THE JOURNAL OF THE NSW BAR ASSOCIATION | SUMMER 2006/2007

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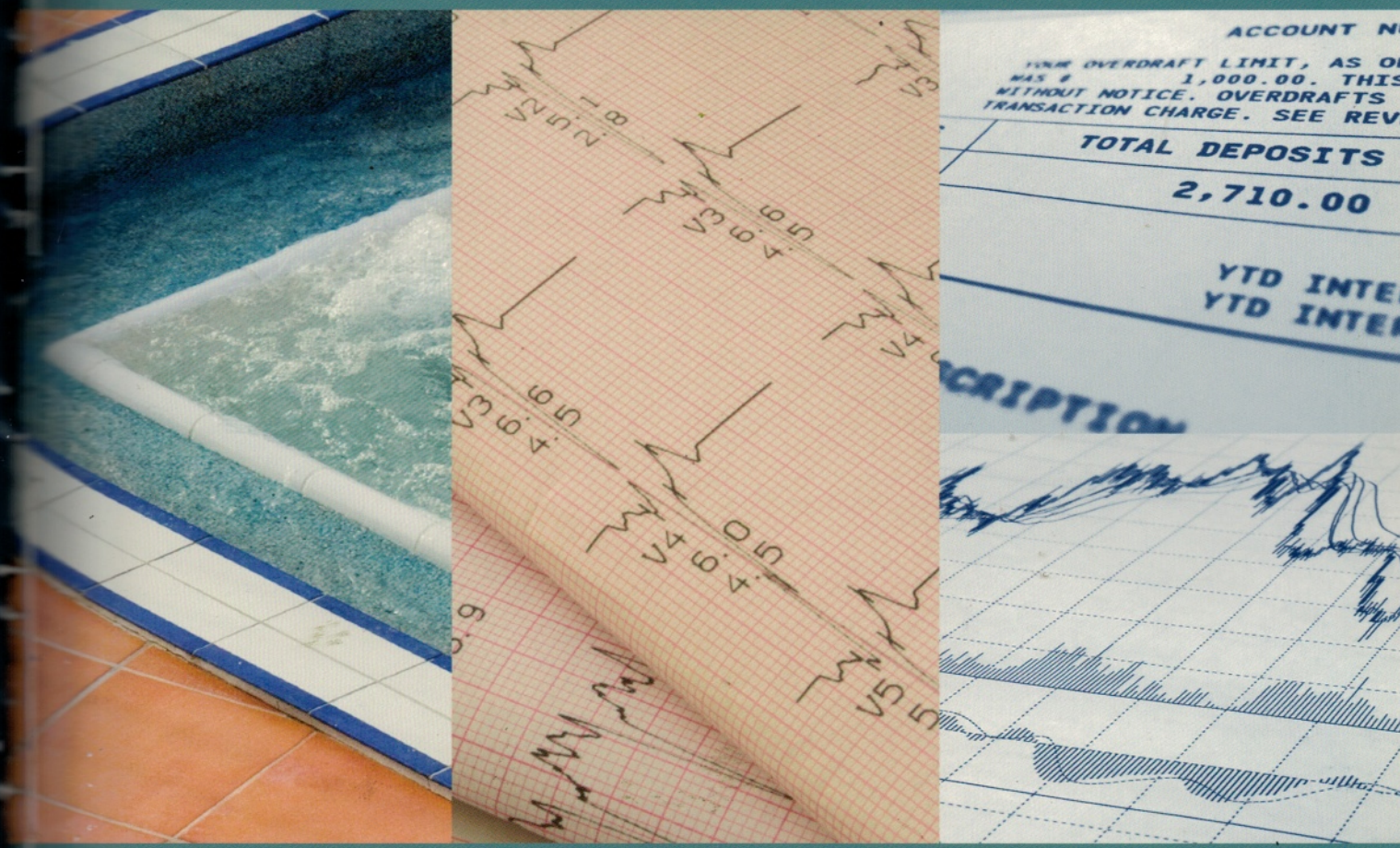

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EDITOR'S NOTE

As another busy year draws to an end, there is in the air a spirit of change and anticipation. Shortly before going to press, the appointment of the crown advocate, Richard Cogswell SC to the District Court, and of Ian Harrison SC to the Common Law Division of the Supreme Court of New South Wales were announced, to take effect from February 2007. (Whilst the wisdom of the appointments is not in doubt, the wisdom of giving Harrison almost three months to prepare his swearing in speech may be doubted – but it will guarantee a packed Banco Court on 12 February 2007.) Harrison is to replace that model of judicial propriety and integrity, Mr Justice Sully, who has served on the Bench since 1989. Justice Handley also reaches the statutory retirement age early in the New Year, after 16 years of unbroken service on the Court of Appeal. The launch of his Honour's most recent extra-judicial publication, *Estoppel by Conduct and Election*, is covered in this issue of *Bar News*, and his Honour's actual retirement from the Bench will be more fully noted in the next issue of *Bar News*.

At the time of writing, rumours also abound as to the imminent retirements of a number of other long-serving and distinguished judges of the Supreme Court, with corresponding rumours as to potential replacements. Phillip Street rumours are, of course, notoriously reliable!

If there is to be a rash of appointments to the Bench, those appointments will not be affected by but may promote the swirling debate as to the desirability or otherwise of a judicial appointments commission, a topic raised by Justice McColl in her paper reproduced in the last issue of *Bar News*. In his opinion piece in this issue, Arthur Moses brings this debate forward by reference to the detailed paper by Dr Evans and Professor Williams entitled *Appointing Australian Judges: A New Model*.

Coupled with the possibility of significant personnel changes in the judiciary is the impending retirement of the Hon Bob Debus MLA as attorney general. Mr Debus has held that position since 2000 and has, in the opinion of many, been a very fine attorney general. He has worked closely with a series of Bar Association presidents as well as the Bar Council Executive over that time, has spoken regularly on behalf of the Bar at swearings-in, and has been a regular and willing contributor to *Bar News*. His speech to the Bench and Bar Dinner in 2002 will be long remembered. His successor, from whatever side of politics following next year's state election, will have large shoes to fill. (Followers of New South Wales politics will also enjoy David Ash's most recent foray into the world of the clerihew.)

The current issue of *Bar News* focuses on the role of expert evidence in a suite of articles which, it is hoped, readers will find of immense interest and assistance. There are papers by Justice Branson of the Federal Court, Henry Ergas, the prominent economic commentator and a regular witness in Part IV TPA cases, together with detailed papers by Hugh Stowe, Liz Cheeseman and Gregory Nell SC. An enormous amount of work and effort has gone into these papers and *Bar News* records its appreciation to each of the authors for their contributions.

Apart from containing valuable analyses, a number of the papers, particularly those by Henry Ergas and Hugh Stowe, are designed to and will stimulate debate as to, in the one case, the role of economic evidence in court proceedings and, in the other case, the complex ethical questions concerning the legitimate and permissible extent to which barristers can and should be involved in the preparation of expert reports. In this regard, there is a degree of tension between the importance of the expert maintaining his or her independence – one of the cardinal concerns of the various expert Codes of Conduct, usefully surveyed by Alexandra Bartlett and analysed by Liz Cheeseman – and the need, in the client's interest, for any expert report to comply with the strict requirements associated with the decision of Heydon JA (as he then was) in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705. In this context, readers will benefit enormously from Gregory Nell's analysis of that decision and the contrast drawn with a number of decisions of the Federal Court and, in particular, that of Justice Branson as a member of the full court in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55IPR 354. Her Honour's own contribution to this issue, being a paper presented to the Inaugural Australian Women Lawyers' Conference in September 2006 (separately noted in this issue by Catherine Parry), gives an invaluable and practical insight to practitioners of what is expected by the Bench in terms of the presentation of expert evidence.

It is hoped that the publication of the various articles on and relating to expert evidence will provoke discussion and debate on these topics. Ideally, that debate would continue in the pages of *Bar News* and contributions in the form of opinion pieces and/or letters to the editor are encouraged.

Finally, I wish to thank all of the members of the *Bar News* committee and, particularly, Chris Winslow, of the Bar Association, for their invaluable assistance in the production of two excellent issues of *Bar News* in 2006. As with Bar Council and all committees of the Bar Association, members of the *Bar News* committee devote considerable time and energy to the production of *Bar News* in the interests of and for the benefit of all members of the Bar Association. Their work is gratefully acknowledged.

Andrew Bell

Administrative independence for New South Wales courts

By Michael Slattery QC

In September this year Bar Council resolved to raise for public discussion the question whether the Supreme Court of New South Wales and the other courts of this state should have greater financial and management independence from the executive[1] . Full administrative independence for our courts from the executive is not an essential precondition for judicial independence but it is increasingly recognised as both aiding judicial independence and as supporting public confidence in the judiciary.

Bar Council has not yet adopted a formal position on the question for several reasons. There are many available statutory models for New South Wales courts to achieve greater financial and management independence. Important questions must be decided such as which courts and which resources should be independently administered. The judiciary, the executive and the legislature, not the Bar, must ultimately settle upon what might be the right model for this state. Nevertheless the Bar is uniquely placed to raise this important question. The times call for it to be examined.

The executive government in New South Wales decides upon and then parliament appropriates the total funds which will be allocated to the Supreme Court and each of the other state courts to enable them to administer their respective functions. The executive also controls how the budgets of all state courts will be expended. Although there is consultation with the judges, through the Attorney General's Department, the executive in effect has control of items such as court staff numbers, staff salaries, information technology, library resources and various utility services. The question now raised by the Bar for discussion is whether the executive or the courts should determine how monies appropriated by parliament to the courts will be spent.

Providing a statutory basis for independent court administration does not mean that the courts would be free of any requirement to account for their operations. The parliament appropriates the funds and the courts will still be answerable to the parliament for their expenditure. Under many statutory models of independent court administration the parliamentary appropriation for the courts is sometimes rather inaptly described as a 'single line budget', as though the parliament only appropriates the global amount of the budget and leaves the details to the courts. The reality of these models is that a parliamentary appropriation only occurs after the courts provide their own detailed cost estimates to the parliament, usually after negotiation with the executive. Importantly though, once the appropriation is approved by parliament, expenditure is managed by the court.

Commonwealth and state models

A generation ago Commonwealth legislators pioneered structures for independent court administration. *The High Court of Australia Act 1979 (Cth)* removed administrative and financial responsibility for the High Court from the federal Attorney-General's Department to the court itself. Later the *Courts and Tribunals Administration Amendment Act 1989* (Cth) transferred the administrative and financial management of the Federal Court, the Family Court and the Administrative Appeals Tribunal to each of them. Federal courts administer their own affairs and receive and expend their parliamentary appropriations, subject to the scrutiny of the auditor-general and annual reporting to parliament.

With only one exception, the judiciary in all states of Australia work with court budgeting arrangements similar to those now used in New South Wales. Under the *Courts Administration Act 1993* (SA) South Australia created a comprehensive Courts Administration Authority, independent of the executive, controlled by the chief justice and the chief judges of the state's other courts. The Courts Administration Authority is responsible for estimating and allocating the appropriations among the Supreme Court and the inferior courts of that state.

At least three recent events now lead the Bar to call for debate about the introduction of independent court administration in New South Wales. These events all suggest an immediate need to promote ideas that will aid judicial independence. Self-managed judicial administration is such an idea. The first event is the intensification of public attacks upon the judiciary, both inside and outside state parliament, this year. The second is the continuation of relentless pressure on state courts' financial resources. The third is the recent conferring of statutory jurisdiction on the Supreme Court to review various forms of executive detention under legislation like the *Anti-Terrorism Act (2005)* and the *Crimes (Serious Sex Offenders) Act 2006*. The second of these events needs further examination.

Court economies

The financial economies now being expected of the Supreme and District courts are such that acceptable standards of civil and criminal justice are difficult to maintain. Two examples of this will suffice. In December 2000 the then president of the Bar Association, Ruth McColl SC, declared in *Bar Brief*:

> *At least three recent events now lead the Bar to call for debate about the introduction of independent court administration in New South Wales.*

> The situation concerning the availability of daily transcripts in the District Court is reaching crisis point. Virtually no civil case has a daily transcript. Recently a two week case was completed with no daily transcript available. This is not unusual.

The president then pointed out that when the District Court was earlier given extended jurisdiction the then attorney general had said that transcription services would be increased. Six years later and despite continuing protests from the District Court and the Bar Association, though improved the situation with transcripts is still a problem.

Public commentators in this state would no doubt be astonished to know that despite improvements in the District Court it is still possible to be convicted and sentenced to a substantial term of imprisonment without the accused even having the benefit of a same day transcript of the evidence at the trial. In every other jurisdiction in Australia daily transcripts are provided in District/County Court criminal trials as a matter of course. It is also possible for civil litigation involving claims for serious personal injury to be conducted in the District Court without a daily transcript.

It is unthinkable that the Cabinet Office or the committees of the New South Wales Parliament would conduct any of their business on the basis that they did not have a daily record of what was being transacted. Nevertheless it is expected that the state's legal system should serve the people of New South Wales without these fundamental resources. It is the people of this state who suffer the most from this under-resourcing of our system of justice.

Failing adequately to fund the administration of justice in this state not only threatens the quality of justice, it also imposes hardship directly on members of the community. Since September this year the Bar Association has been calling on government and the opposition to act on the September 1986 Report of the New South Wales Law Reform Commission which, under Keith Mason QC (as he then was) recommended that jurors in criminal and civil trials in New South Wales be paid at least average weekly earnings. Failure to pay average weekly earnings to jurors in longer trials excludes many people from serving on juries and makes juries increasingly unrepresentative of the community, thereby diminishing the quality of justice. It also imposes financial hardship on the jurors who serve and upon the many small businesses which are expected to subsidise the jury system by making up inadequate jurors' pay.

One of the arguments against change to the present system of court funding and management is that independent court administration cannot of itself provide sufficient funds to operate our courts. Whilst that is true, the courts themselves are best placed to decide where greater efficiencies can be introduced without sacrificing the quality of justice. Open negotiations make it more difficult for the executive to deny resources that the judges say are necessary to maintain acceptable standards in the administration of justice. There is also perhaps a danger that overseeing an independent court administration may distract senior judges from their principal judicial duties. Provided the judges are given sufficient support to manage their own budgets this should not be a problem. The Federal and South Australian legislation both appear to work without difficulties of this kind.

The United States experience

The first working model of an independent courts administration was created in the United States of America with the passage by Congress of the *Administrative Office Act of 1939*. The Act established the Administrative Office and had the effect of transferred financial control of the Supreme Court and other federal courts from the Department of Justice to this agency operating under the supervision and direction of the Federal Judicial Conference. The Administrative Office Act was passed in circumstances that are presently instructive for New South Wales. It was widely perceived by the mid-1930s that the US attorney-general's power over judicial administration was resulting in chronic tensions and frustrations with judges, who were complaining of difficulties in communicating with the attorney-general regarding basic needs. This was exacerbated by the effects of great depression. In the background was a perceived need to strengthen the position of the judiciary against increasing executive power, caused at that time by rising international tensions. The matter came to a head in 1937 when President Franklin D Roosevelt moved to pack the Supreme Court, by proposing legislation to appoint additional federal judges. The *Administrative Office Act 1939* was promoted by the American Bar Association in the interests of the US federal judiciary. It largely resolved the tensions and has worked well ever since.

A proposal

This issue now presents a very significant policy opportunity to any political party wishing to show support for the independence of the state's judiciary. State legislators could offer to consult with the state's judiciary on this question after the March 2007 election, should the judiciary wish to engage on it. A report on the question could then be given to parliament six months after the election. The taking of these simple steps should markedly improve the outlook for the administration of justice in this state.

[1] On behalf of the Bar I wish to thank Justin Gleeson SC and Tiffany Wong of Banco Chambers who have researched this question for Bar Council. An article written by Gleeson SC on the subject will be published in the December 2006 edition of the *Australian Law Journal* (2006) 80 ALJ 862.

The status of David Hicks

By Dina Yehia

Introduction

The laws of war have developed over centuries in an effort to place constraints on warring parties and to regulate the treatment of victims and prisoners of war. Traditionally the concept of war was largely restricted to a dispute between nation states and the application of the laws of war was clearly defined. Nation states declared war on each other, soldiers wore uniforms and fighting was conducted by soldiers bearing arms openly. International humanitarian law evolved into a set of rules that are said to regulate this institutionalised form of violence that we call war.

In more recent times, however, the United States administration has moved to include a new concept into the definition of 'war'. The 'War on Terror' is used by the administration not simply as a rhetorical term, but to justify a different response to the 'enemy'. The application of established rules of international law is called into question. The administration argues that this 'new' type of warfare calls for new measures; the rules of international humanitarian law are not relevant to this new type of enemy.

After the bombing of the World Trade Centre on 11 September 2001, the United States Congress authorised the US president to use all necessary force against those responsible for the attacks. Not only did President Bush commence operations in Afghanistan, he also issued a military order that certain people be detained and tried by United States military commissions.

The following paper will endeavour to assess the legality and fairness of the US military commission system.

Laws of war

Throughout history, whenever states and peoples have taken up arms, they have affirmed that they were doing so for a just cause. The enemy was accused of serving an unjust cause. Defeat was sufficient proof of guilt and the conquered could be massacred or enslaved.[1] 'Holy wars', 'crusades', 'just wars' have all demonstrated that those who were loudest in proclaiming the sanctity of their cause were often the perpetrators of the worst excesses. The horrors of war are not limited to the wars of a bygone era. The ideological crusades of the twentieth century - the Russian Civil War, the Spanish Civil War, the First and Second World wars - all demonstrate the horrors and suffering caused by war.

That war seems to be an inevitable facet of human relations is born out by history. However, history also tells us that numerous civilisations have attempted to impose limits on violence and create means by which to regulate the conduct of war. For centuries the limitation on violence took the form of customary rules, generally inspired by religion, which were respected by peoples sharing the same cultural backgrounds and worshiping the same gods.[2] These rules were often cast aside, however, when war involved enemies from different cultural and religious backgrounds.

In order to deal with discriminatory application of rules of war, the development of international law came to be rooted in positive law - that is, in the practice and will of sovereigns and states. Positive law opened the way to recognition of rules of universal scope, capable of transcending the divisions between cultures and religions.[3]

In this courtroom illustration, David Hicks sits at center as US Marine Corps Major Michael Mori (standing) puts his hand on Hicks' shoulder before a military commission at Guantanamo US Naval Base 25 August 2004, in Guantanamo, Cuba. Hicks's father Terry and stepmother Bev are seated at far left. Pool Art / Lein / AAP Image.

The emergence of nation states permitted the adoption of rules designed to regulate the conduct during war. Warfare was the prerogative of kings. States fought through the intermediary of their armed forces, easily recognisable in their colourful uniforms. Civilians took no part in the fighting and combatants who were wounded or surrendered were spared. States agreed not to use treacherous methods and to prohibit the use of certain weapons such as dum dum bullets and poisoned weapons.[4]

These rules were gradually codified, particularly in the Geneva Conventions of 1864, 1906, 1929 and 1949, and in the 1868 Declaration of St Petersburg and the Hague Conventions of 1899 and 1907. These international instruments set out rules relating to the conduct of hostilities, including the methods and means of warfare. They also deal with the protection of non-combatants and set out the rights of those detained as prisoners of war.

A prisoner of war is defined in Article 4 of the Third Geneva Convention in the following terms:

1. Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organised resistance movements belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:
   (a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognisable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognised by the detaining power.

A prisoner of war cannot be prosecuted for conduct coming within the accepted norms of warfare, that is, for engaging in hostilities. They must be released at the cessation of hostilities. If a person is not given combatant status he may be tried for having committed a belligerent act. Where this criminal offence may be punished by capital punishment under the domestic jurisdiction, the lack of prisoner of war status may be a matter of life or death.

If a prisoner of war is alleged to have committed a war crime or a crime against humanity, then he is entitled to be tried in accordance with the Third Geneva Convention. A prisoner of war can only be tried by a regularly constituted tribunal that gives full and fair hearings and that is impartial.[5]

With the advent of the 'War on Terror', the Bush administration set up a structure of military commissions to deal with individuals detained as 'unlawful enemy combatants'. The original military commission system has now been superseded by the system mandated by the *Military Commission Act 2006*. However, in assessing whether such a system provides for a lawful or fair trial it is important to consider the history of the military commission system since 2001.

The fundamental criticism of the procedure under the military commission system [prior to the 2006 Act] was that the process was not impartial and/or independent in that under its structure the United States military is captor, gaoler, prosecutor, defender, judge of the fact, judge of the law and sentencer with no appeal to an impartial and independent judicial body. Such a system did away with essential systems of checks and balances and was simply unchecked rule by the executive branch.[6]

In answering the question of whether the military commission system, past and present, provides for a lawful or fair trial, one has to look at international law.

International humanitarian law is the international law of armed conflict. It is enlivened if there is a connection between the conduct of an individual and a state of armed conflict. The armed conflict can be international or internal in nature. An armed conflict is international if it takes place between two or more states. An internal armed conflict breaking out on the territory of one state may become international if another state intervenes in that conflict through its troops or if some of the participants in the internal armed conflict act on behalf of that other state.[7]

Internal armed conflict can be defined as an armed conflict that takes place in the territory of a state and which does not qualify as an international armed conflict. It is a protracted armed conflict between government authorities and organised armed groups. It does not include unorganised, short-lived insurrections. If an individual, who satisfies the criteria set in Article 4 of the Third Geneva Convention, engages in hostilities during an armed conflict, whether internal or international in character, then international humanitarian law applies. Whether such a nexus exists is a matter of fact to be judged on a case-by-case basis.

The war waged by the United States led coalition in Afghanistan following the September 11 attacks is an example of an armed conflict. The 1949 Geneva Conventions and the rules of customary international law were fully applicable to that international armed conflict. It involved the United States led coalition, on the one side, and Afghanistan, on the other side. Afghanistan was a party to the relevant convention.

A necessary prerequisite for the activation of international humanitarian law was therefore in existence at the time the allegations arose against a number of detainees held in Guantanamo Bay, including David Hicks. However, the existence of an armed conflict is not sufficient to argue that international humanitarian law applies to these cases. In assessing the fairness or legality of the military commission system it is helpful to look at the case against David Hicks by way of case study.

The case against Hicks

The charge sheet against David Hicks alleges that he first became involved in military training with the Kosovo Liberation Army in about May 1999. In the months after, he returned to Australia and converted to Islam. In about November 1999 he travelled to Pakistan where, in early 2000, he joined an organisation called Lashkar e Tayyiba (LET) otherwise known as the 'Army of the Righteous'. The organisation was known to engage in attacks against property and nationals of India and other countries in order to seize control of Indian held Kashmir.

It is alleged that Hicks trained for two months at the organisation's Mosqua Aqsa Camp in Pakistan. His training is said to have included weapons familiarisation and firing, map reading and land navigation and troop movements. In about January 2001 Hicks, with funding and a letter of introduction provided by Laskar e Tayyiba, travelled to Afghanistan to attend al Qaeda training camps.

Hicks is charged with wilfully and knowingly joining a criminal enterprise with other members of al Qaeda to attack civilians, destroy property and commit acts of terrorism. The overt acts relied upon by the United States can be summarised as follows:

It is notable that the only overt act alleged against him in terms of conduct on the battle field appears to be the fact that he, with others, was guarding a Taliban tank for some days.

- Hicks attended an eight week al Qaeda training course outside Qandahar;
- In about April 2001 he attended a seven week guerrilla warfare training course;
- Hicks met with Osama bin Laden during this training course and agreed to translate training camp materials from Arabic to English;
- In about June 2001 Hicks attended al Qaeda's urban tactics training course at Tarnak Farm;
- In about August 2001 Hicks participated in an advanced al Qaeda course on information collection and surveillance in an apartment in Kabul. It is further alleged that he conducted surveillance of various targets including United States and British embassies;
- After the September 11 attacks on the United States, Hicks was assigned to a group of al Qaeda fighters near Qandahar Airport. He was armed with an AK-47, ammunition and grenades;
- In about October 2001, after Coalition bombing operations commenced, Hicks joined an armed group outside the airport where they guarded a Taliban tank;
- After guarding the tank for approximately one week, Hicks travelled to Konduz, Afghanistan, where he joined others, including John Walker Lindh, who had been engaged in combat against Coalition forces.

At this stage, none of these allegations have been tested or challenged in any court proceedings. We are therefore uncertain as to the factual basis for these allegations and as to the credibility and reliability of the evidence upon which the allegations are based. However, for the purpose of this paper, let us assume that Hicks did train with al Qaeda and that he was ready and willing to engage in combat against Coalition forces.

It is notable that the only overt act alleged against him in terms of conduct on the battle field appears to be the fact that he, with others, was guarding a Taliban tank for some days. Whether or not this fact is sufficient to draw an inference as to the relationship or connection between the Taliban and al Qaeda members is difficult to say. However, it is sufficient to raise questions as to what other evidence there may be to establish that some members of al Qaeda may well have been acting as militia or volunteer corps forming part of the armed forces of the Taliban.

During the war in Afghanistan the United States captured a considerable number of soldiers of the Taliban and members of al Qaeda. Questions immediately arose as to their legal status and as to the protections to which they might be entitled under international humanitarian law. One of the most pressing questions was whether these detainees had a legal right to take part in hostilities or whether they were illegal combatants who could be prosecuted and punished for offences under national law.

President Bush determined the answer to these questions as announced by the White House press secretary on 7 February 2002:

US Supreme Court.

1 The 1949 Geneva Convention concerning the treatment of prisoners of war, to which both Afghanistan and the United States are parties, applies to the armed conflict in Afghanistan between the Taliban and the United States;

2 The same convention does not apply to the armed conflict in Afghanistan and elsewhere between al Qaeda and the United States;

3 Neither captured Taliban personnel nor captured al Qaeda personnel are entitled to prisoner of war status under the convention; and

4 Nevertheless, all captured Taliban and al Qaeda personnel are to be treated humanely, consistent with the general principles of the convention, and delegates of the International Committee of the Red Cross may visit privately each detainee.[8]

It is difficult to understand the decision that all Taliban soldiers lack entitlement to prisoner of war status. The explanation given by the White House Press Secretary was in the following terms:

> Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: they would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead they have provided support to the unlawful terrorist objectives of the al Qaeda.[9]

This explanation ignores provision 1 of Article 4. The Taliban soldiers were members of the armed forces of a party to the conflict. It is only with respect to the second category of prisoners of war under Article 4 that the four conditions referred to by the press secretary come into play.

Whether Hicks, if a member of al Qaeda, is entitled to prisoner of war status will depend on evidence as to whether al Qaeda personnel were incorporated in Taliban military units as part of the Taliban armed forces. The answer to that question cannot simply be settled by an executive decision that all detainees are unlawful combatants.

It is possible that some members of al Qaeda could be considered as fighting for Afghanistan or as militias or volunteer corps forming part of the armed forces and may therefore have been affiliated to Afghanistan's armed forces.[10] More facts need to be made available regarding the relationship between the Taliban and al Qaeda. Did they receive financial aid from the Taliban? To what extent were their operations known to the Taliban? Did the Taliban have overall effective control of al Qaeda operations?[11]

The position of the United States is in conflict with the generally accepted principles of international humanitarian law. The official commentary to the Geneva Conventions posits that there is a 'general principle which is embodied in all of the four Geneva Conventions', namely that during an armed conflict or military occupation:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Geneva Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Geneva Convention. There is no 'intermediate status'; nobody in enemy hands can be outside the law.[12]

The question of categorisation of detainees, including Hicks, must be referred to a 'competent tribunal' in order that individual status determinations can be made. This procedure is mandated by Article 5 of the Third Geneva Convention:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.

In the case of *Salim Ahmed Hamdan v Donald H Rumsfeld* (D.D.C No 04-1519) (8 November 2004) Judge Robertson granted in part Hamdan's petition for a writ of habeas corpus. Among other things the court held that Hamdan could not be tried by a military commission unless a competent tribunal determined that he was not a prisoner of war under the 1949 Geneva Convention. The court therefore enjoined the secretary of defense from conducting any further military commission proceedings against Hamdan.

Hamdan had appeared before the Combatant Status Review Tribunal, which had determined that he did not have prisoner of war status. However, the court held that that CSRT was not established to address detainee's status under the Geneva Conventions. It was established to comply with the Supreme Court's mandate in the case of *Hamdi ET AL v Rumsfeld, Secretary of Defence*, United States Supreme Court (No 03-6696) (June 28 2004), to decide 'whether the detainee is properly detained as an enemy combatant' for the purposes of continued detention.

The court held that the president is not a 'tribunal'. It further held that the 'government must convene a competent tribunal and seek a specific determination as to Hamdan's status under the Geneva Conventions. Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war' [at p19].

Judge Robertson also considered the United States administration's attempt to separate the conflict between the Unites States and the Taliban on one hand from the conflict between the United States and al Qaeda forces in Afghanistan. In relation to this issue his Honour stated: 'The government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the conventions themselves, which are triggered by the place of the conflict, and not by the particular faction a fighter is associated with' [at p15].

This decision was appealed to the United States Court of Appeals. The decision of first instance was reversed. In *Hamdan v Rumsfeld*, United States Court of Appeals (No 04-5359) (July 15 2005) the court held that the military commission is a 'competent tribunal' for the purpose of Article 5. The court also held that there was no reason why Hamdan could not assert his claim to prisoner of war status before the military commission at the time of his trial and thereby receive judgment of a 'competent tribunal'.

This reasoning seems to miss the point somewhat. Hamdan's status must be determined before any decision to prosecute him. If he is determined to have prisoner of war status, he cannot be stand trial for conduct arising out of engagement in hostilities.

The Court of Appeal decision was the subject of appeal to the Supreme Court. [The decision will be discussed below.] The conflicting reasoning and conclusion in the litigation thus far reflects the complexity of the issues involved. Such complexity cannot simply be put to rest by way of executive declaration.

Even if an individual does not qualify for prisoner of war status under the Third Geneva Convention, he would still enjoy some degree of protection under the Geneva system. In particular, captured enemy combatants who do not qualify for prisoner of war status would generally still qualify as 'protected persons' under the Fourth Geneva Convention. The category of 'protected persons' under that convention includes not only persons not taking part in hostilities but also so called 'unprivileged belligerents', that is, individuals engaging in belligerent acts but who are determined by a competent tribunal

The conflicting reasoning and conclusion in the litigation thus far reflects the complexity of the issues involved. Such complexity cannot simply be put to rest by way of executive declaration.

not to be entitled to prisoner of war status under Article 4. The main consequence of the denial of that status is that such individuals do not enjoy 'combatant privilege' and may be prosecuted for engaging in combat. On the other hand, nationals of the adverse party, as 'protected persons' would enjoy certain protections under the Fourth Geneva Convention.[13]

Accordingly, those individuals who were captured and do not qualify for prisoner of war status under Article 4 and are nationals of a state with which the detaining power has normal diplomatic relations, are arguably not protected under the Fourth Geneva Convention. However, such individuals would be protected by the 'minimum yardstick' of fair and humane treatment contained in Article 3 common to the Geneva Conventions.[14]

'any such individual receives a full and fair trial before a military commission'. It is interesting to note that these United States citizens were not made subject to trial before military commissions.

There were a number of deficiencies both in the structure and the procedures of the military commission system.

(a) Rules of evidence

The Military Commission Order provided that evidence shall be admitted 'if in the opinion of the presiding officer (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), the evidence would have probative value to a reasonable person'

Contrary to the view that human rights law does not apply during armed conflict, it is a well-established principle that armed conflict does not justify the suspension of fundamental human rights guarantees.

Quite apart from the question of the applicability of international humanitarian law, the fundamental rights of individuals in the position of David Hicks are protected by international human rights law. The United States denies that human rights law applies in times of armed conflict and has reiterated that position with regard to the detainees at Guantanamo Bay.[15]

Contrary to the view that human rights law does not apply during armed conflict, it is a well-established principle that armed conflict does not justify the suspension of fundamental human rights guarantees. This principle, affirmed by the International Court of Justice in the Nuclear Weapons Advisory Opinion in 1996[16], was restated in 2004 in the following terms:

> The protection offered by human rights conventions does not cease in the case of armed conflict, save through the effect of provisions of derogation of the kind found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both branches of the law.[17]

If David Hicks was determined by a competent tribunal not to have prisoner of war status, he does not fall into a legal black hole. Principles of international human rights law apply. These principles include a right to a speedy trial, a right to a fair trial and a right to an impartial appeal procedure. The military commission system does not guarantee these fundamental rights.

The military commission system

On 21 March 2002 the United States secretary of defense signed a Military Commission Order No1. That order established procedures for the trials before military commissions. The purpose of the implementation of the procedures was said to be to ensure that

The rule is deficient in a number of respects. First, it lacks specificity and provides no guidance on how questions of admissibility are to be resolved. Only the presiding officer has legal qualifications. The other members have no such qualifications or legal experience. This raises the potential for fundamental unfairness, particularly when issues as important as the admissibility of confessions and identification evidence arise.

Secondly, a ruling by the presiding officer on admissibility of evidence can be effectively over-turned by a vote of the majority of the commission.[18] The question arises as to whether the non-qualified members will have the confidence to overturn a decision by an experienced military judge. Conversely, a ruling to exclude evidence by an experienced legal officer on the basis of the prejudice to an accused could be overturned by non-qualified members.

Thirdly, there is provision for the taking of evidence despite the absence of a witness and the inability to challenge the account by way of cross-examination. So, for example, information given to interrogators against David Hicks could be admitted, notwithstanding the fact that the accuser is not present to give evidence. An account of what the witness said to the interrogator could be read to the commission. Any challenge to the reliability of the material or the voluntariness with which it was obtained cannot be made. This creates a 'palpable unfairness'.[19]

(b) Presence of accused

Aspects of the Military Commission Order No1 entitled the presiding officer or the appointing authority to exclude an accused from hearing or being aware of particular information given against him. Hicks, for instance, has already been excluded from portions of evidence during a voir dire hearing in August 2004.

In the decision of the District Court of Columbia in *Hamdan*, Judge Roberston concluded that in this respect the military commission process was fatally contrary to, or inconsistent with, the procedures of

the Uniform Code Of Military Justice. The unfairness of this procedure was strongly pointed out by his Honour:

> A tribunal set up to try, possibly convict, and punish a person accused of crime that is configured in advance to permit the introduction of evidence and the testimony of witnesses out of the presence of the accused is indeed substantively different from a regularly convened court-martial. If such a tribunal is not a regularly constituted court affording all of the judicial guarantees that are recognised as indispensable by civilised peoples, it is violative of Common Article 3. That is a question on which I have determined to abstain. In the meantime, however, I cannot stretch the meaning of the military commission's rule enough to find it consistent with the UCMJ's right to be present. A provision that permits the exclusion of the accused from his trial for reasons other than his disruptive behaviour or his voluntary absence is indeed directly contrary to the UCMJ's right to be present. I must accordingly find on the basis of the statute that, so long as it operates under such a rule, the military commission cannot try Hamdan.

As noted above, this decision was reversed on appeal. However, the reasoning of Judge Roberston clearly raises the unfairness fundamental to such a rule. This unfairness was not addressed in the Appeal Court.

The appeal process

The military commission system prior to 2006, did not allow for review by a court independent of the executive branch of government. Review of the commission's proceedings was limited to a specially created review panel appointed by the secretary of defense. No appeal was permitted to the United States federal courts or the United States Court of Appeals for the Armed Forces, a civilian court independent of the executive. The president had final review of commission convictions and sentences.

The standard of review was narrow in scope: the panel must disregard procedural errors that would not have 'materially affected the outcome of the trial'. Moreover, the rules required that the panel issue its ruling within 30 days of the receipt of the case. This gave defence counsel insufficient time to prepare an appeal.

This process does not represent any form of genuine appeal. This problem is further exacerbated because the particular personnel involved demonstrated a lack of independence of the process.[20]

(d) Gag orders on defence counsel

The commission rules contained various provisions that prevent defence counsel from speaking publicly about their cases or commission proceedings. These provisions are not limited to protected or classified information.

Military Commission Instruction No4(5)(C) prohibited defence counsel - both military and civilian - from making statements about military commission cases or other matters relating to the commissions to the media unless they have received approval from the appointing authority or the general counsel of the secretary of defense.

Outside of concerns relating to classified information or suppression orders to prevent prejudicing a jury, it appears that the purpose of the gag rule was to control what the public may learn and understand about commission proceedings. Such a purpose is inconsistent with the right of the public to know what its government is doing and serves to deprive an accused of the protections afforded by public scrutiny.[21]

These factors are but some of the matters which raised real concern as to the fairness of the military commission system. Some of the structural and procedural features of the commission process were inconsistent with the rights and protections afforded by international human rights law. Indeed, in his first report on the commission process, Lex Lasry QC concluded 'my preliminary view is that a fair trial for David Hicks is virtually impossible'.[22]

His opinion did not change in his second report to the Law Council of Australia. The second report detailed the developments since August 2004 in the United States with respect to the military commission system. Lasry concludes the second report by expressing the view that 'in many respects the circumstances faced by David Hicks at Guantanamo Bay are worse than they were in August 2004'.[23]

Hamdan v Rumsfeld, US Supreme Court, 29 June 2006

In June 2006 a majority of the United States Supreme Court held that the military commission convened to try Mr Hamdan 'lacked power to proceed because its structure and procedures violate both the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.' [at p1]

During hostilities in Afghanistan in 2001, militia forces captured the petitioner, Hamdan, a Yemeni national. He was then turned over to the US military. In 2002 he was transported to Guantanamo Bay. Over a year later, President Bush deemed Hamdan eligible for trial by military commission. After another year he was charged with conspiracy 'to commit offences triable by military commission'.

Hamdan argued that the military commission lacks authority to try him because neither the Congressional Act nor the common law of war supports trial by such commission for conspiracy, an offence he argued that is not a violation of the law of wars. Furthermore, he argued that the procedures adopted to try him were in violation of basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

In deciding that the military commission system violates the UCMJ and the Geneva Conventions, the court pointed to some of the procedures as set out in Commission Order No1. The majority judgment was critical of the fact that an accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during any part of the proceeding that the official who appointed the commission decides to 'close'.

Another feature of the military commission, noted by the court to be 'striking' is that the rules governing Hamdan's commission allow the admission of any evidence that, in the presiding officer's opinion, would have probative value to a reasonable person. Moreover, the accused and his civilian counsel may be denied access to classified and other 'protected information' so long as the presiding officer concludes that the evidence is 'probative' and that its admission

without the accused's knowledge would not result in the denial of a full and fair trial [at pp 49-52].

The Appeals Court had agreed with the government's argument that the Geneva Conventions did not apply because Hamdan was captured during the war with al Qaeda, which is not a signatory to the Convention, and that the conflict was distinct from the war with the signatory, Afghanistan.

The majority in the Supreme Court were of the view that they did not need to decide the merits of this argument because there is one provision of the Geneva Conventions that applies even if the relevant conflict is not between the signatories. The court held that Common Article 3, which appears in all four conventions, provides that, in 'a conflict not of international character occurring in the territory of one of the high contracting parties each party to the conflict shall be bound to apply, as a minimum, certain provisions protecting persons... placed hors de *combat by detention*, including a prohibition on the passing of sentences without previous judgment...by a regularly constituted court affording all the judicial guarantees...recognised as indispensable by civilised people' [at pp 65-68].

Common Article 3 affords some protection, therefore, to individuals associated with neither a signatory nor even a no signatory who are involved in a conflict 'in the territory of a signatory'.

The court also held that while Common Article 3 does not define the term 'regularly constituted court', the phrase is taken to mean an 'ordinary military court' that is 'established and organised in accordance with the laws and procedures already in force in a country' [at pp 65-68].

The question as to whether the offence of 'conspiracy' was a recognised violation of the law of war was also given consideration by the various members of the court. However, the judgments in relation to this issue are outside the scope of this paper.

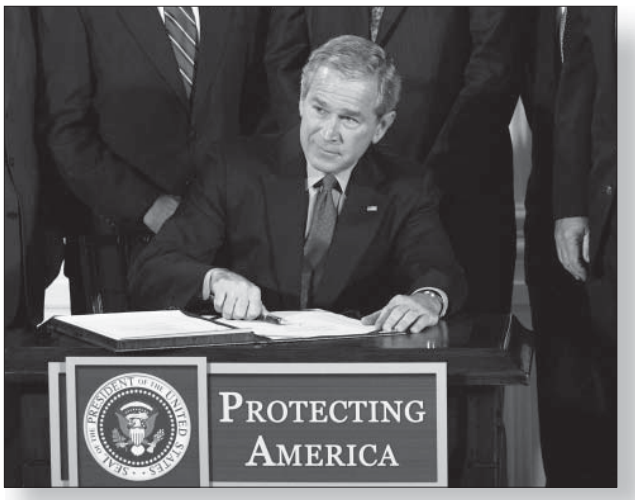
In arriving at its decision, the majority proceeded on the basis that the various allegations against Hamdan could be established:

> Even assuming that Hamdan is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment [at p 72].

The Military Commission Act 2006

On 27 September 2006 the US House of Representatives passed the *Military Commission Act 2006* ['The Act']. On 28 September 2006 the Act was passed by the Senate. On 17 October 2006 the Act was signed by President Bush. The Act was drafted in the wake of the decision in *Hamdan v Rumsfield*. The legislation is an attempt by the US administration to overcome the impediment created by the decision with the backing of Congress.

The Acts stated purpose is to 'facilitate bringing to justice terrorists and other unlawful enemy combatants through full and fair trials by military commissions, and other purposes'.[24] The question therefore arises as to whether the system of military commission set up under the Act differs from that previously in place to the extent that it provides for lawful and fair trials?



President Bush after signing the Military Commissions Act 2006 on Tuesday, 17 October 2006. Photo: AAP Image / Charles Dharapak

The new commissions differ from the old commissions in two respects: the new commissions' rules provide that defendants cannot be convicted based on evidence that they cannot see or rebut, and that defendants can appeal all convictions to a civilian appellate court.

However, it appears that the *Military Commissions Act 2006* contains some of the same troubling provisions included in the old rules and perhaps goes further in entrenching unfair and unlawful concepts.

It should be noted at the outset that the Act only applies to non-citizens or 'aliens': s948c of title 10 United States Code. Section 948a of title 10 of the United States Code, as added by the Act, defines an 'unlawful enemy combatant' as:

- a person who is engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- a person who, before, on, or after the date of the enactment of the *Military Commissions Act 2006*, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the president or the secretary of defense.

The criteria by which the Combatant Status Review Tribunal might determine someone to be an unlawful enemy combatant are provided by the *Detainee Treatment Act 2005*. Detainees may testify before the tribunal, call witnesses and introduce other evidence.[25] The unfairness here is that, in effect, it is the executive that determines who is an 'enemy combatant'.

The Act changes pre-existing law to explicitly disallow the invocation of the Geneva Convention when executing a writ of habeas corpus or in other civil actions: 'No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Convention as a source of rights.' [Section 948b (g)]

This provision applies to all cases pending at the time the Act is enacted, as well as to all future cases. In effect, the provision seeks to override international legal principles as developed over centuries. This law prohibits an unlawful enemy combatant from raising claims under the Geneva Conventions in lawsuits against the United States. If this law had been in place previously, Hamdan would have been prevented from bringing an important claim in his case that the commissions as set up by President Bush violated the fair trial requirements of Common Article 3 of the Geneva Conventions.[26]

This provision demonstrates the fundamental unfairness of the Act in that it prevents a basic challenge previously available. The unfairness of the Act is not limited to the express denial to unlawful enemy combatants of rights under the Geneva Conventions. The unfairness extends to various specific procedural provisions.

While excluding evidence obtained through torture, the Act permits the use of evidence obtained through abusive interrogation techniques if the admission of the evidence is found to be in the 'interests of justice'. The Act allows any interrogation method that is less severe than 'serious physical pain or suffering'. The Military Commission Act purports to make torture an offence:

> 'Any person subject to this chapter who commits an act intended to inflict severe or serious physical or mental pain or suffering... upon another within his custody or control shall be punished...
>
> The term 'serious physical pain or suffering' means bodily injury that involves:
>
> (i) a substantial risk of death;
>
> (ii) extreme physical pain;
>
> (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or
>
> (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty'.

As long as the interrogation methods are not assessed as falling into the exceptions defined as 'serious physical pain or suffering', evidence obtained during such interrogations is arguably admissible.

The admission of such evidence has the potential to introduce material of a highly unreliable nature by means that have previously been considered illegal. Both our system of justice and that of the United States have traditionally expounded principles to guard against the unfairness caused by the admission of evidence obtained by the use of violent or oppressive interrogation methods. That tradition has been informed by the acceptance that such means invariably lead to false confessions or unreliable witness accounts.

The Act reduces the standards previously applied to the admission of evidence of this kind. It thereby allows for the admission of evidence that may be highly suspect and fundamentally unreliable.

While the Act purports to change the rules in relation to the admission of evidence not seen or tested by the accused, it does not succeed in providing a more fair or just system. The rules continue to allow for hearsay material as long as it is deemed 'reliable' and 'probative'. The burden falls on the accused to establish the evidence is not reliable or probative. This burden is unfairly placed upon an accused who has limited discovery rights.

As long as the interrogation methods are not assessed as falling into the exceptions defined as 'serious physical pain or suffering', evidence obtained during such interrogations is arguably admissible.

The Act continues to allow for the reception of evidence based on second or third hand hearsay provided by way of summaries of witnesses accounts provided to interrogators. In such circumstances an accused is refused the opportunity of confronting their accuser and effectively testing the account put forward. Such a system removes fundamental protections for an accused.

The unlikelihood that the present military commission system will provide fair and lawful trials is also evidenced by the continued limits placed on discovery rights by an accused. The use of classified evidence makes it extremely difficult for an accused to obtain material that may, for instance, establish the illegality of evidence. How can an accused make an argument for the exclusion of evidence obtained by illegal means (ie torture) if he/she does not have access to material relating to interrogation methods?

Another feature of the legislation that highlights unfairness is the process of appealing interlocutory orders. Section 950d relates to interlocutory appeals and allows the United States to take an interlocutory appeal to the Court of Military Commission Review. From the point of the United States, if there is an unfavourable decision excluding evidence, on closure of proceedings, exclusion of the accused, or protection of classified information, the military judge knows his/her decision may be appealed immediately.

In contrast, the Court of Military Commission Review is only permitted to hear appeals from an accused of a final decision. The difference in approach creates a disequilibrium and structural pressure on the military judge to make decisions favourable to the government

Conclusion

While terrorist movements can engage in violent attacks, they cannot destroy a democratic state founded on the rule of law. Destruction of such a state happens from within when it starts to supplant well-established legal principles, rights and protections, with unilateral executive declarations.

