son of anonymous Victorian (ring in), Rohan Geddes (ring in), Muston, Tim Pritchard, Mim Pritchard.

## NSW Barristers v Victorian Bench and Bar

Five years have now passed since the recommencement of the annual NSW Barristers v Victorian Bench and Bar hockey match. While the score in the now legendry revival game of 2000 has long since been forgotten (by everyone in NSW anyway), time has done little to erode the NSW Barristers' bittersweet memory of the reporting of that match in the subsequent edition of Victorian *Bar News*. And so it was that on the evening of Friday 21 October 2005, members of the NSW Bar hockey team found themselves touching down at Tullamarine, troubled by the absence of several experienced members of the 2000 team (stalwarts like Bellanto QC, Ireland QC, Callaghan SC and Katzmann SC) and with the words 'too old, too fat and too slow' (used by the Victorians to describe the team) still burning in their ears.

In the previous four encounters, the closest NSW had come to defeating the Victorians was a 2:2 draw at the Homebush Olympic Pitch in 2001. At noon on Saturday 22 October 2005, a quick headcount revealed that a total of only six NSW

barristers had survived the long journey to the Hawthorn-Malvern Hockey Centre to restore the honour of the NSW Bar. In these circumstances, the Victorian squad (which included a seemingly inexhaustible – in every sense of the word – supply of interchange players) may have been forgiven for thinking that they were safe for yet another year. However, to have leapt too quickly to this conclusion would have been to greatly underestimate the impenetrable defence of Scotting, the crafty midfield play of McManamey and Larkin and the highly unpredictable striking power of Muston, Pritchard and Jordan in the front line.

To have done so would also have ignored the 'ring in rule', exercisable by any touring team. This year Rohan Geddes donned the goalie's pads for the NSW Barristers. Rohan (a tax partner at PwC and former goalkeeper for Gordon's 6th grade team 'The Legal Eagles') no longer resides in NSW but is an outstanding goalie. He was quite literally all that stood between a respectable score line and something which more closely resembled Poulos QC's bowling figures on a bad day. At centre-half was Ganasan Narianasamy, a law clerk. Ganasan is another 'legal eagle' who was happy to join the touring party and cites as the highlight of his hockey career the day he was selected to represent Malaysia at the 1980 Olympics (the low point being the following day when Malaysia thoughtlessly announced that it would be boycotting the 1980 Olympics due to the Soviet invasion of Afghanistan). The NSW Bar's numbers were further buoyed by three Victorians (who played in balaclavas and have asked that their names not be published in any match report) and cameo appearances by both Mim (aged 6) and Tim (aged 4) Pritchard (who between them dragged the average age the players on the field down to about 45).

Despite the best efforts of all who turned out for the NSW Barristers, the Victorians ultimately managed to escape with a 3:1 victory and, as such, were the first team to raise the newly minted Rupert Balfe – Leycester Meares Cup. A most enjoyable celebratory dinner was held at Borsari's on Lygon St. following the game. That said, insofar as the celebrating was concerned it could be inferred from the grins, hats and sunburn (which adorned most of the passers by) that Makybe Diva's win in the Cox Plate that afternoon well and truly trumped the Victorians' victory in the hockey.


Pritchard lines up for a shot on goal.


Muston goads the Victorians with a bit of sledging

Thanks must be extended to the Victorians for organising the ground, the umpires and some excellent post match refreshments. Thanks also to Scotting, whose organisational efforts at the Sydney end made the game possible.

Finally, the NSW Barristers v NSW Solicitors game is due to be played on 27 November 2005. As the barristers have won that game comfortably for the past few years, it is hoped that their pride will be restored on that occasion – having more than six players who are practicing NSW barristers might even help (believe it or not).

# Arthur Leslie QC

The redoubtable Arthur Leslie QC recently celebrated 50 years at the Bar. Arthur was admitted to the Bar on 6 May 1955 and took silk in 1982.

He was one of the founding members of Ground Floor Wentworth Chambers when it opened in January 1977.