The decision in *Hamdan v Rumsfield* provided, albeit briefly, hope that our institutions could withstand the difficult challenge presented by the threat of terrorism. The decision restored the fundamental importance of the rule of law. Principles relating to the right to a fair trial, even in cases of unpopular accused, were restored.

The *Military Commission Act 2006* takes us back to a system that lends legitimacy to practices and procedures that are fundamentally opposed to a fair trial. As for David Hicks and others like him, the issue as to their status under international law is circumvented under this legislation and their rights under the Geneva Conventions swept away.

If the Act stands, Hicks and others in his position, face the prospect of trials where there will be limited disclosure of material potentially probative in the defence case; presentation of evidence by way of second or third hand hearsay in circumstances that prevent effective cross-examination and challenge; the admission of accounts procured by interrogation methods short of 'serious physical pain or suffering' (with the potential for significant unreliability that such methods may produce); and where independence and impartiality is compromised as a result of the overarching role the executive, primarily the secretary of defense, would play in the procedures and the appointments of military judges to sit on the commissions.

These features of the Act leave little prospect that the trials under such a system will be either lawful or fair. Whether the legislation is successfully challenged is a question still to be determined. In the meantime, we are left to ponder, with some alarm, the way in which fundamental protections for accused persons are discarded in the name of national security.

[1] F Bugnion 'Just Wars, Wars of Aggression and International Humanitarian Law' *International Review of the Red Cross*, September 2002, No 847, Volume 84 pp 523-546.

[2] ibid.,p5.

[3] ibid.

[4] ibid.

[5] Lex Lasry QC *United States v David Mathew Hicks: First Report of the Independent Legal Observer for the Law Council Of Australia*, September 2004 at para 47.

[6] American Bar Association, Report of the *Task Force on the Treatment of Enemy Combatants*, August 2003 at p2.

[7] K Kittichaisaree, *International Criminal Law*, Oxford University Press, 2002, p135.

[8] Press release, 'Status of Detainees at Guantanamo', 7 February 2002, in G H Aldrich 'The Taliban, al Qaeda and the Determination of Illegal Combatants', (2002) *Humanitares Volkerrecht* No 4/2002 at p 203.

[9] ibid.

[10] A McDonald 'Defining The War On Terror and the Status of the Detainees' International Review of the Red Cross, 31 October 2002, p206.

[11] ibid.

[12] O Uhler and H Coursier, 'Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary', Geneva 1950, Commentary to Article 4 p 51.

[13] S Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the War On Terror', International Review of the Red Cross, Volume 87 Number 857, March 2005, p51.

[14] Nicaragua v United States of America, ICJ Reports 1986, p114, para 218.

[15] Additional response of the United States to Request for Precautionary Measures on Behalf of Detainees at Guantanamo Bay, 15 July 2002, supra note 14, p52.

[16] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996(1), p240 paragraph 25.

[17] Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004 paragraph 106.

[18] L Lasry QC, First Report of the Independent Legal Observer for the Law Council Of Australia, September 2004, para 28.

[19] L Lasry QC, Report of the Independent Legal Observer for the Law Council of Australia, July 2005, paragraph 73.

[20] Supra note 19 para 40.

[21] J Ross, 'US Military Commissions and International Law', International Commission of Jurists, Geneva 26-28 January 2004.

[22] Supra note 19 paragraph 93.

[23] Supra note 20 paragraph 76.

[24] Military Commission Act 2006, accessed http://thomas.loc.gov/cgibin/bdquery/2?d109:S.3930: September 22, 2006.

[25] Deartment of Defense, Memorandum on the Order Establishing Combatant Status Review Tribunals, http://www.defenselink.mil/

[26] Military Commissions, accessed http://hrw.org/backgrounder/usa/qna1006/4.htm

Appointment of Australian judges

The debate continues but will change ever happen?

By Arthur R Moses

In her address to the Anglo-Australasian Society of Lawyers on 3 May 2006, the Hon Justice Ruth McColl AO considered recent changes in the United Kingdom to the process by which judges are appointed there and called for an examination of whether a judicial appointments process 'similar to that adopted in the United Kingdom can be adopted in Australia'.[1] Her Honour commended the English reforms and called for an appointment process that is transparent and accountable and which is able to accommodate diversity.[2]

A recent analysis of the English model was presented in a paper by Dr Evans and Professor Williams, 'Appointing Australian Judges: A New Model' to the Tenth Colloquim of the Judicial Conference of Australia in October 2006.[3] Those authors also argue for a new approach to the appointment of judicial officers in Australia, at state and federal levels, and propose reform along the lines of the English system introduced under the *Constitution Reform Act 2005* (UK).

In summary, Evans and Williams recommend a process which out-sources the selection process for Australian judges to independent state and federal commissions. Such commissions would be responsible for the selection process (including identifying the necessary competencies) and ultimately recommending to the relevant state or federal attorney-general three suitable candidates from whom the attorney general is to make the final appointment.[4]

As with the English model, the Evans and Williams model would require Australian commissions to apply three overriding principles in the selection process. First, selection would be solely based on merit. Secondly, a person would not be selected unless they are of good character. Thirdly, in performing its functions, the commission would have to have 'regard to the need to encourage diversity in the range of persons available for selection for appointments'.[5]

The need for reform in the appointment process arises out of a perceived need to change the face of the judiciary to reflect the community from which the judiciary is drawn. As has been argued, a judiciary which is not representative of the community from which it is drawn will ultimately lose public confidence in it.[6] The question then, is whether the proposed reforms can deliver a competent and diverse judiciary.

Clearly the community wants capable judges. The community expects that the best candidate for judicial office will be appointed when a vacancy arises. Merit must be the underpinning factor. But we also want judges to be reflective of the community. How can these two concepts realistically co-exist? As Justice McColl pointed out in her address, merit can be used as a means of ensuring that those who are appointed simply reflect established notions of what a judge looks and sounds like.[7] In other words, there is a risk that the notion of getting the best person for the job means looking for qualities which draw from traditional notions of what makes a good judge, such as a successful and well regarded practice at the Bar. Traditional notions of what makes a good judge may of themselves restrict the type of candidate who is being put forward, as for example, women and ethnic groups are not well represented in traditional legal practice.

Both the English model and the model proposed by Evans and Williams, seek to draw the merit and diversity principles together in a hopeful manner. The Australian model proposes deconstruction of the merit concept by charging the commissions to 'disaggregate the concept of merit into its constituent elements and ensure that recommendations for appointments [are] made on the basis of evidence that demonstrate[d] the candidate's possession of those constituent elements'.[8] The underlying concept is a transparent process where applicants are assessed against well defined criteria.[9] At the same time, the diversity principle looks to the achievement of diversity by a process which involves the commission actively targeting under-represented groups and encouraging them to apply to become judicial officers.[10] This would be achieved via numerous outreach programs.[11] In other words, the aim of diversity is sought to be achieved by widening the range of applicants who are available for selection.

This is a commendable long term approach. One has to question its immediate usefulness in the face of systemic and cultural impediments which for example, prevent the retention/promotion of women graduates in the profession and impede or hinder ethnic minorities from entering the profession in the first place.

The model proposed by Evans and Williams introduces no real process by which to address the existing imbalances and under-representation. Addressing gender and ethnic imbalance requires more than opening up the range of candidates for selection, when the range itself is very limited to begin with. There must be a recognition that unless a more radical approach is taken, change at best will be in the long term and dependent on a wide range of factors which extend beyond the immediate control of a selection process. If true change is to be achieved, it may well involve the application of diversity as specific criteria for selection or the use of a quota system[12], approaches which understandably are expressly rejected in these models.[13] What is needed is an analysis to assess how such mechanisms could be introduced alongside a merit based appointment system. It is clear that true change will also involve significant cultural change.[14]

Ultimately, whether or not there is any change rests with the executive.

Federal governments of both political persuasions have been reluctant for any fetters to be placed on the sole discretion of the executive to appoint judges. An attempt to set up a commission for the appointment of Federal Court and Family Court judges in 1994 by former federal attorney-general Michael Lavarch in the Keating government was rejected by the cabinet[15]. The current federal attorney-general, Philip Ruddock, has already said that the Evans and Williams model is unnecessary because the current system is working, and in his view, provides public accountability.[16]

It seems clear that the executive (regardless of the political party in power) will not readily give up an unfettered discretion to appoint judges.[17] It can only be assumed that the executive will be even more reluctant to make changes which are

necessary to redress the imbalance in a more immediate manner. Nevertheless, it is imperative that these more radical approaches be investigated. If there is to be significant change, then all options should be properly explored and evaluated by the Australian Law Reform Commission and the NSW Law Reform Commission so that an informed decision may be made.

[1] McColl JA, 'Women in the Law', Address to the Anglo-Australasian Society of Lawyers, delivered in Sydney on 3 May 2006, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mccoll030506 at p6.

[2] ibid., p3.

[3] Evans, S & Williams, J., 'Appointing Australian Judges: A New Model', Judicial Conference of Australia Colloquium, 7-9 October 2006, http://www.jac.asn.au/pubs/coll10.html

[4] ibid., pp4-5.

[5] ibid., at p21.

[6] ibid., p9.

[7] McColl JA, op.cit., pp4-6 and generally.

[8] Evans & Williams, op.cit., p5.

[9] ibid., p5, pp21-22.

[10] ibid., pp22-23.

[11] ibid., p23.

[12] The writer does not agree with a quota system but does support the application of diversity as a specific criterion for selection.

[13] Evans & Williams, op.cit.,p22.

[14] McCol JA, op.cit, p6.

[15] Lavarch, M, 'Judicious Section Needed', *The Australian Financial Review*, Friday 20 October 2006, p59.

[16] Priest, M, 'Ruddock to Condemn Elitist Judges', *The Australian Financial Review*, Friday 27 October 2006, p27.

[17] Although it is to be noted that Nicola Roxan MP, Shadow Federal Attorney-General has expressed her personal support for the general thrust of the Evans & Williams model: see Roxan, N, 'Comment on Proposal for Judicial Appointments Commission', Judicial Conference of Australia Colloquim, 7-9 October, 2006, http://www.jca.asn.au/pubs/coll10.html .

Criminal law developments

R v Thomas [2006] VSCA 165 (18 August 2006)
Jabbour v Thomas [2006] FMCA 1286 (27 August 2006)

After his apprehension at Karachi Airport on 4 January 2003 Joseph Terrence Thomas was detained by the Pakistani authorities until 6 June 2003, when he was released and returned to Australia. Except when interviews were being conducted, Thomas was held in solitary confinement throughout this period of detention. During his detention, in a formal interview conducted by Australian Federal Police on 8 March 2003, Thomas confessed to receiving funds from a terrorist organisation and possessing a falsified Australian passport.

In *R v Thomas* [2006] VSCA 165 the Victorian Court of Appeal held that these confessions were involuntary and had been wrongly admitted into evidence in the trial of Thomas for offences, including receiving funds from a terrorist organisation and possessing a falsified Australian passport. In *Jabbour v Thomas* [2006] FMCA 1286 the Federal Magistrates' Court held that the confessions were admissible in proceedings in which the AFP sought the imposition of an interim control order on Thomas under the Commonwealth's counter-terrorism laws.

Joseph Terence Thomas aka 'Jihad Jack' led in shackles from Melbourne Supreme Court after being denied bail. Photo: Brett Hartwig / News Image Library

The circumstances of Thomas's custody in Pakistan prior to the AFP interview were critical to the finding by the Victorian Court of Appeal that the confessions were involuntary. The majority of Thomas's account of this custody was accepted by the trial judge as truthful, including the following matters:

- on 4 January 2003, after presenting his passport and air ticket to Customs at Karachi Airport, Thomas was taken into custody by a number of men dressed in military uniforms who took him, blindfolded and hooded, to what he believed to be a military base;
- there he was questioned by two Pakistanis and two Americans, to whom, out of fear of being sent to Guantanamo Bay and detained indefinitely, he lied about travelling in Pakistan as a student;
- later that night he was twice further questioned by men, who included the Americans, and it became clear to Thomas that his account was not being accepted as truthful;
- later still, he was taken by car, blindfolded and hooded, to a house and kept for about two weeks in a cell 'that he described as 'a dog kennel about the size of a toilet', with open bars and a gate that exposed him to the elements';
- when questioned at this location Thomas was taken to a room, blindfolded and hooded, and his feet were padlocked to the floor and his hands cuffed behind his back;
- during the first interview at this location, at which Pakistanis and the Americans were present, Thomas maintained his untruthful account and was threatened with electrocution and execution by the Pakistanis present, and informed that he was not allowed water;
- he decided to change his approach to the questioning when, after a break in the interview, 'the short Pakistani officer grabbed my hood by the collar and strangled my hood so that I was suffocating and being strangled with my hood and the heat and the stress was unbearable and I felt they were not going to stop until I screamed out and they released me';
- shortly afterwards, a 'cold-frosted' bottle of water was placed in front of Thomas;
- some time after returning to his cell, when asked what he wanted, Thomas indicated that he wanted to return home to his family and informed another Pakistani of his intention to co-operate;
- soon after he was given food and his detention conditions improved;
- the next day, when interviewed, he gave a truthful and thorough account and was told by his interrogators that they were 'overjoyed' with the information provided;
- at the end of this two-week period of detention Thomas was flown to Islamabad, again blindfolded, hooded and shackled;
- on 22 January 2003 Thomas had his first contact with an Australian official, the consular officer Alastair Adams;
- Adams gave evidence that during a telephone conversation Thomas had at this time with his family, Thomas was told by a Pakistani intelligence official that 'he should not assume that he was not going to Guantanamo Bay';
- AFP officers interviewed Thomas four times between 25 January and 29 January 2003 in the presence of Pakistani and Australian officials, who emphasised to Thomas that his future was dependent upon the extent of his co-operation;
- in the second of these interviews Thomas was shown a photgraph of his family and in the fourth, a letter from his family;

- after these interviews Thomas was flown from Islamabad to Lahore, where he was held for three weeks and interviewed daily by Pakistani officials and an American called 'Joe', whom he believed to be from the CIA;
- during this period Joe threatened that Thomas would be returned to Afghanistan where he would be tortured; and
- eventually Thomas broke down 'because of what [Joe] was saying, especially about my wife and sending agents to Australia to rape my wife'.

After the Lahore period, Thomas was returned to Islamabad and twice interviewed by AFP officers and ASIO agents. The Victorian Court of Appeal summarised the relevant admissions he made during the formal AFP interview conducted on 8 March 2003 as follows:

> In the interview, the applicant admitted that he had altered his passport in order to conceal the amount of time he had spent in Pakistan. He was concerned that questions might be asked about his associations and activities whilst absent from Australia, which included his contact with members of the al Qaeda terrorist organisation and his having been in Afghanistan (more specifically, at the al Faroq camp at which al Qaeda training was conducted). He also stated that the ticket and money had been provided to him by a man named Khaled bin Attash, who was an associate of Osama Bin Laden and a high ranking al Qaeda operative.

It was accepted by the court that the AFP agents who conducted this interview wished to comply with the admissibility requirements set out in Part 1C of the *Crimes Act 1914* (Cth), including the requirement set out in section 23G that Thomas be given access to a legal practitioner. However, the Pakistani authorities refused to allow Thomas such access. Thomas gave evidence on the voir dire in the trial that at the time of this interview he believed it was a 'test' the failure of which would result in his 'indefinite detention'.

The Victorian Court of Appeal, following the well-known decision of Dixon CJ in *McDermott v R* (1948) 76 CLR 501, held that the events leading up to the interview led to Thomas's will being overborne during the interview by the 'hope of advantage' held out to him by both the Australian and Pakistani authorities in the following sense:

> The Pakistani officials put explicitly to the applicant the possibility, on the one hand, of returning to his family and, on the other, a very different fate. They made clear that the Australian authorities would only be able to assist him if he could be seen to have co-operated fully. The Australians present did nothing to distance themselves from the position attributed to them. Acquiescence alone would have been sufficient confirmation in the circumstances but the Australian officials went further and, by their remarks, impliedly endorsed what the Pakistanis had said.

For this reason the court held that the admissions made during the interview were not made voluntarily and were inadmissible.

Although the common law rule that confessions must be voluntary has not applied in New South Wales since the introduction of the *Evidence Act 1995*, it is probable that the admissions Thomas made would be inadmissible in this state due to the operation of s84 of the Evidence Act. This provision prevents confessions from being admitted unless the court is satisfied that they were not influenced by violent, oppressive, inhuman or degrading conduct, or threats of such conduct.

Shortly after the decision of the Victorian Court of Appeal was handed down and he was acquitted, the AFP sought the imposition of an interim control order on Thomas under section 104.4 of the Commonwealth Criminal Code. Mowbray FM held that the AFP interview of Thomas on 8 March 2003, despite being held to be inadmissible against Thomas in the criminal proceedings referred to above, was admissible in the control order proceedings because those proceedings were interlocutory civil proceedings.

Mowbray FM was satisfied of the following matters on the balance of probabilities:

- an AFP member holding the rank of superintendent or above requested the control order in accordance with sub-section 104.3 of the Criminal Code;
- the court had received and considered the information put before the court by the AFP;
- making the order would substantially assist in preventing a terrorist act;
- Thomas had received training from a listed terrorist organisation; and
- each of the obligations, prohibitions and restrictions to be imposed on Thomas by the order was reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

The admissions Thomas made during the 8 March 2003 interview were crucial to the decision of Mowbray FM to grant the interim order. During the interview Thomas admitted to receiving training from al Qaeda in 2001. This, it was held, made him an available resource to that organisation, and gave him a capacity to carry out terrorist acts. Mowbray FM found Thomas to be vulnerable, and therefore potentially susceptible to exploitation by extremists. He also found that the training Thomas had received might make him attractive to aspirant extremists, who might seek assistance or guidance from Thomas to achieve their objectives.

The conditions of the order included: a residential condition with a midnight to 5am curfew; thrice-weekly reporting to the Victorian Police; and the provision of fingerprints. They also included prohibitions on:

- overseas travel;
- possessing weapons, firearms, ammunition or explosives;
- engaging in combat activities; and
- contacting a number of nominated individuals or members of nominated terrorist organisations.

Thomas was also prohibited from using any non-approved telecommunications facilities, including public telephones, except in the case of an emergency.

By Chris O'Donnell

XYZ v Commonwealth (2006) 80 ALJR 1036

The issue raised in this case was whether a law which applies to conduct outside Australia by Australian citizens or residents is within the legislative competence of the Australian Parliament because it is a law for the peace, order and good government of Australia with respect to external affairs.

Section 50BA and s50BC of the *Crimes Act 1914* (Cth) make it an offence for an Australian citizen or a resident, while outside Australia to engage in sexual intercourse with a person under 16 or to commit an act of indecency on a person under 16.

The plaintiff was due to stand trial in the County Court of Victoria on charges under the legislation alleging sexual activity with children in Thailand that had occurred in 2001. Before being arraigned the plaintiff instituted proceedings in the original jurisdiction of the High Court seeking a declaration that ss50BA and 50BC of the *Crimes Act 1914* were not valid laws of the Commonwealth. Under s18 of the *Judiciary Act 1903* a justice stated a case to the full court.

By majority, the High Court found that both sections of the Crimes Act were valid.

The chief justice was of the view that the Australian legislature had the right to regulate the conduct outside Australia of Australian citizens or residents. In this regard he saw the fact that the Australian legislature had confined the relevant Crimes Act provisions to the conduct of Australian citizens and residents as a desire on the part of the Australian Parliament to conform to international expectations and not an attempt to invade the domestic concerns of the country where the alleged conduct occurred. On that point the chief justice referred to Professor Brownlie's comments in *Principles of Public International Law:*

> Extra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed:
>
> i. that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction;
>
> ii. that the principles of non-intervention in the domestic or territorial jurisdiction of other states should be observed;
>
> iii. that the principle based on elements of accommodation, mutuality, and proportionality should be applied. Thus nationals resident abroad should not be constrained to violate the law of the place of residence.

The chief justice also referred to the plaintiff's argument that the external affairs power only allowed parliament to make laws with respect to relations between Australia and other countries. Finding for the plaintiff would require the High Court to depart from the decision in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501. Such a course was never going to be followed. The chief justice said on that point:

> *Polyukhovich* held that the external affairs power covers, but is not limited to, the matter of Australia's relations with other countries. It also includes a power to make laws with respect to places, persons, matters or things outside the geographical limits of, that is, external to, Australia. That conclusion represents the current doctrine of the Court on the external affairs power, and should be maintained because it is correct.

In a joint judgment Gummow, Hayne and Crennan JJ were of the view that the Commonwealth correctly submitted that legislative enactments such as ss50BA and s50BC of the *Crimes Act 1914* proscribing activities of the type alleged in this case are supported by the external affairs power.

Kirby J was also part of the majority who found the laws were valid. His Honour considered the arguments by the plaintiff relating to *Polyukhovich* at some length. One of these was that in *Polyukhovich* for the first time a majority of the High Court had endorsed the geographical externality principle and it had been accepted without criticism in other cases. The submission to the court in *XYZ* was described by his Honour in these terms:

> Now, so it was suggested, was the time to pause and reconsider the 'modern doctrine' with the benefit of critical analysis, which the court needed in order to sharpen its federal jurisprudence and to correct a dangerous wrong turning.

The invitation was not accepted by the court.

By Keith Chapple SC

Litigation funding

Campbell's Cash & Carry v Fostif (2006) 229 ALR 58

The High Court's decision in *Campbell's Cash & Carry v Fostif* (Fostif) has made the position of a litigation funder at least a little clearer. It has made some kinds of representative proceedings in the Supreme Court a little less clear.

Litigation funding and abuse of process

Firmstone & Feil (Firmstones) attempted to arrange and fund representative proceedings on behalf of several thousand tobacco retailers who appeared to have a claim against tobacco wholesalers. The claim was for money had and received for a licence fee that was later held unconstitutional.

The defendants argued that this was an abuse of process. They complained that Firmstones:

- sought out potential plaintiffs;
- insisted on a high level of control over the proceedings; and
- hoped and expected to make a substantial profit from the litigation (being one third of any amount recovered on the principal claims plus any costs award).

Gummow, Hayne and Crennan JJ disagreed, albeit *obiter*: 'none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.' Gleeson CJ agreed with their Honours, and Kirby J published separate reasons coming to the same conclusion. (Gleeson CJ and Kirby J were in the minority on the outcome of the case.)

Their Honours did not say that litigation funding poses no risk to the court's process. Rather, in their view, any risks are adequately addressed through the court's general control over its process and

through the ethical regulation of the legal profession. Special dangers posed by class actions or the way in which settlements are procured should be dealt with in the rules that govern those matters. They do not justify a general rule of public policy that saves the other party from answering the claim.

The court was not dealing with the question of whether a funding agreement is unenforceable for maintenance or champerty. Section 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) expressly preserves the rules relating to when contracts are treated as against public policy or illegal. That is a matter between the funder and the funded party. It is not a ground to stay proceedings. The effect of their Honours' comments on the enforceability of litigation funding agreements is a question for the future.

Callinan and Heydon JJ were firmly of the view that there was an abuse of process. Since the majority on the disposition of the case was Gummow, Hayne, Callinan, Heydon and Crennan JJ, the 'majority' comments on abuse of process have no precedential value. However, they have the support of five out of the seven justices. They are likely to be relied on by litigants and are likely to be regarded as persuasive.

Numerous persons having the same interest

The holding which disposed of the appeal was that Pt 8 r 13(1) of the Supreme Court Rules was not engaged. That sub-rule permits representative actions on behalf of 'numerous persons [having] the same interest in [the] proceedings'. Part 7 r 4 of the UCPR and O 7 r 13 of the Federal Court Rules use the same words. (The Federal Court also has separate and detailed provision for large-scale representative proceedings in Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA).) The words can be traced back to Chancery practice before the *Judicature Act 1873* (UK).

In *Fostif,* a summons was filed on behalf of a lead plaintiff, purportedly representing other relevant (unidentified) plaintiffs. The summons only sought remedies for the lead plaintiff. According to the majority, this meant other potential plaintiffs had no 'interest in [the] proceedings', as required by the sub-rule.

The position was different in an earlier case considering Pt 8 r 13(1), *Carnie v Esanda Finance Corporation* (1995) 182 CLR 398 *(Carnie)*. *Carnie* involved loan arrangements said to be unlawful. Representative proceedings were commenced against lenders on behalf of all relevant debtors. The High Court held that Pt 8 r 13 was engaged. Crucially, the lead plaintiff sought not only a money sum, but also a declaration that no represented debtor was obliged to pay for charges of a particular kind. All potential plaintiffs had an interest in that declaration.

In Callinan and Heydon JJ's view, seeking a declaration could not have saved the summons in *Fostif*. The action was only for a money sum, and a declaration would have been surplusage. Moreover, each plaintiff's right to be paid depended on the particular arrangements between that plaintiff and the wholesaler. Until that right was alleged, a declaration would go beyond the pleadings.

The availability of a declaration in *Carnie* was, in a sense, fortuitous. A declaration in favour of all plaintiffs would be surplusage, or would depend on the particular facts of each plaintiff's case, in many potential representative proceedings.

The rules now appear to fall between two stools. If the view is taken that class actions should be available before the class of potential plaintiffs has been exhaustively identified, then the rules ought to provide for it, as does Pt IVA of the FCA. It is difficult to see the reason for an additional hurdle that the lead plaintiff be able to shape its claim to include a remedy on behalf of all potential plaintiffs. If, on the other hand, such actions are felt to be so dangerous that they cannot be controlled by judicial supervision, or by a more detailed regime in the rules of court, then there is no reason to permit them simply because a such a remedy can be devised. There is something to be said for revisiting the form of the rules.

Discovery as to potential plaintiffs

A third issue, which arose in the courts below, is the availability of discovery to identify potential plaintiffs. Einstein J at first instance and Mason P, Sheller and Hodgson JJA in the Court of Appeal would have permitted it if the claims proceeded.

Discovery must be necessary before it is ordered. Special considerations presumably apply to discovery sought for the benefit of unknown plaintiffs. It remains for future litigation or legislation to give further guidance on when it will be available and how it should be controlled.

By James Emmett

Freedom of information

McKinnon v Secretary, Department of Treasury (2006) 229 ALR 187

The appellant, Michael McKinnon, is the freedom of information editor of *The Australian*. In 2002 McKinnon made two applications to the Treasury Department under the *Freedom of Information Act 1982* (Cth) ('FOI Act') seeking access to documents relating to bracket creep and the level of fraud associated with the First Home Buyers Scheme. The department denied access to a number of documents on the basis that they were exempt documents under s36(1) of the FOI Act. A document is exempt from disclosure under s36 if two conditions are satisfied. First, the document must be an internal working document according to the objective criteria in s36(1)(a).

Broadly, internal working documents are those which contain or relate to opinions, advice, recommendations, consultations or deliberations within the Commonwealth Government. The second condition is that disclosure of the document would be contrary to the public interest (s36(1)(b)).

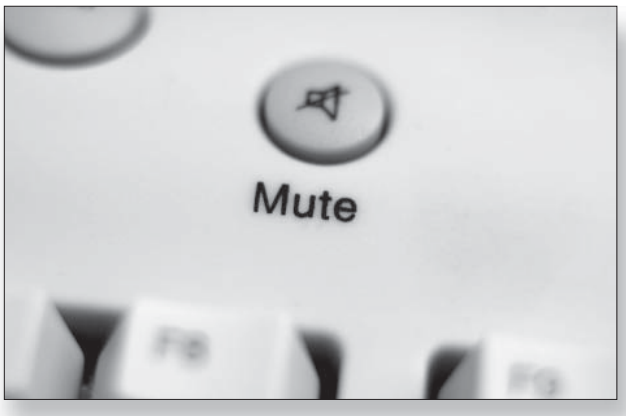
McKinnon sought a review of the department's decision in the Administrative Appeals Tribunal ('AAT'). Prior to the hearing of the review, the treasurer issued certificates under s36(3) of the Act identifying seven grounds on which disclosure of the documents was contrary to the public interest. The various grounds described in the certificates fell broadly into two categories. First, the certificate asserted that disclosure of the documents would compromise necessary confidentiality and candour within government. Secondly, the certificates stated that disclosure would be apt to mislead the public because the material contained in the documents was provisional, incomplete or comprised of technical terms and jargon that were only intended for a specific audience.

The AAT was satisfied that the documents in dispute were internal working documents within the meaning of s36(1)(a) and this issue was not pursued on appeal. The key issue in dispute was the validity of the certificates issued by the treasurer in determining the public interest question. Although the certificates were referred to in the proceedings as 'conclusive certificates', this is something of a misnomer as the Act did allow for limited review of the certificates. The AAT was not empowered to perform its usual merits review function in the sense of determining whether the department, in refusing the application, or the treasurer, in issuing the certificates, had made the correct or preferable decision. Instead, in reviewing the certificates the AAT was required under s58(5) of the FOI Act to determine 'whether there exist reasonable grounds for the claim that the disclosure of the document[s] would be contrary to the public interest'.

After inspecting the documents and taking evidence on the question of the public interest, including evidence given in the absence of the applicant and his representatives regarding the grounds relied upon by the treasurer, the AAT held that there did exist reasonable grounds for the claim that disclosure of the documents would be contrary to the public interest.

McKinnon appealed unsuccessfully, on a question of law only, to the full court of the Federal Court (Tamberlin and Jacobson JJ, Conti J dissenting). Jacobson J, with whom Tamberlin J agreed, held that the determination of whether reasonable grounds existed for the particular claim described in the certificates was a question of fact for the AAT. On the question of the proper construction of the requirement that reasonable grounds exist for the claim, Jacobson J rejected the appellant's argument that the AAT was required to balance all aspects of the public interest.

McKinnon appealed to the High Court, where he argued that the AAT and the majority of the full court had effectively reduced the test of whether reasonable grounds exist for the claim to a test of whether there was a ground for the claim that was 'not irrational, absurd or ridiculous'. The appellant argued that this set the bar for conclusive certificates too low and was inconsistent with the object of the FOI Act, being 'to extend as far as possible the right of the Australian



community to access to information'. The central question in the High Court was whether the AAT was required under s58(5) of the Act to consider competing aspects of the public interest and to give weight to those considerations which favoured disclosure. In the AAT the appellant had led evidence from a number of witnesses, including former public servants, to raise alternative arguments about the public interest and to challenge the basis of the claims contained in the certificates, including the propositions that release of information would impede necessary candour between public servants and was apt to mislead the public.

The High Court dismissed the appeal by a majority of three (Hayne, Callinan and Heydon JJ) to two (Gleeson CJ and Kirby J). Callinan and Heydon JJ, in a joint judgment, held that it was sufficient if one reasonable ground for the claim of public interest existed, even if there were competing reasonable grounds in favour of disclosure of the information. Hayne J, in contrast, held that the AAT was not confined in its inquiry to considering whether one of the considerations advanced in support of the claim can be said to be based in reason. Rather, the AAT was required to consider whether the claim that disclosure would be contrary to the public interest 'can be supported by logical arguments which, *taken together*, are reasonably open to be adopted and which, if adopted, would support the conclusion expressed in the certificate'. Hayne J agreed with the appellant that the expression 'not irrational, absurd or ridiculous' is not synonymous with 'reasonable grounds', but did not agree that the AAT had applied the former test. Hayne J also rejected the submission that the AAT was required to balance competing facets of the public interest and determine which view of the public interest is to be preferred. Instead the AAT must consider the grounds relied upon by the minister for the determination that disclosure was contrary to the public interest and determine whether those were reasonable grounds.

Gleeson CJ and Kirby J, in a dissenting joint judgment, held that the AAT was required to take account of all relevant considerations bearing on the question of whether disclosure was contrary to the public interest. As their Honours were not satisfied that the AAT had taken into account all such considerations, they would have remitted the matter to the AAT for reconsideration. Gleeson CJ and Kirby J placed particular reliance on the objects of the FOI Act and the 'right'

of access which the Act confers. Because of the stated objects of the FOI Act, the dissenting judges considered that it was misleading to describe the minister's decision under s36(3) as involving a 'balancing' of public interest factors. Instead, the minister's decision on the public interest and the question of reasonableness that is considered by the AAT must operate in the context of the legislature's clear intention to confer on the public a general right of access.

The decision of the majority leaves little scope for challenging a certificate issued by a minister under s36(3). A certificate may be set aside by the AAT if it can be established that there are in fact no reasonable grounds to support the asserted claim, but otherwise it will not suffice to point to countervailing factors in favour of disclosure. Alternatively, as suggested by the majority judges in the High Court, a certificate may be challenged in judicial review proceedings. It is possible that the latter course will provide a more fruitful avenue of attack for those faced with a conclusive certificate, despite the usual limitations of judicial review.

By Stephen Free

Post employment restraints

By Arthur Moses and Tony Saunders

In 2006 the Supreme Court has been called upon to deal with an increasing number of applications for interlocutory injunctions to enforce post employment restraints contained in contracts of employment. Four such recent cases are summarised below.

Cactus Imaging Pty Limited v Peters [2006] NSWSC 717

Cactus Imaging Pty Limited's (*Cactus*) former New South Wales Sales Manager, Mr Peters, commenced employment with its chief competitor, Metro Media Technologies Inc (MMI), approximately six months after resigning from his employment with Cactus.

Cactus did not seek to prevent Mr Peters from remaining in the employment of MMI, notwithstanding that the contractual restraint, if enforced, would do so. Instead, Cactus sought to have Mr Peters restrained from disclosing Cactus's confidential information; and, for a period of twelve months following the end of his employment, from canvassing soliciting or endeavouring to entice away from Cactus any persons who were its clients or customers during the year before Mr Peters' departure, from soliciting or enticing away from Cactus any employee consultant or contractor of Cactus, and from counseling, procuring or otherwise assisting any person to do any of those acts. An interlocutory injunction to that effect was granted, by Gzell J, on 22 March 2006, and the hearing was expedited.

At the final hearing, Brereton J emphasised that a plaintiff who seeks to restrain a former employee from using confidential information must be able to identify with specificity, and not merely in global terms, the relevant information.[1] One reason for this is that an injunction in general terms restraining a former employee from using the employer's 'confidential information', would inappropriately leave, to an application for contempt, determination of whether particular information was or was not confidential.

Brereton J held that Mr Peters had access to Cactus's confidential information, including information as to internal costs and pricing rates, optimal operating speeds of Cactus's printing equipment and the functions and details of the production scheduling software used by Cactus.

By reason of Mr Peters' knowledge of Cactus's New South Wales clientele, their needs and idiosyncrasies, Brereton J held that Cactus had a legitimate protectable interest in its customer connection.[2]

Brereton J concluded that the contractual provision prohibiting Mr Peters from canvassing, soliciting or endeavouring to entice away from Cactus any of its clients was supported, not only by protection of customer connection, but also by protection of confidential information.[3] Those legitimate protectable interests would have also supported the provision prohibiting Mr Peters from working for a competitor, had Cactus sought to enforce it.[4]

As to the duration of the restraint, Brereton J relied upon the following factors in finding that the period of twelve months was not excessive: first, that is what the parties agreed; secondly, at least for lower volume customers, it would probably take 12 months for a replacement to prove his or her competence and establish a rapport with the customer; thirdly, insofar as the restraint protects confidential information, knowledge of Cactus's pricing parameters and marketing strategies might well afford the employee an unfair advantage for as long as twelve months after separation; and fourthly, albeit slightly, that one of Mr Peters' fellow employees at Cactus had a similar restraint.[5]

Brereton J reviewed the authorities on non-recruitment covenants and concluded that although the more recent cases tended to support such covenants on the basis of protection of confidential information, they were also supported by staff connection, which constitutes part of the intangible benefits that may give a business value over and above the value of the assets employed in it, and thus comprises part of its goodwill.[6] Because the non-recruitment covenant was supported by both staff connection and confidential information, Brereton J held that a restraint period of twelve months was reasonable.[7]

John Fairfax Publications Pty Limited v Birt [2006] NSWSC 995

In this case Brereton J was called upon to consider contractual restraints prohibiting John Fairfax Publications Pty Limited's (Fairfax) former general manager of sales, Mr Birt, for a period of six months, from approaching any employee, agent or customer of Fairfax with a view to enticing them away from Fairfax; for a period of three months, from carrying on or being engaged or interested in, in any capacity, including as an employee, or being otherwise associated with any business which is in competition with the Fairfax Group; or, at any time, using any confidential information of Fairfax. In addition, Fairfax sought to restrain Mr Birt's new employer from inducing or requiring him to engage in any of the activities from which he was restrained.

Brereton J considered two primary questions: first, whether Fairfax had a legitimate protectable interest; and second, whether the restraint was no more than reasonable for the protection of that interest.

As to protectable interests, Brereton J held that Fairfax had three such interests:

- confidential information (which Mr Birt effectively conceded by offering an undertaking not to disclose certain information);
- customer connection; and
- staff connection.[8]

These interests supported the contractual restraints, save for the protection against solicitation of agents, in respect of which there was no evidence to permit a finding that Fairfax had any relevant connection with its agents.[9] Brereton J also held that the restraint periods were reasonable in the circumstances.

In considering discretionary factors, Brereton J concluded that, in the context of restraints of trade, damages are rarely a sufficient remedy.[10] In addition, after expressing sympathy for Mr Birt's predicament (namely, the prospect of being out of employment for three months), his Honour expressed the view that, 'to a significant extent, an employee who pursues such employment despite the terms of a restraint is the author of his or her own misfortune'.[11] An injunction was granted in the terms sought against Mr Birt.

Brereton J also held that a case had been made out for an interlocutory injunction restraining two entities within the new employer's group of companies from inducing Mr Birt to breach his contractual obligations with Fairfax.[12] That finding was made on the basis that Mr Birt's new employer was placed on notice of his contractual obligations to Fairfax shortly after his resignation. In the face of that notification, the new employer continued to pursue the employment of Mr Birt.

Russ Australia v Benny [2006] NSWSC 1118

In this case Justice Campbell granted an interlocutory injunction restraining Ms Benny, a former national sales manager of Russ Australia Pty Limited (Russ), from acting as an employee of one of Russ' competitors in the gift and toy industry for a period of six months.

Campbell J held that Russ had a legitimate interest in protecting its confidential information, staff connection and customer connection.[13] His Honour also made reference to the practical difficulties faced by an employer in seeking to protect itself against activities of a former employee which encroach on its legitimate interests by obtaining a specific covenant against solicitation of customers, or solicitation of employees; namely, it is often difficult for a former employer to know, or to be able to establish, that a breach of such a covenant has occurred.[14] In making these comments, Campbell J referred to Lord Denning's decision in *Littlewoods Organisation Limited v Harris*:[15]

> Experience has shown that it is unsatisfactory simply to have a covenant against disclosing confidential information, because it is difficult to draw the line between information which is confidential and information which is not, and very difficult to prove a breach when the information is of such a character that an employee can carry it away in his or her head, so that the only practicable solution is to take a covenant from the employee by which he or she undertakes not to work for a trade rival.

These practical difficulties were the primary reason for Campbell J's refusal to grant injunctions prohibiting Ms Benny from soliciting or endeavouring to entice away from Russ any client of Russ with whom she had dealt or otherwise had contact with in the course of her employment with Russ. In particular, Campbell J held that:

(a) the phrase 'clients with whom you have dealt' would include clients with whom the dealing was of a passing nature. To that extent, the clause went further than protecting legitimate interests of the employer, and hence would be invalid at common law;

(b) it was therefore necessary to consider whether the clause could be read down under the *Restraints of Trade Act 1976 (NSW)*. To apply that Act, one needs to look at the particular breach, and determine whether the application of the restraint to that breach is contrary to public policy; and

(c) in circumstances where Ms Benny had given undertakings not to solicit business from four particular clients with whom she had made contact since commencing work at her new employer, Russ was not able to provide any evidence of any actual breach of Ms Benny's obligation not to solicit business from any other 'clients with whom she had dealt'. As a consequence, Russ was not able to demonstrate that the non-solicitation covenant could be saved by the application of the Restraints of Trade Act. [16]

Campbell J applied the same analysis to a covenant prohibiting solicitation of employees, including employees with whom Ms Benny

had no significant contact. Because the covenant was, on its face, wider than necessary to protect the legitimate interest of Russ, evidence of breach was necessary in order for the covenant to be saved under the Restraints of Trade Act.[17] No such evidence was available.

In contrast to Brereton J's decision in *John Fairfax Publications Pty Limited v Birt* [2006] NSWSC 995, Campbell J declined to grant an injunction prohibiting Ms Benny's employer from inducing Ms Benny to breach her post employment contractual restraints. Campbell J's decision in this regard was based on his finding that, although the managing director of Ms Benny's new employer knew about the terms of Ms Benny's previous contract of employment at the time he employed her, he held a bona fide belief reasonably entertained that the employment of Ms Benny would not result in her breaching her contract of employment with Russ. The managing director's belief was based on his opinion that his business did not compete with that of Russ.

Linwar Securities Pty Ltd v Christopher Savage [2006] NSWSC 786

This case involved an application by Linwar Securities Pty Ltd (Linwar) for an interlocutory injunction to restrain Mr Savage, its former employee, from commencing employment or becoming engaged in any other capacity with Goldman Sachs J B Were (Goldman), a competitor.

In order to appreciate Nicholas J's decision, it is necessary to understand a little about Linwar's business and Mr Savage's duties as an employee. Linwar's principal activities include providing institutional investors, such as superannuation fund managers, with information and advice about ASX-listed companies to assist in making investment decisions. In his role with Linwar, Mr Savage's duties included identifying small to medium companies believed by him to be undervalued or overvalued which provide buying or selling opportunities for Linwar's clients. He was required to estimate the fair value of companies, produce a written research report which included a summary of information about the company and his valuation, and then market his research to Linwar's clients.

Linwar sought to support the restraint by reference to two protectable interests: confidential information and customer connection. Nicholas J held that the evidence did not establish actual or threatened use of Linwar's confidential information by Mr Savage.[18]

As to the claim for relief based on customer connection, Nicholas J had regard to the fact that Mr Savage was in contact with the client institutions which traded through Linwar. In particular, Mr Savage spoke to their representatives from time to time to explain his research reports, thereby assisting them in making investment decisions. He met them on social occasions, and on occasions conducted by Linwar to discuss the performance of companies the subject of his analyses and reports.

Notwithstanding this evidence, Nicholas J concluded that it fell short of establishing that Mr Savage's relationship with Linwar's clients gave rise to a protectable interest.[19] His Honour held that the client relationship (customer connection) was essentially incidental to Mr Savage's principal activity as an analyst and researcher. Mr Savage's success was the product of his own skill and judgment; he did not have personal knowledge of, or influence over, any clients gained in his employment which could have been used to the detriment of Linwar. Nicholas J concluded that it was Mr Savage's skill and knowledge, and the high quality of his reports, which were likely to be attractive to clients, rather than any special relationship attributable to his employment with Linwar.[20]

Concluding analysis

It is apparent from the number of recent restraint of trade cases before the Supreme Court that, in the current economic environment, employers are more willing to seek the enforcement of post employment restraints. The success of such actions depends largely upon whether the employer has any legitimate protectable interests and, if so, whether the restraints are no more than is reasonable for the protection of those interests.[21]

1 *Cactus Imaging Pty Limited v Peters* [2006] NSWSC 717 at [14].

2 ibid., at [25], [28], [29].

3 ibid., at [34].

4 ibid., at [34].

5 ibid., at [42].

6 ibid., at [43] - [55].

7 ibid., at [63].

8 *John Fairfax Publications Pty Limited v Birt* [2006] NSWSC 995 at [27] - [41].

9 ibid., at [35] - [41].

10 ibid., at [45].

11 ibid., at [51].

12 ibid., at [54].

13 *Russ Australia v Benny* [2006] NSWSC 1118 at [40].

14 ibid., at [44].

15 [1977] 1 WLR 1472 at 1479.

16 ibid., at [30] - [32].

17 ibid., at [37].

18 *Linwar Securities Pty Ltd v Christopher Savage* [2006] NSWSC 786 at [33].

19 ibid., at [36].

20 ibid., at [39].

21 The most recent judgment of the NSW Court of Appeal dealing with post employment restraints of trade is *Woolworths Limited v Mark Konrad Olsen* [2004] NSWCA 372. The judgment in a concise manner sets out the relevant principles which will guide the exercise of the discretion set out in section 4(1) of the *Restraints of Trade Act 1976* (NSW) when employment contract cases are being litigated: see [38] - [46] per Mason, P (with whom McColl and Bryson, JJA agreed). See also Moses A 'Restraints of Trade in NSW' (2004) 1 UNELJ pp 200 - 223.

National Indigenous Legal Conference

By Tony McAvoy

On 22 September 2006, 180 delegates from across the country attended the first National Indigenous Legal Conference. The conference was held at the New South Wales Bar Association, in Phillip Street, Sydney. The theme for the conference was Indigenous customary law.

The conference was opened by Mullenjaiwakka (aka Lloyd McDermott) on Friday 22 September 2006, who was still on a high from having received a lifetime achievement award at The Deadly's the night before. Mullenjaiwakka, at veteran of some 30 years practise at the Bar, said in his opening remarks that while he had not been subjected to overt or even covert racism by members of the legal profession, it was painfully obvious to him that very small numbers of Indigenous practitioners painted a stark picture of lack of opportunity. He also commented that contrast between the time when he was last at law school as the only Indigenous law student to now opening the conference at which he was standing before a room full of Indigenous law students and lawyers was a cause for some celebration and much hope for the future.

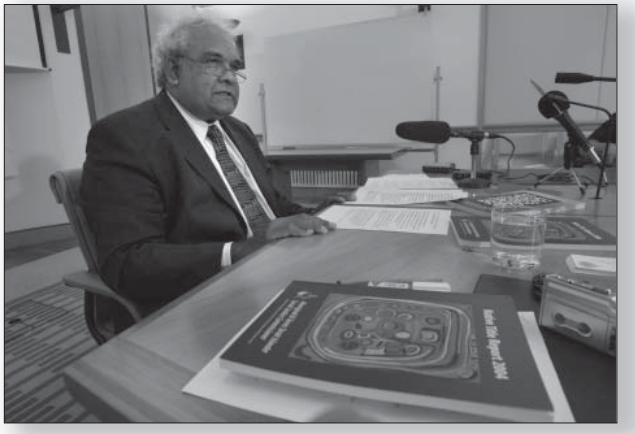
The sense that an Indigenous legal fraternity had indeed arrived was palpable. This was evident from the first session when a number of Indigenous legal practitioners from around the country told the story of their progression through their legal careers. Norman Laing, of 11 Garfield Barwick, gave a particularly inspirational account of his battles with illness and a variety of obstacles that may have stopped a less determined person.

The second session of the conference was the highlight for many practitioners. It comprised reviews of the 'hybrid' courts[1] operating in NSW, Queensland, Victoria, South Australia and Western Australia. It was readily apparent that the people working within each of the systems had a passionate commitment to justice and a real hunger for the exchange of ideas.

On Saturday, 23 September 2006, an opening address was given by Sir Gerard Brennan AC KBE, patron of the Mum Shirl – Indigenous Barristers Trust, who spoke with genuine fondness of his time working in the Northern Territory on land rights cases and his first hand experiences of customary law at work. His words of encouragement to the Indigenous lawyers and law students present at the conference rang loudly and clearly for the remainder of the day and long after. He informed those present that they had a great opportunity to assist their people but that they must also do what they can to learn and know their customary law.

Tom Calma, Race Discrimination Commissioner, gave the keynote address on the 'Integration of Indigenous Customary Law in to the Australian Legal System'. The address very effectively highlighted the serious dangers posed by the Commonwealth proposals legislatively to exclude customary law factors in the consideration of sentence in criminal matters.

The sense that an Indigenous legal fraternity had indeed arrived was palpable.



Aboriginal and Torres Straight Islander Social Justice Commissioner Tom Calma. Photo: Fairfaxphotos / Penny Bradfield

In addition, papers were presented by Dr Larissa Behrendt, Megan Davis, David Woodroffe and Stewart O'Connell (solicitors from NT), Jacquie Payne SM (Qld), Gerry Moore of the NSW ALS, and Richard Trugden and Maratja Dhamarrandji of the Aboriginal Resource Development Service (NT).

The event was generously supported by the Bar Association with an inestimable number of hours from Travis Drummond, Cindy Penrose and other staff. Particular credit must be given to Chris Ronalds SC for her commitment and drive in coordinating the event.

Thanks must also be given to the Mum Shirl – Indigenous Barristers Trust and the Attorney General's Department (Cth) who sponsored the event. Last but not least, gratitude must be expressed to those members of the Bar Association who sponsored Indigenous law students to attend. The ongoing support from the association and its members is outstanding.

[1] 'Hybrid' courts is a reference to those courts in which Aboriginal people, usually Elders, sit with Magistrates during the sentencing process in criminal matters.

Inaugural Australian Women Lawyers Conference

Sydney, Sheraton on the Park, 29 – 30 September 2006

By Catherine Parry

The title of the first ever Australian Women Lawyers conference held in Sydney on 29 and 30 September 2006 was 'Celebrating Excellence' and, indeed, that was an understatement. In attendance was a glittering array of speakers and delegates drawn from the ranks of the judiciary, the Bar, government and private practice who travelled near and far from around the country, their presence and commitment a testament to the national pull of the organisation. As one would expect from the title of the proceedings, it was an all female affair, with the exception of one or two brave male souls spotted in the seminar audience from time to time, including Slattery QC, who is always an enthusiastic supporter of such events.

The theme of the conference was human rights, which was addressed in plenary sessions, together with a three-stream programme of litigation, corporate governance and property and finance. The conference was held over two days, and the sessions were interspersed with numerous networking opportunities for speakers and delegates alike over endless cups of tea, coffee, wicked Danish pastries and gourmet buffet-style luncheons. The bell ringer kept things on track, an old fashioned but effective way of keeping control of the delegates. Overall the ambience of the conference was efficient professionalism, but with an air of relaxed informality, a difficult but ideal combination.

The benchmark has now been set for future national AWL conferences and was a credit to the organisers.

The Hon JJ Spigelman AC, Chief Justice of New South Wales, opened the conference with customary style at a cocktail party held at the conference venue, the Sheraton on the Park, at which local Sydney delegates greeted and met our interstate colleagues. The work of the conference began the next morning, with two days of thought provoking, informative sessions, presented by a cast of outstanding speakers who included Justice Margaret Beazley AO, Justice Ruth McColl AO, Justice Catherine Branson, Chief Justice Diana Bryant, Chief Justice Marilyn Warren AC, Justice Margaret McMurdo, Justice Robyn Layton, Justice Narelle Johnson, Judge Felicity Hampel, Anna Katzmann SC, Chris Ronalds AM SC, Chrissa Loukas (fresh from The Hague), Nicola Roxon MP, Federal Shadow Attorney-General and from the Victorian Bar came Kate McMillan SC, Jennifer Batrouney SC and Dr Sue McNicol.

The highlight of the conference was the address given by keynote speaker, The Hon Mary Gaudron QC, who spoke on the topic 'Equality: the Guarantee of Excellence', and warmed to the theme that true equality allows for individual talents through recognition of differences, be it race, religion or gender, which of itself advances the pursuit of excellence. Gaudron noted that since the launch of AWL 10 years ago, whilst the position could not be described as ideal, there had been 'significant improvement' in the position of women lawyers within the legal profession and judiciary by the growing number of women in professional organisations and a 'noticeable presence' of women in important commercial litigation in all states.

Perhaps the speaker whose speech sparked the most controversy, was the shadow attorney-general, Nicola Roxon. Her speech has already been well documented in the press (including the front page of *Lawyers Weekly*: 'AWB lawyers are part of a broken system'). Ms Roxon expressed the view that the profession's reputation is tarnished in the eyes of the public, and she used AWB's claim of legal professional privilege as an example to test the issue. Barristers and payment of tax was also aired by Ms Roxon. Roxon called for reform to fix the profession's 'PR issue'.

The business of the conference culminated in a gala dinner held at the Sheraton on the Park on Saturday 30 September. Some partners of delegates and speakers attended, but it would be fair to say that it was a mainly female turn out, particularly amongst the interstate guests. The after dinner speech fell to the president of the Law Society, Ms June McPhie, who told her now infamous 'Bat bites solicitor and dies' story which, for those of us at the Bar, had a certain ring to it. There followed a floor show and dancing, with the Northern Territory contingent notably present, particularly on the dance floor. Yes, unlike the Bench & Bar Dinner, there was a dance floor, and it was populated almost entirely by women plus two or three rather smug looking men.

Frankly, one had to be there and if one wasn't, one should make a point to attend the next AWL conference, wherever that may be.

'Celebrating Excellence' at the Sheraton on the Park.

Alexandra Richards QC (Victorian Bar); Chrissa Loukas (NSW Bar); Justice Robyn Layton (SA Sup Ct); Caroline Kirton (President, AWL, Victorian Bar).

The Local Court comes of age

On 30 August 2006 Deputy Chief Magistrate Graeme Henson was sworn in as chief magistrate of New South Wales. In the course of his remarks, the new chief magistrate made some important and interesting observations in relation to the history of the Local Court and the role of the magistracy in New South Wales. What follows is an edited version of his Honour's remarks.

[P]rior to 1985 magistrates in this state were public servants. What judicial independence they may have had was circumscribed by the Public Service Act of the day. As a consequence the composition of the court was drawn almost exclusively from the public service and from the court registry staff in particular. In the view of many this constraint on independence and inward looking approach to appointment to the office of magistrate was not conducive to the healthy development of the court. As events transpired this view was correct. My perspective is formed from playing a small role in the evolutionary process.

In the latter part of 1983 and during 1984 I spent many a morning sitting in the then chief justice's conference room at the Supreme Court. I had been assigned the task of providing executive assistance to the Magistrates' Appointments Committee chaired by former Chief Justice Sir Laurence Street. They were troubled times for the magistracy and the inquiries undertaken by the committee involved inter alia listening to the views of many prominent people involved in the legal system. The cumulative effect of what fell to my ears described a journey to what some might describe as an increasingly dystopian destination. I have never forgotten the circumstances and lessons that surrounded that relatively unhappy time. The deliberations and recommendations of the committee having been completed and delivered to government the first step was taken in establishing a local court that was not merely a continuum of the old. To assist in this event it was my role to organise the proclamation announcing the commencement date of the Local Courts Act and to prepare the Executive Council minute appointing the first 112 appointees as magistrates under that Act.

At the beginning of January 1985 it can be argued, and it is certainly my view, that a new court was created. No longer shackled by the constraints of the public service the court was born with the greatest of all gifts, independence. True it is, it was made up of an overwhelming majority of those who had held office as a magistrate immediately prior. However, the expediential effect of independence had immediate philosophical and practical effects. Access to appointment of qualified and meritorious persons from within the wider community became a reality. The court was obliged to consider the consequences of its changed nature and so too were successive chief magistrates. The court became one that ceased to be fixed in time and developed the characteristics of constant self development. For those who appreciate the distinction it is equally timely to note that in January of this year the Local Court that I described turned 21, an age usually associated with the coming of age and not an inappropriate analogy in many respects. The benefits of that initiation step taken in granting independence to the court has manifested itself many times over.

The entrenched independence of the court was further added to by reason of an amendment to the state Constitution in 1992 adding the magistracy to the protective provisions applying to the other levels of the judiciary. In addition to emphasising the independence of this court the amendment was another step towards establishing a commonality of identity with other levels of jurisdiction. The perceived and philosophical need for an independent judiciary was further emphasised in the March 1995 referendum that overwhelmingly carried the view of the community that there should be no change to this entrenched position other than through the referendum process. It may properly be said that the people of this state whom the judiciary are sworn to serve clearly understand the importance of judicial independence in carrying out that obligation. The underpinnings of the court are strong. The base upon which it has been constructed in the short period of 21 years parallels the development since its birth.

As I have observed, in 1985 there were 112 magistrates; there are now 136 made up of 130 full-time magistrates and six permanent part-time magistrates. In 1985 there were only four women appointed to the newly constituted bench; there are now 44 and the court has a commitment to increasing this level of representation.

In 1985 the overwhelming majority of magistrates came from within the local courts administrative system. Now the court draws its appointments from throughout the extended family of the law and benefits through the diversity of choice. Associate professors and lecturers in law from academia, crown prosecutors, public defenders, barristers and solicitors drawn from private and government practice and from executive positions in government both state and federal populate its ranks. Such an enlivening and enrichment of the court through such disparate callings and experience could not however have taken place without the initial steps to full integrated independence. That legally qualified persons from so many different roles continue to seek appointment to this court reflects ongoing recognition of its importance and positive perspective in which it is viewed by the outside world of the law.

In turn the court has repaid such confidence. There have been five magistrates appointed as judges of the District Court and two elevated

to courts in Supreme and superior jurisdiction culminating on Monday in the appointment of my predecessor and colleague Derek Price as a justice of the Supreme Court. These appointments could not have happened from within a court that failed to grow and develop a reputation for professionalism complemented by respect from within the wider community of the law.

Continual growth in jurisdiction and case loads is something with which my colleagues and I are more than passingly familiar. The court has regularly experienced the devolution of jurisdiction within its criminal and civil jurisdictions. When this occurs the court is entitled to conclude that it is due in part to the confidence the government has in the capacity of the court. This court has been a willing participant in implementing progressive legislative and administrative initiatives predominantly in this criminal jurisdiction and lately through the Uniform Civil Procedures legislation within its civil jurisdiction.

A short précis of the fields of adjunct involvement serve to demonstrate the many and varied complexities with which the court has become involved in those two short decades of its existence:

- circle sentencing for identified Aboriginal offenders;
- magistrates' referral into treatment programmes designed to address the underlying health and drug addiction issues outside the coercive role of the court now operates at 58 courts;
- pilot programmes in rural alcohol diversion are operating at Orange and Bathurst;
- a pilot domestic violence court intervention model at Campbelltown and Wagga Wagga; and
- adult conferencing programmes operate at Liverpool and Tweed Heads.

In the Children's Court jurisdiction there is a Youth Drug Court, young conferencing and the intensive court supervision programme operating in the Children's Court jurisdiction at Bourke and Brewarrina.

All represent opportunities for addressing some of the causes of crime that often fall outside traditional approaches. So too were the locations of psychiatric nurses at 22 courts throughout the state to identify those who may be better dealt with through a compassionate health oriented approach to combat the otherwise blunt instrument of the criminal justice process. These are not the limits of involvement by the court in reaching out into discrete areas of the community, merely representative. They demonstrate however just how complex the world of today's magistrate has become compared to that which predated the creation of this court.

International arbitration

On 29 June 2006, the Hon Justice Garry Downes AM, President of the Administrative Appeals Tribunal, addressed a dinner for the Diploma in International Commercial Arbitration course conducted under the joint auspices of the Chartered Institute of Arbitrators (Australia) Ltd and the Law Faculty of the University of New South Wales.

It is a privilege to have been invited to speak tonight. Although I am now removed from the world of arbitration on a daily basis, I welcome the opportunity to return to it from time to time.

In the past, international arbitration was the home of an elite. That is not so true now. The explosion of world trade means that international arbitration is no longer small enough to be the preserve of a privileged cognoscente. London and Paris remain centres of arbitration, but they are not the almost exclusive places of work for arbitrators.

The elite world of just a few years ago contained a group of very influential people. I had the privilege of knowing some of them. A number were members of Essex Court Chambers. Sir Michael Kerr is the first to come to mind. He was a giant in world arbitration. Born in Germany, he had a brilliant legal career at the English Bar and on the Bench before becoming one of the most sought after world arbitrators. He was very important to both the London Court of International Arbitration and to the Chartered Institute. So was Lord Michael Mustill, who still arbitrates from Essex Court Chambers, with his co-author Stewart Boyd QC. On the Continent, Robert MacCrindle QC, who died recently, was a giant. Jan Paulsson is still amongst the leaders there. In Paris, Alain Plaintey, who had been president of the Institut de France, was Chairman of the International Court of Arbitration of the International Chamber of Commerce. He was succeeded by Robert Briner from Switzerland who recently retired from that position.

I would not, however, want you to think that these greats were infallible. Robert MacCrindle managed to leave us with *Hiscox v Outhwaite*[1], which went all the way to the House of Lords, as a result of his stating in an award that it was 'dated at Paris' when the place of the arbitration was London. The oral argument in the House of Lords took three days.

The days of a small elite dominating international arbitration are over. This is good news for you. Americans are now significantly involved and Canadians as well. This is also good news for you. I will explain why.

Swiss arbitrators such as Robert Briner have long dominated Continental European arbitration. The reason for this is that they were seen as neutrals in French language arbitrations. Accordingly, they were very prominent in arbitrations in which one of the parties came from France.

Similar reasoning has lead to the recent success of English speaking Canadian arbitrators. They are seen as neutrals in disputes between the United Kingdom and the United States. Australia is similarly placed to Canada. I think the future holds a place for Australian arbitrators, who are prepared to travel, in these arbitrations. At the time of my appointment to the Bench I had to resign from appointment as chairman in such an arbitration.

For the last four years I have given up international arbitration for administrative review. Unfortunately, this has meant giving up travel which requires a passport for travel that does not.

Tribunals in Australia and especially tribunals where work is confined to the review of administrative decisions on their merits, carry out their functions in different ways to courts. The same is true of arbitrations. As tribunal hearings differ from court hearings, so arbitration is different to litigation.

Arbitration provides advantages over litigation for the settlement of international disputes. A major advantage is greater enforceability. Other advantages include the ability to resolve disputes more efficiently.

The relative merits of arbitration and litigation have been the subject of much debate. A very amusing analysis is Sir Michael Kerr's story of the Macao Sardine Case.[2] This has been taken altogether far too seriously by commentators in a number of articles about it.

An old established company in Macao, falling on hard times, finds itself with no option but to meet a contract for the supply of sardines with tins filled with mud. The cost of the tins and the labour was not prohibitive but the cost of the sardines was. It was anticipated that the sardines would not reach a consumer market for many years and maybe never. The goods were accordingly sold and resold on the high seas during an ever rising market. The Macao company flourished. But then disaster stuck in the form of a food shortage following an earthquake in the Philippines. The shipment was finally sold for consumption. As Sir Michael Kerr said, quoting Milton's *Paradise Lost* as his source, 'all hell broke loose'.[3]

The tale catalogues and contrasts the different problems facing purchasers engaged in litigation in Hong Kong (which results in 46 judgments) and arbitration proceedings between the Macao company and its purchaser. As Sir Michael tells the story, the first two years of the arbitration are taken up with 'preliminaries to the appointments' of the arbitrators. I will let you imagine what this might have involved. And that is only the beginning.

Sir Michael's conclusion? 'Occasionally - litigation is - arguably - not so bad after all!'

The Macao Sardine arbitration is not the model for modern international arbitration. Efficiency is what we now strive for. Interestingly, that is what tribunals in Australia are about.

The *Administrative Appeals Tribunal Act 1975* has always required the tribunal to proceed 'with as little formality and technicality, and with as much expedition as ...' possible.[4] The tribunal is not bound by the rules of evidence.[5] Since last year it has been required, much more imperatively, to be 'fair, just, economical, informal and quick.'[6]

That seems to me not to be a bad description of what international arbitration should be aiming to achieve.

Common lawyers, particularly those insulated from other systems of jurisprudence, such as in the United States and Australia, tend to conclude too readily that the appropriate procedure for an arbitration is to emulate a common law trial. English common lawyers who sit as arbitrators are now more comfortable with a flexible approach. They have to be.

English arbitrators only have to experience one arbitration as party appointed arbitrator where the other party appointed arbitrator is French and the chairman is Swiss to realise that non common law thinking can be compelling.

'How long shall we allow for cross examination of the witnesses,' the naïve English silk asks? 'Why is there any need for cross examination at all?', chorus the other two arbitrators? 'Because that is the way to discover the truth?' Derisive laughter follows, punctuated by suggestions that it is the documents which will disclose where the truth lies not the evidence of self-interested witnesses.

The Continental tradition has had its influence on the procedures of international arbitrations. I think it has been for the good. Cross-examination can be a very effective tool, but it is rarely decisive in a commercial dispute where the documents, of which there is usually no shortage, give the most accurate impression of the facts.

In the first edition of Mustill and Boyd on *Commercial Arbitration*, published in 1982, the authors suggested, in Chapter 1, that they could advance 'with reasonable confidence' the propositions that, one, an arbitrator should adopt a procedure that is adversarial in nature which should, two, be on broadly the same lines as a High Court action.[7] In the second edition, published only seven years later, in 1989, they 'doubt[ed] whether [the second proposition can now be sustained.'[8] In the 2001 companion to the second edition the authors said '...[W]e suggest that the reader should no longer rely on Chapter 1.'[9] Such is the speed of change which has occurred in arbitration in recent years. Of course, the authors were heavily influenced by the enactment of the English *Arbitration Act 1996* but that is merely reflective of the change. What is important is that they were talking about domestic arbitration, not international arbitration, where, to my mind, the change has been more extensive and more rapid.

So I suggest you take to your international arbitration careers a passion for efficiency and a willingness to be flexible. By and large the business community will thank you. Only those trying to prop up hopeless claims or to resist strong ones will ask for something different. Indeed there is evidence at all levels that the business community is moving away from determinative procedures for dispute resolution because of the inefficiency and cost.

Modern international arbitrators should be looking for the procedure most appropriate to the case. Of course, they should take careful cognisance of the parties' submissions about procedure, usually put by lawyers, but where the terms of appointment leave them with the discretion to do so, they should ultimately look to the efficient procedure which most suits the case.

The extent of cross examination is an obvious matter for consideration. So is the manner of adducing expert evidence. Where cross examination of experts is appropriate the technique now generally described as concurrent evidence will often be appropriate. The expert witnesses give their evidence concurrently. They interact with one another. The panel plays an active role. The lawyers ask their questions last. I have found this technique to be very effective. However, it needs to be structured to avoid chaos. You can read more about my views of concurrent evidence in papers published on the Administrative Appeals Tribunal web site.

Let me conclude with a particular thought. It cuts across everything else in international arbitration. It is the one thing to remember if all else is forgotten. Robert MacCrindle did not turn his mind to it sufficiently in *Hiscox v Outhwaite*. I am sure he did after that. It is the enforceability of the award.

Judges do not have to think about this. Means of enforcement are a given. But the issue should always be present in the thinking of an arbitrator. If an arbitrator makes a wrong decision he is letting down one party. If he makes an unenforceable decision he is letting down all parties. So simple a slip as writing Paris rather than London above a signature can lead to so much unnecessary litigation. I know about *Hiscox v Outhwaite* because Robert MacCrindle was a member of Essex Court Chambers. Indeed, along with Sir Michael Kerr and others he was one of its founders. I know he went to great trouble in the case to arrange that the award should be published in London. But he missed the fact that it contained a statement to contradict this.

The New York Convention is the friend of those successful in international arbitration but only when the arbitrators have dotted all 'Is' and crossed all 'Ts.'

1 [1992] 1 AC 562; 1991 2 WLR 848.

2 (1987) 3 *Arbitration International* 79; [2002] 7 *LCIA News* Issue 2 11.

3 Milton, *Paradise Lost*, Book 11, line 117.

4 Section 33 (1)(b).

5 Section 33 (1)(c).

6 Section 2A.

7 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (1982) p17.

8 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2d ed, (1989) p17.

9 Mustill and Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (2001) p118.

An address by Major Michael Mori USMC

New South Wales Bar Association, 15 August 2006

By Keith Chapple SC

A capacity crowd gathered in the New South Wales Bar Association Common Room in August to hear an address by Major Michael Mori USMC arranged by the Bar Association with the support of the New South Wales Law Society.

Barristers and solicitors had an opportunity to hear the defence perspective on the case of the well-known Guantanamo Bay detainee David Hicks.

Major Mori joined the Marine Corps in 1983. In 1994 he graduated from the Western New England College School of Law in Springfield, Massachusetts, before being admitted to the Bar in that state.

After various postings in the military legal system he was selected by the United States Department of Defense to act for Hicks in November 2003. On current estimates he could be acting as his lawyer well into 2007.

In 2005 Mori and other military defence lawyer colleagues were awarded the Medal of Liberty Award by the American Civil Liberties Union for their Guantanamo Bay work.

Major Mori's address dealt initially with the American military commission system that is being used to try detainees including Hicks. Military commissions have been used before in the United States to try those who have committed offences against the laws of war. Significantly, one needs to argue that there is a war on terror to allow for their use in these cases.

The military commissions were used as early as 1847 in the Mexican American War and apparently were also proposed for use as late as the Korean War. One example often referred to is the trial of German saboteurs captured in the United States during World War II (see *Ex part Quirin Et Al*, 317 US 1, 63 SCt 2 (1942)).

The commissions lay dormant until 2001 when it was argued by the US Government that the war on terror involved offences being committed against the laws of war by certain non-US citizens. Once detained by US forces many people including Hicks were declared to be 'enemy combatants' and taken to the facility in Guantanamo Bay to await processing by a military commission.

Mori made a number of points about the process. One was that the procedure that was proposed for conducting the commissions was unfair in itself. For example, evidence was to be given of the results of interrogations of suspects by those involved in the interrogations without the suspect being available for cross-examination and restrictions were to be placed on the conduct of defence lawyers.

Both in his address and in questions from the audience, Major Mori continually contrasted the procedures in a military commission with those in a court martial. Presumably he was proposing that the functions of the court martial be changed in appropriate ways to allow them to deal with charges against a non-US citizen. The virtues of the court martial system he suggested ranged from the quality of the Bench available to production of witnesses for cross-examination and the availability of classified documents to the defence with appropriate censoring of sensitive information.

Once charges were eventually laid against Hicks, Major Mori described a rather tortuous research trail he was forced to make in an attempt to find precedents for the charges. This ranged from research into the records of the International Military Tribunals in Nuremberg set up after World War II to the more recent International Criminal Tribunal proceedings at The Hague. No comparable case could be found.

Major Mori expressed concern about the detention of his client which has involved large amounts of time in solitary confinement, including lengthy spells without natural light. He was at pains to say that as far as he was aware his conferences with his client were not the subject of monitoring but suggested that certain other restrictions did apply to the general lawyer/client relationship.

Since Major Mori's address there have been some developments in the United States regarding proceedings against suspected terrorists.

In June of this year the US Supreme Court ruled that the military commissions violated US and international law.

In October 2006 the *Military Commissions Act 2006* was enacted with wide ranging powers for interrogation of suspects and limited rights available to detainees to challenge the process that holds them in US civil courts.

Despite these restrictions, perhaps it will lead to a new round of defence challenges to the revamped military commissions. At the moment nothing is certain.

One matter that was clear from the address and questions and answers that followed was that the process so far has led to lengthy delays in any resolution of the status of a person in the position of David Hicks. Years have passed without any final determination.

At first, the US Government designated the inmates at Guantanamo Bay as 'enemy combatants' and decided they would be dealt with by a military commission system. That military commission system was found to be invalid and new legislation has been passed, apparently with widespread support from the country's law makers. This legislation allows for a new type of military commission, so it would seem unlikely that an adapted form of court martial as proposed by Major Mori would have any chance of being adopted.

Recent press reports suggest that no further proceedings will occur until at least 2007. The options of Hicks and his lawyers seem to be limited as at present new charges have to be drafted and laid against him.

Where all this ends up in the end is anybody's guess – maybe nowhere.

The most poignant point that Major Mori appeared to be raising with his audience was that perhaps that was always the intended destination.

Opening of new UNSW Law School building

By John Pender

The Hon Murray Gleeson AC, Chief Justice of Australia, opened the new Law Building at the University of New South Wales on 21 September 2006.

In doing so the chief justice referred to the difficulties of ordinary citizens in affording the services of lawyers, especially if they became involved in litigation, and noted that the reasonable availability of legal services to ordinary people is no less a question of access to justice than the availability of services to those at the extremes of disadvantage. The chief justice stated:

> Impressing upon law students the importance and value of serving people across the whole community, and bringing home to them the personal satisfaction and fulfillment to be gained from identifying and answering the needs of all their fellow citizens, is a challenge. Law admitting authorities, in co-operation with law schools, need to see to it that new entrants to the profession have not only the capacity but also the interest to serve the general community's need for legal advice and services.

The opening of the building was also marked by a public lecture delivered by his Excellency Dr Jose Ramos-Horta, Prime Minister of East Timor as the Inaugural Hal Wooten Lecture on 10 October 2006. The Hon Hal Wooten AC QC was the foundation dean of the University of New South Wales Law Faculty and the lecture is intended to commemorate his founding vision for the faculty.

In his lecture Dr Ramos-Horta acknowledged that the May 2006 crisis in East Timor was a major set back not only for the country's security but for the systems which protect that security – the police and the judiciary. Dr Ramos-Horta discussed the difficulties in establishing democracy in circumstances where East Timor's infrastructure is relatively limited. While critical of some aspects of the UN administration, he also acknowledged that the East Timorese Government, in which he had served as foreign minister, had to take partial responsibility for recent events.

He spoke with hope for his country's future and praised the professionalism of the Australian and other international troops currently serving there. 'Today we [the East Timorese Government] struggle to maintain ideals of freedom, of fairness and justice. It is four years since East Timor's independence and we are still faced with the immense challenge of creating a functioning government in the wake of the devastation of 1999 and in the midst of widespread poverty,' he said.

His Excellency Jose Ramos-Horta, Prime Minister of East Timor.

Expert evidence: a judge's perspective

The admissibility of expert evidence under the Uniform Evidence Act

The following paper was delivered by the Hon Justice Catherine Branson, a judge of the Federal Court of Australia, at the inaugural Australian Women Lawyers Conference, Sydney, 29-30 September 2006.

Introduction

In a high proportion of the civil trials conducted in the Federal Court, and in other superior courts, expert evidence of one sort or another is received. This is not surprising. Australia's superior courts are increasingly required to deliver judgments concerning complex or highly technical subject matters including pharmacology, technology, economics, business and medicine. If public confidence in the outcomes of these trials is to be ensured, the public needs to know that judges get the assistance that they need by way of expert evidence to understand, and then to resolve, the disputes that come before them.

The expression 'expert evidence' is commonly used to mean expert opinion evidence. On other occasions it is used in a more limited sense to mean expert opinion evidence given by an independent witness. It was in this sense that Mr Justice Cresswell in *The Ikarian Reefer*[1] observed:

> Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

However expert evidence is not confined to opinion evidence. For example, an accountant who has inspected the financial records of a company may give a summary of their effect in evidence.[2] An expert with qualifications in a particular field may give evidence of the meaning and denotation of technical terms used in that field[3] and of the construction that a notional person skilled in that field would have placed on a technical publication as at a particular date.[4]

This paper principally gives consideration to the opinion evidence of independent witnesses. This is not intended to imply that the Uniform Evidence Act[5] requires an expert witness to be independent. In *ASIC v Rich* at first instance, Austin J noted that according to the preponderance of Australian authority the fact that an expert is aligned to the party engaging him or her, and biased or not independent, is not a bar to the admissibility of the expert's opinion evidence although it may affect the weight of the evidence.[6] The position may be different in the UK.[7]

The Australian Law Reform Commission, the NSW Law Reform Commission and the Victorian Law Reform Commission have recently conducted a joint inquiry into the Uniform Evidence Act.[8] One of the objectives of their inquiry was to identify and address any defects in the Act. The only amendment which they have proposed to Part 3.3 of the Act, which includes the opinion rule and the exceptions to that rule, is an amendment concerning the evidence of a person who has specialised knowledge of child development and behaviour.[9]

The law reform commissions have additionally recommended that the Act be amended to confirm that s60 (which allows hearsay evidence admitted for a non-hearsay purpose to be used as evidence of fact) applies to both first-hand and more remote hearsay.[10] Their report expresses the view that *Lee v The Queen*,[11] to the extent that it limits the operation of s60 to first-hand hearsay, does not reflect the intention of the ALRC when recommending the enactment of s60. They observe:

> If Lee is read as deciding that s60 has no application to second-hand and more remote hearsay, it follows that evidence of accumulated knowledge, recorded data, and other factual material commonly relied upon by experts will be inadmissible as evidence of the truth of the facts asserted in the material. Yet a central reason for enacting s60 was to continue to allow such evidence to be admissible as evidence of the truth of the facts asserted, even though the evidence is hearsay.[12] (citation omitted)

The limited nature of the above recommendations suggests that the law reform commissions concluded that the Act, generally speaking, provides a satisfactory framework for the provision of assistance to judges by way of expert evidence. This is a conclusion with which I broadly agree.

Nonetheless, it seems that many practitioners are concerned that the Act has added unnecessary complexity to the task of adducing expert evidence. This paper seeks to allay these concerns by identifying, and examining, the basic principles which govern adducing expert opinion evidence under the Act.

Before turning to these basic principles it is necessary to address briefly the broader statutory framework provided by the Act.

The general rule

In proceedings to which the Act applies[13] the admissibility of all evidence is governed by that Act. The central provision of the Act is s56 which provides:

> (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
>
> (2 Evidence that is not relevant in the proceeding is not admissible.

It flows from s55,[14] which gives meaning to the phrase 'evidence that is relevant', and s56 of the Act that unless any evidence, including expert evidence, sought to be adduced in a proceeding could rationally affect the assessment of the probability of the existence of a fact in issue in that proceeding it is not admissible. It also flows from these two sections that all evidence that could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding is admissible unless the Act itself makes it inadmissible or provides a basis upon which the court may refuse to admit it.

The opinion rule

The ordinary rule, which is reflected in s76 of the Act, is that evidence of an opinion is inadmissible to prove the truth of the subject matter of the opinion.[15] This is the opinion rule. An opinion for the purpose of law of evidence is an inference drawn from assumed facts.[16] The ordinary position is that witnesses must state facts (what they saw, heard or otherwise experienced) and it is for the court or other trier

of fact to draw inferences from those facts. The ordinary position reflects an assumption that the judge, or other trier of fact, has the competence to draw all necessary inferences where the subject matter of the inquiry is common-place.

Where the subject matter of the inquiry is not common-place, but rather an area of acquired wisdom, the opinion rule requires modification. In such a case the court, or other trier of fact, may not have the competence to draw all necessary inferences from established or accepted facts; if its judgment is to be sound it will need help from a person who has the relevant acquired wisdom.

The Act recognises three exceptions to the opinion rule. The first is where evidence of the opinion is admitted for a purpose other than for the purpose of establishing the truth of the opinion.[17] The second is a limited exception in respect of lay opinions.[18] The third exception is found in s79 which is relied on in most cases in which expert evidence is adduced. Section 79 provides:

> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

It is critically important to note the four requirements which must be satisfied before s79 will take evidence of an opinion outside the opinion rule. The section requires that:

- the evidence in question must evidence a person's opinion;
- the person must have specialised knowledge;
- that knowledge must be based on the person's training, study or experience; and
- the opinion must be wholly or substantially based on that knowledge.

The basis principles which this paper identifies all derive from the general rule governing admissibility and the requirements of s79 of the Act.

Basic Principle No 1

It is important to distinguish between expert evidence and other forms of expert assistance.

The distinction between expert evidence and expert assistance was highlighted by Allsop J in *Evans Deakin Pty Ltd v Sebel Furniture Ltd*[19] in comments concerning a report prepared by an expert accountant. His Honour, after noting that the report was argumentative in style and did not contain clear evidence of an expert opinion, observed:

> There may well have been great value in those preparing *Sebel's Case* obtaining the views of Mr ... . Such views would no doubt have assisted them in analysing and preparing the case and in marshalling and formulating arguments. That is the legitimate, accepted and well known role of expert assistance for a party preparing and running a case. Expert evidence in which a relevant opinion is given to the Court drawing on a witness' relevant expertise is quite another thing.'[20]

Expert assistance in litigation takes many forms. Expert assistance may be provided to a party's legal representatives entirely privately for the purpose of helping them to understand and thus prepare their client's case. For example a marketing expert might provide advice about features of the packaging of two rival products which deserve particular attention in a passing-off suit. At trial, armed with that advice, the party's lawyer may need to do no more than place the two sets of packaging in evidence and invite the court, by reference to those features, itself to draw inferences as to the impression that the challenged packaging would make on the minds of ordinary members of the community when purchasing products of the relevant kind.[21]

Similarly, an accountant might assist a party's legal representatives to analyse a company's financial records for the purpose of identifying its debts, the dates on which those debts were, or will be, due and payable and the resources available to the company to pay those debts as they become due and payable. With that assistance the party's case that the company was insolvent as at a particular date should, in other than a complex case, be able to be made out without expert accounting evidence - and thus without confronting the issue of whether an opinion concerning solvency is admissible.[22]

In other cases legal assistance may be provided directly to the court but not by oral or affidavit evidence. For example, where the court requires expert assistance in understanding technical subject matter, expert assistance in the formulation of an agreed technical primer or an agreed glossary of technical terms can prove very valuable. In some cases of this kind the court might even be persuaded that an expert should be permitted to address the court orally, perhaps as part of a party's opening, to provide a non-contentious explanation of relevant technology or scientific principles.[23]

Expert assistance in the senses discussed above will often not be evidence as such and thus may not be governed by the laws of evidence. Careful attention to the distinction between expert assistance and expert evidence may reduce, and might eliminate entirely, the need for an expert witness in a particular case. Even if it remains necessary or desirable to have an expert witness, the inclusion of expert assistance in an expert report which is required to comply with the laws of evidence is calculated to give rise to problems of admissibility (see Basic Principle No 5).

Basic Principle No 2

The starting point for any expert evidence is the identification of the fact in issue to which the opinion is to relate.

Expert evidence is not admissible merely because it satisfies the requirements of s79 of the Act. Unless the evidence is relevant,[24] s56 of the Act will render it inadmissible. It is therefore necessary to identify, by reference to the substantive law and the pleadings, or other documents which clarify the issues between the parties, what is the fact in issue in the proceeding on which expert evidence is to be adduced. The expression 'a fact in issue in the proceeding' in s55 of the Act is intended to carry a wide rather than a restrictive meaning; it will encompass at least all of those things that one party must prove in order to succeed and that the other must prove to establish its defence.[25] In a proceeding conducted on pleadings the facts in issue will be those material facts pleaded by one party which are not accepted, or deemed to be accepted, by an opposing party. The opinion of an expert will be admissible only to the extent that the opinion, if accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue. An illustration of the way in which identification of the fact in issue can determine the content of admissible expert evidence is found in *EI Dupont de Nemours & Co v Imperial Chemical Industries PLC*.[26]

Both in the area of expert evidence and evidence generally, the requirement that evidence be relevant to be admissible highlights the desirability of parties' cooperating with the court both to clarify and to narrow the issues in dispute in any proceeding. Steps which may usefully be taken include drawing pleadings carefully so as to plead only material facts,[27] amending them as the real issues in dispute are clarified, and the seeking and making of appropriate formal admissions.

Basic Principle No 3

Identify with precision the question or issue on which the expert opinion is to be expressed.

The question or issue on which the expert's opinion is to be expressed may not be the same as the fact in issue to which the opinion relates - although it must be logically related to the fact in issue in the sense that if it were accepted it could rationally affect the assessment of the probability of the existence of that fact.[28] By way of example, the fact in issue might be that the applicant was in good mental health on a particular day. If evidence were available that the applicant had been seen seven days later by a neurologist who had observed severe symptoms of dementia, an issue on which an expert opinion might be sought is whether a person who showed severe symptoms of dementia on a particular day could have been in good mental health seven days earlier.

To satisfy the court that the expert's opinion is admissible under s79 it is necessary to identify the relevant specialised knowledge that the expert has (i.e. what is the precise nature or field of that knowledge) and demonstrate how that knowledge is based on his or her training, study or experience. The identification of the precise question or issue on which the expert's opinion is to be expressed will not only assist in obtaining helpful and admissible expert evidence; it will also assist in identifying what is the specialised knowledge based on training, study or experience that the expert will need to have. In the above example, the specialised knowledge that the expert will need to have is knowledge concerning the speed of progression of dementia; it may be that not every neurologist will have this specialised knowledge.

In *Adler v Australian Securities and Investment Commission Giles* JA noted that the phrase 'specialised knowledge' is deliberately not defined in the Act.[29] He observed that its scope, rather than being restrictive, is informed by the available bases of training, study and experience and in this last regard perhaps extends the common law. The following have been held to be areas of specialised knowledge within the meaning of s79 - investor behaviour,[30] coded language of drug dealers[31] and the propensity of prison escapees to engage in criminal activity.[32]

A critical aspect of 'specialised knowledge' is its reliability; unless the knowledge is reliable an opinion wholly or substantially based on it will not be of assistance to the court in forming a sound judgment on an issue outside the competence of ordinary people.[33] However, the Act has not adopted the United States field of expertise test which asks not only if there is a field of expertise but also whether the scientific procedures used have gained the requisite standing in the scientific community to be regarded as 'generally accepted'.[34]

Not only must an expert witness have the appropriate specialised knowledge, the opinion expressed by the expert must be wholly or substantially based on that specialised knowledge. This means that the expert's competence to draw the inference which constitutes the opinion must be wholly or substantially based on his or her specialised knowledge.[35] An accountant, for example, might be qualified to express an opinion about what accounting standard is applicable in particular circumstances but not qualified to express an opinion on how a competent and experienced company director would act faced with particular circumstances.[36] A general practitioner might be able to express an opinion concerning an every day illness, but not be qualified to express an opinion in an area of specialised medical practice.

The danger of not identifying with precision the exact question or issue on which an expert opinion is required and selecting an expert whose expression of opinion will be wholly or substantially based on

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his or her expert knowledge is illustrated by *HG v The Queen*.[37] In that appeal Gleeson CJ observed of the opinion given by a psychologist:

> That opinion was not shown to have been based, either wholly or substantially, on Mr ... specialised knowledge as a psychologist. On the contrary, a reading of his report, and his evidence at the committal, reveals that it was based on a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise of a psychologist.[38]

Basic Principle No 4

Pay attention to the factual basis of the expert's opinion.

Basis rule

The Act does not expressly incorporate what has been called the 'basis rule'. Under the 'basis rule' the expert must disclose the facts or assumptions on which his or her opinion is based; those facts and assumptions must be capable of proof by admissible evidence; and evidence must be admitted to prove the facts and assumptions upon which the opinion is based.[39]

Disclosure

Published judgments of the NSW Court of Appeal and the full court of the Federal Court might be thought to reveal differences of approach, or perhaps of emphasis, so far as the disclosure of the factual basis of the expert's opinion is concerned. The NSW Court of Appeal has identified a requirement for an expert to state the asserted factual basis of his or her opinion as a condition of admissibility.[40] The full court of the Federal Court has tended to address disclosure of the factual basis of an expert opinion in the context of the requirement that the court be satisfied on the balance of probabilities[41] of the relevance of the opinion and of its basis. If satisfied that the opinion is relevant and that it is at least substantially based on the specialised knowledge of the expert, failure fully to disclose and prove the factual basis of the expert opinion is treated as affecting the weight to be given to the evidence.[42]

As Allsop J recognised in *Evans Deakin Pty Ltd v Sebel Furniture Ltd*[43] the differences in approach between the two courts as to the significance of any failure to disclose and prove the factual basis of an expert's opinion is likely to be of only theoretical interest. The requirement of the Act that the court be satisfied that the requirements of s79 are met, together with the discretion vested in the court to exclude evidence if its probative value is substantially outweighed by the danger that it might be unfairly prejudicial, misleading or confusing or result in undue waste of time,[44] will mean that differences in outcome will be rare. Moreover, compliance with the guidelines or rules published by courts for the assistance of expert witnesses should prevent the issue from arising (see, for example, the *Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*).

The guidelines or rules published by Australian courts for the assistance of expert witnesses require the expert to state all assumptions of fact made by him or her.[45] An assumption of fact for this purpose is any factual matter to which the expert had regard in forming his or her opinion. All such facts may be characterised as assumptions because it is for the court, not the expert or a party, to determine what are the true facts. It is for this reason that it is impermissible for an expert to read a transcript of a hearing, or sit in court for the purpose of hearing all evidence adduced, and then express an opinion based on what he or she has read or heard.[46] The expert cannot know how much of the evidence that he or she had heard will be accepted by the court.

Assumptions of fact made by an expert may include:

- assumptions of fact which the expert's instructions require the expert to make (eg 'on the assumption that the height of Mount Meru is 4,566 feet above sea level, at what temperature does water boil at its peak?');
- relevant observations made by the expert (e.g. an observation made by a medical practitioner that the applicant had a rash on the abdomen);
- information conveyed to the expert by a solicitor (e.g. 'our client's instructions are that he was driving his motorbike at 60 km/h'); and
- representations made directly to the expert (e.g. 'I was driving my motorbike at 60km/h').

All assumptions of any of the above kinds should be stated by the expert - if he or she has prepared a report, in that report, or otherwise orally or in an affidavit.

However, in some fields of expertise, it is not realistic to expert a witness to identify every assumption which underlies his or her opinion.

This was recognised by Spigelman CJ in the NSW Court of Appeal decision in *ASIC v Rich*, an appeal concerning the evidence of a forensic accountant, where the chief justice noted that:

> An expert frequently draws on an entire body of experience which is not articulated and, is indeed so fundamental to his or her professionalism, that it is not able to be articulated ... There will be occasions in which matters of this character are proper to be explored during the course of cross-examination for the purposes of determining the weight to be given to the opinion. The mere fact that there must have been use of some extraneous material ... does not of itself necessarily lead to a conclusion that the evidence is of low probative value. In many cases the opinion will plainly be capable of being supported by the underlying facts proven or assumed. If so, the fact that a broader range of information may originally have been availed of would not necessarily detract to any significant degree from the probative value of the evidence given. Any such conclusion must depend on the particular circumstances of the matter under consideration.'[47]

In *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)*[48] Lindgren J drew attention to the great practical differences in respect to the listing of factual assumptions between, for example, a physicist who specialises in slipping accidents[49] and historians and anthropologists concerned with more complex questions such as whether there are communal, group or individual rights and interests of Aboriginal peoples in relation to land and waters possessed under traditional laws and customs observed by those peoples.

Moreover, the authorities recognise that in the case of some expert economic evidence, such as that traditionally adduced in competition

law cases, it may even be artificial and unhelpful to try to identify all of the factual assumptions on which the relevant opinion is based.[50] In *ACCC v Liquorland (Australia) Pty Ltd*, a case concerning shopping behaviour, Allsop J observed that economics can usefully be understood, in the words of John Maynard Keynes, as 'a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor draw correct conclusions.' [51] His Honour said:

> Because it is a social science and because in one sense and in part it truly is a way of approaching matters and a way of thinking about matters, there is a role, it seems to me, for the economist to assist the court by expressing, in his or her own words, what the human underlying facts reveal to him or her as an economist and what it reflects to him or her about underlying economic theory and its application.[52]

Other disciplines in which it has been acknowledged that an expert cannot be expected to identify every assumption of fact upon which he or she has relied, including history,[53] pharmaceutical chemistry,[54] anthropology[55] and valuation.[56] The same approach may be assumed to be appropriate and permissible under the Act in respect of every discipline in which it is usual practice for a practitioner to draw upon a body of knowledge available generally to all practitioners in the discipline.

Proof

Unless the truth of the factual assumptions (other than those which constitute the body of knowledge available generally to practitioners in the discipline) that underpin an expression of opinion is established, the opinion itself will either be inadmissible, or if admitted, of limited, or perhaps no, weight. For example, if a fact in issue were the temperature at which water boils at Mt Meru's peak, an opinion on this question expressed by a hydrologist who accepted an invitation to assume that the height of Mt Meru is 4,566 feet above sea level would either be irrelevant or of no probative weight if the court were to find that the true height of Mt Meru is 4,566 metres above sea level.

Similarly, if a fact in issue were whether an applicant had contracted measles, an opinion on this question expressed by a medical practitioner whose evidence of having observed a rash on the applicant's abdomen was disbelieved would be likely to be of little, if any, weight. However, if the only discrepancies between the factual assumptions made by an expert and the facts as found by the court were slight, at least in the Federal Court, the failure to prove the truth of all of the factual assumptions that underpinned the expert's opinion would go only to the weight to be attributed to the opinion.

Particular attention needs to be given to hearsay evidence in the context of an expert opinion. Section 60 of the Act provides that the hearsay rule[57] does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation. It is common for evidence of a previous representation to be admitted because it is relevant as the basis of an assumption of fact made by an expert. For example, if a medical practitioner is asked to express an opinion on whether an applicant's injuries are consistent with his claim to have driven his motorbike into a tree, the medical practitioner is likely to ask the applicant about the speed at which he was travelling at the time of impact and base his or her opinion on an assumption that the applicant was travelling at or near the speed indicated by his answer. When the medical practitioner's report is admitted, unless an order is obtained under s136 of the Act[58] limiting the use to be made of the evidence, the hearsay evidence of the applicant's representation as to his speed of travel will also constitute evidence tending to prove the truth of that representation. Of course, the weight to be accorded to the hearsay evidence as proof of the truth of the representation is a matter for the court. Nonetheless, practitioners need to be alert to the need to request an order under s136 of the Act in appropriate cases.