Arthur's gladiatorial approach to litigation has always been balanced by his passions for Scottish dancing, golf, flying light planes and Jaguar sports cars. He still makes the occasional appearance in the Court of Appeal and the Dust Diseases Tribunal, when otherwise not engaged in reducing his handicap at Leura Golf Course.

To have survived in the profession for so long and at such a high level is rare, let alone to have done it with such good humour and irreverence.

**Ian Bailey SC and Grant Carolan**

# River to the Sea Paddle

I would like to take this opportunity to thank all the barristers that kindly donated to the 'River to Sea Paddle' charity event. I completed the paddle on 8 October 2005. It took me three hours instead of two due to the weather conditions. Professor Pam Russell from the Oncology Research Centre was there to welcome us. We are pleased to let her know that we raised $16,000 for her research. I couldn't have done it without the great generosity of the New South Wales Bar.

Thank you all so much.

**Paul Daley**

# Verbatim

*Antoun v The Queen* [2005] HCATRANS 823

**Kirby J:** Of course the Bench is made up of a myriad of different personalities and people have different ways of expressing themselves and some are more circumlocutious and longwinded than others. Others are given to more direct expression.

**Mr Byrne:** Certainly.

**Kirby J:** I think you would agree that the silent judge is the greatest menace of all.

**Gleeson CJ:** One of the greatest.

*CSR Ltd & Anor v Eddy as Administrator Representing the Estate of Thompson* [2005] HCATrans 390

**Callinan J:** Mr Jackson, it is really a question of where you draw the line in a sense, is it not? If I am injured and I have to employ a coach to coach my grandchild in cricket, and assume I am doing that now, if the principle is good, it would be good for that. I could pay for Greg Chappell – give Greg Chappell $40 an hour to provide the service, no doubt much better than I would, but provide the service - - -

**Mr Jackson:** You may need to hurry before he goes to India, your Honour, but leaving that - - -

# Coombs on cuisine

### In the matter of Fish

Of the three Doyles fish restaurants I like the one at the Fish Markets the best. Watson's Bay is a tourist trap with too many tables and ordinary seafood platters. The Quay is better with lovely views but expensive for what it is. At the markets everything is super fresh, well cooked and interesting.

Three of us went recently and shared salt and pepper squid (lovely with beer) octopus in chilli prawn sauce (an Alice Doyle speciality, sweet tender and not too bitey) and an avocado and seafood salad with prawns, an oyster and smoked salmon with a tangy mayonnaise. If you go alone, just have this, it is great for a warm day.

Then we shared whiting fillets, fried with chips. After the entrees, the serve was plenty for three. The fish was very lightly battered, juicy and tender. There were too many chips even for three!

Fisherman's Lager and a glass or two of Montana sauvingnon blanc made this a memorable meal.

The Coffs Harbour Whole Snapper which I have had several times is a show stopper. It comes golden crisp and crunchy upright as if swimming on the plate. They also do a seafood crepe which has a mornay of lobster, white fish and an oyster or two wrapped in it. Yum.

### Value near home

The South Curl Curl Winter Swimmers, a motley crew of men and women who share a love of cold salt water, meet for lunch every month. Usually eight or so of the group (about 30 in all) turn up.



The venue is the Harbord Beach Hotel (known to the locals as the Harbord Hilton) where everyone has the 'Tradesman's lunch'. To have it you have to pay cash and sit in the public bar not the restaurant areas. The meal is a good meat pie with mash, plenty of peas, good brown gravy with tomato and Worcestershire sauces provided. To that add a schooner of beer of your choice and a mystery trifecta ticket on whatever is the next race anywhere (Dapto Dogs, Albion Park trots, a surprise). The lot for $6.00.

**Doyles Fish Markets Bistro**
Sydney Fish Markets
Ph: (02) 9552 4339 (no bookings)
Cards: MasterCard, Visa, Bankcard
No Amex or Diners

**Harbord Beach Hotel**
Moore Street, Harbord
Ph: (02) 9905 3434
Cards accepted in the restaurant
Tradesman's lunch must be ordered by 12:40

**John Coombs QC**