It will not be appropriate to request an order under s136 of the Act in every case in which an expert gives hearsay evidence. The truth of the hearsay may not be contentious. Moreover, it would probably constitute an error for a court to invoke s136 simply because the evidence in question is hearsay.[59] However, if s60 is invoked in circumstances which suggest, for example, an intention to avoid having contentious evidence tested by cross-examination, a court is likely to be readily persuaded to make an order that the hearsay evidence may not be used to prove the truth of any assertion contained in it.[60]

An important limitation on the operation of s60 is that its operation is limited to 'evidence of a previous representation'. This gives importance to the form in which an expert gives evidence of the factual basis of his or her opinion.[61] If given in the form of an assumption s60 will have no operation; if given in the form of a positive representation s60 will have an operation. The ALRC has justified this outcome by noting that it would be perjury for an expert to state as a representation what was only put to him or her as an assumption.[62]

A further important limitation on the operation of s60 derives from *Lee v The Queen*.[63] This case is generally understood to exclude from the operation of s60 second-hand or more remote hearsay. On this basis, a statement in an expert report recording that a solicitor had advised that the client's instructions were that he was driving a motorbike at 60km/h would not constitute evidence as to the speed at which the client was travelling. However, a statement in the report that the client had advised the author of the report that he was travelling at 60/km/h would constitute evidence of the speed at which he was travelling.

In the recently published review of the Act it is stated that the ALRC did not intend to limit s60 to first-hand hearsay, either in relation to prior statements or in relation to the factual basis of expert opinion evidence.[64] As mentioned above, a recommendation has been made that the Act be amended to confirm that s60 does not have a limited operation.[65]

Basic principle No 5

Lawyers should take steps to ensure that expert reports are in the proper form.

The admissibility requirements of the Act, and the strictures of guidelines for the preparation of expert reports, are unlikely to be fully appreciated by an expert whose discipline is not the law. For this reason lawyers should help experts retained by their clients to

formulate their reports in an admissible form and in compliance with the appropriate guidelines. If lawyers do not undertake this role, time and cost on all sides is likely to be wasted and the court deprived of the expert assistance that it needs.[66]

The appropriateness of lawyers helping experts to prepare reports in admissible form was recognised by Lindgren J in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)*. His Honour noted that many of the experts' reports in that case made little or no attempt to address in a systematic way the admissibility requirements of the Act. His Honour said:

> Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is not the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. So long as the court ... is bound by the rules of evidence ... the requirements of s79 (and of s56 as to relevance) of the Evidence Act are determinative in relation to the admissibility of expert opinion evidence. [67]

Of course, it is important that lawyers understand the boundaries within which their assistance can properly be provided. In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* the conduct of a solicitor in suggesting changes to a draft opinion expressed by an expert led Wilcox J to conclude that it would be unsafe to rely on that expert in relation to any controversial matter.[68]

The *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* deal in detail with the appropriate form of a report. The equivalent rules or guidelines of other courts do likewise.[69] If lawyers help experts to ensure that they are followed, the opinion sought to be adduced under s79 will be clearly identified; the specialised knowledge of the expert will be specified and the training, study or experience on which that knowledge is based particularised. Additionally the assumptions of fact made by the expert will be set out as will the reason why those assumptions led to the opinion expressed.

One reason why the courts have sought to control the form of expert reports is that proper form facilitates the determination of admissibility. Only so much of the report as constitutes evidence of the expert's opinion will be admissible under s79 of the Act. The rest of the report will be admissible only to the extent that it satisfies the general admissibility requirements of the Act, and in particular, the criterion of relevance. A report in proper form will include, and only include, evidence which is relevant because, if accepted, it could rationally affect (indirectly) the assessment of the probability of the existence of the fact in issue to which the opinion itself is directed. The evidence will be of this character because it underpins the weight, if any, to be given to the opinion of the expert.

Conclusion

Expert evidence is an important category of evidence. It is likely to become even more important as the subject matter of litigation becomes increasingly removed from ordinary experience.

More than a decade has passed since the Uniform Evidence Act came into operation. Considerable jurisprudence has emerged touching on its operation, including its operation in respect of expert evidence. This paper attempts to identify important features of that jurisprudence and place them in a practical context.

Additionally it attempts to encourage legal practitioners to be thoughtful about whether in any particular case the court will require expert assistance and, assuming that it does, about the type, extent and form of expert assistance most likely to be beneficial and the expertise and experience that an individual will need to have before he or she is able to provide that assistance.

Consideration of court appointed experts and restrictions on the number of expert witnesses, if any, that a party may call are outside the scope of this paper. However, it is appropriate to note that the impetus towards initiatives of this kind are probably rooted in a relatively wide-spread belief that litigation is often unnecessarily protracted, or unnecessarily expensive, or both, because legal practitioners are not displaying sufficient thoughtfulness and discipline with respect to expert evidence.

1 [1993] 20 FSR 563 at 565.

2 *Potts v Miller* (1940) 64 CLR 282 per Dixon J at 302; *Spassked Pty Ltd v Commissioner of Taxation (No 2)* (2002) 49 ATR 642 at [13].

3 *Borowski v Quayle* [1966] VR 382; *R v Patents Appeal Tribunal; Ex parte Baldwin & Francis Ltd* [1959] 1 KB 105.

4 *El Dupont de Nemours & Co v Imperial Chemical Industries PLC* (2002) 54 IPR 304 at [59].

5 '*Uniform Evidence Act*' (or 'the Act') is used in this paper to refer to the *Evidence Act 1995* (Cth), the Evidence Act 1995 (NSW), the *Evidence Act 2001* (Tas) and the *Evidence Act 2004* (NI).

6 (2005) 190 FLR 242 at [334].

7 See the Civil Procedure Rules (UK) Part 35.3 and Toth v Jarman [2006] EWCA Civ 1028.

8 Uniform Evidence Law Report (2005) comprising ALRC Report 102, NSWLRC Report 112 and VLRC Final Report December 2005.

9 Recommendation 9.

10 Recommendation 7-2.

11 (1998) 195 CLR 594.

12 *Uniform Evidence Law Report*, above n 8, at par 7.99.

13 All proceedings in the High Court, the Federal Court, the Family Court, the Federal Magistrates Court or before any person or body (other than a court or magistrate of a state or territory) that is performing a function or exercising a power under a law of the Commonwealth that is required to apply the laws of evidence; all proceedings in any court of the ACT or before any person or body that in performing a function or exercising a power under a law of the ACT is required to apply the laws of evidence; all proceedings in a NSW court; all proceedings in a Tasmanian court; and all proceedings in a Norfolk Island court.

14 Section 55(1) of the Act provides: 'The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.'

15 Section 76(1) of the Act provides: 'Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.'

[16] J D Heydon, *Cross on Evidence*, 7th Australian edn, at [29010].

[17] Section 77 of the Act.

[18] Section 78 of the Act.

[19] [2003] FCA 171.

[20] ibid. at [676].

[21] See *Pacific Publications Pty Ltd v IPC Media Pty Ltd* (2003) 57 IPR 28; Cat Media Pty Limited v Opti-Healthcare Pty Limited [2003] FCA 133 at [55].

[22] *Quick v Stoland Pty Ltd* (1998) 87 FCR 371; *ASIC v Rich* (2005) 190 FLR 242 at [284]-[291]. See also *Potts v Miller* (1940) 64 CLR 282 per Dixon J at 302; *Re Montecatini's Patent* (1973) 47 ALJR 161 at 169; *Spassked Pty Ltd v Commission of Taxation* (No 2) (2002) 49 ATR 642.

[23] I granted such permission in *Brookfield v Davey Products Pty Ltd* (1996) 14 ACLC 303. The explanation was not received in evidence - it constituted part of the party's opening on the facts.

[24] See s 55(1) of the Act, above n 14.

[25] *EI Dupont de Nemours & Co v Imperial Chemical Industries PLC* (2002) 54 IPR 304 at [48].

[26] ibid. at [52]-[60].

[27] See, for example, O 11 r 2 of the Federal Court Rules.

[28] Section 55 of the Act.

[29] (2003) 179 FLR 1 at [629].

[30] *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (No 6) (1996) 64 FCR 79.

[31] *R v Lam* [2002] NSWCCA 377.

[32] *Godfrey v New South Wales (No 1)* [2003] NSWSC 160.

[33] *Osland v The Queen* (1998) 197 CLR 316, Gaudron and Gummow JJ at [53].

[34] *Frye v United States* 293 F. 1013 (D.C.Cir. 1923).

[35] See *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 375.

[36] *Adler v ASIC* (2003) 179 FLR 1 at [630].

[37] (1999) 197 CLR 414.

[38] ibid. at [41].

[39] Uniform Evidence Law Report, above n 8, at par 9.52. This report at par 9.63 concludes: 'There is no formal "basis rule" at common law. Rather, the label "basis rule" acts as a shorthand for two orthodox proportions: that (1) the lower the correlation between the facts proved and the facts assumed, the less weight can be given to the expert opinion evidence; and (2) where the facts proved and the facts assumed are substantially different, the point might be reached where the opinion evidence carries so little weight that it is not probative, and hence inadmissible.' (references to footnotes omitted).

[40] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 per Heydon JA at [85]; ASIC v Rich (2005) 218 ALR 764 at [134].

[41] Section 142 of the Act.

[42] *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354; Quick v Stoland (1998) 87 FCR 371.

[43] [2003] FCA 171 at [670].

[44] Section 135 of the Act.

[45] See, for example, 2.2 of the Federal Court Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia; the Federal Magistrates Court Rules 2001 (referring to the Federal Court Guidelines); Part 15.5 of the *Family Law Rules 2004*; Part 31, Division 2 and Schedule 7 of the *Uniform Civil Procedure Rules 2005* (NSW); Order 44 of the Supreme Court (General Civil Procedure) Rules 2005 (VIC); Chapter 11, Part 5 of the *Uniform Civil Procedure Rules 1999* (QLD); Order 44 of the Supreme Court Rules (NT); Part 2.12 of the *Court Procedure Rules 2006* (ACT); Part 9, Division 2 of the *Supreme Court Civil Rules 2006* (SA).

[46] *Arnotts Ltd v Trade Practices Commissioner* (1990) 24 FCR 313 at 345-354; *Hillier v Lucas* (2000) 81 SASR 451 at [351]-[353].

[47] (2005) 218 ALR 764 at [170].

[48] (2003) 130 FCR 424 at [26].

[49] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

[50] See *ACCC v Universal Music Australia Pty Limited* (2001) 115 FCR 442; on appeal *Universal Music Australia Pty Limited v ACCC* (2003) 131 FCR 529.

[51] [2005] FCA 630 at [21].

[52] Ibid at [29].

[53] *R v Zundel* (1987) 35 DLR (4th) 338 at 387-390.

[54] *Borowski v Quayle* [1966] VR 382 at 386.

[55] *Daniel v Western Australia* (2000) 178 ALR 542 at [24]-[30].

[56] *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370 at 374-5 per Ipp J.

[57] The hearsay rule is set out in s 59(1) of the Act which provides: 'Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.'

[58] Section 136 of the Act provides: 'The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing.'

[59] See *Papakosmas v The Queen* (1999) CLR 297 at [94].

[60] *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 378.

[61] ibid. at 377-378.

[62] *Uniform Evidence Law Report*, above n 8, at par 7.118.

[63] (1998) 195 CLR 594.

[64] See *Uniform Evidence Law Report*, above n 8, at par 7.97.

[65] Recommendation 7-2.

[66] *Seven Network Limited v News Limited (No 15)* [2006] FCA 515.

[67] (2003) 130 FCR 424 at [19].

[68] (2005) 220 ALR 1 at [227]-[231].

[69] See, for example, the Federal Magistrates Court Rules 2001 (referring to the Federal Court Guidelines); Part 15.5 of the Family Law Rules 2004; Part 31, Division 2 and Schedule 7 of the *Uniform Civil Procedure Rules 2005* (NSW); Order 44 of the *Supreme Court (General Civil Procedure) Rules 2005* (VIC); Chapter 11, Part 5 of the *Uniform Civil Procedure Rules 1999* (QLD); Order 44 of the Supreme Court Rules (NT); Part 2.12 of the *Court Procedure Rules 2006* (ACT); Part 9, Division 2 of the *Supreme Court Civil Rules 2006* (SA).

Reflections on expert economic evidence

By Henry Ergas

I should note at the outset that I offer these comments from the perspective of an economist, and do not claim any real familiarity with the many complexities that seem to characterise the law of evidence, including its application to expert evidence. That said, economic evidence plays an important role in some areas of litigation, so it may be useful to consider, from the perspective of a practitioner, what it may or may not have to offer.

The purposes for which economic evidence is used

Economic evidence seems most frequently sought for four, somewhat different, purposes.

The first is that of providing an explanation of economic concepts as they appear in legislation, and most particularly in statutes related to economic regulation. Competition law, for example, relies on concepts such as a 'market', 'market power' and 'competition' that are terms of art in economics and whose application involves tools and methods that have been developed in economics. Courts that need to apply these concepts can benefit from access to understandable explanations of the underlying economic analysis.

A second purpose for which economic evidence is deployed is that of assisting in the application of those concepts to the relevant facts. While the concept of a 'market' is reasonably readily explained, the determination of the boundaries of the market in a particular instance can be complex. Equally, in cases involving price regulation, determining a 'reasonable rate of return' often involves difficult conceptual and practical issues whose resolution can greatly benefit from the evidence of financial economists.

A third purpose, that goes beyond the second in the range of evaluative considerations it involves, is that of providing an economic assessment and interpretation of a situation as a whole or of crucial elements within it. For example, a key component of section 46 of the *Trade Practices Act 1974* (Cth) ('the Act') is the notion of 'taking advantage of' market power. It has become common for economic evidence to be offered as to whether or not such 'taking advantage' has occurred, evidence which by necessity involves an economic evaluation of the relevant conduct as a whole. In practice, that evidence offers what amounts to an explanation of the conduct from an economic perspective and in the light of that explanation, assesses its pro- or anti-competitive nature.

A fourth and final purpose, about which I will say relatively little, is that of assisting in the assessment of damages. Central here is the use of economic models to determine the main parameters of a 'but for' world by reference to which a loss can be evaluated. While economists are heavily involved in the assessment of damages in North America (and to an increasing extent in New Zealand), loss assessments in Australia remain based on accounting, rather than economic, methodologies. Economists may play a part - for example, in setting out macroeconomic scenarios, or identifying the main features of industry demand and supply - but that part is still relatively limited in scope and significance.

The strengths and weaknesses of economic evidence

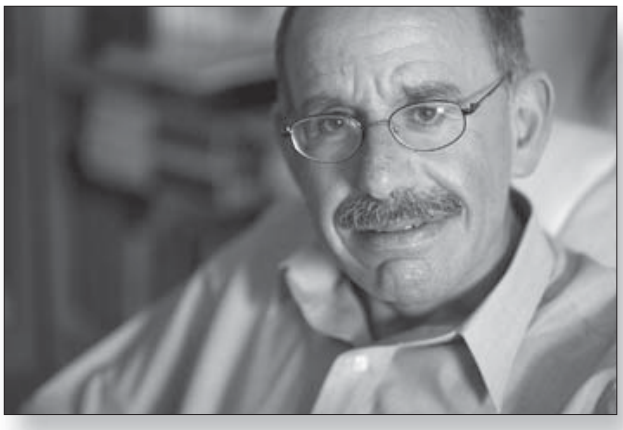
Set against these four purposes, economic analysis seems better placed to assist with some than with others.

In my experience, economists can, and usually do, make a substantial contribution to explaining the relevant concepts and to assisting in their immediate application - that is, to the first two of the purposes I have set out above. There may be disagreements as to precisely how a concept should be defined or applied, but usually, the areas of agreement are substantial relative to the range of points in dispute. I may come to the view that the relevant market is a Sydney-wide market for bread, while another economist believes that it is confined to Sydney's Eastern Suburbs and only includes rolls and bagels, but there are not likely to be material differences about the methods and facts that should be used in testing our respective views. Additionally, in most cases, the process of testing those views, and coming to a reasonable determination as to which opinion is most convincing, should be well within the capabilities of the judicial process.

Where matters necessarily become more complicated is when economists are called upon to make an evaluative assessment of entire courses of conduct. For example, in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2005] FCA 581 (16 May 2005) ('Baxter'), was Baxter's conduct such that it would not or could not have been adopted by a firm that did not have a substantial degree of market power? To answer this question, an economist needs to develop an overall explanation of the conduct - a 'story' - that makes sense of a complex set of facts.

Those 'stories' are typically the verbal formulation of an economic model, where the term 'economic model' has a specific meaning. Such a model is a deductive structure, which starts from some elementary propositions as to the goals of identified economic agents and the resources at their disposal (including in terms of the range of actions they can take, the outcomes those actions can have, and the information on which each agent can draw). From those propositions the economist deduces courses of conduct that those agents will take, which are 'equilibria', where an equilibrium is typically defined as a situation in which no agent could do better by individually changing his or her behaviour, given some assumption about the behaviour of others. The identification of a course of conduct as such an equilibrium is then taken as an explanation of that course of conduct, in the sense and the resources at their disposal (including in terms of the range of actions they can take, the outcomes those actions can have, and the information on which each agent can draw). From those propositions the economist deduces courses of conduct that those agents will take, which are 'equilibria', where an equilibrium is typically defined as a situation in which no agent could do better by individually changing his or her behaviour, given some assumption about the behaviour of others. The identification of a course of conduct as such an equilibrium is then taken as an explanation of that course of conduct, in the sense that given the elementary propositions that underpin the model, it would be rational for agents to adopt that course of conduct.

A greatly simplified example may help. Consider a case where the issue is whether a 'meeting the competition' clause in a contract could have the effect or likely effect of substantially lessening competition, and hence contravening section 47 of the Act (and potentially section 46 as well). In thinking through that issue, an economist might draw on a model that runs along the following line:



- Assume that firm A (the firm that has engaged in the conduct) is a monopolist (the only firm that serves a particular market) but is faced with the threat of entry into its market by firm B, where for firm B to enter, firm B must make substantial investments that, once made, cannot be recouped should the firm choose to exit.
- Assume also that firm B can only be viable in the market if its unit costs are lower than firm A's, but that firm B does not know how low or high firm A's costs really are.
- In that event, it may be rational for firm A to persistently price below the monopoly level, *or* to intermittently set price very low, *or* to let it be known that it has entered into contracts which specify that should firm B come into the market, it will match firm's B price: this is because each of these forms of conduct can be taken by firm B to be a credible signal that firm A has low costs (since if it did not have low costs, it would be unprofitable for it to act in that way) and hence, will deter firm B from entering.

As a result, and given this analysis, the economist might opine that firm A's conduct - in entering into price-matching contracts - is *explained* by its desire to forestall competition, which implies that the conduct lessens competition, and perhaps substantially so. The model, and the opinion it led to, would then be set out in an expert witness statement in the form of a 'theory of the case' that elaborated on the chain of steps set out above.

A first issue this raises is whether such 'theories of the case', when advanced by an economist, are evidence, at least as conventionally defined (i.e., an assertion which, if true, increases the probability properly attached to a hypothesis) or rather, are a form of rhetoric. Without wishing to go into the legal questions this involves, it may be helpful to note the approach recently adopted to this issue by Allsop J. in *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] FCA 826 (30 June 2006) where his Honour notes (at paragraph 842) that:

> The recognition of the place of expert economic assistance ...means that often the point of the expert opinion is to give a form or construct to the facts. It may appear to be an argument put by the witness. So it is. The discourse is not connected with the ascertainment of an identifiable truth in which task the court is to be helped by the views of the expert in a specialised field. It is not, for example, the process of ascertaining the nature of a chemical reaction or the existence of conditions suitable for combustion. The view or argument as to the proper way to analyse facts in the world from the perspective of a social science is essentially argumentative. That does not mean intellectual rigour, honesty and a willingness to engage in discourse are not required. But it does mean that it may be an empty or meaningless statement to say that an expert should be criticised in this field for 'putting an argument' as opposed to 'giving an opinion'.

Taking that as given, the 'argument' that is being put obviously needs to be assessed, both in terms of substantive correctness and in terms of the weight that can be placed on it. It is here that three important, but often not fully recognised, difficulties associated with relying on 'stories' of the type I have set out above become relevant.

The first is that the underlying models almost invariably rely on complex assumptions and are highly brittle relative to those assumptions - in the sense that small changes in the assumptions can reverse the modeled results. However, understanding these assumptions and the way they relate to the results usually requires a detailed understanding of the techniques used in this kind of analysis. For example, the price-matching model I have just described relies heavily on the way firm A thinks firm B interprets its conduct, the way firm B thinks firm A thinks firm B interprets its conduct, and so on.

Secondly, although the 'stories' are generally told as if the models yielded a single outcome (for example, it is rational for a monopolist to enter into price-matching contracts so as to deter competitive entry), in fact the models almost always generate multiple outcomes or equilibria. In the price-matching model, for example, it can be an equilibrium for the firm, instead of choosing a 'meet the competition' clause, to alternate probabilistically between low and high prices. It is not clear why one of those outcomes would have any particular status (in terms of being more likely) relative to the others.

Third and related, the mere fact that a model can be devised that generates particular conduct says nothing about whether, in the specific context at issue, that model is likely to be at work. For example, are A and B really engaged in a complex dynamic 'game', or are there other forces at work that occasionally lower A's costs? Is A's use of price-matching clauses really driven by a desire to deter entry or is it driven by the need to provide some degree of assurance to customers who enter into long-term purchase commitments that A, once it has those commitments, will not undercut them by offering better terms to those customers' competitors[1]? That a model can be constructed in which the effect of the clauses is to reduce competition neither eliminates these alternatives or helps to select among them.

This last point is of great significance, particularly in competition cases, and hence merits some elaboration. Three aspects of it are especially important.

First, as a matter of economic theory, it is possible to generate at least one model that 'explains' - in the sense specified above - any type of conduct. However, in and of itself, generating such a model tells us little about conduct, because we do not know whether it is that

model, or some other set of factors, that is actually giving rise to the conduct in any specific fact situation.

Second, this difficulty is accentuated by the fact that deductive economic models, especially those used in the competition area, are rarely subject to empirical testing. For example, we do not know whether, as an empirical matter, it is true that in circumstances that correspond to the assumptions of the simple entry-deterrence model set out above, we more frequently than not observe the conduct at issue and its associated harmful effects. Nor do we know whether, as an empirical matter, when we observe conduct such as that at issue, it is more often than not in circumstances where the assumptions of the model I have outlined (and its conclusion of harm to competition) hold. As a result, we cannot properly have any presumptions based on statistical likelihoods about the validity of the 'story' that has been advanced: we cannot, in other words, properly make any statements of the kind that say 'statistical analysis suggests that in 80 per cent of instances where we observe price-matching contracts, the effect is to deter entry'.

Third, given competing 'stories', at least as developed by competent practitioners, it is not usually possible to devise an empirical test that will adequately select among them in a particular fact situation, simply because there are too many variables and too few observations. While the economists may point to factors that seem 'more consistent' with one 'story' than the other, the inferences that can properly be drawn from those indications are usually very weak indeed.

In short, caution is needed in relying on economic evidence as a basis for inferring 'what it is that is happening here'. The kinds of models economists use can suggest possible explanations; but there are substantial risks involved in concluding (say) that a firm is acting anti-competitively merely because there exists an economic model in which conduct of that kind can be anti-competitive, or equivalently, that, because a competitive scenario can be constructed in which the conduct is not anti-competitive, it indeed is not.

The resulting tensions

This need for caution may seem obvious but it is far from being universally heeded. One significant factor here is the demands on economic analysis which have arisen from the interpretation placed on the 'taking advantage' limb of section 46.

At the centre of this interpretation is the so-called counterfactual test, which asks, in respect of the impugned conduct, whether that conduct could or would have been adopted by a firm that lacked a substantial degree of market power.[2] That test was most explicitly set out in *Queensland Wire*[3] where Mason CJ and Wilson J noted that:

> In effectively refusing to supply Y-Bar to the appellant, BHP is taking advantage of its substantial market power. It is only by virtue of its control of the market and the absence of other suppliers that BHP can afford, in a commercial sense, to withhold Y-Bar from the appellant. If BHP lacked that market power - in other words, if it were operating in a competitive market - it is highly unlikely that it would stand by, without any effort to compete, and allow the appellant to secure its supply of Y-bar from a competitor.[4]

In their Honours' view, BHP took advantage of its market power because it could not engage in the same conduct in a competitive market.

Dawson J likewise observed that the concept of 'take advantage of' requires comparison to a competitive counterfactual. Specifically, his Honour commented that:

> The words 'take advantage of' do not have moral overtones in the context of section 46. That being so, there can be no real doubt that BHP took advantage of its market power in this case. *It used that power in a manner made possible only by the absence of competitive conditions. Inferences in this regard can be drawn from the fact that BHP could not have refused to supply Y-bar to QWI if it had been subject to competition in the supply of that product.* BHP supplies all its other steel products without restriction and its practice with regard to Y-bar was not in accordance with its normal behaviour. If there had been a competitor supplying Y-bar, BHP's refusal to supply it to QWI would have eroded its position in the steel products market without protecting AWI's position in the fencing materials market.[5]

This approach then received further standing when it was endorsed by the Privy Council in *Telecom Corporation of New Zealand v Clear Communication Ltd*.[6] The key issue for the board was whether Telecom had 'used' its substantial market power ('use' being the New Zealand statutory equivalent of 'take advantage of' in relation to section 36 of the Commerce Act).

In concluding that Telecom had not so used its market power, the board said that the relevant test requires the court to:

> Consider how the hypothetical seller would act in a competitive market [but] attention must be directed to ensuring that (apart from the lack of a dominant position), the hypothetical seller is in the same position vis a vis its competitors as is the defendant ...
>
> ... it cannot be said that a person in a dominant market position 'uses' that position for the purposes of s36 unless he acts in a way which a person not in a dominant position but otherwise in the same circumstances would [not] have acted.[7]

Given this test, the court in section 46 proceedings is required to compare a factual world - in which the corporation has the substantial degree of market power needed for the section to apply - to a counterfactual world in which that power is absent. It is difficult to see how this comparison could be made without economic analysis,

...underlying models almost invariably rely on complex assumptions and are highly brittle relative to those assumptions - in the sense that small changes in the assumptions can reverse the modeled results.

with the result that the task of devising and comparing factual and counterfactual worlds has become a staple part of the economic evidence adduced in proceedings under section 46.

However, this test probably asks both too much and too little.

It asks too much because in most cases it is not at all obvious that one could construct a meaningful counterfactual that abstracted from the features that give the firm its market power.

For example, both Telecom (in Telecom/Clear) and BHP (in Queensland Wire) operated in activities that involved substantial fixed costs and economies of scale - indeed, it was those features that caused them to have a substantial degree of market power. A world in which they lacked that power would necessarily be one in which those features were absent; but how could such a world - that removed the key elements of those firms' economic characteristics - usefully inform the interpretation to be placed on the conduct of firms which did have those characteristics? More specifically, why would the mere fact that absent those features, it would not be rational for a firm to do X or Y, imply that X or Y in some sense 'relied' on market power (rather than say, on the need to cover fixed costs and exploit economies of scale)?

At the same time, the test seems to do too little if it is interpreted as meaning that conduct that might be found even absent the market power is necessarily harmless. For example, it is all very well to say that the conduct in *Melway*[8] could reflect the protection of an efficient distribution system, but it would hardly provide a sufficient basis for an assessment of whether or not the section had been contravened if all that was being raised was a possibility (in other words, if there was no basis for concluding that the possibility was an actuality). Rather, what would need to be clear is that the conduct could reflect that objective and in *Melway* actually did. Many kinds of conduct can be found in competitive markets and if all that is needed to defeat a section 46 claim is to construct a competitive counterfactual in which a particular variety of conduct occurs, then the test would have as few teeth as it had economic meaning.

These difficulties notwithstanding, economists are commonly asked in section 46 proceedings to produce counterfactuals that cannot really be given a sound basis in economic theory. It is true that the High Court emphasised in *Melway* that counterfactual analysis must not be 'completely divorced from the reality of the market'; but quite what this means very much remains to be determined.

This is not a complaint about economic evidence as such, but rather about the current construction of section 46 and the issues it raises.[9] Nonetheless, the weight that has in some cases been given to implausible counterfactuals highlights the difficulties the courts face in properly testing economic evidence.

Testing economic evidence

There are, of course, many similarities between the forensic elements involved in testing economic evidence and those involved in testing other forms of expert evidence. That said, it is my impression that economic evidence does present some special challenges.

More specifically, it is in the nature of economic analysis, particularly when it is applied to complex problems, to rely on the kind of stylised deduction I described in respect of economic models. A relatively small set of assumptions, some of them highly technical in nature, are used to generate, by the repeated application of deductive processes, equilibrium outcomes. Few lawyers have the knowledge of economics required to understand either the lengthy chains of reasoning by which these outcomes are derived or their proper interpretation. Faced with that fact, economists tend to 'dumb down' the analysis into accounts that are little more than analogies to the underlying reasoning. While seeming to make the analysis more approachable, this risks further disguising the underlying assumptions and the specific nature of the dependence of the results on those assumptions.

One response to these risks has been the use of 'hot tubs' in which economists essentially question each other on the views they have presented. These 'hot tubs' can be useful, but they do have some important limitations.

To begin with, economists are not trained in, or at all familiar with, the forensic analysis involved in cross-examination, and rarely approach 'hot tubs' in a structured and systematic way. Additionally, the language in which economists assess each other's work is no less technical than that which underpins the analysis they undertake, and inevitably involves many terms of art, and references to the literature, which non-economists will find difficult to understand, much less assess. Moreover, 'hot tubs' are especially at risk of being dominated

...economists are not trained in, or at all familiar with, the forensic analysis involved in cross-examination, and rarely approach 'hot tubs' in a structured and systematic way.

by those participants who are most confident or assertive - traits that may bear little relation to the merits of the analyses being presented. Finally, time constraints often mean that the discussion remains relatively superficial, further limiting its value.

Conclusions

Economic laws, such as the Trade Practices Act, rely on a number of concepts that are difficult to interpret and apply without extensive recourse to economic analysis. Expert economic evidence can be essential if that analysis is to be undertaken in a reliable way. However, the economic way of thinking has some unique features that create difficulties for the legal process.

Central among these is the fact that economics, uniquely among the social sciences, is an essentially deductive discipline, in which inferences are drawn from axiomatic reasoning. That reasoning itself involves long chains of analysis, often reliant on technical assumptions whose implications are not apparent from mere knowledge of the inference ultimately drawn. Those inferences are not usually intended as predictions or statements of likelihood; rather, they are the working out of the consequences of the assumptions originally made.

Accentuating the difficulties to which this gives rise is the fact that, especially in areas related to competition analysis, few of the inferences drawn from these models have been subjected to empirical testing on a scale sufficient to allow statements of likelihood to be made. Most of the model results are therefore statements of possibility, rather than of any kind of statistical tendency. Both understanding the results of these models, and assessing the relevance and weight to be attached to them, is therefore a challenging task.

Moreover, 'hot tubs' are especially at risk of being dominated by those participants who are most confident or assertive - traits that may bear little relation to the merits of the analyses being presented.

These difficulties will be most acute when economists are asked to provide an economic assessment of a complex fact situation - for example, to evaluate whether conduct would or would not occur in a competitive market; or whether a course of conduct is likely to lessen competition relative to the world as it might otherwise have been. These are questions economists may well be able to usefully address, but only if they can draw on theories and analyses that courts may find difficult to fully understand and properly evaluate.

Obviously, there are things economists can do to help address this problem - not merely through clarity of exposition, but also by carefully explaining the underlying thought processes involved in the analysis, and those processes' strengths and weaknesses. Equally obviously, however, matters would be improved were the legal profession in Australia more familiar with contemporary economics. Whether that will happen, and if so, how, is perhaps an interesting issue for further discussion.

1 Contrast, for example, Baker, J B 1996, 'Vertical Restraints with Horizontal Consequences: Competitive Effects of 'Most-Favoured Customer' Clauses', *Antitrust Law Journal*, vol. 64, pp 517-534, p528 with Hubbard, R G and R J Weiner 1991, 'Efficient Contracting and Market Power: Evidence from the U.S. Natural Gas Industry',3 *Journal of Law and Economics* 25-68.

2 See generally, Landrigan, M & Ergas, H, 2004, 'Not Another Article About Section 46 of the Trade Practices Act!',32 *Australian Business Law Review* 415 - 435.

3 *Queensland Wire Pty Ltd v BHP Pty Limited* (1989) 167 CLR 177.

4 n2, at 192.

5 ibid. at 202.

6 (1995) 1 NZLR 385.

7 ibid., at 403. The bracketed word [not] was inserted by the dissenting judges, Lord Scott of Foscote and Baroness Hale of Richmond, in *Carter Holt Harvey Building Products Group Ltd v The Commerce Commission* [2004] UKPC 37, para 74, noting that the omission of the word 'not' from the original judgment was an 'obvious mistake'.

8 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1.

9 It is worth noting that similar issues frequently arise in proceedings under ss45 and especially 47, though perhaps in less acute form.

Preparing expert witnesses

A search for ethical boundaries

By Hugh Stowe

> Even though witness preparation occurs in practically every lawsuit, it is almost never taught in law school, not directly regulated, seldom discussed in scholarly literature, and rarely litigated. Witness preparation is treated as one of the dark secrets of the legal profession. The resulting lack of rules, guidelines, and scholarship has created significant uncertainty about the permissible types and methods of witness preparation.[1]

This article does not purport to provide an authoritative statement of the ethical boundaries of expert witness preparation. Its ambitions are limited to highlighting issues, and raising tentative suggestions. Those suggestions are offered with an acknowledgment that they are unquestionably contestable, and with a hope that they might trigger further debate. That debate is needed. Straw polling undertaken during the preparation of this article has demonstrated a stunning divergence in both practice, and attitudes as to ethical limits. This subject matter is too important to be left in its present state of ethical uncertainty.

For the purpose of this article, 'witness preparation' is used neutrally to mean 'any communication between a lawyer and a prospective witness - ... that is intended to improve the substance or presentation of testimony to be offered at a trial or other hearing.'[2]

This article does not address the wider question of preparing lay witnesses. The strategies and ethics of witness preparation will differ as between lay and expert witnesses, reflecting differences in the nature of the evidence: lay evidence relates to a witness' perception, whereas expert evidence relates to a witness' intellectual reasoning. There are differences as to the nature and extent to which those different forms of evidence are vulnerable to distortion (and amenable to elucidation) through witness preparation.[3]

Although this article is focussed on barristers, similar considerations apply to all legal practitioners.

Inherent importance of witness preparation

Bar Rule 16 provides that a 'barrister must seek to advance and protect the client's interests to the best of the barrister's skill and diligence... and always in accordance with the law including these rules'.

Consultation with (and preparation of) experts is an important part of the discharge of that ethical duty. It may be necessary to test whether the expert has appropriate expertise; to ensure that any expressed opinion is within the scope of that expertise; to ensure that the assumptions upon which any opinion is based are appropriate; to exclude irrelevant material from a report; to ensure that the opinion is expressed in admissible form; to test the soundness of the reasoning process upon which an opinion is based; to test whether any unfavourable expressions of opinion are reasonably grounded; to facilitate the persuasive articulation and presentation of opinion evidence in support of a party's case; to understand fully the expert issues, for the purpose of cross-examination of opponents' experts, re-examination the party's expert, and submission; to limit the likelihood that cross-examination will unfairly diminish the probative force of the expert testimony; to assess the court's likely perception of the strength of the expert evidence, in light of the personal presentation and demeanour of the witness; and to assess the prospects of success in light of the strength of the expert evidence.

The ethical importance of witness preparation is reinforced by a consideration of the adversarial nature of our justice system. In an adversarial system it is presupposed 'that the truth will best be found by the clash of two or more versions of reality before a neutral tribunal'.[4] 'The very foundation of the adversarial process is the belief that the presence of partisan lawyers will sharpen the presentation of the issues for judicial resolution.'[5] Witness preparation is an integral aspect of the partisan case development upon which adversarial justice depends, because at least some degree of witness preparation is 'essential to a coherent and reasonably accurate factual presentation'.[6]

Inherent dangers of witness preparation

> 'For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend ... to espouse the cause of those instructing them to a greater or lesser extent'.[7]

That is a reflection of 'adversarial bias': i.e. a 'bias that stems from the fact that the expert is giving evidence for one party to the litigation'.[8] That bias may arise from 'selection bias' (being the phenomenon that a party will only present an expert whose opinions are advantageous to the party's case), 'deliberate partisanship' (where an expert deliberately tailors evidence to support the client), or 'unconscious partisanship' (where an expert unintentionally moulds his or her opinion to fit the case). The NSW Law Reform Commission recently observed that: 'Although it is not possible to quantify the extent of the problem, in the commission's view it is safe to conclude that adversarial bias is a significant problem'.[9]

Aspects of witness preparation unquestionably have the capacity to facilitate 'deliberate partisanship' and exacerbate the insidious process of 'unconscious partisanship'. Signals as to what opinion would assist the case will be communicated by the barrister, will be absorbed by the expert, and may influence the expert's stated opinion. Those processes of communication, absorption and influence may be entirely unintended. Regardless of intention, the signals may generate 'subtle pressures to join the team - to shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster'.[10]

However, there are a number of considerations which limit the likely extent that witness preparation of experts will contribute to adversarial bias.

1. Pursuant to the *Makita* rules for the admissibility of expert evidence[11], an expert is required to set out the assumptions and reasoning process upon which the opinion is based. Consequently, an expert can not swayed by suggestion beyond a position which can be coherently justified.
2. The recent introduction of the expert codes into court rules will presumably counteract the process of adversarial bias, 'by requiring experts and those who instruct them to give careful consideration to the problem of unconscious bias and deal with it as best they can'.[12]
3. The inevitability of cross-examination, the possibility of adverse judicial comment, and possibility of face-to-face interactions with peers in 'joint conferences', may all further constrain an expert from deviating beyond that which can be reasonably justified.

Tension between conflicting policy objectives

There is a fundamental ethical tension in this area. Witness preparation is both an essential tool for the elucidation of truth in an adversarial system, but also a possible tool of truth's distortion. 'Witness preparation presents lawyers with difficult ethical problems because it straddles the deeper tension within the adversary system between truth seeking and partisan representation.'[13]

Ideally, any framework for defining the ethical boundaries in expert witness preparation should:

- reflect (and balance) the tension between the possibly conflicting objectives of facilitating the presentation of advantageous opinion evidence, and preventing the corruption of opinion evidence through adversarial bias; and
- embody sufficient certainty to provide practical guidance; and
- retain sufficient flexibility to reflect the reality that the 'ethical balance' in this area will be crucially context-sensitive.

Bar Rules

Bar Rule 43 provides that: 'A barrister must not *suggest* or condone another person *suggesting* in any way to any prospective witness (including a party of the client) the content of any particular evidence which the witness should give at any stage in the proceedings'.

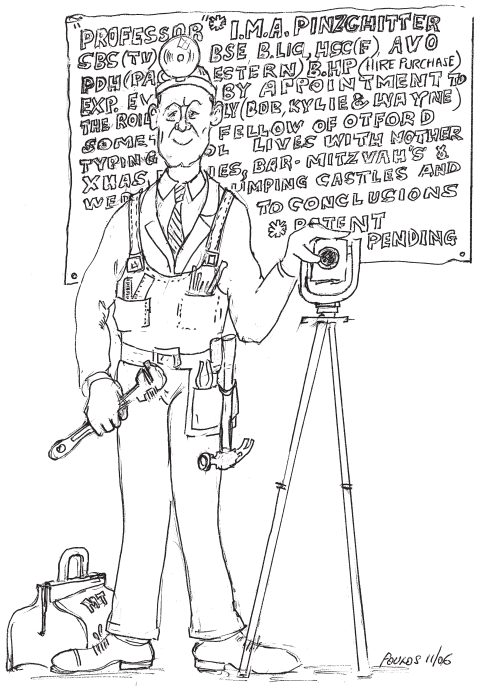
Bar Rule 44 provides that: 'A barrister will not have breached Rule 43 by expression a general admonition to tell the truth, or by *questioning and testing* in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not *coach or encourage* the witness to give evidence different from the evidence which the witness believes to be true'.

These rules provide some guidance, but within the rules lurk uncertainties.

1. Does the prohibition on 'suggesting' in Rule 43 focus on the subjective intent of the lawyer, or the objective effect of the lawyer's conduct? If the latter, how great must be the objective risk of suggestion before the Rule is breached?
2. What are the meaning and limits of legitimate 'testing' under Rule 44?
3. Does the right to 'test' under Rule 44 truly qualify (or merely elaborate the natural limits of) the prohibition on 'suggestion' in Rule 43? Does the prohibition on 'coaching' truly qualify (or merely elaborate the natural limits of) the liberty to 'test' in Rule 44?
4. What constitutes the conduct of 'coaching' prohibited by Rule 44?

These are questions to which there are no obvious answers. I suggest that:

- the prohibition on 'suggestion' in Rule 43 should not be construed as turning exclusively on the subjective intention of the barrister. The legal system must protect itself from conduct which has the objective effect of causing 'suggestion', irrespective of the intention to cause that outcome;



- the liberty conferred on 'testing' under Rule 44 should be construed as truly qualifying the prohibition on 'suggestion' under Rule 43, in the sense that 'testing' should be permitted notwithstanding that it possesses some objective capacity to cause 'suggestion';
- the prohibition on 'coaching' under Rule 44 should be construed as nonetheless truly qualifying the legitimate scope for 'testing', in the sense that conduct comprising 'coaching' should be prohibited (notwithstanding that it might also constitute 'testing');
- in the context of expert evidence, the expression 'coaching' should be construed as meaning conduct which objectively creates an undue risk that evidence will be corrupted by adversarial bias. Two considerations support that construction.
  - *First*, the expression 'coaching' seems often to be used simply to denote the conclusion that (for unspecified reasons) witness preparation has 'crossed the line' (which seems simply to reflect the conclusion that the relevant conduct creates an undue risk of corruption of the evidence).[14]
  - *Secondly*, the construction facilitates the explicit articulation and balancing of the competing policy considerations underlying witness preparation, which is inherent in the notion of '*undue* risk'.

On that construction, the scope of the prohibition in Rule 43 and 44 significantly turns upon the scope of the prohibition on 'coaching' (which turns on an unarticulated balance between policy objectives). The advantage of that construction is that it permits flexibility, and an explicit consideration of policy considerations relevant to the proscription of conduct. The disadvantage is that it reduces the capacity of the rules to provide firm guidance.

I suggest that the assessment of 'undue risk' requires a balance between the conflicting policy objectives referred to above. Factors relevant to that balance might include:

- The inherent capacity of the conduct to facilitate the presentation of expert opinion advantageous to the party's case;
- The inherent capacity of the conduct to corrupt expert opinion through the operation of adversarial bias;
- The extent to which the legitimate objectives of facilitating the presentation of advantageous opinion can be achieved through strategies with less inherent capacity to corrupt expert opinion;
- Specific contextual considerations relevant to the extent of the risk of corruption of opinion through adversarial bias. These may include:
  - the experience and stature of the expert, within the expert's discipline and relative to the barrister;[15]
  - whether the course of dealing with the expert has demonstrated a willingness or tendency of the expert to be unduly swayed by suggestion;
  - whether the subject matter of the opinion is one in which there is significant scope for 'judgment calls', such that modified opinions can be plausibly rationalised;
  - the nature and extent of any incentives for the expert positively to assist the instructing party.[16]

The strategic dimension

Strategic considerations may overlay ethical considerations when considering the appropriate limits of expert witness preparation.

There is presently significant judicial concern about maintaining the appearance and reality of expert impartiality. Notwithstanding that particular strategies of witness preparation might satisfy a theoretical test for ethical propriety, the strategies may be strategically imprudent if they *appear* to compromise impartiality.

Two considerations provide particular reason to give careful consideration to the prudent strategic limits of witness preparation (in addition to ethical limits). First, there is a significant risk of privilege being impliedly waived in relation to all dealings with an expert: ie, a significant risk that the details of witness preparation will be exposed.[17] Secondly, cross-examination and submissions by a skilful opponent may cause ethically legitimate witness preparation strategies to be (unfairly) ethically tainted, and the perceived impartiality and credit of the expert to be (unfairly) compromised.

There is unquestionably a strategic advantage in minimising the role of lawyers in the process of witness preparation (and thereby protecting the appearance of impartiality). This needs to be balanced against the countervailing strategic advantage that may be generated by implementing various witness preparation strategies. That balance will be context-specific. Before implementing any strategy of witness preparation, a barrister should ask: 'Firstly, is it ethically appropriate? Secondly, does the potential strategic advantage of the strategy outweigh any risk of strategic disadvantage that might arise if the conduct is disclosed and becomes the subject of cross-examination?'

Both to promote the spirit of expert impartiality, and to limit vulnerability to claims that the expert's impartiality has been compromised, prudence dictates that there should be frequent exhortations to the expert (in conference and in writing) to adhere to the expert codes.

Practical questions

Set out below is a consideration of some ethical and strategic considerations relevant to some selected aspects of witness preparation.

'Expert assistance' v 'expert evidence'

> A practice has grown up, certainly in Sydney, perhaps elsewhere, in commercial matters, for each party to arm itself with what might be described as litigation support expert evidence' to provide assistance in 'analysing and preparing the case and in marshalling and formulating arguments.[18] 'That is the legitimate, accepted and well known role of expert assistance for a party preparing and running a case'.[19]

By contrast, 'expert *evidence* in which a relevant opinion is given to the court drawing on a witness' relevant expertise is quite another thing'.[20]

The better view is that there is no ethical problem in using the same expert to provide both 'assistance' and 'advice', 'as long as that person and the legal advisers understand and recognise the difference between the two tasks, and keep them separate'.[21] However, there are significant strategic considerations which militate against using the same expert for both roles.

First, the nature and extent of involvement by the expert in the partisan process of case formulation and development might be the subject of cross-examination,[22] and may tend to diminish the expert's apparent impartiality. While an inference of partiality should not render the opinion inadmissible on the grounds of bias,[23] the 'bias, actual, potential or perceived, of any witness is undoubtedly a factor which the court must take into account when deciding issues between the parties'.[24] The degree to which perceptions of partiality affect the weight of an opinion 'must, however, depend on the force of the evidence which the expert has given to the effect that, by applying a certain process of reasoning to certain specific facts, a particular conclusion should be drawn'.[25]

Secondly, there remains a risk that the evidence of the expert will be excluded in the exercise of the court's discretion, if the court considers that the probative force of the opinion has been sufficiently weakened by reason of the expert being exposed to (and unconsciously influenced by) inadmissible evidence in the course of the expert's immersed involvement in case preparation.[26]

Thirdly, 'expert assistance' may lead to an unpleasant operation of waiver of privilege. The process of expert assistance may involve the expert being privy to many sensitive and privileged communications. It is appropriate to assume that there is a very significant risk that waiver may extend to all such communications.

In light of the strategic dangers associated with using an expert for both 'assistance' and 'evidence', a well-funded litigant in a complex

case will frequently engage different experts to provide the 'assistance' and the 'evidence', respectively.

Briefing the expert

Assistance in the formulation of instructions

There is no ethical difficulty in consulting with the expert in relation to the formulation of instructions. However, such consultation is in the nature of 'expert assistance', and is subject to the strategic dangers described above.

Preparation without formal instructions

Occasionally experts are not formally instructed until the report is being finalised. This creates no ethical difficulty. However, the deferral of formal instructions will increase the prospect of privilege being waived in relation to communications between the lawyers and the expert. This is because the absence of instructions during the period of preparation of the report raises the question as to the basis upon which the report was prepared, and supports a waiver of privilege in relation to associated materials to facilitate that question being answered.

False or incomplete instructions

It would be unethical to present a case on the basis of an expert report, when the expert was briefed on assumptions which contradict material facts known by the party (or where facts known to be material have been omitted from the instructions).[27]

Preliminary conferences

There is no ethical problem with extensive conferring to discuss and test the preliminary opinions of experts, prior to the preparation of a first draft. Some practitioners recommend this, to prevent the generation of a paper trail of draft reports which disclose the meandering evolution of the final opinion. I suggest that any conferring should be consistent with the guidelines suggested below under the heading 'Substance of the expert opinion'.

Minimising the prospects (and prejudice) of waiver

In the article in this edition titled 'Expert reports - waiver of privilege in associated materials', there are outlined some suggested strategies to minimise the prospects (and prejudice) of a waiver of privilege in relation to materials associated with the preparation of the expert report.

There is no ethical impropriety in such a strategy. The objective of protecting privilege requires no significant justification. Briefly, however, the justification includes promoting 'free exchange of views between lawyers and experts'; [28] preventing experts being inhibited from changing their minds by fear of exposure of working papers and drafts; preventing the integrity and strength of an expert's final opinion being attacked through cross-examination on an expert's working notes and drafts (which have potentially been taken out of context); and avoiding the hearing being distracted and lengthened by 'what is usually a marginally relevant issue':[29] i.e. the nature of (and reasons for) the evolution of the expert's opinion.

If a barrister proposes to raise propositions for consideration by the expert in relation to the substance of the expert opinion, there are very finely balanced strategic considerations as to whether the propositions should be raised orally in conference, or in writing. If the matter is raised orally in conference and without written record, there is no paper trail concerning the evolution of the opinion. This has both advantages and disadvantages if the expert modifies the opinion, and privilege in associated materials is later found to have been waived.

The advantage of no paper trail is that the lawyer's role in the evolution of the opinion may not be disclosed (thereby avoiding the chance that the probative force of the opinion will be discounted by reason of the lawyer's role).[30] On the other hand, the existence of a paper trail will immediately focus a line of cross-examination on the role of the lawyer.

The disadvantage arises from the fact that any waiver in respect of written communications will extend also to oral communications between the barrister and the expert. A skilful cross-examination of an expert about extensive oral dealings with lawyers is dangerously unpredictable. On the other hand, the existence of a paper trail will provide a crisp and clean description of those dealings which can demonstrate the propriety of the dealings.

Reasonable minds will unquestionably differ on this strategic question. Whether the communications are oral or written, the communications should be laced with emphatic exhortations to the expert to abide the letter and spirit of the expert codes; and should be undertaken on the assumption that privilege may be waived.

Disclosing case theory

It appears to be a matter of general practice that barristers provide to the expert an explanation of the nature of the proceedings, the instructing party's position in the proceedings, and the instructing party's case theory. The provision of such contextual information has significant benefits for case formulation and presentation. If an expert possesses a broad contextual understanding of the case, he or she may be able to provide significant assistance in the identification of the key issues in the case on which expert opinion is required. It is not uncommon for instructions to be refined following a consultation with the expert which illuminates the 'real issues'. Further, an expert's understanding of the factual and legal significance of his or her testimony is likely to focus the expert's analysis on relevant issues.

However, the appropriateness of outlining case theory is not without ethical and strategic uncertainty.

Ethical considerations

There is no doubt that the disclosure of the instructing party's case theory significantly increases the risk of adversarial bias, by clarifying what opinion is in the instructing party's interests. The best way to prevent adversarial bias is to cause the expert to prepare a report in ignorance of the instructing party's partisan interests in the litigation. It is clearly debatable whether the advantages of disclosing case theory described above can justify the associated increased risk of adversarial bias. However, one matter which significantly weighs against any general prohibition on disclosing case theory to experts is the practical unreality of such a prohibition. There will be many cases where the position of the instructing party in proceedings (and

the nature of their partisan interests) is obvious from the very fact of engagement of the expert.

Strategic considerations

The disclosure of case theory is effectively a procedure to facilitate the expert providing 'expert assistance' of the type described above. It is important to bear in mind that utilising a witness for 'expert assistance' has the strategic dangers previously identified in relation to that practice. To protect the appearance of impartiality (and thereby protect the credit of the expert), there is great strategic value in minimising the extent of partisan influence to which an expert is exposed.

Drafting the expert report

The propriety of involvement by lawyers in drafting the form of the expert report has received explicit judicial endorsement in Australia. Lindgren J has held that:

> Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed.[31]

It appears to be a common (but certainly not universal) practice in Sydney for lawyers to be involved in the actual drafting, either during or following a conference with the expert.

This position is to be contrasted to the position in the United Kingdom. In what remains a leading UK case on the ethical limits of lawyer's involvement in the preparation of expert reports, Lord Wilberforce held: 'Expert evidence presented to court should be, and should be seen to be, the independent product of the expert, *uninfluenced* as to form or content by the exigencies of litigation'.[32] In a subsequent case, Lord Denning relied upon that statement to conclude that lawyers must not 'settle' the evidence of medical reports.[33]

The ethical and strategic limits to the role of barristers in drafting expert reports are controversial. There are compelling considerations weighing for and against lawyer involvement.

The general considerations in favour of a barrister being involved in the actual drafting are as follows.

1. Compliance with the demanding requirements of form and structure under the *Makita* rules may sometimes necessitate a lawyer's substantial involvement in the drafting.
2. As with any form of communication, the persuasiveness of an expert report will depend not just upon the substantive content of the opinion, but also the method of its presentation. The expertise of many experts may not extend to the skills of persuasive written communication. Lawyers may be able to provide valuable assistance in the persuasive presentation of the expert's substantive opinion, both in relation to structure and verbal expression.
3. If the lawyer is participating in the drafting process, the lawyer is able to test any tentative opinions expressed by the expert, before that opinion is incorporated into the draft report. This is likely to prevent the creation of any documentary record of ill-considered opinion. Such a record might subsequently be (unfairly) exploited in cross-examination to undermine the credibility of the expert's final opinion, if privilege is subsequently waived in relation to draft reports.
4. If the barrister conducts him or herself with integrity, intellectual rigour and care, the draft will faithfully reflect the detailed instructions of the expert. If so, there is logically very limited scope for the draft to corrupt the expert's opinion through 'suggestion'. This is particularly so if any draft is presented to the expert with exhortations to review the draft in light of the expert's obligations under the expert code.
5. The scope for corrupting 'suggestion' is diminished further if the drafting is done in conference with the expert. This necessitates the focus of the expert on the crafting of each word, and eliminates the suggestive effect of the presentation by the barrister to the expert of a polished and completed draft.
6. The scope for corrupting 'suggestion' is diminished further in relation to subsequent drafts. This is because the expert will likely feel a protective ownership over the substance of the opinion expressed in the first draft which the expert has prepared.

The ethical considerations weighing against a barrister personally drafting a report on instructions are as follows.

1. There is significant scope for a draft prepared by a barrister to diverge from instructions provided by the expert. This may be a product of carelessness in the recording or reproduction of instructions, the influence of adversarial bias on the barrister, or the simple fact that within the framework of an expert's instructions there will remain scope for significant nuance in the final expression of written opinion.
2. To the extent that the draft diverges from (or embellishes) the expert's instructions, the draft has a substantial capacity to corrupt the expression of the expert's actual opinion. A draft report will have a powerfully suggestive effect on an expert, if it is persuasively expressed, well structured, and crafted by a respected authority figure (such as a barrister). Further, there is a significant risk that a busy expert will simply adopt a draft for expedience, without proper consideration.
3. If the expert prepares the first draft, it is thereby possible to avoid the corrupting suggestiveness inherent in presenting the expert with a first draft prepared entirely by the lawyer, without precluding the lawyer's subsequent legitimate role in refining the form and expression of that first draft.
4. In light of the above considerations, it is arguably justifiable to impose a general prophylactic prohibition on barristers preparing the first draft.
5. The endorsement by Lindgren J of lawyers' 'involvement' in drafting should not be construed as an ethical carte blanch to all forms of involvement (including independent drafting of reports).

There are also weighty strategic considerations against the substantial involvement of the lawyers in the drafting process.

First, irrespective of the integrity of a barrister's involvement in the preparation of a draft, and the coherence of the finally expressed opinion, the mere fact that a lawyer has crafted the words of the report may cause an irrevocable stain on the credit of the expert in the eyes of a judge.

Secondly, as Justice McDougall has observed extra-judicially:

> 'it is not desirable to fiddle too much with the actual phraseology of the expert. For better or worse, we all have our own individual modes of expression. Evidence - whether lay or expert - speaks most directly when it speaks in the language of the witness and not in the language of the lawyer who has converted it from oral into written form'.[34]

Thirdly, the possibility of ill-considered adoption by an expert of a lawyer's terminology creates the risk of the credit-crushing spectacle of an expert stumbling over or disowning the wording of a report during cross-examination.

Fourthly, requiring the expert to prepare the draft will likely increase the expert's engagement with the issues on which the expert is briefed.

Set out below is my personal suggestion as to where the line should be drawn in relation to various aspects and stages of drafting.

Template for report

An effective (and ethically sound) strategy is to provide to the expert a detailed template to assist the preparation of the first draft. The template might set out the structure of the report, the assumptions the expert is instructed to make, and detailed instructions as to what must be addressed in which section of the report. The template should be accompanied by detailed instructions as to the requirements of form and structure of an expert report under the *Makita* rules.

Preparing first draft

If a barrister acts with careful integrity on the basis of detailed instructions, it is strongly arguable that there is no ethical impropriety under the present rules in the barrister preparing the first draft (in conference or alone). However, strategic prudence strongly dictates that the expert should typically prepare the first draft.[35] This may properly occur after extensive conferring with the expert, in which the expert's preliminary opinion is discussed and tested.

Comments on first draft

It is common and acceptable for barristers to submit to experts a 'marked up' version of the first draft, which contains queries of the type described in the section below ('Substance of the expert opinion - Testing an unfavourable opinion'), and requests for the elaboration of reasoning in the draft, and which invites the expert to prepare a further draft in light of those queries and requests.[36]

Preparing subsequent drafts

I suggest that the ethical and strategic balance may swing in favour of active participation of the barrister in the drafting process, when the substance of the opinion is effectively settled and recorded in a draft, and the focus is on the refinement of form and expression.

As a proposed balance between facilitating the presentation of advantageous opinion, and avoiding the reality and perception of adversarial bias, I suggest the following guidelines:

- it is desirable to undertake the drafting in conference with the expert (rather than for the barrister to produce a further draft independently following conference);
- it is appropriate for the redrafting to address the clarification of ambiguous expression, the comprehensive and coherent articulation of the reasoning process, and the amendment of wording which significantly detracts from the persuasive communication of the substantive opinion.[37] It is otherwise strategically imprudent to seek to refine or otherwise amend the expert's own words;
- unless clearly obvious or inconsequential, any amendment of expression should generally be on the basis of specific and detailed instructions from the expert, and should reflect the expert's own words. The barrister should only suggest a mode of expression when open-ended questioning of the expert has failed to elicit wording which communicates with reasonable clarity the substance of relevant opinion;
- to the extent that the drafting process traverses substantive amendment to a previous draft, it may be strategically prudent for the drafting not to be done in conference with the barrister. Rather, the matter requiring substantive redrafting should be identified (possibly by some notation in the draft being worked on), and the expert should be invited to attend to the redrafting independently in a further draft.

Notwithstanding the ethical propriety of involvement by lawyers in the process of preparing subsequent drafts, there will remain significant strategic advantage in avoiding or minimising a barrister's involvement. The appropriate role of a lawyer may depend upon the capacity of the expert to craft an opinion in admissible and persuasive form without assistance from lawyers.

Substance of the expert opinion

Exclusion of irrelevant opinion

It is ethically permissible for a lawyer to propose substantive amendments to a draft report, which relate to deletion of evidence which is irrelevant, or beyond the expertise of the expert. Beyond that point, the ethical consensus and clarity breaks down.

Testing an unfavourable opinion

I suggest that the clearly better view is that the lawyers are entitled to test rigorously any unfavourable opinion contained in a draft report (in a manner which may lead to the modification of the unfavourable opinion). This testing may relate to the appropriateness of assumptions, and the soundness of reasoning. This is effectively endorsed by Bar Rule 44 which authorises 'testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies and other difficulties with the evidence'. Consistent with the general ethical proviso that witness preparation strategy should seek to minimise the

risk of opinion corruption, the process of testing should proceed by way of open ended questions, which simply direct attention to an issue: eg, 'What are the assumptions and reasoning process which support that conclusion?' 'How is that assumption consistent with X, Y, Z?' 'Why do you discount the relevance of A, B, C', 'What is the basis for that reasoning process?'. It should not proceed by way of closed questions which explicitly suggest a response: e.g. 'That line of reasoning is clearly wrong, wouldn't you agree', 'Do you agree that the assumption is obviously flawed?'

The practice of open-ended questions is not only ethically appropriate, but also strategically prudent for the following reasons.

1. In view of the (proper) sensitivity of experts to maintaining an independent and impartial stance, there may be a natural defensiveness to modifying an opinion in response to direct suggestion.
2. All communications with experts should be conducted on the basis that privilege in the conversation may be waived. The more suggestive and leading is the question which preceded a modification of opinion, the greater the risk that the final opinion will be discounted by reason of perceived adversarial bias (if the question is exposed following the waiver of privilege).

Raising propositions for consideration by the expert

Can the lawyer raise propositions for consideration by the expert, which are inconsistent with an opinion already expressed by that expert? This might involve a statement to the following effect: 'An alternative proposition to the one stated in your draft report is X. Why is X wrong? To what extent (if at all) do you consider X is supported by matters A, B, C? If not, why not?'. I suggest that this practice should be regarded as ethically permissible (and strategically prudent), if the following procedure is followed:

1. The barrister has first undertaken the open-ended 'testing' described above, and the expert has not independently expressed an opinion consistent with the proposition;
2. Before engaging in the practice, the barrister emphatically exhorts the expert to abide by the spirit of the expert codes;
3. The barrister does not engage in conduct which has the intention or consequence of pressuring the expert to adopt the proposition;
4. If the expert purports to adopt the proposition, the barrister rigorously tests the basis for it, to ensure that the expert is capable of reasonably justifying the proposition.

The conclusion that this practice should be regarded as ethically permissible is supported by the following considerations.

1. It may facilitate the articulation by the expert of opinion favourable to the client's case, which supports the legitimacy of the practice unless it gives rise to an undue risk that the expert's opinion will be corrupted through adversarial bias.
2. The mere fact that a change in an expert's opinion was triggered by a suggestion raised by a barrister does not reflect that the modified view is not genuine or not reasonable. Barristers will often acquire substantial expertise in a field relevant to a case. In light of that expertise, the barrister's familiarity with the case, and the analytical capacities barristers will (hopefully) bring to bear on the matter, it is unsurprising that barristers might be able to raise valid propositions which an expert might reasonably and genuinely adopt.
3. If the practice were not permitted, a client would face the equally unattractive alternatives of proceeding to trial with expert evidence weaker than the case might reasonably justify, or incurring the expense of shopping around to find an expert who might articulate the proposition without prompting.
4. In light of the factors outlined at the last paragraph of the section above titled 'Inherent dangers of witness preparation', the risk of corrupting the expert's opinion would appear very low if the suggested guidelines set out above are followed.

The better view is that the practice does not breach Bar Rule 43, which prohibits 'suggesting in any way....the content of any particular evidence which the witness should give at any stage in the proceedings'.

First, the better view is that putting alternative propositions to the expert is part of the process of 'testing' evidence, which is expressly permitted by Bar Rule 44.

Secondly, there is a profound ethical distinction between 'suggesting' the evidence that the expert 'should give' in proceedings in breach of Rule 43, and merely raising a proposition for consideration.[38]

The better view is that the practice does not even breach the authoritative statement of UK principle in the decision of *Whitehouse v Jordan*, that: 'Expert evidence presented to court should be, and should be seen to be, the independent product of the expert, *uninfluenced as to form* or content by the exigencies of litigation'.[39] As Justice Callinan observed:

> 'For the legal advisors to make suggestions is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt'.[40]

All that said, it is obvious that the mere fact of a barrister raising a proposition for consideration has inherent suggestive capacity, which generates the possibility of the corruption of opinion through adversarial bias. It is therefore obvious that there is scope for divergent views about the ethical propriety of such a practice.

'Crossing the line'

There are certainly ethical limits to the legitimate scope of a barrister's involvement in the formulation of the expert's substantive views.

First, consistently with Bar Rule 43, a barrister must never (directly or indirectly) suggest (or condone someone suggesting) the content of evidence which the expert 'should give' in proceeding. This is to be contrasted with merely raising a proposition for consideration, as described above.

Secondly, as noted above, I suggest that an appropriate ethical limit on 'raising propositions for consideration by an expert', is the proviso that the barrister must not seek to 'pressure' the expert to

adopt the proposition (or engage in conduct which might have that consequence). By way of admission, this is a frustratingly question-begging limitation.[41] By way of defence, it is difficult to draw a brighter line. By way of (some) elaboration, factors which may be relevant to determine whether there is 'pressure' include the extent to which any question is expressed in a leading manner; the extent to which the question is repeated; the extent to which the barrister personally advocates the merits of the proposition; the extent to which the barrister highlights the strategic importance of the proposition to the case; the extent to which the barrister seeks to argue with the expert about the proposition (as distinct from testing the expert's opinion by open-ended questioning); and the relative stature of the expert and barrister (which may affect the power dynamic between the two).

General advice about the process of giving evidence

It is standard practice for barristers to give witnesses general advice as to court room procedure, courtroom demeanour, and methods for the presentation of testimony (in examination in chief, and cross-examination).[42]

There is generally no controversy as to the ethical propriety of such conduct.[43] This is because it relates to procedure and the form of evidence, rather than substance. It is therefore relatively innocuous in terms of distorting testimony.

However, instructions as to demeanour and presentation may be ethically inappropriate if they have the intention or effect of causing an expert to express an opinion more decisively than the expert's personal views warrant. On that basis, it would be inappropriate to say: 'Express all your opinions decisively and confidently'. On the other hand, it would be appropriate (in the alternative) to say: 'Express your testimony as confidently and decisively as your personal opinion permits. Don't give wishy-washy, equivocal answers like 'possibly,' 'probably,' and 'maybe' when your personal opinion permits you to be more confident and decisive in your response'.

Rehearsal of cross-examination

Rehearsal relates to the process of practising the presentation of testimony to be given in court. In light of general requirement that expert evidence 'in chief' be provided by way of written report, the issue of the 'rehearsal' of experts only arises in relation to cross-examination.

In the UK, barristers 'must not rehearse practise or coach a witness in relation to his evidence'.[44] In the USA, there is no prohibition on rehearsal, and among witness preparation techniques it is described as 'the most strongly advised among trial lawyers'[45]. In Australia, there is uncertainty.[46]

The question of rehearsal raises particularly difficult ethical issues.

Arguments for rehearsal of cross-examination

A compelling case can be made for the propriety of mock cross-examination of experts. First, for a number of reasons, the practice has the capacity to facilitate the presentation of testimony that does justice to the inherit merits of the opinion. The mere experience of formulating and articulating opinion under the pressure of cross-examination will likely improve the general quality of the presentation of testimony during cross examination at trial. More specifically, it will facilitate the development of strategies to combat the following techniques of cross-examination, which might otherwise cause the testimony of an expert to appear weaker than is warranted by the inherent merits of the expert's opinion.

1. Techniques of cross-examination might be employed to engender a tendency of acquiescence, which leads to the extractions of concessions contrary to an expert's genuine considered opinion. These techniques may include: inducing confusion through complex and rapid fire questioning; inducing submission through aggression or overbearing demeanour; provoking the witness to anger, in a way which compromises the expert's rational deliberations; encouraging a co-operative and trusting relationship with the expert through flattery and respect; creating a habit of acquiescence through a pattern of 'Dorothy Dixers'; weakening confidence by embarrassing the expert on collateral matters; trapping the expert in a logical corner which demands a concession, when the trap has been created by extracting the expert's agreement to flawed assumptions (which the expert might carelessly have provided, oblivious to the logical consequences of his concession).
2. The cross-examination might damage the credibility of the expert by creating the impression that the expert is unduly defensive and evasive, by a conscious strategy of provocation;
3. The cross-examination might probe the expert opinion to expose flaws and inconsistencies (real or imagined). If confronted with those contended flaws for the first time in cross-examination, the expert may be unable properly to address them (and the expert's testimony might be correspondingly weakened). However, the expert might have been able readily to explain them away (on reasonable grounds), had the expert had adequate time to reflect upon them.

The strategy of mock cross-examination has the capacity to alert the witness to the strategies that might be used to attack him or her, to alert the witness to his or her vulnerability to those techniques, and to facilitate the witness developing defences against them. By educating the barrister as to how the witness responds under cross-examination, a mock cross-examination also produces the advantages of facilitating preparation of re-examination and an informed assessment of the strength of the case.

Secondly, rehearsal of the cross-examination of experts does not have the same inherent distorting tendencies as rehearsal of lay witnesses. The susceptibility of lay evidence to suggestion is exacerbated by the inherent vulnerability of memory to unconscious reconstruction.[47] The extent to which expert opinion can be distorted by the rehearsal of answers in a mock cross-examination is (or can be) limited by a number of considerations.

First, an opinion is substantially anchored by the necessity to justify the opinion by reference to assumptions and a coherent process of reasoning. This constrains the extent to which the expert's opinion

can be swayed by possible suggestion. Secondly, the pre-trial mock cross-examination will be conducted after the final report has been long since served. Any tendency to be swayed by suggestion will be counterbalanced by the fact that the expert is already 'locked in' to a publicly communicated position. Thirdly, the scope for distortion through suggestion can be further reduced if the mock cross-examination is conducted on the proposed basis set out below. Fourthly, the process of mock cross-examination will substantially revolve around challenging (rather than rehearsing) the expert's evidence in chief.

Arguments against rehearsal of cross-examination

There are a number of considerations weighing against the ethical propriety of cross-examination rehearsals:

- notwithstanding that mock cross-examination is aimed at 'challenging' the expert's evidence, the reality is that discussion and rehearsal of answers to cross-examination are integral aspects of the process;
- the inherent vulnerability of witnesses to suggestion during the rehearsal of evidence on the eve of trial: 'rehearsal has a greater potential for suggestiveness than other preparation techniques. A witness naturally feels apprehensive about an upcoming appearance. The inclination to welcome a script is strong. Furthermore, repetition of a story is extremely suggestive.'[48]
- the legitimate objectives of mock cross-examination can be substantially achieved without the risks associated with that process. Testing and probing the expert report can be readily undertaken in conference. General advice as to the techniques and traps of cross-examination can also be provided in conference. The experience of the actual rigours of cross-examination can be created by a mock examination on a subject matter unrelated to the proceedings;[49]
- the conduct of mock cross-examination is arguably contrary to the spirit of the expert code. Any 'mock cross-examination' will presumably seek to employ all the tricks of cross-examination. The likely consequence is to instil in the expert a defensive wariness of cross-examining counsel. That defensiveness is antithetical to the process of open-minded and impartial engagement by experts in litigation, which is the intention of the expert codes. This has strategic considerations as well. A defensive or partisan demeanour will weigh heavily against the credit of a witness.

Conclusion

It is a finely balanced and controversial question. As a purely ethical matter, I tentatively suggest that mock cross-examination on the actual case should generally be ethically permissible, subject to the following parameters:

- the barrister should emphatically exhort the expert to abide by the witness codes;
- on no occasion should the barrister during the session give any direction or suggestion as to the substance of any answer which the expert should provide to any question;
- it is reasonable to discuss answers given in the mock cross-examination, for the purpose of:
  - exploring and testing the basis for any stated answer;
  - exploring whether any answer (on further reflection) truly accords with the considered opinion of the expert;
  - if not, exploring why the expert gave the answer in the mock cross-examination;
  - discussing strategies to facilitate the expert responding to questions in a manner which accords with the expert's considered opinion;
- there should be no more than limited repetition of cross-examination on each subject matter.

However, reasonable minds will differ as to the strategic prudence of the practice of mock cross-examination. Because there does not appear to be universal support for the ethical propriety of the practice, some judges might perceive the rehearsal of cross-examination as tainting the credit of the expert.

Reform in regulation?

It may be useful to consider whether amendments to the Bar Rules might provide more practical and clear guidance on witness preparation. Any such consideration might address the following issues:

- the general question of the appropriate nature of ethical regulation in this area. There is often contrasted two types of ethical regulation: 'codes of ethics' (which prescribe high level principles to provide loose general guidance), and 'codes of conduct' (which prescribe specific binding rules consistent with the high level principles). Those different forms reflect the often conflicting goals of regulation: the retention of sufficient flexibility to permit ethical discretion which is sensitive to individual circumstance; and the provision of sufficient certainty to give firm practical guidance (and to facilitate enforcement);
- the relative priority of the conflicting policy objectives in this area;
- whether there should be recognised an ethical duty to take positive steps to promote the spirit of independence and impartiality that underpins the new expert codes;
- whether conduct should be proscribed merely because it creates an appearance of expert partiality.

Expert testimony plays a critical role in litigation. Witness preparation plays a critical role in the presentation of expert testimony. A framework of rules and principles to provide effective ethical guidance in the area is needed. That framework does not presently exist.

To facilitate the development of such a framework, it might be helpful to undertake the following steps:

- organise a working party through the Bar Council to address the issue. It would be desirable that the Law Society and the judiciary also be represented;
- survey existing practice in relation to expert witness preparation, across the Bar and within law firms;

- survey judicial attitudes as to the impact on expert credibility of various methods of expert witness preparation;
- survey practice in different legal cultures;
- circulate a discussion paper through the working party, setting out proposed guidelines;
- in light of responses to the discussion paper, produce guidelines for practice for approval by Bar Council.

I am interested in exploring this topic further, and welcome comments.[50]

[1] Applegate, 'Witness Preparation' (1989) 277 *Texas Law Review* 277, at 279.

[2] Applegate, supra fn 1, 278.

[3] For a recent general considerations of the ethics of witness preparation for lay witnesses, see *Day v Perisher Blue Pty Ltd* (2005) 62 NSWLR 731 (CA); *R v Momodou* [2005] 2 All ER 571 9CA).

[4] Applegate, supra fn 1, 327.

[5] Zacharis and Martin, 'Coaching Witnesses' (1998-98) 87 *Kentucky Law Journal* 1001, at 1006.

[6] Applegate, supra fn 1, 352.

[7] *Abbey National Mortgages Plc v Key Surveyors Nationwide Limited and Others* [1996] 3 All ER 184; see also *Fox v Percy* (2003) 214 CLR 118, per Callinan J at [151].

[8] NSW Law Reform Commission, Report 109, 'Expert Witnesses', page 70.

[9] NSWLRC, Report 109, supra fn 8, page 74.

[10] Quoted in J Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823, at 835; quoted in NSWLRC Report 109, supra fn 8, page 73.

[11] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

[12] NSWLRC, Report 109, supra fn 8, page 75. As to the expert codes, see Uniform Civil Procedure Rules, Schedule 7: 'Expert Witness code of Conduct'; Federal Court Practice Direction: 'Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia'.

[13] Applegate, supra fn 1, at 350.

[14] It is also apparently used with more precision to describe the process of rehearsal of evidence, or direct suggestion of answers.

[15] Suggestibility will be influenced by the 'power dynamic' between expert and the barrister.

[16] Eg, contingency fee.

[17] See my other article in this edition: 'Expert reports and waiver of privilege'.

[18] *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171, per Allsop J at [676], [678].

[19] ibid.

[20] ibid.

[21] Ibid., [678].

[22] *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454, per Pagone J at [9]; *Aitchison v Leichhardt Municipal Council* [2002] NSWLEC 226, per Talbot J at [21]; *ASIC v Rich* [2005] NSWCA 152 (CA) [167].

[23] *Fagenblat*, supra fn 22, [7].

[24] *Fagenblat*, supra fn 22, [7].

[25] *ASIC v Rich* [2005] NSWCA 152 (CA) [167].

[26] *ASIC v Rich* [2005] NSWSC 650, per Austin J at [40].

[27] see Bar Rule 36; *Bush* (1993) 69A Crim R 416 at 431.

[28] NSW Bar Association Response to the NSW Law Reform Commission Issues Paper 25 - Expert Witnesses, [33].

[29] ibid.

[30] There is no obligation to disclose the process of the evolution of an expert opinion.

[31] *Harrington-Smith v Western Australia* (No 7) [2003] FCA 893, at [19]; quoted with approval in *Jango v Norther Territory* (No 2) [2004] FCA 1004, per Sackville J at [9], and *R v Coroner Maria Doogan* [2005] ACTSC 74 (Full Court, ACTSC), at [118].

[32] *Whitehouse v Jordan* [1981] 1 WLR 246, per Lord Wilberforce at 256-257.

[33] *Kelly v London Transport Executive* [1982] 1 WLR 1055, per Lord Denning at 1064-1065. However, Callinan J has pointed out *Whitehouse v Jordan* does not support 'as far reaching a proposition as that propounded by Lord Denning': *Boland v Yates Property Corporation Pty Ltd* (1999) 167 ALR 575, at [279].

[34] Justice McDougall, 'Commercial List Practice: Expert Evidence', College of LAW CPED Seminar, 28 July 2004.

[35] Urgency might create a necessary exception to this guideline.

[36] Some practitioners would prefer to organise a conference to discuss the matters raised, before a further draft was prepared.

[37] Eg, the amendment of wording which is convoluted.

[38] However, it could be contended that merely raising the proposition is indirectly suggestive of what the witness 'should say' in proceedings.

[39] *Whitehouse v Jordan* [1981] 1 WLR 246, per Lord Wilberforce at 256-257.

[40] *Boland v Yates*, supra fn 33, per Callinan J at [279].

[41] What is sufficient to constitute 'pressure'?

[42] For a good example of such guidelines, see Freckleton & Selby, 'Expert Evidence: Law, Practice, Procedure and Advocacy' (2nd Edn, 2002), at 706-713.

[43] See Re *Equiticorp Finance Ltd; ex part Brock [No 2]* (1992) 27 NSWLR 391, per Young J at 395; *R v Momodou* [2005] 2 All ER 571, at 588 (CA).

[44] Code of Conduct of the Bar of England and Wales, Rule 705(a); see also *R v Momodou* [2005] 2 All ER 571, at 588.

[45] G. Bellow & B. Moulton, 'The Lawyering Process: Preparing and Presenting the Case' (1981), at 357-8; see Applegate, supra fn 1, at 281 fn 13.

[46] There are some authorities against the practice: eg, Re *Equiticorp Finance Ltd; ex part Brock [No 2]* (1992) 27 NSWLR 391, per Young J at 395. However, the practice nonetheless appears widespread.

[47] *Goodrich Aerospace Pty Limited v Arsic* [2006] NSWCA 187, per Ipp JA at [19].

[48] Applegate, supra fn 1, 323.

[49] This was endorsed by the Court of Appeal in *R v Momodou* [2005] 2 All ER 571, at 588.

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Hot tubbing: concurrent expert evidence

By Elizabeth Cheeseman

What is 'hot tubbing' in the curial context?

The advent of 'hot tubbing' in the courts has excited some publicity in legal circles and for reasons that extend beyond suggestive word play.[1] Hot tubbing, which is the practice of the court receiving concurrent expert evidence, represents a significant departure from the traditional adversarial method of presenting expert evidence and is likely to become more widely utilised in New South Wales courts. It is important to be cognisant of the emerging practice and to focus on the ramifications the practice may have to the manner in which experts are prepared to give evidence.

Traditionally, in cases in which expert evidence is led, the expert witnesses are called as part of each party's respective case, usually after the evidence of each party's lay witnesses is completed. The party calling the expert will have obtained and served a report detailing the expert opinion evidence to be given by the witness. Often the report in effect constitutes the expert's evidence in chief and the expert will then be cross-examined. On occasion, directions may be made that the experts of both parties be called out of sequence so that they give evidence one after the other.

The New South Wales Law Reform Commission noted:

> In recent years, however, there has been considerable interest in a different approach, in which the relevant experts in a particular area are sworn in at one time and remain together in court. The giving of evidence becomes a discussion rather than a series of exchanges between a lawyer and a witness. In the discussion, questions may be asked not only by the lawyers and the judge, but also by one expert of another, a departure from the traditional approach in which only the cross-examining lawyer asks questions. The discussion is focussed, highly structured, and controlled by the judge. [2]

The Australian Law Reform Commission described the process of concurrent evidence (the 'hot tub' panel) as follows:

- experts submit written statements to the tribunal, which they may freely modify or supplement orally at the hearing, after having heard all of the other evidence
- all of the experts are sworn in at the same time and each in turn provides an oral exposition of their expert opinion on the issues arising from the evidence
- each expert then expresses his or her view about the opinions expressed by the other experts
- counsel cross-examine the experts one after the other and are at liberty to put questions to all or any of the experts in respect of a particular issue. Re-examination is conducted on the same basis.[3]

An intermediate step that may be interposed between the first two steps described above is to require the experts to confer before giving evidence and to produce a joint memorandum which summarises the matters upon which they disagree after the conferral process is complete. The expert conferral process typically occurs in the absence of the parties' legal representatives. An emerging practice in cases involving a number of separate fields of expertise which interlock in the legal context is to engage an independent legal practitioner to act as a facilitator during the expert conference. The independent legal practitioner's role is facilitate and to assist in structuring the experts' discussion so that all expert issues relevant to the legal framework of the dispute are addressed.

Justice McClellan, who played a significant role in the establishing the practice of concurrent evidence in the Land and Environment Court, described the process as follows:

> all experts in relation to a particular topic are sworn to give evidence at the same time. What follows is a discussion, which is managed by the judge or commissioner, so that the topics requiring oral examination are ventilated. The process enables experts to answer questions from the court, the advocates and, most importantly, from their professional colleagues. It allows the experts to express in their own words the view they have on a particular subject. There have been cases where as many as six experts have been sworn to give evidence at the same time.
>
> For hearings in my court, the procedure commonly followed involves the experts being sworn and their written reports tendered together with the document which reflects their pre trial discussion - matters upon which they agree or disagree. I then identify, with the help of the advocates and in the presence of the witnesses, the topics which require discussion in order to resolve the outstanding issues. Having identified those matters, I invite each witness to briefly speak to their position on the first issue followed by a general discussion of the issue during which they can ask each other questions. I invite the advocates to join in the discussion by asking questions of their own of any other witness. Having completed the discussion on one issue we move on until the discussion of all the issues has been completed.
>
> Experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although I do no encourage it, very often the experts who will be sitting next to each other, normally in the jury box in the courtroom, end up referring to each other on first name terms. Within a short time of the discussion commencing, you can feel the release of the tension which normally infects the evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

> This change in procedure has met with overwhelming support from the experts and their professional organisations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively respond to the views of the other expert or experts. They believe that there is less risk that their expertise will be distorted by the advocate's skill. It is also significantly more efficient. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20 per cent of the time which would have been necessary.
>
> As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter together with the ability to ask and answer each other's questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you actually have the expert's own views expressed in his or her own words.[4]

Potted 'hot tub' history

The practice of taking the evidence of experts concurrently appears to be an Australian innovation[5] and is reported to have developed initially under Justice Lockhart when sitting as president of the Trade Practices Tribunal (now the Australian Competition Tribunal).[6] The tribunal, chaired by a Federal Court judge, decides whether authorisations should be given on public benefit grounds to arrangements that would otherwise be contrary to competition law.

The Administrative Appeals Tribunal has used concurrent evidence since at least 1994.[7] The potential advantage of using concurrent evidence in the tribunal was illustrated by *Coonawarra Penola Wine Industry Assoc Inc v Geographical Indications Committee* [2001] AATA 844. That case related to the use of the name 'Coonawarra' by wine producers. An estimated six months hearing was reduced to five weeks. More recently, Justice Downes, President of the AAT, utilised the concurrent technique in proceedings relating to the importation of Asian elephants to zoos in Sydney and Melbourne - 16 experts gave evidence and were cross-examined by three senior counsel in a total of four hearing days.[8]

The practice of taking the evidence of experts concurrently was pioneered in New South Wales by the Land and Environment Court under Chief Judge McClellan (as he then was). In *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399 at [121] - [122], McClellan CJ observed:

> The issues which were ultimately defined in the proceedings required resolution of the different views of experts in relation to a number of significant matters. As will become commonplace in proceedings in this court, the oral testimony of the experts was taken by a process of concurrent evidence. This involved the swearing in of the experts with similar expertise, who then gave evidence in relation to particular issues at the same time. Before giving evidence, the experts had completed the joint conferencing process, which enabled the court to identify the differences which remained and which required resolution through the oral evidence. Each witness was then given an opportunity to explain their position on an issue and provided with an opportunity to question the other witness or witnesses about their position. Questions were also asked by counsel for the parties. In effect, the evidence was given through a discussion in which all of the experts, the advocates and the court participated.
>
> Both Commissioner Watts and I found this to be an efficient and effective method to receive expert evidence. It enabled ready identification of fundamental issues and it ensured that court time was devoted to understanding those issues and providing the court with the material necessary to resolve them. Apart from enhancing the quality of the court's decision, it ensured that a number of days of hearing time were saved.

In *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* [2004] NSWLEC 315 at [14] Talbot J observed that:

> The conduct of the case has contemporary interest as a consequence of the successful use of concurrent evidence techniques that resulted in the oral evidence being confined to four days of the 13-day hearing. In particular, the oral evidence of the six expert witnesses in respect of town planning issues and development potential took only two days of hearing time. The other witnesses who assisted the court by giving evidence in a concurrent session were experts in relation to SEPP 5 development, contamination, design modelling and the respective valuers.

In September 2004, the attorney general for NSW, the Hon Bob Debus MP, commissioned the New South Wales Law Reform Commission to inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales.[9]

In September 2005, the NSW Law Reform Commission[10] released its report in relation to expert witnesses.[11] The report reviewed the emerging practice of experts giving concurrent evidence but made no recommendation in relation to altering the existing rules.[12]

The commission made the following observations with respect to the significant potential advantages[13] of giving expert evidence concurrently:

- the Land and Environment Court's experience indicated that experts typically make more concessions, and state matters more frankly and reasonably, than they might have done under the traditional type of cross-examination; and
- if used effectively, concurrent evidence has considerable potential to increase the likelihood of the court achieving a just decision. It was considered to be more likely to decrease costs and delay than to increase them.

The commission observed that the efficacy and attendant success of the process 'may well depend on the extent to which it is embraced by judicial officers', noting that:

> An important factor is the structuring and control of the discussion by the judge. This requires considerable skill, and often a significant amount of preparation, so that the issues are identified and arranged in a way that lends itself to a fruitful discussion. The

> conduct of the discussion needs to encourage some freedom of exchanges, but nevertheless ensure that all points of view are aired, and that counsel have an adequate opportunity to test opposing experts. The overall success of the technique must also depend on the skills, preparedness and co-operation of the lawyers and experts involved.[14]

Although the commission declined to recommend that the rules be amended to stipulate that expert evidence be given concurrently unless otherwise ordered[15], the commission noted that the wider application of the process of taking evidence concurrently would be beneficial and surmised that 'it may well be that, in the future, the taking of expert evidence concurrently will become the norm rather than the exception.'[16] This is particularly likely given that Justice McClellan who was instrumental in introducing the use of concurrent expert evidence in the Land and Environment Court is now chief judge at Common Law of the Supreme Court. It is expected that he will be an advocate of the broad use of concurrent evidence in the Supreme Court.[17]

Recent Examples

Order 34A rule 3 of the *Federal Court Rules 1979* (Cth), introduced in 1998, empowers the court or a judge to direct that the evidence of expert witnesses called in relation to the same or similar questions be given concurrently.

Federal Magistrate McInnis delivered a recent paper in which he provided an overview of current issues concerning expert evidence in the federal courts, namely the Federal Court, the Family Court and the Federal Magistrates Court.[18] In that paper he described the following innovative orders being made under Order 34A rule 3 in relation to the presentation of expert evidence:

Example 1:

In Qantas Airways Ltd (2004) ACompT 9 (12 October 2004) Goldberg J made the following orders:

1) The parties deliver to the experts later this afternoon or early this evening a number of questions or issues to which the tribunal wishes to direct the expert's attention and which it will ask them to address tomorrow.
2) Each of the experts, when he receives the list of questions or issues, is not to discuss those matters with anyone before being sworn in to give evidence tomorrow.
3) Those questions and issues will be made available to counsel overnight, but the tribunal does not wish the dissemination of the questions or issues to go any further at this stage.
4) The tribunal proposes to adopt the following procedure in relation to the giving of the expert's evidence tomorrow.
   a) the five experts will be sworn in at the same time;
   b) each of them be invited to make an opening statement of around 15 minutes as to how they see the issues in terms of their evidence and the core issues in the proceedings at this stage;
   c) then the experts will be invited to ask questions of any of the other of the experts;
   d) then the tribunal will open the floor between the five experts for any dialogue which they wish to undertake, having regard to what has preceded that dialogue earlier in the morning;
   e) the experts will then have the opportunity of about 10 minutes to sum up the position as they see it from their point of view in relation to the issues in respect of which their evidence and their participation is relevant;
   f) then counsel would be given the opportunity to cross-examine. So far as cross-examination is concerned, or questioning, depending on who asks the questions, the extent to which questions might be leading is a matter of flexibility. Each counsel would cross-examine what I might call the five witnesses who are called by the opposing parties, but not their own witnesses. After that range of cross-examination has been completed, then give a final opportunity for re-examination;
   g) during the procedure the tribunal may ask questions for the purpose of its own clarification. The tribunal will also ask the witnesses to address the specific issues that it has raised in its issues paper.

Example 2:

Directions made on 20 September 2004 by Goldberg J in proceedings before the Australian Competition Tribunal concerning Sydney Airport included the following directions as to the mode of expert conferral which might precede evidence being given concurrently:

3. There be a meeting of each of the parties' experts in Sydney on 15 October 2004 at 8am, at a place to be notified, which meeting will be chaired by Registrar Efthim. The experts should arrive between 7.30am and 7.45am in preparation for the 8 am start.
4. Secretarial or administrative assistance should be provided by the parties to the meeting of the experts if required.
5. The experts are to consider the expert evidence which they have filed and also the evidence generally which is before the tribunal.
6. The meeting will follow such procedures as are determined

by Registrar Efthim after consultation with the experts and the meeting is otherwise to be informal.

7. Legal counsel will not be present at the meeting.
8. The experts must at all times exercise independent judgment.
9. The experts must not act upon instructions to withhold agreement on any matter.
10. The experts are not advocates and are not to act as such.
11. The meeting is not a negotiation as such, nor is it directed to achieve a compromise outcome. The meeting is for the purpose of the experts acting to identify areas of agreement between them and areas of disagreement between them. They are to clarify the scope and extent of any disagreement between them and to assist the tribunal in an impartial manner.
12. The experts are to prepare a joint statement under the supervision of Registrar Efthim and, if they can agree, the first draft is to be prepared by one of their number and circulated to others.
13. The content of the joint statement will be along the following lines:

    (i) A brief statement of the issues considered by the experts at their meeting.

    (ii) A statement of the matters upon which they have reached agreement. Reasons are not required in respect of those matters, but rather a statement of the matters is to be set out so that the subject matter of agreement can be identified.

    (iii) A statement of matters upon which they have not reached agreement, including a brief outline of the reasons for the disagreement and any suggestions for resolution of such disagreement.

    (iv) The experts are to sign that joint statement and give it to Registrar Efthim who will file it in the tribunal and arrange for it to be circulated to the parties, if possible, by 5pm on the day the meeting was held or, if not possible, as soon as possible thereafter as can be arranged.

    (v) The statement should also identify the extent to which there is unanimous agreement on issues if not otherwise identified and, to the extent to which there is disagreement, the nature of the disagreement should be set out in outline, identifying which experts are on which side of the disagreement.'

Example 3:

Similarly, orders made by Lindgren J in a native title case provided for experts to confer according to their respective areas of expertise:

(a) separate conferences of anthropologists, historians and linguists in the absence of lawyers;

(b) lawyers were permitted to assist in setting the agenda; and

(c) the conferences were presided over by an officer of the court.[19]

A good illustration of the flexibility provided by use of concurrent evidence is the procedure adopted by Downes P in recent proceedings in the AAT:

I recently used concurrent evidence in a hearing concerning proposals by Melbourne and Sydney Zoos to import eight Asian elephants. There were 16 expert witnesses and three senior counsel to examine them. The evidence of all 16 witnesses was concluded within four hearing days. This was achieved notwithstanding that, although the experts all had doctorates in disciplines associated with animal behaviour, one group had worked in zoos and the other group had worked in the wild. As one senior counsel said: '[I]t's very clear to all concerned that there is a great degree of polarisation of views on this subject matter.'

Nevertheless, the process enabled areas of agreement to be readily discovered and set to one side, and issues of disagreement then to be effectively addressed. This happened although there were up to four witnesses giving evidence at the same time, including on occasion when one of a group of four gave evidence by telephone from New Delhi. We also took concurrent evidence from two witnesses in the United Kingdom by video link, although the two witnesses were in different parts of the United Kingdom.

All the witnesses had prepared extensive reports which became evidence. The process we adopted was to ask the witnesses to meet together to identify areas of agreement and disagreement. They were asked to produce a document setting this down. At the beginning of their evidence, the document was admitted as an exhibit. Each witness was then asked to outline the essence of their evidence on matters not agreed. The witnesses were then invited to ask questions of one another. During the whole process, members of the tribunal asked questions when they thought it appropriate. Finally, counsel for the three parties were invited to question any of the witnesses, including those they had called to give evidence.

The process of asking the experts to find areas of agreement and disagreement was very successful. The two who gave evidence from England both had doctorates. One was head of wildlife for the RSPCA. The other was the Director of the British and Irish Association of Zoos and Aquariums. They definitely gave evidence from different perspectives. They could only meet by telephone. They were a long way from the lawyers and any guidance as to how they should go about their meeting. Yet they produced a comprehensive multi-page document of points of agreement and disagreement.

...

Concurrent evidence can have a number of virtues over the traditional process:

- the evidence on one topic is all given at the same time;
- the process refines the issues to those that are essential;
- because the experts are confronting one another, they are much less likely to act adversarially;
- a narrowing and refining of areas of agreement and disagreement is achieved before cross- examination; and
- cross-examination takes place in the presence of all the experts so that they can immediately be asked to comment on the answers of colleagues.[20]

Conclusion

In November 2005, the Administrative Appeals Tribunal published its report evaluating the use of concurrent evidence in the NSW Registry.[21] The study supported the continued use of concurrent evidence in the tribunal and noted in particular that there appeared to be significant benefits for the decision-making process in using concurrent evidence, such as: improved objectivity of the evidence presentation; improved quality of evidence; easier comparison of competing expert evidence; enhanced decision-making and easier preparation and delivery of judgments. Interestingly, the findings suggested that the use of concurrent evidence only reduced the overall length of the hearing in 30 per cent of cases; in 50 per cent of cases the length of the hearing was about the same and in the remaining 20 per cent of cases it was perceived that the use of concurrent evidence increased the length of the hearing.

The study made a number of recommendations in relation to the continued use of concurrent evidence which included:

- the development of guidelines in relation to:
  - the identification and selection of cases in which the procedure would be used; and
  - the procedure to be followed;
- the provision of information and training to tribunal members, representatives and experts in relation to the use of the procedure.

In the study the four factors most commonly identified as making a matter suitable for concurrent evidence were that:

- the experts had the same level of expertise;
- the experts would be commenting on the same issues;
- concurrent evidence would improve the objectivity of the evidence;
- concurrent evidence would clarify some complex issues.

While it remains to be seen whether the practice of taking expert evidence concurrently becomes the norm rather than the exception, it is likely to be encountered with greater frequency for the foreseeable future, particularly as the procedure is trialled and modified to suit different types of dispute. In the Supreme Court, concurrent expert evidence has been used in medical negligence cases.[22] It has also been used where the expert matter in issue was the forgery of a signature on a guarantee.[23] The use of concurrent evidence in medical cases is reminiscent of the introduction of joint conferences between experts in the Professional Negligence List in 1999, an innovation that was incorporated into the general court rules in 2000. The provision of effective training to all involved in the procedure will influence the success of a broader implementation of concurrent evidence in the courts. As identified by the Law Reform Commission, effective utilisation of the procedure will depend heavily on the degree to which the procedure is embraced by the bench and will require significant preparation to ensure that the flow of evidence is controlled in such a way as to focus on the relevant issues before the court.

1 Justice P Heerey, 'Recent Australian Developments' (2004) 23 *Civil Justice Quarterly* 386 referred to 'the hot tub' as an 'irreverent soubriquet'. Paul Stockton, Director of Reviews and Legislation, Department of Constitutional Affairs, UK, acknowledged that concurrent evidence was a fascinating innovation but commented that 'the hot tub' label was possibly used to stimulate interest at otherwise dull legal events: P Stockton, 'Comment: Some Lessons from Australia', Council on Tribunals, *Adjust Newsletter*, July 2006

http://www.council-on-tribunals.gov.uk/adjust/item/comment_australia.htm

2 New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005) [6.48] (references omitted).

3 Australian Law Reform Commission, *Managing Justice: a Review of the Federal Justice System*, Report No 89 (2000) [6.116] (references omitted). The commission cited Lockhart J, 'Memorandum to the Registrar of the Federal Court' (21 April 1998).

4 Justice P McClellan, 'Expert Witnesses: The Experience of the Land & Environment Court of NSW' (Paper presented at the XIX Biennial LawAsia Conference, Gold Coast, 20 - 24 March 2005).

5 See: P Stockton at n 1 above.

6 Justice P Heerey, above n 1; Federal Magistrate M McInnis, 'Expert Evidence and the Federal Courts Current Developments' (paper presented at the International Institute of Forensic Studies Conference on 'Experts and Lawyers: Surviving in the Brave New World', Broome, 16 - 19 October 2005) and Administrative Appeals Tribunal 'An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal' November 2005 http://www.aat.gov.au/SpeechesPapersAndResearch/Research/AATConcurrentEvidenceReportNovember2005.pdf.

7 *Re Ciba Geigy Australia and Worksafe Australia Ltd* AAT 9385, 18 March 1994 - cited in AAT Report at n6 above.

8 Both examples are drawn from Justice G Downes AM, 'Problems with Expert Evidence: Are Single or Court-Appointed Experts the Answer?' (2006) 15 *Journal of Judicial Administration* 185. See also Justice G Downes AM 'Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience' (Paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004).

9 The terms of reference were as follows:

1. To inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales.
2. In undertaking this inquiry, the commission should have regard to:
   * recent developments in New South Wales and other Australian and international jurisdictions in relation to the use of expert witnesses, including developments in the areas of single or joint expert witnesses, court-appointed expert witnesses, and expert panels or conferences;
   * current mechanisms for the accreditation and accountability of expert witnesses for the purposes of court proceedings, including the practice of expert witnesses offering their services on a 'no win, no fee' basis;
   * the desirability of sanctions for inappropriate or unethical conduct by expert witnesses; and any other related matter.
3. The commission to report no later than 31 March 2005. See New South Wales Law Reform Commission, above n 2.

[10] Pursuant to s12A of the *Law Reform Commission Act 1967* (NSW) the chairperson of the commission constituted a division for the purpose of conducting the reference: Professor Richard Chisholm (Head of Division); The Hon Justice Michael Adams; Professor Michael Tilbury; Dr Duncan Chappell; The Hon Justice David Kirby; The Hon Gordon Samuels AC CVO QC; and The Hon Hal Sperling QC.

[11] New South Wales Law Reform Commission, above n 2.

[12] Pt 31 r 25 *Uniform Civil Procedure Rules 2005* (NSW) makes provision for the court to direct that expert evidence be taken concurrently.

[13] Although much has been written proclaiming the benefits of concurrent expert evidence, the process is not universally acclaimed: see for example Justice G L Davies, 'Recent Australian Developments: A Response to Peter Heerey' (2004) 23 *Civil Justice Quarterly* 396. See also discussion within of the decision of the Australian Competition Tribunal in *Qantas Airways Limited* [2004] ACompT 9.

[14] New South Wales Law Reform Commission, above n 2, [6.57].

[15] In the Western Australian State Administrative Tribunal the default position is that all evidence given by experts in the same field is given concurrently.

[16] New South Wales Law Reform Commission, above n 2 [6.60].

[17] See Justice P McClellan, above n 4.

[18] Federal Magistrate M McInnis, above n 6.

[19] McInnis DCM cited this example from Heerey J's article above n 11.

[20] I*nternational Fund for Animal Welfare (Australia) Pty Ltd v Minister for Environment and Heritage* [2006] AATA 94, which is described in Justice G Downes AM, 'Problems with Expert Evidence', above n 8.

[21] Administrative Appeals Tribunal, 'An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal' (November 2005) Administrative Appeals Tribunal <http://www.aat.gov.au/SpeechesPapersAndResearch/ResearchPapers.htm> at 3 October 2006.

[22] Justice P Biscoe, 'Expert Witnesses: Recent Developments in NSW' a paper delivered to the Australasian Conference of Planning and Environment Courts and Tribunals on 16 September 2006.

[23] *Jeans v Cleary* [2006] NSWSC 647 (28 June 2006).

Verbatim

Burge & Ors v Swarbrick [2006] HCATrans 573

Gleeson CJ: Yes, Mr Garnsey.

Mr Garnsey: If your Honour pleases. Your Honours, when the poet enunciated the self-evident truth that a thing of beauty is a joy forever, no one doubted that statement and it gave one a comfortable feeling and one says 'How true' automatically. When one enunciates the proposition that the hull and deck mouldings made from the moulds made from a plug for a racing yacht designed to be manufactured, industrialised, marketed and, if possible, raced in a class, when one says that such a yacht or the hull and deck mouldings of it are works of artistic craftsmanship, one does not have the same immediate confidence that, if those words are ordinary English words, they bear a meaning which is appropriate for a racing yacht or its component parts.

The proposition which we advance in this case is to advance a proposition which contains a positive test for work of artistic craftsmanship based on the legislative history and the authorities and we invite your Honours to set the boundaries to that term, because at present, your Honours, it is our respectful submission that the horse is out of the stall, is running around the stable yards and it is high time that someone put a halter on it and got it back.

Kirby J: Could you not have thought of a nautical analogy instead of an equine one? Seeing as you began with the poet and I was lifted into a higher plane, suddenly I am getting mixed metaphors here.

Mr Garnsey: Well, your Honour, I do not know if the amount of paper we are going to inflict on your Honours will lift your Honours to a higher plane.

Gleeson CJ: No, it will not. Somebody on your side of the record seems to think that the word 'lengthy' when applied to submissions is a badge of honour. We have read the written submissions.

Leichhardt Municipal Council v Montgomery [2006] HCATrans 462 (30 August 2006)

Kirby J: Was there a danger for you in the questions and answers – the questions to you from the chief justice and the answers you gave that the subcontractor is committing a nuisance unless it is relevantly performing the statutory functions as the road authority?

Mr Garling: I would not put it quite that way, your Honour. I would accept – and I certainly would not accept there is any danger in any question that his Honour the chief justice ever puts, but - - -

Hayne J: You will learn.

Kirby J: You always have to watch these questions.

Adhering to expert codes of conduct

By Elizabeth Cheeseman

For practitioners in New South Wales the relevant guidelines are contained in:

- Order 34A of the Federal Court Rules and the Practice Direction of 19 March 2004 entitled *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*; and
- Part 31, Division 2 of the *Uniform Civil Procedure Rules 2005* (NSW) and The Expert Witness Code of Conduct contained in Schedule 7 of the *Uniform Civil Procedure Rules*.

Part 36 rule 13C(2) of the *Supreme Court Rules 1970* (NSW) was the precursor of the code contained in the UCPR. Part 36 rule 13C(2) provided that unless the court otherwise ordered an expert report that does not contain an acknowledgement by the expert that he or she has read the code and agrees to be bound by it, the report shall not be admitted into evidence. The rule is set out below as it is relevant to the discussion of cases that follows:[1]

2. Unless the court otherwise orders:

(a) at or as soon as practicable after the engagement of an expert as a witness, whether to give oral evidence or to provide a report for use as evidence, the person engaging the expert shall provide the expert with a copy of the code;

(b) unless an expert witness's report contains an acknowledgment by the expert witness that he or she has read the code and agrees to be bound by it:

(i) service of the report by the party who engaged the expert witness shall not be valid service for the purposes of the rules or of any order or practice note; and

(ii) the report shall not be admitted into evidence

The following cases illustrate the consequences of failing to comply with an applicable expert code of conduct in a variety of circumstances.

Barak Pty Ltd v WTH Pty Ltd [2002] NSWSC 649

In this case, the report of an expert architect failed to include an acknowledgement in the terms contemplated by Part 36 rule 13C(2), however the evidence demonstrated that notwithstanding the failure to include the express acknowledgement the architect was in fact aware of the code and had complied with the code to the best of his ability. In those circumstances, Barrett J admitted the report into evidence (at [4] - [5]):

> There have thus been unequivocal statements by Mr Byrnes under oath acknowledging that he had read the code in Schedule K and agreed to be bound by it. I am satisfied that that position may be taken to relate back to the time when he prepared the report.
>
> In those circumstances, the intent of the rule of ensuring that only reports by experts who have proceeded in accordance with stated norms of conduct should be relied upon can be seen to be satisfied and it is appropriate that the court make an order under the opening words of Pt 36 r13C(2) displacing the operation of para (b), that is, an order that service of the report annexed to Mr Byrnes' affidavit was valid service and that the report is admitted into evidence.

Commonwealth Development Bank of Australia Pty Ltd v Cassegrain [2002] NSWSC 980 (Cassegrain)

Justice Einstein rejected the report of an expert witness in matters of banking in circumstances where the at the time of preparing his report the expert was not aware of the code and as a result his report did not contain the acknowledgement in accordance with the rules. At paragraph [9], Einstein J commented as follows as to the requirements for strict compliance with Pt 36 r13C of the NSW Supreme Court Rules:

> To my mind, considerable significance attaches to enforcing strict compliance in the expert witness provisions now found in Pt36 r13C. Questions of the significance of the opinions of experts have been mooted over a very extended period of time and the Schedule K and Pt 36 r13C(1) Expert Witness Code Of Conduct was promulgated with the clear intent that only reports by experts who have proceeded in accordance with the stated norms of conduct, should be relied upon and may be admitted into evidence. The significance of the code of conduct emerges clearly from the whole of the code as well as from the 'general duty to the court' section of Schedule K as well as from the stipulations as to the form of expert's reports.

The determination of whether an 'otherwise' order should be made is discretionary and Einstein J declined to make such an order, stating at [11] that:

> In my view the problems which confront the opposing party when such an otherwise order is sought, clearly include, importantly, the fact that an expert not having committed to the code of conduct at or as soon as practicable after his or her engagement in circumstances such as the present, will have committed to a particular form of opinion. Whilst the party applying for an otherwise order may submit that there is no difficulty in the putative experts adopting Schedule K in an ex post facto fashion, it seems to me that this is a course which the court should strain against in so far as the proper administration of justice is concerned and in terms of fundamental fairness. For those reasons it seems to me that the application for an 'otherwise order' should be refused.

In *Portal Software International Pty Ltd v Bodsworth* [2005] NSWSC 1228, Brereton J made the following observation in respect of this decision:

> It has not infrequently been accepted that the decision of Einstein J can be distinguished inter alia on the basis that it was a commercial cause in which a higher degree of alertness to strict compliance with procedural requirements may be insisted upon than might be the case, for example, in some of the personal injury cases heard in the Common Law Division.

Langbourne v Sate Rail Authority NSW [2003] NSWSC 537 (Langbourne)

In this case Levine J assumed that Pt 36 r13C of the NSW Supreme Court Rules applied as there was a question as to whether the expert had been retained prior to the commencement of the rule (1 March 2000). Justice Levine relied on the judgment of Einstein J in *Cassegrain*

as providing useful guidance but in the exercise of his discretion allowed the admission into evidence of a non-complying expert report. The factors that predisposed Levine J to admit the report were identified at [13] - [14] as follows:

(a) consent to the tender of the original report in the course of the hearing;

(b) the defendant's concession that no prejudice had been incurred by reason of the apparent failure to comply with the rule;

(c) the expert's evidence on voir dire, that having read the Schedule he would not have changed his approach or opinion;

(d) the expert's evidence in the cause that he was familiar with what Levine J inferred to be a cognate rule of the Supreme Court of South Australia;

The final factor was the question as to whether the expert had been retained prior to the commencement of the relevant rule.

United Rural Enterprises Pty Ltd v Lopmand Pty Ltd & Ors [2003] NSWSC 870

In this case the expert report was that of an accountant prepared to evidence the value of a share in a company in circumstances where one of the remedies under contemplation was the compulsory acquisition of the share in the company. The expert was not supplied with a copy of the code before he embarked on writing his report and was provided with it only shortly before he actually swore his affidavit. Importantly, his affidavit did contain an acknowledgment that he had read and agreed to be bound by the code in the terms required by Part 36 rule 13C(2)(b). The difficulty was that the expert had not been provided with a copy of the code as soon as practicable after being engaged to give expert evidence as required by Part 36 rule 13C(2)(a).

Justice Campbell commented at [9] that:

> The provisions of Part 36 rule 13C were introduced into the court's Rules at the beginning of 2000. They should by now be very well known to the profession. It is only as the result of extraordinary incompetence that the situation has arisen where I am asked to make the decision which I now need to make. Any solicitor practicing in this court ought know that if an expert is to be engaged, that expert must be given a copy of the code of conduct.

Unlike in *Langbourne*, where the expert had some acquaintance with what was described as a cognate rule of the Supreme Court of South Australia, the expert in this case had not, from his previous professional activities, come across the code.

The expert gave evidence, which was not challenged, that he believed that had complied with Schedule K in preparing his opinion and that at all times he understood that his obligations were to the court.

Justice Campbell accepted that because the affidavit did contain an acknowledgement in the terms of Part 36 rule 13C(2)(b) that the mandatory rejection of the expert's evidence under that rule did not arise and it was not necessary to consider whether the court should make an 'otherwise order' under that rule.

The alternative submission upon which Campbell J ruled was whether the expert's evidence should be rejected under section 135 of the Evidence Act (NSW). Ultimately, Campbell J did not reject the evidence because he did not consider there was 'a risk that the fact that Mr Brigden formed his opinions without having Schedule K at the forefront of his mind will result in a real possibility that the court might be misled, or the opposite party unfairly prejudiced, because he might be expressing an opinion to the court which is infected by failure to understand his responsibilities as an expert.'[2] Justice Campbell's conclusion was based on the fact that upon analysis of the expert report in question and the opposing party's expert report, he regarded that the differences between the experts were quite clear, and were of a type which would not be resolved by the court simply saying that it accepted one expert over the other but by an application of legal principle rather than of accounting expertise. That said, Campbell J regarded the policy underlying the existence of Part 36 rule 13C was a matter to be taken into account in considering whether the affidavit should be rejected under section 135:

> That policy recognises that an expert witness can form a view in circumstances where he or she does not realise that his role is one of the kind set out in the code, and once that view has been formed will find it difficult to retreat from it. This can happen as a matter of ordinary human psychology, without any dishonesty on the part of the expert concerned. Therefore, one needs to be very much on guard as to whether there is any real possibility that this sort of process of opinion formation may have influenced the ultimate report which is presented to the court, with the result that the court cannot safely act on it.[3]

Portal Software International Pty Ltd v Bodsworth [2005] NSWSC 1228

In this case, Brereton J considered the application of *Uniform Civil Procedure Rules 2005* (NSW), rule31.23(2).[4] The plaintiff had sought to rely on two expert affidavits that did not contain an acknowledgement with respect to the code and subsequently sought to rely on two later affidavits in substantially the same form save that the later affidavits did contain an acknowledgement with respect to the code. The acknowledgement in the later affidavits extended to include confirmation that in swearing one of the earlier affidavits the expert had acted in accordance with the obligations imposed by the code.

Justice Brereton indicated that he would, if necessary, make an 'otherwise order' to permit the evidence to be led because the expert after being made aware of the code of conduct confirmed that he prepared the earlier affidavit in accordance with the obligations which the code contains. However, because the evidence in issue was in the form of an affidavit, Brereton J considered that it was not necessary to make such an order:

> The rule distinguishes between oral evidence being received from an expert, and the tender of an expert's report. The rule does not deal explicitly with evidence by affidavit. Generally speaking, an

affidavit is regarded as a substitute for oral evidence, rather than as a report. What is sought in this case is to read an affidavit. I would regard this as the adducing of oral evidence within r31.23(2), rather than the tendering of a report under sub-rule (3). That being so, the affidavits which are read (being those of 17 October) do include a statement by which the witness acknowledges in writing that he has read the code of conduct and agrees to be bound by it, and a copy of that has been served, albeit only today, as I understand it, on the defendant. Accordingly, I do not think there has been a failure to comply with r31.23(2).[5]

Expert reports should conform to the principles in the oft cited decision of Crestwell J in *National Justice Companions Naviera SA v Prudential Insurance Co Ltd ('The Ikarian Reefer')* [1993] 2 Lloyd's Rep 68 at 81-82. The following extract is from the decision of Heydon J in *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [79]:

> In *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* ('The Ikarian Reefer') [1993] 2 Lloyd's Rep 68 at 81-82 Cresswell J set out a list of duties and responsibilities of expert witnesses in civil cases as follows:
>
> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ...
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise... An expert witness in the High Court should never assume the role of an advocate.
> 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one ... In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report ...
> 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.
> 7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports ...
>
> While some of these matters have an ethical dimension, taken together they point to the need for the trier of fact to be fully informed of the reasoning process deployed in arriving at the expert's opinions. Cresswell J's list has been influential both in causing rules of court to be devised in this and other jurisdictions to control expert evidence and in later judicial pronouncements. Thus in *Clough v Tameside and Glossop Health Authority* [1998] 2 All ER 971 at 977 Bracewell J said:
>
> > It is only by proper and full disclosure to all parties, that an expert's opinion can be tested in court: in order to ascertain whether all appropriate information was supplied and how the expert dealt with it. It is not for one party to keep their cards face down on the table so that the other party does not know the full extent of information supplied.
> >
> > This implies that not only must the appropriate information be supplied, but that the expert must reveal the whole of the manner in which it was dealt with in arriving at the formation of the expert's conclusions.

In the explanatory memorandum accompanying the third version of the Federal Court expert guidelines (issued on 19 March 2004), the Federal Court stated that ways in which an expert giving opinion evidence may avoid criticism of partiality included ensuring that the report, or other statement of evidence:

- is clearly expressed and not argumentative in tone;
- is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;
- identifies with precision the factual premises upon which the opinion is based;
- explains the process of reasoning by which the expert reached the opinion expressed in the report;
- if confined to the area or areas of the expert's specialised knowledge; and
- identifies any pre-existing relationship between the author of the report, or his or her firm, company etc and a party to the litigation (e.g. a treating medical practitioner, or a firm's accountant).

1 See also *Uniform Civil Procedure Rules 2005* (NSW), r31.23(2). *Uniform Civil Procedure Rules*, Pt 31 r23 provides relevantly as follows:

(2) Oral evidence may not be received from an expert witness unless:

(a) he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the Code of Conduct and agrees to be bound by it, and

(b) a copy of the acknowledgment has been served on all parties affected by the evidence.

(3) If an expert's report does not contain an acknowledgment by the expert witness who prepared it that he or she has read the code of conduct and agrees to be bound by it:

(a) service of the report by the party who engaged the witness is not valid service, and

(b) the report is not admissible in evidence.

(4) This rule applies unless the court orders otherwise.

2 At [19]

3 At [15]

4 Extracted at n 1 above.

5 At [7]

The admissibility of expert evidence

Makita v Red Bull

By Greg Nell

The admission of expert evidence is a significant exception to the general rule, found for the purposes of proceedings in New South Wales in s76 of the Commonwealth and New South Wales Evidence Acts,[1] excluding the admission of opinion evidence. Moreover, reliance upon expert evidence is now a common occurrence in litigation, with expertise being claimed over a broadening range of areas. As a result, when advising as to the use of such evidence and preparing expert's reports, it is important to be aware of the circumstances in which expert evidence can be admitted[2] and the requirements that must be satisfied by a party seeking to rely upon such evidence at a final hearing.

The current rules for the admissibility of expert evidence require that the evidence be relevant[3] and that it have sufficient probative value.[4] Critically it must also satisfy s79 of the Evidence Act, which is in the following terms :

> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

The effect of s79 is that, before evidence can be admitted as expert evidence, three requirements must be met: first, the witness giving that evidence must have a 'specialised knowledge';[5] secondly, this specialised knowledge must be 'based on training, study or experience'; and thirdly the opinion sought to be expressed by the witness must be one that is 'wholly or substantially based on that [specialised] knowledge'. At its most basic level, s79 points up that there is a critical nexus[6] between

- the requirement that the 'specialised knowledge' be shown to be based on the 'training, study or experience' of the witness and
- the requirement that the opinion expressed by the witness be based wholly or substantially on that 'specialised knowledge'.[7]

The requirements of s79 are mandatory. They go to the admissibility of the evidence, as well as its weight if admitted. If those requirements are not satisfied, the evidence is not admissible and will not be admitted.[8] Where there is a challenge to the admission of such evidence on the basis that it is not expert evidence, it will be necessary for these requirements to be established, on the balance of probabilities, by the party seeking to adduce and rely upon that evidence.[9]

There are two further sources of additional obligations relevant to a party's ability to rely upon expert evidence, which must also be considered where such evidence is proposed to be adduced. The first is the rules of court and practice notes or guidelines[10] that have been produced by the courts on the topic of expert evidence. These contain requirements that are, for the most part, procedural, for example prescribing the giving of prior written notice of expert evidence where it is to be relied upon, the time within which such notice must be given, the formalities that must be complied with when such evidence is reduced to writing, particular matters that must be included in an expert's report and the consequences of a failure to comply with any of these requirements. In some respects, the requirements may be expressed as prerequisites to the admissibility of the proposed expert evidence.[11] But even where they are not, they nevertheless still go to whether the party seeking to rely upon that evidence may be permitted to do so and for that reason should be met.

The second source, or potential source, of obligations are those requirements not expressly found in s79 but which the courts have nevertheless stated must be satisfied if expert evidence to be successfully relied upon. These additional requirements derive from the basis on which expert evidence was admitted under the common law prior to the Evidence Act and the enactment of s79. It is these further requirements and the two competing approaches that have been taken by the courts, both to these requirements and the role that they play that are identified and discussed briefly in this article.

Makita (Australia) Pty Ltd v Sprowles

The leading statement as to what a litigant is required to prove in order to successfully adduce expert evidence in proceedings in New South Wales is to be found in the judgment of Heydon JA (as his Honour then was) in *Makita (Australia) Pty Ltd v Sprowles*,[12] in particular in the following summary:

> [85] In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of 'specialised knowledge'; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be 'wholly or substantially based on the witness's expert knowledge'; so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v The Queen* [(1999) 197 CLR 414] (at 428[41]), on 'a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise'.[13]

The facts of that case may be shortly stated. The plaintiff fell down stairs at her workplace and was injured. She sued her employer in negligence. The trial judge found for the plaintiff and awarded her substantial damages. In doing so, the trial judge found that the tread of the stairs was slippery, that this was the reason the plaintiff fell and that her employer was in breach of the duty of care that it owed the

plaintiff by reason of the condition of the stairs. The finding that the plaintiff's fall was due to the slipperiness of the stairs was largely, if not entirely, based on the evidence of an expert called by the plaintiff,[14] who had concluded that the plaintiff's accident was caused 'by the inadequate frictional grip afforded by the very smooth concrete stair treads for [the plaintiff's] footwear. ...Whilst the interface between [the plaintiff's] shoes and step tread should not be classed as very slippery, the level of grip afforded is below that needed for a reliable margin of safety'.[15] Prior to and for the purposes of giving this evidence, the expert had carried out two types of tests. The first consisted of tests conducted on the stairs, using various shoe materials, albeit some $9^{1/2}$ years after the accident. The purpose of these tests was to measure the slipperiness of the stairs. The second type of test conducted by the expert was to test the slipperiness of the plaintiff's shoe.

There was also before the trial judge evidence of the plaintiff's use of the stairs in question repeatedly for nearly $2^{1/2}$ years prior to her accident and without incident or injury; evidence from the plaintiff's immediate superior of his regular and frequent use of the same stairs without incident or injury; the expert's own observation that present occupants of the building regularly used the stairs in question for access to and from the car park and between the floors of the building; and the absence of any evidence of any other person engaged in the defendant's business having ever encountered relevant problems on the stairs either before or after the accident. In those circumstances, were it not for the evidence of the plaintiff's expert, a conclusion that the stairs were not slippery would have been inevitable.[16]

The employer appealed. Included amongst its grounds of appeal was a claim that the trial judge had erred in accepting the expert evidence. The appeal was upheld unanimously and verdict entered for the employer. All three members of the Court of Appeal dismissed the evidence of the expert and found that the trial judge ought not to have accepted it, particularly in light of the evidence that was before the trial judge to the contrary effect.

The employer's challenge to the expert's evidence was not as to its admissibility, the expert's report having been admitted at the trial without objection.[17] Rather it was as to whether his evidence ought to have been accepted by the trial judge. In examining whether the expert's report was useful, Heydon JA stated that it was necessary to consider whether it complied 'with a prime duty of experts in giving opinion evidence: to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions'.[18] This then led his Honour to a discussion of the requirements for the admission of expert evidence, commencing at paragraph [59] of his reasons for judgment and culminating in the summary contained in paragraph [85] (quoted earlier).

His Honour's discussion is of interest for at least three reasons. The first is because of the explanation as to how it is that experts came to have this 'prime duty'. In this regard, his Honour noted that an expert cannot usurp the role of the trial judge,[19] who must make the necessary findings of fact.[20] The expert, however skilled and eminent, can give no more than evidence.[21] Whilst it is open to the court to accept that expert evidence when given and to make findings in accordance with that evidence and based upon it, the court is not obliged to accept the evidence of an expert, even where no other expert is called to contradict it.[22] This is particularly where that evidence goes to the ultimate issue.[23] The tribunal of fact is bound to consider and assess all the evidence before it, including that of an expert, in order to determine whether or not to accept that evidence and (assuming that the evidence is accepted) whether or not to prefer it over any contrary evidence. In order for the court to perform that task, it is necessary for the expert to explain the basis on which he or she has reached their opinion, so that the court may undertake its own independent assessment of that evidence and form its own conclusion. The tribunal of fact cannot arrive at an independent assessment of the expert opinion and its value unless the basis of that opinion is explained.[24] The tribunal of fact cannot weigh and determine the probabilities of a fact that is sought to be proved by expert opinion evidence if the expert does not fully expose the reasoning that he or she relied upon in reaching that opinion.[25]

The second reason his Honour's discussion is of interest is for the description of the content of that duty, or more correctly what the expert must do in order to discharge that duty.[26] As has already been observed, first the expert must identify the reasoning underpinning their opinion. This may include for example furnishing :

> the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. [27]

As Heydon JA noted, a statement to similar effect had also been earlier made in Australia by Fullagar J in *R v Jenkins; Ex parte Morrison:*[28]

> Fullagar J said that an expert witness must 'explain the basis of theory or experience' upon which the conclusions stated are supposed to rest, for, as Sir Owen Dixon said in an extra-judicial address quoted by Fullagar J, 'Courts cannot be expected to act upon opinions the basis of which is unexplained.[29]

Secondly, the expert must also identify the particular facts and assumptions upon which their opinion rests, distinguishing between those facts that the expert is able to prove by his or her evidence

and those that have been assumed by the expert and which must be proved independently. For otherwise, it may not be possible for the court to test or assess the expert's opinion,[30] or more importantly, its application to the facts of the case before the court. As Heydon JA observed :

> [64] The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are 'sufficiently like' the matters established 'to render the opinion of the expert of any value', even though they may not correspond 'with complete precision', the opinion will be admissible and material: see generally *Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505 at 509-510; *Paric v John Holland Constructions Pty Ltd* (1985) 59 ALJR 844 at 846. One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some rational relationship with the facts proved.[31]

The third reason why this discussion is of interest is because of Heydon JA's identification of the consequences of the expert having this duty, or perhaps more importantly, the consequences of the expert failing to discharge that duty, namely that it goes to the admissibility of the expert's evidence. This was identified in the following statement within the summary in paragraph [85] of the judgment in *Makita*:

> If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight.[32]

It is in this third respect that a divergence has developed in the authorities, in particular in the Federal Court of Australia.[33]

In *Makita* the Court of Appeal did not find that the evidence of the expert called by the plaintiff was inadmissible and both the court's rejection of his evidence and its decision to set aside the judgment below were not made on that basis. Rather, each of the members of the court of Appeal found that the trial judge had erred in accepting the expert's evidence over the contrary evidence that was otherwise available,[34] having regard to the weight of the evidence. For example, after discussing the content of the expert's evidence, Heydon JA concluded :

> The conclusions in Professor Morton's report ought not to be accepted uncritically. On examination it is difficult to be convinced by them. The lay history of incident-free use of the stairs suggests that they were not slippery. That inference from that history is preferable to Professor Moreton's conclusions. If the stairs were not slippery, the defendant was not in breach of its duty of care as occupier and employer. The appeal should be allowed on that ground.[35]

The requirements for the admissibility of expert evidence had also previously been the subject of an extra curial commentary by Heydon JA at a seminar dealing with aspects of the Evidence Act held by the Judicial Commission on 14 November 2000. Extracts from this commentary were quoted with approval by Einstein J. in *Idoport Pty Ltd v National Australia Bank Ltd.*[36] A complete copy of the commentary is available on the Supreme Court web site.[37] In this commentary, Heydon JA summarised the relevant requirements for the admission of expert evidence under the following seven heads:[38]

1. There must be a field of specialised knowledge and the witness must identify it.
2. The witness must have expertise in an aspect of that field, and must identify it.
3. The opinion proffered must be substantially based on the expertise of the witness and the witness must identify it.
4. Any factual assumptions underlying the witness's opinion must be clearly identified and articulated.
5. Any factual observations made by the witness which underly the witness's opinion must be clearly identified and articulated, and the observations must have been sufficiently detailed to form a satisfactory basis for the opinion.
6. If the witness relies on a combination of factual assumptions and factual observations, they must be identified,
7. The witness must explain how the knowledge on which the witness is an expert applies to the facts assumed or observations made so as to produce the opinion propounded.

The short point is that not only must the essential requirements for admissibility be satisfied, but they must be proved to have been satisfied. Whether they exist cannot be left to speculation.

The commentary also contained a discussion of each of these heads and what they entailed. It is not proposed to repeat that discussion here. Suffice it to say for present purposes that the first three heads which his Honour has identified reflect the language and express obligations of s79 of the Evidence Act. The remaining heads reflect those additional requirements which the courts had in the past also required to be satisfied under the common law for the admission of expert evidence, which are not found expressly in s79 but which his Honour found continued to apply to evidence sought to be admitted under that section. Moreover, consistent with the position under the common law, the view expressed in this commentary[39] is that these last four heads go to the admissibility of the evidence and therefore must be proved in order for the evidence is to be admitted.[40] Accordingly, Heydon JA observed in his commentary in relation to the sixth head:[41]

> A failure by a witness to make or identify sufficient factual assumptions to form a rational basis for the opinion may render it inadmissible, or of so little weight that it should not be left for the consideration of the trier of fact. The same is true if a witness fails to make sufficient factual observations to support the opinion. And the same is also true of that class of case where the witness's opinion can only validly rest on a combination of observations and assumptions.

In the same vein, his Honour expanded upon the seventh head in his commentary in inter alia the following terms:[42]

> The opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions

reached: that is, the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If one cannot be sure of that, the evidence is not admissible. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but to use Gleeson CJ's characterisation of the evidence in *HG v R*, on 'a combination of speculation, inference, personal and second hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise of a psychologist' (at para [41]). ...

The process of making the reasoning explicit enables the court to see whether the evidence is admissible expert evidence, or whether it is instead nothing more than 'putting from the witness box the inferences and hypotheses on which' the party calling the witness wishes to rely (*HG v R* at para [43]). The vital importance of compliance with the requirement of s79 that opinions of expert witnesses be confined to opinions based wholly or substantially on their specialised knowledge was stressed by Gleeson CJ for the following reason: 'Experts who venture 'opinions' (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted'. But the rendering explicit of what experts say not only aids the court in the determination of admissibility; it aids the court in fact finding at the end of the trial by making plain what the process of reasoning is. This is important, because it is not the role of the finder of fact merely to accept the opinions given to it, or select one opinion which seems more plausible than another. According to Lord President Cooper in *Davie v Edinburgh Magistrates* 1953 SC 34 at 40, experts must 'furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence'. It follows that an expert witness must explain what Fullagar J. called 'the basis of theory or experience' on which the opinion of the witness has applied to the dispute in questions rests: *R v Jenkins; ex parte Morrison* [1949] VLR 277 at 303.

Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd

Following the decision in *Makita*, the issue of the admissibility of expert evidence arose for the consideration of the full court of the Federal Court of Australia in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*,[43] and in the course of dealing with that issue, the members of the full court made a number of observations in relation to the judgment of Heydon JA in *Makita*, especially the summary at para. [85], not all necessarily consistent with it.

In that case, the respondents had brought proceedings against the appellants alleging that the packaging of a product distributed by the appellants was substantially identical with, and deceptively similar to, the respondent's product (which the appellants also distributed) and that the appellants' conduct contravened provisions of the *Trade Practices Act 1974* (Cth) and constituted passing off. The respondents succeeded at first instance. The appellants appealed to the full court.

One of the appellants' grounds of appeal was a challenge both to expert evidence of Dr Beaton which the respondent had relied upon below, and the trial judge's use of that evidence. Although Dr Beaton's evidence had been received at the trial without objection, it was argued by the appellants on appeal that his evidence was inadmissible or ought not to have been accorded weight.[44] In support of that ground, the appellant referred to and placed reliance upon the judgment in Makita.[45] The full court unanimously held that the challenge to the admissibility of Dr Beaton's evidence failed; as did the appellants' challenge to the trial judge's use of that evidence.[46]

In relation to *Makita*, Branson J. observed at the outset:

> [7] The approach of Heydon JA as set out [in paragraph [85] of the judgment] is, as it seems to me, to be understood as a counsel of perfection. As a reading of his Honour's reasons for judgment as a whole reveals, his Honour recognised that in the context of an actual trial, the issue of the admissibility of evidence tendered as expert opinion evidence may not be able to be addressed in the way outlined in the above paragraph.[47]

Three reasons were given for this statement.[48] The first concerned the situation where, as in that case, the expert evidence was admitted without objection. In this regard, her Honour stated:

> Rarely, if ever, would a trial judge be expected to interfere with the basis upon which represented parties had chosen to conduct their litigation by challenging the basis of an implicit concession concerning admissibility.[49]

The second reason had regard to the fact that any ruling on the admissibility of evidence is ordinarily required to be made by the trial judge during the course of the trial rather than at its conclusion, and the consequences of that fact.

> The trial judge's rulings will be based on the evidence and other relevant material, which may include assurance given by counsel, which are before the judge at the time that the ruling is required to be made. ... For this reason, it may prove to be the case that evidence ruled admissible as expert opinion will later be found by the trial judge to be without weight for reasons that, strictly speaking, might be thought to go to the issue of admissibility (eg that the witness's opinion is expressed with respect to a matter outside his or her area of expertise or is not wholly or substantially based on that expertise).[50]

The third reason was that, as her Honour had earlier pointed out in *Quick v Stoland Pty Ltd*:[51]

> the common law rule that the admissibility of expert opinion evidence depends on proper disclosure of the factual basis of the opinion is not reflected as such in the Evidence Act 1995 (Cth) (the Evidence Act). The Australian Law Reform Commission recommended against such a precondition to the admissibility of expert opinion, expressing the view that the general discretion to refuse to admit evidence would be sufficient to deal with problems

> that might arise in respect of an expert opinion the basis of which is not disclosed : ALRC Report No. 26, vol. 1 para. 750.[52]

This last point is one that has since been taken up by a number of subsequent judgments in the Federal Court, distinguishing the judgment of Heydon JA in *Makita* on this basis.[53]

Branson J. also made a number of further observations as to what may be required of a party to satisfy the admissibility of expert evidence. In broad terms, these might be seen as reflecting a relaxation of the stringency of the requirements to admissibility that Heydon JA had identified.[54] First, if Heydon JA's use of the word 'sure' in paragraph [85] of his judgment in *Makita* was intended to be in its usual sense of subjectively certain, then her Honour stated that she did not agree that when determining the admissibility of expert evidence it is necessary for the court to the sure whether the opinion is based wholly or substantially on the expert's specialised knowledge.

> The test is whether the court is satisfied on the balance of probabilities that the opinion is based wholly or substantially on that knowledge: s142 of the Evidence Act. However, as identified in [12] above, satisfaction of that test is not sufficient to render the evidence of the expert opinion admissible. To be admissible the evidence must also be relevant. It is the requirement of relevance, rather than the requirement that the opinion be based wholly or substantially on the expert's specialist knowledge, that, as it seems to me, most immediately makes proof of the facts on which the opinion is based necessary. If those facts are not at the close of trial proved, or substantially proved (see *Paric v John Holland (Constructions) Pty Ltd* (1985) 59 ALJR 844 at 846), it is unlikely that the evidence, if accepted, could rationally affect the assessment of the probability of the existence of the fact in issue in the proceeding to which the evidence is directed.[55]

Secondly, Branson J. also stated that the requirement that an expert opinion be wholly or substantially based on the witness's specialised knowledge was not, in her opinion, intended to require a trial judge to give 'meticulous consideration', before ruling on the admissibility of the evidence of the opinion, to whether the facts on which the opinion is based form a proper (in the sense of logically or scientifically or intellectually proper) base for the opinion. Rather, her Honour said:

> It is sufficient for admissibility, in my view, that the trial judge is satisfied on the balance of probabilities on the evidence and other material then before the judge that the expert has drawn his or her opinion from known or assumed facts by reference wholly or substantially to his or her specialised knowledge. [56]

Branson J. also went on to observe in this regard that the usual practice of requiring expert evidence in writing, together with guidelines such as the Federal Court's *Guidelines for Expert Witnesses* will generally ensure that there is sufficient material before the trial judge to enable him or her to form a view, on the balance of probabilities (albeit in the context of the trial as a whole, a provisional view), as to whether an opinion is wholly or substantially based on the witness's specialised knowledge. [57]

Finally, Branson J. noted that evidence adduced after the reception of the expert evidence, most likely in cross examination, may reveal that an opinion proffered in an affidavit or report is not wholly or substantially based on the witness's specialised knowledge or that the expert made an error (whether of logic, science or otherwise) in the process of reaching his or her opinion.

> While that evidence might be relevant to admissibility in a hypothetical sense, it would not, of itself, demonstrate error in the earlier ruling that the affidavit or report be received in evidence. The correctness of that ruling is to be judged by reference to the relevant evidence and other material before the judge at the time of the ruling. The evidence might, however, be of crucial importance with respect to the weight to be accorded the opinion at the end of the day.[58]

In the course of their joint judgment, Weinberg and Dowsett JJ. also made a number of observations regarding the dicta of Heydon JA in *Makita*. The first was in relation to the strictness with which the elements identified in paragraph [85] of the judgment of Heydon JA were to be applied:

> [87] The use of the phrase 'strictly speaking' in the last sentence should not be overlooked. It may well be correct to say that such evidence is not strictly admissible unless it is shown to have all of the qualities discussed by Heydon JA. However, many of those qualities involve questions of degree, requiring the exercise of judgment. For this reason it would be very rare indeed for a court at first instance to reach a decision as to whether tendered expert evidence satisfied all of his Honour's requirements before receiving it as evidence in the proceedings. More commonly, once the witness's claim to expertise is made out and the relevance and admissibility of opinion evidence demonstrated, such evidence is received. The various qualities described by Heydon JA are then assessed in the course of determining the weight to be given to the evidence. There will be cases in which it would be technically correct to rule, at the end of the trial, that the evidence in question was not admissible because it lacked one or other of those qualities, but there would be little utility in so doing. It would probably lead to further difficulties in the appellate process. [59]

As to the contents of the expert's report, in particular in relation to the expert's duty to explain his or her reasoning, Weinberg and Dowsett JJ observed:

> [89] ... Further, we do not accept the proposition inherent in much of what the appellants have said, that every opinion in an expert's report must be supported by reference to an appropriate authority. Some propositions may be so fundamental in a particular discipline as to be treated as virtually axiomatic. That does not exclude the possibility of cross examination upon such matters. There may be disagreements among experts as to what is axiomatic in their shared discipline ... The extent to which an expert should seek to justify views, including opinions expressed in a report may well depend upon the matters which are really in issue between him or her and any expert called by the opposing parties. In most cases, as one would expect, reputable experts will agree on many, if not most of the preliminary steps and learning upon which an ultimate opinion is based. The areas of difference will emerge when opinions are exchanged. Differences will be further ventilated in the course of cross examination. It cannot be sensibly suggested that an expert should offer chapter and verse in support of every opinion against the mere possibility that it may be challenged. [60]

The differing approach taken by full court in *Red Bull* to the requirements identified by Heydon JA in *Makita* has since been embraced in a number of other Federal Court decisions, in at least three respects. The first is as to the potentially more lenient approach to what must be satisfied at the time of the tender of an expert's report to satisfy the admissibility of the report. This is consistent with the observation of Branson J. that the approach of Heydon JA was a counsel of perfection and the admissibility of evidence tendered as expert opinion evidence may not be able to be addressed in the way outlined by Heydon JA in para [85] of his judgment in *Makita*.[61] The second is as to whether those requirements identified by Heydon JA which are not expressly referred to in s79 in truth go to the admissibility of the expert evidence tendered under that section or only to its weight. The third, following on from the second, is whether a failure to prove the facts on which an expert's evidence is based renders that evidence inadmissible or merely goes to the weight which the tribunal of fact should give to that evidence.

This third respect was, for instance, recently considered by Heerey J. in *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd*.[62] In that case the respondents relied upon (what his Honour described as) the 'well known passage from the judgment of Heydon JA in *Makita*'[63] in support of an objection taken to the admissibility of opinions sought to be tendered as expert evidence 'based on market research reports and the like which had not been proved in evidence and were not likely to be *proved*'.[64] In dismissing the objection on that basis,[65] Heerey J. said:

> However, I accept the submission of senior counsel for Cadbury that this aspect of *Makita* has not been followed in the Federal Court. The lack of proof of a substantial part of the factual basis of Dr Gibbs' opinions does not of itself render his evidence inadmissible under s79. Such lack of proof merely goes to the weight which may be given to the opinion: *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354; [2002] FCAFC 157 at [16] per Branson J and at [87] per Weinberg and Dowsett JJ, *Neowarra v Western Australia (No 1)* (2003) 134 FCR 208; 205 ALR 145; [2003] FCA 1399 at [16], [21] - [27] per Sundberg J, *Jango v Northern Territory (No 4)* (2004) 214 ALR 608; [2004] FCA 1539 at [19] per Sackville J. This line of authority is consistent with the earlier High Court common law decision in *Ramsey v Watson* (1961) 108 CLR 642 at 649; [1963] ALR 134 at 138-9.[66]

In *Neowarra v Western Australia*[67] Sundberg J was required to rule on objections to a joint anthropological report in native title proceedings. In the course of his judgment, his Honour discussed[68] whether 'the basis rule' at common law operated as a criterion of admissibility or merely went to the weight of the evidence and, in any event, whether it survived the enactment of the Evidence Act and was incorporated into s79. His Honour concluded[69] that the Australian Law Reform Commission had decided not to include a basis rule in its draft of the Evidence Act, with the result that opinion evidence whose basis was not proved by admitted evidence would prima facie be brought before the court. In these circumstances, the weight to be accorded to that evidence was to be left to be determined by the tribunal of fact.[70] If the evidence was to be excluded (or not admitted), that would be on discretionary grounds.[71] This conclusion was at odds with what Heydon JA had said in *Makita*,[72] in particular the fourth requirement of his summary at para [85][73] which according to Sundberg J:

> seems to me, with respect, to be restoring the basis rule. The reason his Honour gave for requiring this and the other presently immaterial requirements is that 'if all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge'. While that may be so with respect to other requirements, the expert's exposure of the facts upon which the opinion is based is sufficient to enable the relevant inquiry to be carried out. That inquiry is not dependent on proof of the existence of those facts.[74]

Further, in support of this conclusion, Sundberg J. also stated that the dicta of the High Court in *HG v The Queen*[75] does not support this 'supposed requirement'.[76] Referring to what Gleeson CJ said in that case at para [39] Sundberg J. observed:

> His Honour does not thereby require, as a condition of admissibility, that the assumed facts on which the opinion is based are established by the evidence. If at the end of the evidence they are not established, the weight to be accorded the opinion will be reduced, perhaps to nil. But that is not a matter of admissibility.[77]

But as Sundberg J. also recognised, this is not to say that it may not be not necessary for an expert to identify the facts and assumptions on which his or her opinion (and thereby evidence) is based.

> While the legislation does not incorporate a 'basis rule', an expert should nevertheless differentiate between the facts on which the opinion is based and the opinion in question, so that it is possible for the court to determine whether the opinion is wholly or substantially based on the expert's specialised knowledge which in turn is based on training, study or experience.[78]

It is not proposed to canvass in this article all of the decisions of the Federal Court in this regard; or to seek to reconcile them. The intention is simply to draw the reader's attention to the existence of these competing views.

The potential impact of the full court's decision in *Red Bull* on the dicta of Heydon JA in *Makita*, at least in relation to the first of the three aspects earlier identified, has also been the subject of obiter comment by Austin J in *Dean-Willcocks v Commonwealth Bank of Australia*.[79] After referring to both the effect of some of the observations of Weinberg and Dowsett JJ and Branson J in *Red Bull*,[80] Austin J said:

> [13] To the extent that the observations in the full Federal Court may be taken to have qualified Heydon JA's statements (a question that is open to debate: see Notaras v Hugh [2003] NSWSC 167 ... at [3] - [8]), it seems to me that the qualification was directed to a point that is not before me in the present case. The judges of the full Federal Court appear to have been concerned that, as a practical matter, it will often be difficult for the judge to decide early in the trial, when asked to rule on the admissibility of an expert's report tendered in evidence, whether the assumed or proved facts form an adequate foundation for the expert's opinion, and whether the expert's reasoning process is sufficiently laid out and exposed to analysis: see also *Australian Securities and Investments Commission v Adler* (2002) 20 ACLC 222. However, in my opinion there is no

practical or other difficulty in the trial judge deciding, when an expert's report is tendered early in the hearing, whether the subject matter of the report is within the scope of the expert's specialised knowledge. ...It is the latter aspect of *Makita*, rather than the former, that arises in the present case.[81]

In *Notaras v Hugh*[82] Sperling J after referring to paragraph [85] of *Makita* and to Einstein J's judgment in *Idoport Pty Ltd v National Australia Bank*[83] noted that:

[6] *Makita* presents a strict approach to the admissibility of expert evidence. It arises by implication from the terms of s79 and the antecedent common law. One has then to bear in mind, however, that all statements of principle are to be received in the context of the case before the court: *Quinn v Leathem* [1901] AC 495, 506

[7] The full court of the Federal Court has held that many of the matters referred to by Heydon JA in Makita 'involve questions of degree, requiring the exercise of judgment' and that, in trials by a judge alone they should commonly be regarded as going to weight rather than admissibility : *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157 at [16] and [87].

[8] I would take the statements I have quoted from *Makita* and *Idoport* to be statements of general principle, to be applied insofar as they are apt to ensure compliance with the conditions specified in s79 in the circumstances of the case.[84]

Concluding comments

Where expert evidence is to be relied upon, it is critical that in preparing that evidence the elements of s79 be addressed and proven, or at least capable of being proven if that evidence is or is likely to be challenged. At the same time, care should also be taken to address the other requirements identified by Heydon JA in para [85] of *Makita* which are not otherwise referred to in s79, in particular in identifying those facts and assumptions upon which the proposed evidence is based and explaining adequately the reasoning that underlies the opinion(s) comprised in that evidence. Again, this is especially so if the evidence is, or is likely to be, challenged and notwithstanding the absence of any express reference to these matters in s79. For the purposes of proceedings in the New South Wales courts, the strict application of the dicta of Heydon JA means that these additional matters go to the admissibility of the evidence and require that they be established on the balance of probabilities to avoid rejection of the evidence or a failure to have it admitted.

Whilst the comments of the full court in *Red Bull* and subsequent cases in the Federal Court may reflect an apparently more lenient approach to that apparently countenanced by the comments of Heydon JA, at least insofar as these additional requirements may not be treated as going to the admissibility of the proposed expert evidence and may not serve to prevent the admission of that evidence if the requirements of relevance and s79 are otherwise satisfied, these additional requirements will, nevertheless, still go to the weight that the court is likely to give such evidence once admitted. Accordingly, prudence dictates that these additional requirements should still be addressed when expert evidence is being considered and prepared and steps taken to satisfy them.

Similarly, even if (as the judgments of the Federal Court cited above suggest) the effect of the Evidence Act and s79 is to remove the formal requirement that the basis of the expert evidence must be proved by admissible evidence to make the expert evidence admissible, such that the expert evidence may be admitted even where the assumed facts have not been proved, in the absence of identification of the facts on which it is based and proof of those facts, that evidence is unlikely to have much if any probative value. Indeed, its value may be so low that the evidence is found to have no weight at all or is rejected (not admitted) on discretionary grounds. Accordingly, even if the effect of the Evidence Act is as has been contended, prudence nevertheless still dictates that those facts (and assumptions) which the expert relies upon in reaching his or her opinion should be identified expressly in the expert's report and should be proved, if not by the expert, then by other admissible evidence in order for the expert's opinion to have its desired effect.

1 which are collectively referred to in this article as the Evidence Act.

2 and equally the circumstances in which the attempts of one's opponent to rely upon such evidence can be resisted.

3 see section 55 of the Evidence Act.

4 see section 135 of the Evidence Act.

5 In *Veloski v R* (2002) 187 ALR 233, Gaudron J. described (at [82]) what was meant by 'specialised knowledge' as importing knowledge of matters which are outside the knowledge or experience of ordinary persons and which is sufficiently organised or recognised to be accepted as a reliable body of knowledge.

6 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 123 at paras [5] - [6] per Einstein J.

7 as to this latter nexus, see also *Ocean Marine Mutual Insurance Association (Europe) OV -v- Jetopay Pty Ltd* [2000] FCA 1463 at [23] which was cited by both Heydon JA in *Makita* at para [86] and Einstein J in *Idoport Pty Ltd v National Australia Bank Ltd* (ibid) at para [19].

8 at least on this basis and in the absence of the lack of any objection from the party or unless some other basis for its admission can be found in the Evidence Act.

9 see also the extract from the commentary of Heydon JA listing the seven heads of proving admissible evidence, quoted later in this article.

10 such as the Federal Court of Australia's *Guidelines for Expert Witnesses* and the rules in UCPR Part 31 Division 2 and the Schedule 7 Code of Conduct.

11 E.g. UCPR r. 31.18(3).

12 (2001) 52 NSWLR 705.

13 (2001) 52 NSWLR 705 at 743 para [85].

14 Professor Morton.

15 (2001) 52 NSWLR 705 at 724 [45].

16 (2001) 52 NSWLR 705 at 728 [56].

17 (2001) 52 NSWLR 705 at 745 [86].

18 (2001) 52 NSWLR 705 at 729 para [59].

19 OR jury, where there is one.

20 (2001) 52 NSWLR 705 at paras [59] and [88].

21 *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* 1953 SC 34, cited by Heydon JA in *Makita* at (2001) 52 NSWLR 705 at 729 para [59].

[22] (2001) 52 NSWLR 705 at para [89] citing *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at 1060 para [355].

[23] evidence, including expert evidence, is no longer to be inadmissible because it goes to the ultimate issue (s80 of the Evidence Act).

[24] (2001) 52 NSWLR 705 at 733 para [68].

[25] (2001) 52 NSWLR 705 at 733 para [67].

[26] this is particularly having regard to the third reason why the discussion is of interest, namely the consequences of the expert not complying with its duty.

[27] *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* 1953 SC 34 per Lord President Cooper at 39-40, cited by Heydon JA in *Makita* (2001) 52 NSWLR 705 at 729 para [59]. As Heydon JA went on to remark at para [61], since that decision, the approach of Lord President Cooper has been followed and adopted on a number of occasions in Australia, (which his Honour listed in that paragraph).

[28] [1949] VLR 277 at 303.

[29] (2001) 52 NSWLR 705 at 730 para [60].

[30] 'Examining the substance of an opinion cannot be carried out without knowing the essential integers underlying it' (2001) 52 NSWLR 705 at 735 para [71].

[31] (2001) 52 NSWLR 705 at 731 para [64]. The dicta of both Beaumont J in *Trade Practices Commission v Arnotts Ltd (No. 5)* (1990) 21 FCR 324 and of the full court on appeal *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 quoted by Heydon JA at paragraphs [74] to [78] of his reasons for judgment are also particularly apposite and useful in this regard.

[32] (2001) 52 NSWLR 705 at 744 para [85].

[33] examples of this divergence are dealt with later in this article.

[34] see (2001) 52 NSWLR 705 at paras [5] - [6] per Priestley JA; paras [20] - [21] per Powell JA and paras [99] and [102] per Heydon JA.

[35] (2001) 52 NSWLR 705 at 750 para [102].

[36] [2001] NSWSC 123 at paras [8] - [13]. The commentary was in fact upon a paper on different aspects of the Evidence Act delivered by Justice Einstein at that same seminar. A copy of that paper is also available on the Supreme Court web site.

[37] http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_heydon_201100.

[38] which, for the most part, are also consistent with his Honour's summary in para [85] of his judgment in *Makita.*

[39] and repeated in *Makita,* including in the summary at para [85].

[40] or conversely, may result in the evidence not being admitted if they are not proved.

[41] and reminiscent of what his Honour was to later write in *Makita.*

[42] again, reminiscent of what his Honour later wrote in *Makita.*

[43] (2002) 55 IPR 354.

[44] (2002) 55 IPR 354 at [6] per Branson J.

[45] (2002) 55 IPR 354 at [6]. All of the cases that the appellant relied upon are listed at [84].

[46] (2002) 55 IPR 354 at [18] per Branson J and [109] per Weinberg and Dowsett JJ.

[47] (2002) 55 IPR 354 at 356 para. [7]

[48] (2002) 55 IPR 354 at 357 paras [8] - [10].

[49] (2002) 55 IPR 354 at 357 para [8].

[50] (2002) 55 IPR 354 at 357 para [9].

[51] (1998) 87 FCR 371 at 373-74.

[52] (2002) 55 IPR 354 at 357 para [10].

[53] two examples are referred to later in this article.

[54] again consistent with her Honour's observations at para. [7].

[55] (2002) 55 IPR 354 at 358 para [14].

[56] (2002) 55 IPR 354 at 359 para [16].

[57] (2002) 55 IPR 354 at 359 para [16].

[58] (2002) 55 IPR 354 at 359 para [17].

[59] (2002) 55 IPR 354 at 379 para [87].

[60] (2002) 55 IPR 354 at 379 para [89].

[61] (2002) 55 IPR 354 at 365 para [7].

[62] (2006) 228 ALR 719.

[63] (2006) 228 ALR 719 at 722 para [6].

[64] (2006) 228 ALR 719 at 722 para [6].

[65] Heerey J. nevertheless found the opinions to be inadmissible on the basis that they did not furnish the court with scientific information likely to be outside the experience and knowledge of ordinary persons and as such were within the concept of 'specialised knowledge' required by s79 and therefore not expert evidence (see paras [8] - [11]).

[66] (2006) 228 ALR 719 at 722 para [7].

[67] (2003) 205 ALR 145.

[68] at (2003) 205 ALR 145 at 151 paras [16] and following.

[69] as Branson J had also found in *Red Bull* at para [10].

[70] (2003) 205 ALR 145 at 152 para [19] and 153 para [22].

[71] for instance under s135 of the Evidence Act on the basis of a lack of probative value.

[72] see (2003) 205 ALR 145 at 153 para [20].

[73] namely, 'so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some way' (see (2003) 205 ALR 145 at 154 [24] line 30).

[74] (2003) 205 ALR 145 at 154 para [24].

[75] (1999) 197 CLR 414, which Heydon JA referred to and relied upon in *Makita* at para. [84].

[76] (2003) 205 ALR 145 at 154 para [25].

[77] (2003) 205 ALR 145 at 154-155 para [25].

[78] (2003) 205 ALR 145 at 153 [23] citing *HG v The Queen* (op cit) at [39] and *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* (op cit) at [123].

[79] (2003) 45 ACSR 564 at 566- 568 paras [9] - [13].

[80] (2003) 45 ACSR 564 at 567 para [12].

[81] (2003) 45 ACSR 564 at 567 para [13].

[82] [2003] NSWSC 167.

[83] [2001] NSWSC 123 at paras [83] and [197].

[84] [2003] NSWSC 167 at paras [6] - [8].

Expert reports and waiver of privilege

By Hugh Stowe

Introduction

This article addresses the following vexed questions concerning expert reports: in relation to the documentary materials generated during the production of expert reports in legal proceedings, when does privilege arise and when is it waived? These materials may include instructions, source materials, other confidential communications with lawyers, drafts, and internally generated working documents ('associated materials').

Regrettably, a crisp answer to the questions cannot be given. Privilege may arise, and privilege may be waived on service or tender of the report. However, the scope of privilege and waiver are uncertain.

This article sketches an overview of the law of legal professional privilege, briefly reviews the authorities and principles relevant to the application of privilege to associated materials, proposes a working rule to regulate the scope of waiver over associated materials, and outlines possible strategies to minimise the prospect and prejudice of waiver. These are large and significant topics which bristle with controversies and uncertainties. The thorough analysis which these topics merit is beyond the scope of this brief article.

Which body of evidence law applies?

In the Federal Court, questions of legal professional privilege are governed by the common law in pre-trial proceedings[1], and by the *Evidence Act 1995* (Cth) at trial. By contrast, in NSW question of privilege are governed by the *Evidence Act 1995* (NSW) in all stages of proceedings, by reason of the *Uniform Civil Procedure Rules 2005* (NSW) extending its application to pre-trial proceedings.[2]

Purpose of legal professional privilege: the policy tension

The scope of privilege represents the resolution of a fundamental policy tension:

> A person should be entitled to seek and obtain legal advice in the conduct of his or her affairs, and legal assistance in and for the purposes of the conduct of actual or anticipated litigation, without the apprehension of being prejudiced by subsequent disclosure of the communication. The obvious tension between this policy and the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case lies at the heart of the problem of the scope of the privilege. Where the privilege applies, it inhibits or prevents access to potentially relevant information.... For the law, in the interests of the administration of justice, to deny access to relevant information, involves a balancing of competing considerations.[3]

The operation of privilege gives paramountcy to the first policy consideration. The 'raison dêtre of legal professional privilege is the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client'.[4] By its very nature, it will exclude admission of relevant evidence.

Privilege and waiver under the common law

The question as to the scope of privilege under the common law is 'more easily asked than answered, despite all that is to be found in the decided cases and all that has been said in the learned articles'.[5] Nevertheless, the following general traditional categories can be identified:[6]

- 'advice privilege': protects from disclosure confidential communications between a client and lawyers, made for the dominant purpose of seeking or providing legal advice;
- 'litigation privilege': protects from disclosure confidential communications between clients and lawyers, and lawyers or clients (on the on hand) and third parties (on the other hand), for the dominant purpose of pending or reasonably contemplated legal proceedings.

It has been said that the doctrine of privilege itself reflects the final resolution of the policy tension described above,[7] and that 'no further balancing exercise is required' in the application of privilege.[8] However, the doctrine of privilege is 'subject to defined qualifications and exceptions'.[9] These act as 'the common law's safety valve',[10] when the operation of privilege places undue pressure on the search for truth. In other words, within the recognised 'qualifications and exceptions' to privilege, there remains embedded the scope for the further balancing of the conflicting policies which underpin the operation of privilege. The doctrine of 'waiver of privilege' is one of those safety valves. Waiver of privilege may be 'express' or 'implied'.

Express waiver arises when a party 'deliberately and intentionally discloses protected material'.[11]

Implied waiver arises under the common law when there has been an 'intentional act' which was 'inconsistent with the maintenance of ...confidentiality. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large'.[12] 'Fairness' is thereby identified as relevant to (but not determinative of) the matter.

'Fairness presupposes a balancing of interests between parties who are in dispute'.[13] The 'question of 'fairness' involves an inquiry as to whether the facts supply sufficient reason for depriving the client of the form of protection which the law confers upon communications between solicitor and client'.[14]

An assessment of 'inconsistency' and 'fairness' depends upon all the circumstances of the case,[15] but a full exploration is beyond the scope of this paper.

One example of implied waiver is known as 'associated material waiver', which arises when it is deemed 'unfair or misleading to allow a party to *refer to or use* material and yet assert that that material, *or material associated with it*, is privileged from production'.[16] In such circumstances, privilege will be waived in relation to associated materials necessary for a 'proper understanding' of the primary privileged materials which have been referred to or used.[17]

The difficulty with the concepts of 'inconsistency' and 'unfairness' is that they reflect a policy conclusion on specific facts that the law will override privilege, but leave unarticulated the precise basis for that conclusion. Although the operation of implied waiver is well settled in many areas, the law awaits a comprehensive statement of the criteria relevant to the underlying policy balance. I suggest that the (unarticulated) reality is that the application of implied waiver

involves the court re-opening and re-striking the balance between the fundamentally irreconcilable policies which underpin the law of privilege (referred to above).

Privilege and waiver under the Evidence Act

Sections 118 and 119 generally mirror the 'advice' and 'litigation' privileges of the common law.

Implied waiver of privilege in relation to associated materials potentially arises under section 126 and section 122.

Section 126 provides that privilege is lost in relation to documents which are 'reasonably necessary for a proper understanding' of other documents in respect of which privilege has been lost. By operation of section 126, 'if a privileged document is voluntarily disclosed for forensic purposes, and a thorough apprehension or appreciation of the character, significance or implications of that document requires disclosure of source documents, otherwise protected by client legal privilege, ordinarily the test laid down by s126 of the Evidence Act will be satisfied.'[18]

Section 122(1) provides that privilege is lost in respect of 'evidence given with *the consent* of the client or party concerned'. By operation of a shameless but convenient fiction, it is the law in NSW that the scope of section 122 extends to 'implied consent', and that a party is deemed to give implied consent to the giving of evidence when waiver would be implied at common law.[19] In light of that construction of section 122, the Evidence Act effectively incorporates the doctrine of implied waiver under the common law.

Privilege & expert reports - overview

Any privilege in relation to expert reports and associated materials in the context of legal proceedings arises as an application of the 'litigation privilege'.

Any loss of privilege in relation to a final expert report which is served or tendered, will arise (if at all) by operation of 'express waiver'.[20]

Any loss of privilege in relation to associated materials will arise (if at all) by operation of 'implied waiver'. As noted above, implied waiver is triggered by some conduct of the privilege holder. If implied waiver is to operate in relation to associated material, the 'triggering conduct' will typically be the service (or tender) of the expert report. Any such implied waiver can be classified as an example of 'associated material' waiver.[21]

As noted above, implied waiver involves a balance of policy considerations. In addition to the general policy tensions described above, there are a number of specific policy matters that are relevant to the 'balance' in the context of the scope of implied waiver in associated materials, following service or tender of an expert report.

The following matters have been identified as weighing in favour of implied waiver in relation to associated materials (following service or tender of the report).

Firstly, 'the important principle that there is no property in a witness means that an adverse party may subpoena an expert retained by the original party and require that expert to give all relevant information in his possession, including an expression of his opinion, to the court'.[22]

Secondly, the fact that in the 'field of expert evidence it is difficult to sever an opinion from the information and process upon which it is based. It would seriously jeopardise the proper testing of such witnesses if privilege were extended to documents' upon which the opinion is based.[23]

Thirdly, 'opinion evidence is a special kind of evidence, and courts have traditionally encouraged experts who are qualified to give such evidence to be objective...an expert's duty to the court is more important than the duty to a client'.[24]

Conversely, there are a number of policy considerations which may weigh against waiver in relation to associated materials.

Firstly, the waiver of privilege with respect to drafts would inhibit the expert from changing his opinion. 'An expert is surely permitted, indeed to be encouraged, to change his or her mind, if a change of mind is warranted..... [E]xperts should not be inhibited by fear of exposure of a draft from changing their minds when such change is warranted by the material then before the expert'.[25]

Secondly, the risk of waiver in relation to associated materials may deter a party from vigorously searching for evidence. 'The efficacy of the adjudicative process depends on the readiness and ability to each party to vigorously search for evidence. A party might be discouraged from making anything but the most cursory enquiries were he to be required to hand over unfavourable evidence to the adversary.'[26]

Thirdly, the spectre of waiver in relation to associated materials is likely to compromise the process of the formulation and articulation of expert opinion.[27] In complex matters, the diligent preparation of an expert report may demand the generation of extensive work notes, drafts and correspondence which facilitate the progressive refinement of the opinion. However, if waiver operates widely in relation to associated materials, prudent litigation management may dictate that working documents not be generated. Further, a possible corollary of the broad application of waiver to *written* associated materials is that privilege would also be waived in relation to *oral communications* between the expert and lawyers. This raises the unedifying prospect of lawyers in the case being called to give evidence of their conferences with experts (which in turn would deter lawyers from conferring with experts and thereby further compromise the process of report and case preparation).

Fourthly, the widespread application of waiver in relation to drafts (and other associated materials) would likely generate a miscellany of collateral inquiries in cross-examination, directed to exploring and challenging the reasons for the evolution of the opinions expressed in the final expert report. In some cases that may be a forensically important process. However, in many cases that will be a time-consuming distraction from the essential task of testing the articulated assumptions and reasoning process recorded in the final report.[28] Further, if associated materials are taken out of context, there is scope for skilful cross-examination to cause unwarranted damage to the credit of the expert.

Fifthly, the relevance to waiver of the expert's supervening duty to the court should not be exaggerated. 'Assistance to the court must be the witness's dominant purpose in providing an opinion for use in the

proceedings. But the purpose of communications between the party's legal representatives and the witness is nonetheless predominantly to assist the party.....The fact that the witness is constrained to assist the court and to be impartial does not displace that purpose'. The argument that the special role of an expert militates against privilege 'fails to recognise the adversarial nature of the proceedings.....The witness's evidence must be impartial, but communications with a view to securing and facilitating the provision of such evidence are entered into for the purpose of assisting the party, not for the purpose of assisting the court'.[29]

Privilege and associated materials: the starting point - ASIC v Southcorp

The leading case which specifically addresses privilege in the context of expert reports is probably *Australian Securities & Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, in which Lindgren J summarised the relevant principles as follows:[30]

1 Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege.

2 Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege.

3 Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications.

4 Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents.

5 Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents.

The case has been widely approved.[31] Despite the general endorsement it has received, Lindgren J's summary of principles contains ambiguous and controversial propositions. These are explored below by reference to different categories of associated materials.

'Instructions'

There is no significant controversy as to the fact the instructions are at least initially privileged, and the subject of waiver if the report is served or tendered.

There is however some authority for the proposition that privilege over letters of instruction will not be waived, if there is no basis for the inference that the instructions had some influence on the content of the report.[32]

In the Federal Court the issue of waiver in relation to instructions is immaterial, because the Expert Code mandates the disclosure of the instructions (oral and written). There is no equivalent provision in the Uniform Civil Procedure Rules. The obligation to disclose oral instructions raises interesting questions (beyond the scope of this paper) as to the nature of the instructions which must be disclosed. When does a suggestion as to style, or a query as to substance, become an 'instruction' that must be disclosed?

Other 'confidential briefings': i.e., dealings between lawyer and expert

In addition to the formal letters of instructions, there may be correspondence between the lawyers and the expert which contain comments and queries in relation to draft reports, and address general case management.

Southcorp provides that privilege over this material initially arises, but will generally be waived upon service of the report. Other authorities affirm that principle.[33]

However, there is a line of authority which supports the immunity from waiver of communications between the expert and lawyer (aside from instructions defining the scope of the required opinion).[34]

'Documents used by an expert' - source materials

Privilege in copy documents

When an originally non-privileged document is copied and provided to an expert for the purpose of briefing him in litigation, the copy is privileged in the hands of the expert (subject to waiver). The privileged status of that copy is determined by the purpose for which it was created.[35]

Waiver

Southcorp affirms that any privilege in source materials will be waived on service of the report, but there are some areas of uncertainty.

Partial reliance and limited waiver?

There is some authority for the propositions that the scope of waiver in relation to source documents relied upon by the expert may be:

- limited to the particular portions of document relied upon, if the expert specifies with particularity the discreet portions of the document relied upon (and did not thereby create any inaccurate perception of the privileged material);[36]
- excluded altogether, if the expert structures his report so that it is based on precisely identified assumptions (rather then privileged source materials).[37]

However, other authorities affirm that waiver should extend to the whole of the privileged document on which at least partial reliance has been placed. This is because the party relying on the report is not the appropriate judge of whether the representations as to the extent of reliance is reasonable.[38]

Proof of actual reliance?

Southcorp seems to affirm that a condition of waiver in relation to a source document is that it was actually 'used' or relied upon by the expert in the formation of his opinion. The weight of authority clearly affirms that principle.[39]

However, it is arguable that waiver should extend to all privileged source materials provided to the expert without regard to the expert's assertion as to the extent of reliance upon them. By analogy from well established principles with respect to waiver of privilege following partial disclosure of privileged materials, it is arguable that fairness dictates that the opposing party should have the opportunity of investigating through cross-examination what aspects of the privileged source material were relevant to the final opinion: i.e. fairness dictates that the 'the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question'.[40]

There are two further considerations which weigh in favour of the waiver being extended to all materials that are provided to the expert.

First, 'it is not only information which has been affirmatively taken into account, but information which has been disregarded or discounted by the expert witness which may be useful in evaluating his or her opinion'.[41]

Secondly, as was recognised in the recent decision of *ASIC v Rich*, there is a risk that the expert may have 'unwittingly relied on, been influenced by or taken into account material that has not been identified as part of the factual basis for the opinions he or she has expressed'.[42]

On the assumption that reliance is a condition for waiver, then reliance is 'a question of fact' to be resolved by reference to the 'testimony of [the deponent] and the inferences properly to be drawn from the documents in dispute themselves'.[43]

'Documents generated unilaterally'

There are numerous authorities (consistent with *Southcorp*) which affirm that unilaterally generated working documents brought into existence by the expert to assist in the preparation of the expert report are not privileged.[44]

The basis of that position is the contention that privilege never arises at all in these documents (as distinct from the contention that service of the report effects a waiver of existing privilege). The basis for that contention is stated to be that the foundation of legal professional privilege is the protection of 'communications' made for the purpose of legal advice and assistance,[45] and 'it is difficult to see why any of a potential witness' documents, not obtained from a party's solicitor, must be kept secret 'to preserve the confidential relationship between client and legal adviser'.[46]

However, there are strong arguments that support the proposition that privilege should arise in such documents in certain circumstances (subject to waiver).

First, the better view is that confidential documents are privileged if they are brought into existence to facilitate subsequent privileged communications. This is based on the analogous principle which arguably applies in relation to such documents brought into existence by clients or lawyers.[47] 'This principle, while obviously falling within the rationale of the privilege, qualifies to this extent the general proposition that legal professional privilege does not protect documents, as such, but protects communications between lawyer and client'.[48] Further, section 119 of the Evidence Act expressly provides that the litigation privilege extends to 'the contents of a confidential document (whether delivered or not) that was prepared' for 'the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding'.

Secondly, privilege may extend to internal working papers which evidence otherwise privileged communications (which will often be the case in relation to associated materials).[49]

'Drafts'

'Drafts' comprise one example of the 'unilaterally generated documents' referred to above. Identical considerations apply to support the proposition that drafts may be prima facie privileged in some circumstances (subject to waiver). The following arguments may further support that conclusion.

First, privilege should attach if the drafts were prepared by the expert for the purpose of communication to the lawyers (whether or not the drafts were actually sent).[50] This is consistent with the general principle that legal professional privilege inheres in a document 'because it records or constitutes a communication prepared, given or received for the purposes of obtaining legal advice or assistance'[51] (whether or not the document was in fact sent).

Secondly, there is authority for the proposition that drafts will be privileged if they contained 'marked up' edits to a draft by the lawyer, thus evidencing a privileged confidential communication.[52]

Thirdly, there is authority which affirms that privilege may be retained over drafts, if they contain annotations which 'record an understanding by counsel or one of the applicant's solicitors of the effect of a passage in the draft or to record suggestions made for the preparation or conduct of the applicant's case which were not directed to the provision of a fresh or revised report by the expert'.[53]

Notwithstanding the *Southcorp* line of authority, there are other decisions which emphatically reject that service or tender of an expert report necessarily waives privilege in relation to any previous drafts.[54]

Supplementary reports

An expert is obliged under the expert codes in various court rules to provide a supplementary report in the event that the expert's opinion changes. Rule 31.24 of the Uniform Civil Procedure Rules provides that 'if an expert witness provides a *supplementary report* to a party', the party may not use the expert's evidence unless the supplementary report is served.

A question arises as to whether the provision of a 'draft' constitutes a 'supplementary report' for the purpose of the rule (which must therefore be served, irrespective of privilege). In relation to the construction of an analogous provision under the old Queensland rules it has been held that draft reports are within the scope of the relevant rule.[55] However, I suggest that Rule 31.24 should be construed as being limited to a report which the expert subjectively determines is a final statement of his supplementary opinion. Such a construction will protect the privilege of draft supplementary reports, and is consistent with the principle that privilege should not be abrogated in the absence of clear legislative intent.[56]

When is waiver triggered?

The timing of any waiver is potentially important for case preparation. Under the *Southcorp* principles, it is the service of the expert report (as distinct from its tender) which generally triggers any waiver. However, there is significant controversy about the proposition that waiver should occur before tender by reason of service alone. This derives from the facts that implied waiver is substantially founded on unfair advantage being taken of privileged materials; and such advantage is difficult to establish before the expert report is formally tendered and relied on.

Some authorities (consistent with *Southcorp*) simply assert that it is service which triggers the waiver, without explaining how such service gives rise to unfairness or inconsistency prior to the tender.[57]

Some authorities support the conclusion that service is sufficient to trigger waiver by reference to some strategic or forensic advantage arising from mere service (which was independent of formal tender in the final hearing): e.g. bolstering a case for mediation.[58]

Other authorities affirm that that privilege is not lost until the report is tendered, being the time at which the party relevantly seeks to take advantage of the report.[59]

An interesting complication arises from the principle in NSW that service of statements pursuant to a court Practice Note or a court direction is deemed to be 'under compulsion of law' for the purpose of section 122(2)(c) of the Evidence Act,[60] by reason of which an expert report retains privilege despite service. It has been held that the absence of waiver in respect of the report itself precludes waiver of associated materials under section 126 of the Evidence Act, because the operation of section 126 is only triggered by the loss of privilege in relation to some primary privileged materials.[61] However, that principle is best regarded as a red herring in relation to the waiver of privilege in relation to associated materials, for the following reasons:

1. section 122(1) of the Evidence Act provides that privilege is lost when 'evidence is given with the consent of the client or party';
2. the expression 'consent' is construed as including 'implied consent', which is deemed to arise whenever there is an implied waiver under the common law;[62]
3. implied waiver at common law in relation to associated materials is not necessarily precluded by a finding that the expert report was served under compulsion;[63]
4. therefore, despite the fact that compulsion precludes the waiver of privilege in relation to the report itself, section 122 may nonetheless lead to a waiver in relation to the associated materials.

Conclusion

The application of privilege in this area is uncertain. This partially reflects the circumstance that waiver of privilege turns on 'inconsistency' and 'unfairness', which are crucially fact-sensitive. It also reflects inconsistencies in the authorities concerning the resolution of the fundamental policy tensions underpinning the operation of privilege in this area.

The law would be assisted by a more coherent statement of the factors relevant to the operation of waiver in relation to associated materials.

There is presumably no controversy about the general principle that the scope of waiver over associated materials (following service or tender of the report) should be limited to what is *reasonably necessary for a proper understanding* of the report.[64] There will presumably be considerable controversy in relation to my tentative suggestions set out below as to the elaboration and application of that general principle (which presently have no express judicial support).

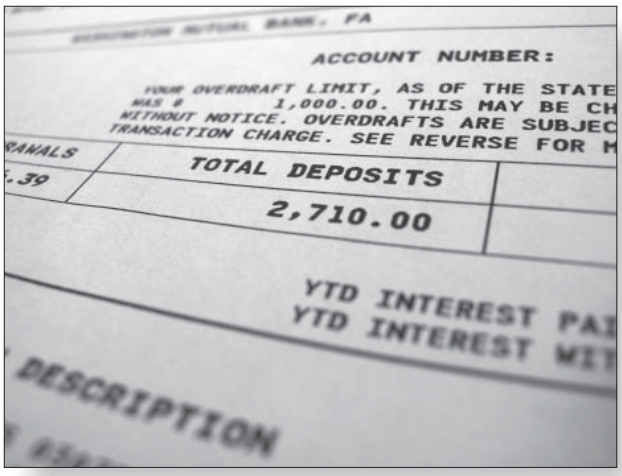
By way of elaboration of the general principle, I suggest:

- the expression 'proper understanding' should be construed as an understanding as to the *admissibility* and *probative force* of the expert report;
- the requirement that waiver be '*reasonably* necessary' for a proper understanding should be construed as facilitating a balance between the policy objectives of facilitating a proper understanding of the expert report, and the countervailing policy considerations supporting the retention of privilege over the associated materials. (That balance is inherently difficult because it involves the weighing of essentially incommensurable factors).

By way of application of the general principle, I suggest that mere service or tender of expert reports should generally not trigger the waiver of privilege in associated materials, for the following reasons.

First, associated materials will typically be of no relevance to the admissibility of the expert report, and of limited relevance to its probative value: i.e., the associated materials are of limited relevance to a 'proper understanding' of the expert report.

- *Effect of disclosure of associated materials*. The waiver of privilege over associated materials effectively reveals the evolution of the final opinion recorded in the expert report. This may be relevant to an assessment of whether the opinion was influenced by matters not specified in the report.
- *Nature and purpose of expert opinion*. If an expert report is prepared consistently with the Makita principles, it will identify the 'facts and reasoning process' which the expert 'asserts justify the opinion'[65]. This will facilitate the discharge of the 'prime duty of experts in giving opinion evidence: to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions'.[66] In other words, the purpose of expert opinion evidence is to 'enable [the judge] to form his own independent judgment by applying the criteria furnished to the facts proved'.[67]
- *Admissibility*. Associated materials which disclose the evolution of the final opinion are irrelevant to admissibility. The test for admissibility is that the 'expert identify the facts and reasoning process which the expert *asserts* to be an adequate basis for his or her opinion'.[68] 'The fact that the expert's opinion was at one time - or even still is - reinforced by undisclosed facts and reasoning processes is irrelevant to the admissibility of the opinion'.[69]
- *Probative value*. Although not relevant to strict admissibility, the fact that an expert's opinion is or was 'reinforced by undisclosed facts and reasoning processes' may nevertheless go to the 'weight' of the opinion.[70] There 'will be occasions' where this will be a proper subject of cross-examination,[71] in respect of which the disclosure



of associated materials may clearly be relevant. Nonetheless, the degree to which the history of the evolution of the expert opinion 'affects the weight of an opinion must, however, depend on the force of the evidence which the expert has given to the effect that, by applying a certain process of reasoning to certain specific facts, a particular conclusion should be drawn'.[72] In many cases the asserted justification for the opinion is entirely manifest in the report, in a way which readily permits independent evaluation by the court of the reasoning processes upon which that justification was based. In such cases, the disclosure of the associated materials for the purpose of understanding the process of the evolution of the opinion would be of limited probative value: the expert opinion should stand or fall on the court's assessment of the self-sufficient justification disclosed in the final report.[73] However, any such conclusion 'must depend on the particular circumstances of the case'.[74]

Secondly, there are strong countervailing policy considerations supporting the retention of privilege over the associated materials, notwithstanding the service or tender of the expert report.[75] These generally relate to preventing the processes of the evolution of the expert opinion being stifled by the prospect of waiver, and preventing irrelevant or unfairly prejudicial lines of cross-examination.

I suggest the following qualifications to the proposed general rule that mere tender (or service) of the expert report should not trigger an implied waiver in relation to associated materials.

First, implied waiver should extend to associated materials comprising *instructions* (in the sense of directions as to the scope and substance of the report) and *source materials* (in the sense of privileged documents containing a record of factual matters which the expert took into account).[76] The basis for this exception is as follows:

- disclosure of instructions will generally be of fundamental importance to a full understanding of the opinion; and disclosure of source materials will be of fundamental importance to testing the factual basis for the stated opinion;
- the general countervailing policy considerations supporting the retention of privilege of associated materials (referred to above), do not apply in relation to these materials. This is because these materials are typically provided to the expert before the evolution of the expert opinion begins;
- it is within the power of an instructing party to eliminate entirely any prejudice associated with waiver in relation to source materials. This can be done by briefing the expert with explicit assumptions, rather than privileged communications (such as draft statements) which contain the relevant facts upon which the expert is directed or invited to express the opinion.

Secondly, the policy balance should shift in favour of implied waiver in relation to all associated materials,[77] when there is some positive basis for inferring that the expert report:

- does not constitute an accurate and comprehensive statement of the nature and justification of the expert's opinion; or
- is otherwise corrupted by 'adversarial bias' (being a conscious or unconscious bias that stems from an expert's partisan leaning in favour the instructing party).[78] In such a case, privilege over associated materials should be waived to permit further investigation of what unstated factors influenced the formation of the stated opinion.

Such a basis might be established if:

- the report fails to articulate assumptions and reasoning processes which adequately justify the stated conclusion (to the extent such an explanation is possible);
- the expert concedes in cross-examination that the report does not reflect the expert's actual opinion, in some material respect;
- the expert concedes in cross-examination that the report fails to include a material qualification to the stated opinion, to which the expert had turned his or her mind at the time of preparing the report;
- the expert concedes in cross-examination that the report does not include reference to other assumptions and processes of reasoning, which were material to the stated opinions;
- the expert concedes in cross-examination that his or her opinion on the relevant matter has changed during the course of preparing the report, and the change is not reasonably explicable in a manner which reasonably excludes the operation of (conscious or unconscious) adversarial bias; or
- the stated opinion is inherently implausible.

Thirdly, the policy balance should shift in favour of implied waiver over associated materials, if the subject matter of the opinion is one which substantially precludes the court from independently evaluating the stated justification for the opinion. As to this:

- Although the objective of expert evidence is to 'furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions', an expert 'frequently draws on an entire body of experience which is not articulated and, is indeed so fundamental to his or her professionalism, *that it is not able to be articulated*'.[79]

- In such cases, the report will be incapable of providing a self-sufficient justification for the opinion, which can readily be independently evaluated by the court. There will remain an irreducible 'judgment call' by the expert. By way of example, this may be the case where the subject matter for expert opinion concerns the correctness of a professional judgment, which must take into account a wide range of incommensurable variables: eg, in a medical negligence case, the question of the point at which a reasonable medical practitioner would have medically intervened in a complex and unusual case.
- To the extent that critical aspects of the expert's reasoning process can not be fully articulated and exposed, the court is effectively being invited to accept the opinion on the basis that it is proffered by the expert (rather than because of the court's independent evaluation of the cogency of the stated justification for the opinion). In such cases, investigations of the factors which might have influenced the formulation of the stated opinion are arguably more relevant to an assessment of the weight of that opinion (than would be the case if the stated justification could be independently assessed). associated materials may be relevant to such investigations.
- This conclusion is reinforced by consideration of the greater vulnerability of such an opinion to adversarial bias. To the extent that the subject matter of the opinion necessitates irreducible 'judgment calls', it logically follows that there is scope for experts plausibly to justify a range of different opinions on given assumptions. This creates greater scope for an expert's opinion to sway (consciously or unconsciously) in a partisan way. This reinforces the relevance of an investigation of associated materials to explore the extent to which the process of the evolution of the report exacerbated the risk (or reflected the operation) of adversarial bias.

Waiver of privilege in respect of associated materials may of course be appropriate in other circumstances, depending upon the application of the policy balance to the particular facts of the case. However, to minimise the prospect of interlocutory disputes in relation to the issue of waiver, there is a real advantage in the law developing clear working guidelines for the operation of waiver in this area.

Strategies

Experts should be engaged on the assumption that privilege may be waived in relation to all associated materials. The following strategies may minimise the prospect (and prejudicial impact) of the operation of waiver. Some of the strategies involve the lawyer in the process of the preparation of expert reports. This is not inherently improper, but it does give rise to ethical and strategic considerations relating to the reality and appearance of improper interference with expert opinion. These matters must always be considered in dealings with experts. They are addressed in another article in *Bar News*: 'Preparation of expert evidence: A search for ethical boundaries'.

1 Before any instructions (or other documents) are provided to the expert, seek to confer with the expert to assess informally the expert's opinions on relevant matters, and general suitability as an expert witness. Possibly, discuss with the expert the formulation of the proposed instructions. Advise the expert that no notes be made of the conference.[80]

2 Ensure that instructions (in the sense of directions as to the required scope and substance of the report) are not recorded in the same document which also records other forms of prima facie privileged communications to the expert.[81]

3 Where possible, avoid briefing an expert with privileged source materials (such as draft statements). In the alternative, brief the expert with explicit assumptions upon which the report is to be based.[82]

4 If source materials have been provided to the expert, instruct the expert to identify with precision in the expert's report the aspects of the materials on which the expert did (and did not) rely.[83]

5 Instruct the expert to prepare drafts only with the intention of communicating them to the lawyers. Instruct the expert not to prepare any draft with the intention only of using it as a working document exclusively for the expert's internal purposes.[84]

6 Instruct the expert to clearly identify drafts, by applying 'Draft' and not applying a signature to the document.[85]

7 Request the opportunity to review drafts (clearly so marked) before any report is finalised.[86]

8 To minimise the number of drafts likely to be required, there is significant advantage in the lawyer being involved in the process of draft preparation (either during or following conference).[87]

9 Advise the expert that all internal working documents may be exposed to waiver, and that the expert should therefore confine the generation of such documents to those which are strictly necessary to the formulation of the expert's ultimate opinion.

10 Do not advise the expert to destroy internal working documents (or acquiesce in such conduct). Destruction might be contempt of a discovery obligations, and any involvement by lawyers in that process might constitute professional misconduct. At the very least, destruction may give rise to an adverse inference.[88]

11 Urge the expert to ensure that all assumptions and reasoning processes are clearly and coherently articulated in the report.

12 Instruct the expert not to refresh his memory before giving evidence by reference to any document over which privilege has been retained. The act of refreshing memory out of court may of itself provide grounds for a waiver.[89]

I am interested in exploring this topic further, and welcome comments.[90]

1 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86, per the Court at 43.

2 *Director-General, Department of Community Services v D* [2006] NSWSC 827, per Brereton J at [29]: see definition of 'privileged information' in the Dictionary of the Uniform Civil Procedure Rules.

3 *Esso*, supra fn 1, per Gleeson CJ, Gaudron, Gummow and Callinan JJ at [35].

[4] *Attorney-General for Northern Territory v. Maurice* (1986) 161 CLR 475, per Mason and Brennan JJ at 487.

[5] *Grant v Downs* (1976) 135 CLR 674, per Stephen, Mason and Murphy JJ at 682.

[6] See discussion in *Desiatnik*, 'Legal Professional Privilege in Australia' (2005), at 24

[7] See text at fn 3.

[8] *Waterford v Commonwealth* (1987) 163 CLR 54, per Mason and Wilson JJ at 65.

[9] *Maurice*, supra fn 4, per Deane J at 490.

[10] *Desiatnik*, supra fn 6, at 131.

[11] *Goldberg v Ng* (1994) 33 NSWLR 639, per Clarke JA at 670.

[12] *Mann v Carnell* (1999) 201 CLR 1, per Gleeson CJ, Gaudron, Gummow and CallinanJJ at [29].

[13] *AWB v Cole* [2006] FCA 1234, per Young J, at [132].

[14] *Goldberg v Ng* (1995) 185 CLR 83, per Gummow J at 120-121.

[15] *Goldberg v Ng*, ibid., per Deane, Dawson and Gaudron JJ at 96.

[16] *Maurice*, supra fn 4, per Gibbs CJ at 481

[17] *British American Tobaco Australia Services Ltd v Cowell* (2002) 7 VR 524, per Phillips, Bat and Buchanan JJA at 664.

[18] *Towney v Minister for Land & Water Conservation for the State of New South Wales* (1997) 147 ALR 402, per Sackville J at 414; quoted with approval in *Director-General, Department of Community Services v D*, supra fn 2, at [32].

[19] *Chen and Ors v City Convenience Leasing Pty Ltd and Anor* [2005] NSWCA 297, Gzell J (with whom the Court agreed), at [33].

[20] This question is not examined in this article.

[21] See text at footnote 17.

[22] *Interchase Corporation Ltd (in liq) v Grosvenot Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, per Thomas J at 160; but compare Re Forsyth; *Re Cordova v Philips Roxane Laboratories Inc* [1984] 2 NSWLR 327, at 334-7 .

[23] *Interchase*, ibid., per Thomas J at 161-2.

[24] *Interchase*, supra, fn 23, per Thomas J at 161-2.

[25] *Linter Group Ltd v Price Waterhouse (a firm)* [1999] VSC 245, [16].

[26] *NJ Williams*, (1980) 58 Canadian Bar Review 1; quoted with approval in *Southern Equities Corporation v West Australian Government Holdings Ltd* (1993) 10 WAR 1, per the Full Court at 21; see also *Mendelow*, 'Expert Evidence: Legal Professional Privilege and Experts' Reports' (2001) 75 ALJR 258, at 271.

[27] *Cole v Dyer and the Nominal Defendant* [1999] SASC 272. Doyle CJ, at [56].

[28] See Woolf, 'Access to Justice - Final Report' (1996), [31], where the Lord Chancellor cited this matter as weighing against the waiver of privilege in drafts.

[29] *Roach & Ors v Page & Ors* (No 17) [2003] NSWSC 973, at [7]-[11].

[30] at [21].

[31] *Federal Court: Temwell Pty ltd v DKGR Holdings Pty ltd (in liq) (No 7)* [2003] FCA 985, per Ryan J at [3]; *AWB v Cole* [2006] FCA 1234, [168]: *New South Wales: Gate Gourmet Australia Pty Ltd (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 768, [28]; *R v Ronen & Ors* [2004] NSWSC 1305, at [18]; *Thomas v State of New South Wales* [2006] NSWSC 380, [16]

[32] *Tirango Nominees v Dairy Vale Foods Ltd [No 2]* (1998) 83 FCR 397; *Collins Debden Pty Ltd v Cumberland Stationery Co Pty Ltd* [2005] FCA 1194, [9]

[33] *Temwell*, supra fn 31, [6]

[34] *Interchase*, supra fn 22, 162; *Greenhill Nominees Pty Ltd v Aircraft Technicians of Australia Pty Ltd* [2001] QSC 7, per Wilson J at [11]; *Roach*, supra fn 29, [7]-[12] *Frances Clare Dyball (by her tutor Charles Dyball) v The Harden Shire Council; Westpac Banking Corporation v The Harden Shire Council* [2004] NSWSC 48.

[35] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

[36] *Towney*, supra fn 18, 414; quoted with approval in *Director-General, Department of Community Services v D*, supra fn 2, [34].

[37] *Cole*, supra fn 27, [57]; *Lampson & 2 Ors v McKendry & Anor* [2001] NSWSC 373, [35]; *Mackinnon v BHP Steel (Ais) P/L and Anor* [2004] NSWSC 459, [24]; *Mackinnon v BHP Steel (Ais) Pty Ltd and Anor* [2004] NSWSC 1027, [20].

[38] *Henderson v Low* [2000] QSC 417, [16], *Bryce v Anderson and Anor* [2005] QSC 216, [8]-[13]; *Minister for Finance v C & I Rogers Pty Ltd* [2004] VSC 370, [9]

[39] *Dingwall v Commonwealth* (1992)39 FCR 521, 524; *R v Ronen & Ors* [2004] NSWSC 1305, per Whealy J at [19]; *Australian Competition & Consumer Commission v Lux Pty Ltd* [2003] FCA 89, [55].

[40] *Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corp* (No 2) [1981] Com LR 138 at 139; quoted with approval in *Maurice*, supra fn 4, per Gibbs CJ at 482 and Dawson J at 498-9.

[41] *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 948, per Ryan J at [12].

[42] *ASIC v Rich* [2005] NSWSC 149, per Austin J at [377]; see also *ASIC v Rich* [2005] NSWCA 152, at [168]-[170].

[43] *ASIC v Southcorp Ltd* [2003] FCA 804, per Lindgren J at [22]; *Thomas*, supra fn 31, [17].

[44] *Interchase*, supra fn 22, at 162, 156; *Temwell*, supra fn 43, at [10]; *Rhiannon Rigby v Shellharbour City Council & Anor* [2003] NSWSC 906, [11]; *Ryder v Frohlich* [2005] NSWSC 1342, [12].

[45] *Maurice*, supra fn 4, at 487; see authorities at *Interchase*, supra fn 23, at 151-3.

[46] Interchase, supra fn 23, at 152.

[47] *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122, per Finn J at [19]; *Propend*, supra fn 37, at 553; *AWB v Cole*, supra fn 13, at [44](8), [46]].

[48] *Pratt*, supra fn 47, per Finn J at [19] (in an analogous but slightly different context).

[49] *Propend*, supra fn 35, 569; *Pratt*, supra fn 47, [20], [88]-[89]; *AWB v Cole*, supra fn 13, [46]; *R v P* (2001) 53 NSWLR 664, [49].

[50] *Brookfield v Yevad Products Pty Ltd* [2006] FCA 1180, [12].

[51] *Esso*, supra fn 1, per McHugh J at 79 [80].

[52] *Southcorp*, supra fn 43, at [31].

[53] *Temwell, supra* fn 31, at [3].

[54] *Linter Group*, fn 25, [16]; *Filipowski v Island Maritime Ltd & Anor* [2002] NSWLEC 177, [23]; *ASIC v Vines* [2003] NSWSC 1005, [15].

[55] *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board* [2005] 1 Qd R 373, [13].

[56] *Daniels Corporation International Pty ltd v ACCC* (2002) 213 CLR 543, per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [11].

[57] *Director-General, Department of Community Services v D*, supra fn 2, [32].

[58] *Thomas*, fn 31, [17], [20]; *Sevic v Roarty* (1998) 44 NSWLR 287, 297 [but cf 290]; *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3, [22].

[59] *Cole v Dyer*, supra fn 27, [56]; *Mackinnon*, supra fn 37, [18]; *Sevic v Roarty*, supra fn 50, 308.

[60] *Sevic v Roarty*, supra fn 50, at 293, 296, 301; *Akins v Abigroup Ltd* (1998) 43 NSWLR 539; *Dubbo City Council v Patrick Joseph Barrett* [2003] NSWCA 267, [15]. That principle has been recently doubted in the Federal Court: *Liberty Funding*, supra fn 58, [24].

[61] *Sevic v Roarty*, supra fn 58, 293.8, 296.6, 301.7.

[62] See text at fn 19.

[63] *Sevic v Roarty*, supra fn 58, per Sheller JA at 297.

[64] This simply picks up the statutory test for implied waiver in section 126 of the *Evidence Act*.

[65] *ASIC v Rich* [2005] NSWCA 152, at [105]

[66] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, at [59]; quoted with approval in *ASIC v Rich*, supra fn 66, at [104]; see also [105], [112]

[67] *Makita*, supra, fn 67, at [879]; quoted with approval in *ASIC v Rich*, supra fn 66, at [106]

[68] *ASIC v Rich*, supra fn 66, at [92], [134]-[136]

[69] *ASIC v Rich*, supra fn 66, at [136]

[70] *ASIC v Rich*, supra fn 66 at [136]; see also at [167]

[71] *ASIC v Rich*, supra fn 66, at [167], [170]

[72] *ASIC v Rich*, supra fn 66, at [167]

[73] *ASIC v Rich*, supra fn 66, at [170]

[74] *ASIC v Rich*, supra fn 66, at [170]

[75] see the text above, under the heading 'Privilege & expert reports - overview', from fn 25 to fn 29

[76] Or (possibly) privileged source materials which were simply provided to the expert, of which he was invited or directed to take account: see text at fn 40

[77] At least those which disclose the formulation, substantiation, testing, and evolution of the opinion.

[78] For a more detailed analysis of adversarial bias, see my other article in this edition of *Bar News*: 'Preparing expert witnesses - a search for ethical boundaries', under the heading 'Inherent Dangers of witness preparation'

[79] *ASIC v Rich*, supra fn 66, at [170]

[80] This practice will prevent the generation of possibly discoverable documents in respect of experts who may never be engaged or called.

[81] This is because implied waiver may be limited to instructions: see fourth paragraph of 'Conclusions'. If privilege is waived over instructions, the separation of instructions from other privileged communications limits the scope for 'associated waiver' over those other communications.

[82] Needless to say, the assumption must otherwise be proved to render the report admissible and probative.

[83] The identification might be done my means of the exhibiting of a folder of relevant documents (masked where necessary to exclude matters not specifically relied on); or a schedule with a detailed description of the portions of the materials relied on). This practice limits likelihood of waiver over all materials: see text at fn 38.

[84] This maximises prospect of waiver being avoided in relation to drafts: see fn 52.

[85] This may be relevant to the determine whether a supplementary report is properly classified as 'draft' or 'final', which may be relevant to the obligation under the Uniform Civil Procedure Rules to serve the report: see the text at fn 55.

[86] Especially for 'supplementary reports', which must be served once received by lawyers: see text at fn 50

[87] This will squarely raise the ethical limits of lawyer's involvement in report preparation - see 'Preparation of expert evidence - the ethical boundaries'

[88] Eg, *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524, at [173]-[175]

[89] *ASIC v Vines* [2003] NSWSC 1005, per Austin J at [3](iv).

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Comparison of jurisdictions[1]

	Supreme Court	District Court
Rules	**Pt 31 Division 2 Uniform Civil Procedure Rules (UCPR)** Expert evidence is inadmissible unless served in accordance with the rules, except by leave or consent; expert witnesses must agree to be bound by code. There is provision for joint conferences and also provides for evidence to be given 'concurrently'(Rule 31.26) Rule 31.18A: Admissibility of reports, applies to Supreme Court proceedings only **Pt 31 Division 3** The court at any stage may appoint an expert to inquire into and report on a question in the proceedings.	Pt 31 Division 2 UCPR- Rule 31.19 is specific to the admissibility of expert reports in Local and District courts – in these courts, it is the responsibility of the opposing party to procure the attendance of an expert for cross examination
Code of Conduct	Schedule 7 to the UCPR is summarised as follows: 1. Duty to act impartially 2. Paramount duty to the court 3. The expert witness is not an advocate for a party 4. Requirements as to form of the report including the expert's qualifications must be stated in the report 5. If any change in opinion, the expert must provide a supplementary report. This obligation applies to court appointed experts as well. 6. An expert witness must abide by any direction of the court to confer, endeavour to reach agreement on material matters for expert opinion and provide a joint report, specifying matters agreed, not agreed and reasons for failure to reach agreement. 7. An expert witness must exercise independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.	Schedule 7 to the UCPR
Practice Notes	SC Practice Note Gen 10 Single Expert Witnesses - applies to all proceedings commenced after 17.8.05 in which a claim is made for damages or personal injury or disability. Unless cause is shown, expert evidence is confined to that of a single witness in relation to any one head of damage. If there is disagreement on the expert or the material to be provided, the court will make directions. Practice Note SC CL 5 General List, Case Management Practice Note It is useful to note the court's concern at number of experts being used in personal injury cases. In general, "Where it is considered that an unnecessary expert has qualified or is sought to be called to give evidence, then the court may, reject the tender of the expert's report; refuse to allow the expert to be called; and disallow any costs incurred in qualifying, in having the expert's report prepared or in calling the expert to give evidence." SC Practice Note Gen 11 Joint Expert Witnesses outlines the processes for joint expert conferences, including: which questions and materials are to be put to the experts; that the conference should take the form of a personal meeting and that the experts should be given a reasonable opportunity to prepare for the conference. Further, the Practice Note provides that t the experts provide their own independent opinion and must not act on any instruction or request to withhold or avoid agreement. The joint report should specify matters agreed and matters not agreed and the reasons for non agreement. This requirement is standard across all jurisdictions in NSW in relation to joint expert reports. The Practice Note also specifies the form the joint report is to adopt. Legal representatives who are approached for advice or guidance by a participating expert must be provided jointly unless all representatives of the parties agree. It is not intended that the joint report be provided to the court or that information provided to the court concerning a conference will be evidence in the proceedings unless admitted into evidence the ordinary way.	The practice notes dealing with expert reports in the District Court are not as detailed as those in the Supreme Court. The main thing to note about expert witnesses in the District Court is the timetables in practice note for particular lists. The practice notes make it clear that failure to abide by such timetables can lead to the exclusion of particular expert evidence. It is useful to note *District Court Bulletin* on the District Court web site under the heading 'Expert witnesses'. The purpose of the bulletin was to 'draw to the attention of experts and practitioners a number of basic propositions', as summarized below. The evidence of an expert is only admissible if the matter sought to be established by the opinion is something which cannot be concluded by the tribunal of fact without the benefit of such an opinion For the conclusions of an expert to be treated as valid, it must appear that those conclusions are sufficiently borne out by the evidence The format or content of the experts' reports is important to their admissibility e.g. expert's qualifications and experience to be provided. Insufficient attention is paid to the order of adducing evidence at a trial. In cases where there is a doubt about what underlying facts will be established in the evidence, it is desirable to call experts later in the trial rather than earlier so that if need be they can be asked to assume different matters of fact.

Land and Environment Court ('LEC')	Federal Court	Federal Magistrates Court
Under the *Land and Environment Court Rules 1996* Part 13 (rules specific to class 3 compensation matters) rule 21 provides registrar may give directions as to expert reports Part 14 (rules specific to class 4 proceedings) provides that directions that may be given when two or more parties call expert witnesses to give opinion evidence about the same question or similar questions, including 'concurrent evidence'	Similar rules to other jurisdictions. There is provision for court appointed expert (Order 34) and directions that may be given to experts (Order 34A: Evidence of Expert Witnesses, including provision for 'concurrent evidence'). There are particular requirements as to the form of the expert report – see Order 33 rule 20.	Division 15.2 is a more concise version of the Federal Court Rules Rule 15.08 – evidence called by two or more parties on the same question – order of giving evidence and conferencing Rule 15.09 – appointment of court expert
The LEC Code in Practice Direction 2003 is the same as Schedule 7 to the UCPR. Practice Direction 2003 in addition states that, unless an expert's report contains acknowledgment of code and agrees to be bound, service of the report will not be valid and the report shall not be admitted into evidence. Further, oral evidence is not to be received from an expert unless acknowledged in writing re proposed evidence, read code and agrees to be bound and a copy of acknowledgment has been served on all parties. As in other jurisdictions, the court can by application or own motion direct experts to confer. The experts must endeavour to reach agreement and provide the court with a joint report, outlining what is agreed, not agreed and the reasons for any non agreement.	Rules on expert witnesses are supplemented by the *Federal Court Guidelines* and explanatory memorandum to the guidelines. The guidelines are 'no more than guidelines. Attempts to apply them literally in every case may prove unworkable.' Guidelines are to be implemented in a 'practically sensible way' which ensure that they achieve their intended purpose. Same themes as in UCPR Schedule 7: factual substratum, relevant expertise, if deficiencies in opinion need to explain why in a timely manner through legal representatives The guidelines also state that it would be improper conduct for an expert to be given or to accept instructions not to reach agreement.	Rule 15.07 adopts the *Federal Court Guidelines.* A note to rule 15.07 points out the key aspects of the guidelines, namely that: an expert witness has a duty to assist the court on matters relevant to the expert's area of expertise and that an expert witness is not an advocate for a party. Further, if expert witnesses confer at the direction of the court it would be improper for an expert to be given or to accept instructions not to reach agreement.
The LEC direction for joint conferences is similar to that of PN SC Gen 11. However, *note* there are some differences including: where experts have conferred and provided a joint report, a party affected may not, without leave of the court, adduce expert evidence inconsistent with the matter agreed; and the content of conference not to be referred to at hearing unless affected parties agree. In addition, there are standard directions for expert witnesses, summarised below: *Standard Direction 1* Experts must confer not less than seven days before hearing and identify: issues within their expertise, agreement, disagreement and reasons for any disagreement. Not less than five days before the hearing file a joint statement specifying matters agreed and reasons for non-agreement. *Standard Direction 2* Same as No 1, Different time frames – 42 days instead of seven, 49 days instead of five. *Standard Direction 3* On site hearings – expert evidence not required for on site hearings but if party intends to rely on expert witness evidence at on site hearing then that party is directed to file and serve an expert report or short position statement in accordance with Pt13 rule 6 of the LEC Rules.		

[1] *Compiled by Alexandra Bartlett. This comparison is intended to be a summary of the procedural requirements for adducing expert evidence in NSW. It is not intended to be a complete guide on each jurisdiction discussed.*

The new Parramatta Justice Precinct

By Simon Furness

A programme of building and renovating courthouses is unfolding across the state. Simon Furness from the New South Wales Attorney General's Department reports on endeavours to improve courthouse conditions for legal professionals, those they represent and all court users.

2006 is shaping up to be a big year for new court buildings. Three opening ceremonies at Bankstown, Mount Druitt and Broadmeadow is already more than any year since 1908. A fourth new building - the Children's Court at Parramatta – will start operating in November. These new buildings represent an investment of over $80 million.

The new courthouses have all been built to the highest design standards and are equipped with the latest courtroom and security technology. They provide spacious and comfortable public areas and facilities for practitioners and clients to meet in private. They also accommodate a range of specialist justice services, and cater for the increasing trend towards alternative dispute resolution, with dedicated facilities for community justice centres.

Western Sydney, where the caseload continues to rise and existing court capacity is stretched to the limit, is a focus for much of the new development. The two new buildings at Bankstown and Mount Druitt, and a $5 million extension onto Blacktown court, have provided eight new courtrooms in the region. The Children's Court will provide another six, and the new trial court at Parramatta will add a further nine courtrooms to the region in 2008. The completion of these projects will allow the department to attend to some long overdue improvements to Fairfield, Penrith and Parramatta. Far from being closed – as has been suggested in some quarters – these existing facilities in Western Sydney will be given a new lease of life.

For the future, the Attorney General's Department's priorities for new court facilities are Coffs Harbour, Armidale, Windsor and the South West of Sydney.

Many of the existing court buildings around the state are in dire need of improvement. Whilst many are fine heritage buildings (85 per cent of courthouses were built before 1930 and 72 per cent are considered historically significant), they lack the space and range of amenities that today we regard as essential. Typically they were built with little or no public waiting areas or facilities for legal practitioners and other court support groups. Providing reasonable access for people with even minor mobility difficulties can be a major challenge. Older courthouses are often difficult to secure and do not conform to modern building standards.

More modern expectations in court buildings, such as safe rooms for victims of violent crime, facilities for vulnerable witnesses to give evidence from outside the courtroom, and dedicated rooms for the many public and philanthropic services have to be creatively accommodated in the limited available space. The cost to address all these issues in a heritage courthouse is often comparable with that of building a new one.

The government has allocated $250 million over ten years for improvements to existing courthouses. Some significant projects in this programme were completed last year, including:

- an additional courtroom and associated facilities at Blacktown,

Parramatta Justice Precinct

The Parramatta Justice Precinct brings together a range of justice agencies in a highly accessible location for residents of metropolitan Sydney, effectively creating a second justice hub with the CBD. Over 550 solicitors and 100 barristers already work in the greater Parramatta region, making it the third largest legal centre in Australia. The precinct involves construction of three new justice facilities for a total investment of $329 million. The project is well ahead of schedule.

- The Children's Court is a $39 million investment.
- A new nine-court complex is to be built on the former Parramatta Hospital site. The project includes one court dedicated to the Parole Board. Construction will commence in 2006 and it will cost $101million. At this stage, it is scheduled for completion in December 2007, six months ahead of programme.
- The new office accommodation is a nine-storey building, for NSW Attorney General's Department. It includes provision for a range of client services including Births, Deaths and Marriages, Office of the Protective Commissioner and Office of the Public Guardian. The building will have a five star environmental rating, the first NSW Government facility to meet these standards. The building is scheduled for completion late September 2007, four months ahead of programme.

- improved access for people with a disability at Muswellbrook, Windsor, Kiama, Albury and Bourke,
- major improvements at Goulburn Courthouse,
- improvements to the fire safety systems at the King Street Courthouse (Supreme Court),
- airport-style perimeter security into eight court buildings, bringing the total number to 25,
- upgrades to electronic security and surveillance systems at 18 court buildings.

There are 166 operational court buildings in NSW, and fixing the problems in all of them would cost far more than the available budget. So expenditure needs to be prioritised. In the next year, $30 million will be spent on capital improvements. The larger projects will include an extension at Nowra to accommodate an additional courtroom, and refurbishments at Albury, Fairfield, Central, Goulburn, Moree, King Street (Sydney) and Penrith. The department will also address some urgent works to improve disability access, especially in regional jury trial courts, and some alterations to accommodate the new CourtLink technology.

Looking ahead to the 2007/08 financial year, the Attorney General's Department plans to continue refurbishments at Goulburn and Central and start major renovations at Wagga Wagga, Dubbo, Bathurst, Taree and Waverley. In later years, capital investment will target Newcastle, Wollongong, Penrith, Manly, Gosford, Parramatta and jury courts in Sydney CBD.

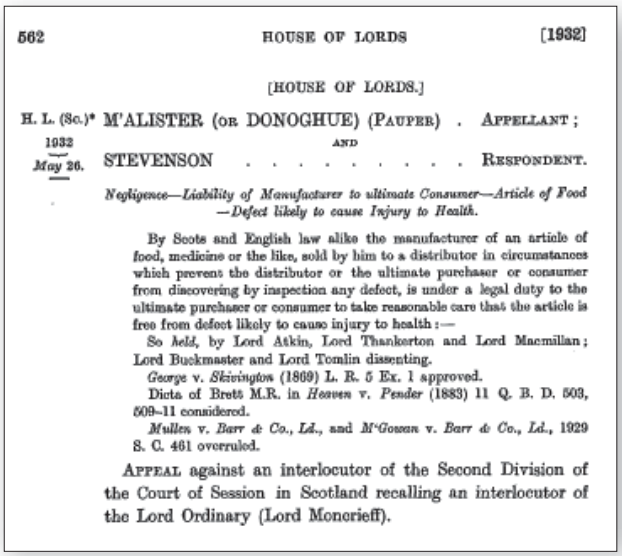
All of the proposed renovations require detailed planning, wide consultation and innovative design to adapt historic buildings for modern use; these take considerable time to do properly. Invariably, courts need to remain fully operational during construction works, adding more time and complexity. Significant progress has already been made and it is hoped that the extensive works currently being planned will result in much improved conditions in our courthouses, especially for those whose working life depends on them.

New court buildings in 2006

- The new courthouse at Bankstown is over twice the size of its predecessor with five state-of-the-art courtrooms. The building also features a Community Justice Centre, where free mediation services are available for the resolution of civil disputes and facilities for the Magistrates' Early Referral Into Treatment Program.
- Mount Druitt did not have a court facility until 2006. The new building incorporates two courtrooms and facilities for the 'circle sentencing' program, which aims to address the over-representation of Aboriginal people in custody.
- Broadmeadow Children's Court, near Newcastle, is the first purpose built courthouse for children's matters, and is specially designed to provide a calm and secure environment for hearing both criminal and care matters involving children and young people. A children's clinic has been incorporated where young people can be assessed before they appear in court.
- The Parramatta Children's Court will provide a purpose built facility to handle both care and criminal matters for the greater metropolitan region of Sydney. Accommodation will consist of six multi-use children's courtrooms and facilities will include a children's clinic and children's registrar's hearing rooms. The court building is nearing completion and hearings will start there in late 2006.

The diamond snail

By David Ash



562 HOUSE OF LORDS [1932]

[HOUSE OF LORDS.]

H. L. (Sc.)* 1932 May 26. M'ALISTER (OR DONOGHUE) (PAUPER) . APPELLANT; AND STEVENSON . . . . . RESPONDENT.

Negligence—Liability of Manufacturer to ultimate Consumer—Article of Food—Defect likely to cause Injury to Health.

By Scots and English law alike the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health:—

So *held*, by Lord Atkin, Lord Thankerton and Lord Macmillan; Lord Buckmaster and Lord Tomlin dissenting.

George v. *Skivington* (1869) L. R. 5 Ex. 1 approved.

Dicta of Brett M.R. in *Heaven* v. *Pender* (1883) 11 Q. B. D. 503, 509–11 considered.

Mullen v. *Barr & Co., Ld.*, and *M'Gowan* v. *Barr & Co., Ld.*, 1929 S. C. 461 overruled.

APPEAL against an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary (Lord Moncrieff).

The chief justice in the summer 2003/2004 issue of *Bar News* confessed that when *Perre v Apand*[1] was handed down, he for one 'became a little anxious and despondent about precisely how on earth I could predict not only the outcome of a case involving purely economic loss, but even the correct approach sanctioned by the High Court in dealing with the question. There appeared to be differences of approach that the court did not appear to have resolved by the time this judgment was handed down'.[2] For current purposes *Perre* interests for a different reason. It is an example - one among many - of the continuing and overarching relevance of *Donoghue v Stevenson*[3], a decision cited eight times in the judgment.

On 26 May 2007 it will be 75 years since the Australian Welshman Lord Atkin carried two Scots over two Sassenach Chancery men to disentangle the law of negligence from concepts of privity and contract. It was 'the Celtic majority'.[4] To mark the occasion, *Bar News* looks both to the decision and to its aftermath. For those needing to know more, there is an educational web site holding a 35-minute interview with Lord Denning and a 42-minute docudrama with Lord Atkin played by Sean Connery's brother Neil.[5]

A law of 'negligence'?

Prior to 1932, if a builder built a house negligently and as a consequence the ceiling fell and injured the occupier or someone else, the orthodox view was that no action lay by that relationship alone.[6] More generally, in any ordinary case, a manufacturer owed no duty to a consumer except by contract.[7] Whether such a result was fair, it was often illogical. For example, a car manufacturer would owe a duty to its dealer, yet it could be said 'with some approach to certainty' that the dealer would be the one person by whom the car would not be used.[8]

Negligence was not unknown to the ancient world. Under Babylonian law, a mental element in wrongs was recognized, with carelessness and neglect being severely punished, but an accident was not deemed an offence.[9] The English were not as generous, even as the industrial revolution unfolded, and use and consumption of goods manufactured in another town, county or country became commonplace. There were exceptions, of course, where the article was dangerous of itself, or where the article was rendered dangerous to the knowledge of the manufacturer.

In *Winterbottom v Wright*[10] a carriage was manufactured negligently, and Mr Winterbottom, a stranger to its manufacture and to its sale, was injured. The court held that he had no cause of action. As Alderson B said, 'The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty.' [11] It was this case that was the starting point of the controversy, one which was referred to at length by subsequent judges including Brett MR in *Heaven v Pender*[12] - as to which see below - and by Cardozo J in *MacPherson v Buick Motor Company*[13], seminal judgments referred to at length in the Snail in the Bottle case.

By the by, one issue of which the case must be but an example is the myriad ways of referring to a judge when they have been further elevated between their judgment and the case in which their judgment is being referred to. In *MacPherson*, Cardozo J refers initially to 'Brett MR afterwards Lord Esher'.[14] However, when thereafter referring to Brett MR's judgment, he refers to Lord Esher only.[15] Is this anachronistic? Lord Buckmaster even cuts out the introductory clarification, referring to 'Lord Sumner in the case of *Blacker v Lake & Elliot Ltd*',[16] whereas Hamilton J was not elevated to the Lords until 1913.

For his part, Atkin is unfazed. He refers first to 'Brett MR in *Heaven v Pender*'[17] then to 'Lord Esher (then Brett MR)' [18], then to Lord Esher as the judge in *Le Lievre v Gould*[19] - by which time he indubitably was Lord Esher[20] - before returning to *Heaven v Pender*, wherein 'the judgment of Lord Esher expresses the law of England'.[21]

Meanwhile, Lord Macmillan refers to Lord Sumner as 'Hamilton J, as he then was...'[22] However, perhaps by way of Scottish shorthand, he later refers to 'Cardozo J, the very eminent chief judge of the New York Court of Appeals and now an associate justice of the United States Supreme Court...'. At the time of *MacPherson* - 1916 - Cardozo J was a puisne judge; he became Cardozo CJ on New Years' Day 1927, reverting to Cardozo J upon his elevation to the Supreme Court.

Whatever, the master of the rolls' dictum in *Heaven v Pender* was to prove vital to Mrs Donoghue's success:

> The proposition will stand thus: whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be a danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence. [23]

However, his colleague Cotton LJ, with whom Brett LJ concurred, was unable to accept the width of the proposition, preferring to restate the prevailing orthodoxy:

> In declining to concur in laying down the principle enunciated by the master of the rolls, I in no way intimate any doubt as to the principle that anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act. [24]

One case of particular interest, given the development of the law of negligent misstatement, is *Le Lievre v Gould*.[25] There, mortgagees advanced moneys to a builder of the faith of certificates given by a surveyor. In consequence of the surveyor's negligence - but not fraud - the certificates contained untrue information, but it was held he owed no duty to the mortgagees. Interestingly, Lord Esher reflects on his earlier dictum:

> But can the plaintiffs rely upon negligence in the absence of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. The case of *Heaven v Pender* has no bearing upon the present question. That case established that, under certain circumstances, one many may owe a duty to another even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property. [26]

The only authority directly in Mrs Donoghue's favour was the case of the harmful hairwash, *George v Skivington*.[27] Mr George had bought a bottle of hairwash for his wife from Mr Skivington. Mr Skivington knew that it was not the purchaser but his wife who would be laying her scalp to his care, and this seems to have been a deciding factor in the court finding for Mr George. As both Lord Atkin and Lord Buckmaster note, Cleasy B reasoned by analogy to fraud, earning from Lord Buckmaster a strong reproof and the dismissive observation, 'I do not propose to follow the fortunes of *George v Skivington*; few cases can have lived so dangerously and lived so long.'[28]

That ginger beer manufacture was a dangerous business was first evidenced in *Bates v Batey & Co Ltd*[29], where a bottle had burst as a result of a defect of which the defendants did not know but could by the exercise of reasonable care have discovered. Horridge J referred to the relevant authorities, and felt himself not bound by *George v Skivington*. (Although it seems Horridge J was a good draw for plaintiffs generally. Lord Morris of Borth-y-Gest recalls Lord Atkin gently chiding him for only getting £100 when he was appearing for a widow, against a bank, and was before Horridge J and a common jury.[30]) But it is *Mullen v Barr & Co*[31] which proves the more fascinating. As Lord Buckmaster puts it:

> In *Mullen v Barr & Co*, a case indistinguishable from the present excepting upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, Lord Anderson says this: 'In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer.' [32]

The case at bar

And so to May Donoghue. Among the more important qualities in life is luck, and Mrs Donoghue found hers by going to the appositely named Mr Walter Leechman. Mr Leechman must be the sine qua non of plaintiff lawyers, for it was no less than he that had acted for Mr Mullen when he took on the mouse. Indeed, he caused Mrs Donoghue's writ to issue less than three weeks after *Mullen v Bar & Co* was handed down.[33] The snail was to have the legs the mouse did not.

However, the event that brought her there cannot be thought lucky. On a Sunday evening, 26 August 1928, Mrs Donoghue visited a café in Wellmeadow Street at Paisley operated by Mr Francis Minchella. She

Among the more important qualities in life is luck, and Mrs Donoghue found hers by going to the appositely named Mr Walter Leechman.

visited the café in the company of a friend. She was separated, and the Wikipedia entry on the case is unchivalrous enough to suggest that she 'may have been illicitly meeting a male friend'.[34] Lord Macmillan has preserved her dignity for posterity, referring to the friend as a 'she'.[35]

The friend purchased for her a bottle of ginger beer, which bottle was made of dark opaque glass and bore the words 'Stevenson / Glen Land / Paisley'. Mr Minchella poured some but not all of contents into a tumbler, and Mrs Donoghue drank from it. When her friend came to pour the remainder, out came a decomposed snail. Mrs Donoghue would allege that she suffered shock and severe gastroenteritis.

In Scotland an action in the Court of Session begins by a summons on the part of the pursuer, to which is annexed a condescendence, containing the allegations in fact on which the action is founded. Mr Leechman issued Mrs Donoghue's writ, sparing nothing of Mr Stevenson's feelings: the plant was a place where 'snails and the slimy trails of snails were frequently found'.[36] The damages sought were £500.

The facts set out above are the facts averred by Mrs Donoghue. The matter was never heard. Instead, against the advice of counsel,[37] the defendant moved the Court of Session to dismiss the claim on the basis that it disclosed no cause of action. In modern parlance, the defendant sought summary judgment, assuming for the purpose of the application the correctness of the facts averred. In other words and as is the nature of such applications, the defendant was required to assume and the court required to accept the plaintiff's case at its highest.

The application failed before the lord ordinary, who held that the averments disclosed a good cause of action and allowed a proof. The Second Division - of which Lord Anderson's view is set out above - recalled the interlocutor of the lord ordinary and dismissed the action. And so it was from here to London. Before turning to the personalities of the case, there are two matters which have tweaked the curiosity of three generations of law students. They arise from Mrs Donoghue's descriptor in the Appeal Cases report, 'M'Alister (or Donoghue) (Pauper)'.

As to the alternative names, Lord Macmillan in *The Citation of Scottish Cases* said:

> Some confusion is apt to arise in the citation of Scottish decisions in consequence of the practice in Scotland of naming a married woman in legal documents and proceedings by her maiden name as well as by her married surname with the (infelicitous) disjunctive 'or' interposed. [38]

Macmillan, it must be said, had an obvious loyalty to his mother tongue. Most judges would have been content to say that the manufacturers in *Mullen's Case* had been absolved. For Macmillan, influenced no doubt by Sir Walter Scott, they were assoilzied.[39]

As to Mrs Donoghue's status as a pauper, her legal team was acting pro bono. She had to petition to be allowed to appear in forma pauperis before the house, to avoid having to put up security for costs. She is described by the law reporter as a shop assistant; by her affidavit in support of her petition, she avers after making clear that she no longer resides with her husband, 'That I am very poor, and am not worth in all the world the sum of five pounds, my wearing apparel and the subject matter of the said Appeal only excepted, and am, by reason of such my poverty, unable to prosecute the said Appeal'.[40]

Mrs Donoghue was represented by George Morton KC and W R Milligan, both of the Scottish Bar. Mr Milligan had earlier raced F E Smith around the Cambridge quadrangle known from the film *Chariots of Fire*,[41] and would later become lord advocate. One of the juniors for the respondent, J L Clyde, would become lord president of the Court Session. W G Normand, the solicitor-general for Scotland and later a law lord, led for the respondent, whose team also included the sole member of the English Bar, T Elder Jones.

The neighbourhood test

Before moving to the other judges' reasons, it is appropriate to set out Lord Atkin's test, as it has attracted the most attention through the years:

> At present I must content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be-persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. [42]

The lawyer's question provoked Jesus to deliver the parable of the Good Samaritan, and to force the lawyer, ultimately, to answer his own question: the neighbour to the man left half dead by thieves was neither the priest nor the Levite who passed by on the other side of the road, but the Samaritan; in the words of the lawyer forced by

Jesus to answer his own question, the neighbour was 'He that showed mercy on him'. [43]

Like all analogies, it breaks down if taken to its logical end. One would have thought that the manufacturer would seem closer to the thieves than the passers-by, having created the evil, so that if the parable has applicability, it is that the duty ultimately imposed by the case is akin to a duty on the thieves not to leave their victims half dead. However, and in fairness to Atkin, he merely repeats the question, not the answer. The more interesting point is that this was not the first time Atkin had spoken in such terms. In 1931, six weeks before argument was heard, he remarked in a lecture at King's College, London:

> It is quite true that law and morality do not cover identical fields. No doubt morality extends beyond the more limited range in which you can lay down the definite prohibitions of law; but, apart from that, the British law has always necessarily ingrained in it moral teaching in this sense: that it lays down standards of honesty and plain dealing between man and man... He is not to injure his neighbour by acts of negligence; and that certainty covers a very large field of the law. I doubt whether the whole law of tort could not be comprised in the golden maxim to do unto your neighbour as you would that he should do unto you. [44]

The bench

Mention has already been made of the make up of the bench. It was no mediocre lot. Lord Buckmaster had been lord chancellor and would in 1933 be advanced to a viscountcy. He had been called to the Bar in 1884. He practised first on the common law side but later developed a large Chancery practice. A Liberal, he spoke frequently in the Commons and, after 1915, in the Lords, in favour of legal and social reform, including on the reform of the divorce laws, birth control and women's suffrage. However, his reforming impulse did not extend to his jurisprudence, and it was said by a biographer that 'Any temptation to find a construction of the law which would 'right a wrong' in the particular case or would mitigate a hardship caused by the law itself was resolutely resisted.'[45]

When asked 'Whom do you regard as the greatest colleague you have had?', Lord Dunedin gave the colourful reply:

> You will be surprised when I tell you-Buckmaster; I have not and I have never had any sympathy with Buckmaster's political ideas and performances and I think him to be a sentimentalist-unless he is sitting on his arse on the bench; there he is one of the most learned, one of the most acute, and the fairest judge I ever sat with; and he will leave much in the books. [46]

Lord Atkin was the next senior of the five, and, as Australian lawyers know, was born in Brisbane. He cemented his link to the Antipodes by marrying the daughter of William Hemmant, one time acting premier of Queensland. He read with the renowned common lawyer Sir Thomas Scrutton, and later sat with him on the Court of Appeal, where they and Bankes LJ formed what Lord Denning thought 'one of the strongest courts of appeal'.[47]

The third member of the bench was Lord Tomlin. He, too, had a distinguished master, this time in Lord Parker. He continued with Parker as his devil until Parker's elevation to the bench. (Parker, like Sir Hayden Starke in Australia, would take a place on his nation's highest judicial tribunal without taking silk.) Like Buckmaster, he practised in the Chancery Division, although he appeared in a wide variety of cases in both the House of Lords and the Privy Council. His biographer says:

> Tomlin's mind struck those who knew him best as being the incarnation of pure common sense, an uncommon quality. He never seemed to leave the firm ground of fact. He had but little of that speculative interest in the history and philosophy of the law which was so marked in the mind of his master Parker. The case to be dealt with was to Tomlin the matter of interest. [48]

This comment informs the reader's appreciation of Lord Tomlin's short - less than two-page - concurrence with Lord Buckmaster, in particular the observation:

> The alarming consequences of accepting the validity of [the proposition put by plaintiff's counsel in *Winterbottom* and urged by the appellant here] were pointed out by the defendant's counsel, who said: 'For example, every one of the sufferers by such an accident as that which recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle.' [49]

Compare Lord Simonds' view - from the bench - that 'it is not seemly to weigh the pronouncements of living judges, but it is, I think, permissible to say that the opinion of few, if any judges of the past command greater respect than those of Lord Tomlin and Rowlatt J'.[50]

Lord Thankerton was the first of the two Scots. His father had been Baron Watson of Thankerton; in the peculiar humour that is the burden of the Scot, he explained that he refrained from taking the title assumed by him 'lest haply he should besmirch it'.[51] He said in a later case that 'There can be little question as to the proper function of the courts in questions of public policy. Their duty is to expound, and not to expand, such policy.'[52] In a four-page judgment, Thankerton does not expand, although he makes clear that Lord Atkin's judgment is one that he 'so entirely' agrees that he cannot usefully add anything to it. His judgment does, however, provide emphasis of the notion of duty. The 'essential element' of the case was the manufacturer's own action in bringing himself into direct relationship with the party injured.'[53]

Lord Macmillan was the final member of the House; his judgment, clearly enough, was for the plaintiff. It was to be his lot to have his judgment overshadowed by Lord Atkin's, but that is not to diminish the clarity of his language:

> The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed...
>
> To descend from these generalities to the circumstances of the present case, I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that, if the appellant

establishes her allegations, the respondent has exhibited carelessness in the conduct of his business... [He owes a duty] to those whom he intends to consume his products. [54]

The aftermath

Atikin's biographer records that a few days before judgment, Lord Wright wrote to Lord Atkin:

> Dear Atkin,
>
> I have been reading with admiration your magnificent and convincing judgment in the snail cases - also Macmillan's which is very good. I am glad this fundamental rule of law will now be finally established.
>
> It seems as if (alas!) I were fated to differ from old Scrutton in the first two cases from his court I have had to deal with!
>
> I hope you will have a pleasant vacation.
>
> Yrs.
>
> Wright
>
> I find Buckmaster on snails very disappointing. I have not seen Tomlin's efforts on the same subject. [55]

Wright, like Atkin, had been a pupil of Scrutton. It is condign that the first reference in CaseBase to *Donoghue v Stevenson* is a judgment of the Court of Appeal, in which Scrutton LJ was able perhaps to lecture his old student and colleague:

> English judges have been slow in stating principles going beyond the facts they are considering. They find themselves in a difficulty if they state too wide propositions and find that they do not suit the actual facts... [the instant case was authority for no more than] a manufacturer's liability to the ultimate consumer when there is no reasonable possibility of intermediate examination of the product. [56]

Meanwhile, from Australia, Mr Justice Evatt wrote to Atkin:

> ... The Snail Case has been the subject of the keenest interest and debate at the Bar and in the Sydney and Melbourne law schools: on all sides there is profound satisfaction that, in substance, your judgment and the opinion of Justice Cardozo of the USA coincide, and that the common law is again shown to be capable of meeting modern conditions of industrialisation, and of striking through forms of legal separateness to reality. There is an article in the *Canadian Bar Review* which expresses the Australian view as well as that of Canada.[57]

Across the way

In the footnotes, I refer to Professor Heuston's comments on the expression 'the Celtic majority'. He mordantly observes 'Oddly enough, apart from Trinity, Oxford, the only place in which this has been produced as a ground for doubting the authority of the decision has been the Irish High Court [in] *Kirby v Burke* [1944] IR 207'.[58] In that case, the judge said:[59]

> The much controverted 'Case of the Snail in the Bottle', while leaving subsidiary questions open, has settled the principle of liability on a similar issue finally against the manufacturer in Great Britain. But the House of Lords established that memorable conclusion only twelve years ago in *Donoghue v Stevenson*, by a majority of three law lords to two, 'a Celtic majority,' as an unconvinced critic ruefully observed, against an English minority. Where lawyers so learned disagreed, an Irish judge could assume, as I was invited to assume, as a matter of course, that the view which prevailed must of necessity be the true view of the common law in Ireland. One voice in the House of Lords would have turned the scale; and it is not arguable that blameworthiness according to the actual standards of our people depends on the casting vote in a tribunal exercising no jurisdiction over them. Hence my recourse to the late Mr Justice Holmes. His classic analysis[60] supports the principle of Lord Atkin and the majority. And to that principle I humbly subscribe.

One would expect an Irish judge who preferred the academic writings of a dead American, however learned, to the recent and considered views of the premier English court, a *fortiori* a Celtic bench in disguise, to be a true patriot. He was. He had been a Sinn Fein MP. He had appeared as counsel for Sir Roger Casement. He had rebelled against Lloyd George's requirement that references to the king had to be inserted in the draft Constitution of the Irish Free State, as well as an oath of allegiance. He was also, as George Gavan Duffy, half-brother of the Australian Chief Justice Frank.[61]

And across the world

Despite the misgivings of Atkin's former master and the mulling of the Irish, the generality of their lordships' decision had been put beyond doubt by the Privy Council in *Grant v Australian Knitting Mills Ltd.*[62] Dr Grant had had the misfortune to purchase underwear which caused him an acute general dermatitis. He sued both the retailer and the manufacturer, succeeded at first instance, but failed before the High Court on the evidence. Mr Justice Evatt in dissent would have applied the Lords' decision to hold the verdict.[63]

The matter came before the Privy Council[64] - which included Lords Macmillan and Wright - and it had little difficulty in reversing the High Court and applying the *Snail Case.* (It did not include Lord Thankerton, whose recorded hobby was knitting, 'at which he was very skilful'.)[65] Once again, the floodgates argument was raised, and once again it was dispatched. It is useful to set out the dispatch in full, if only to compare the view with what in fact happened and to emphasise that the case was determined under a different test for remoteness. The Privy Council says:

> Mr Greene further contended on behalf of the manufacturers that if the decision in *Donoghue's Case* were extended even a hair's breadth, no line could be drawn and a manufacturer's liability would be extended indefinitely. He put as an illustration the case of a foundry which had cast a rudder to be fitted on a liner: he assumed that it was fitted and the steamer sailed the seas for some years: but the rudder had a latent defect due to faulty and negligent casting and one day it broke, with the result that the vessel was wrecked, with great loss of life and damage to property. He argued that if Donoghue's Case were extended beyond its precise facts, the maker of the rudder would be held liable for damages of an indefinite amount, after an indefinite time and to claimants indeterminate until the event. But it is clear that such a state of things would involve many considerations far removed from the simple facts of this case. So many contingencies must have intervened between the lack of care on the part of the makers and the casualty that it may be that the law would apply, as it does in proper cases, not always according to strict logic, the rule that cause and effect must not be too remote: in any case the element of directness would obviously be lacking. [66]

Actionable misrepresentation

In the fourth edition of Spencer Bower's *Actionable Misrepresentation*,[67] Justice Handley of the New South Wales Court of Appeal includes as an appendix a 'Development of action for negligent misrepresentation 1889-1963', in other words, an overview from *Derry v Peek*[68] to *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[69] Of particular interest is *Candler v Crane, Christmas & Co*,[70] as Denning LJ's dissent was vindicated in *Hedley Byrne*. From the red corner, Denning LJ opined:

> If your read the great cases of *Ashby v White, Pasley v Freeman and Donoghue v Stevenson* you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed. [71]

This led Asquith LJ - for the blue team, I think - to utter the memorable retort:

> In the present state of our law different rules still seem to apply to the negligent misstatement on the one hand and to the negligent circulation or repair of chattels on the other; and *Donoghue's Case* does not seem to me to have abolished these differences. I am not concerned with defending the existing state of the law or contending that it is strictly logical-it clearly is not. I am merely recording what I think it is. [72]
>
> If this relegates me to the company of 'timorous souls', I must face that consequence with such fortitude as I can command. I am of opinion that the appeal should be dismissed.

Apropos the Privy Council's dismissal of the concerns advanced by the respondents' counsel in Grant, it is interesting to note that one judge cautioning against liability for negligent words causing pure economic loss was none other than Cardozo CJ, who in *Ultramares Corporation v Touche* said '... what is released or set in motion [in such cases as *MacPherson*] is a physical force. We are now asked to say that a like liability attaches to the circulation of a thought or a release of the explosive power resident in words.'[73] There would be, he said, '... liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[74]

Was there a snail?

Was there a snail? There was never a finding either way. The case settled, with Mr Stevenson's executors paying £200 to end the matter.[75] However, at least two judges have asserted that there was no snail. In 1942, Mackinnon LJ asserted that:

> To be quite candid, I detest that snail... when the law had been settled by the House of Lords, the case went back to Edinburgh to be tried on the facts. At that trial it was found that there never was a snail in the bottle at all! That intruding gastropod was as much a legal fiction as the Casual Ejector. [76]

Lord Normand - who was it will be recalled counsel for the respondent - wrote in the fashion of the seasoned advocate to Lord Macmillan:

> Privately I may say that I would all along have preferred a proof before answer. But I was instructed to fight the relevancy point at the risk of an appeal to the H.L. and did what I could. I personally thought that the H.L. would decide as they did in fact decide, but that we had a very strong case on the facts. If the case had gone to proof I think it would have been fought and possibly won on the issue whether there was a snail in the bottle, and I may have told Mackinnon this. [77]

Yet the myth persisted. In *Adler v Dickson*[78], Jenkins LJ said 'The House of Lords heard the preliminary issue in *Donoghue v Stevenson* and when the trial was finally held there was no snail in the bottle at all.'

Conclusion

The law of negligence - that is, the law relating to that single tort we now call negligence - has not been without critics. In the early years of this century, for example, Australian legislators were critical of what they saw not so much as a rule of law, but a rule of plaintiffs' lawyers. Whether this was true, or whether the actions put in train by those legislators addressed the issue, is for elsewhere. What that debate and other debates have shown is that the words of Lords Atkin and Macmillan have created the paradigm around which both the law's supporters and its critics must move. Such is the resilience of the decision.

1 (1999) 198 CLR 180.

2 At page 61.

3 [1932] AC 562.

4 In '"*Donoghue v Stevenson in Retrospect*"' (1957) 20 MLR 1, Professor Heuston attributes the expression to Landon (1942) 58 LQR 181: see fn 6. He - Heuston - mordantly continues 'Cf (1945) 61 LQR 206 ('Celtic ideology'). Oddly enough, apart from Trinity, Oxford, the only place in which this has been produced as a ground for doubting the authority of the decision has been the Irish High Court: *Kirby v Burke* [1944] IR 207'.

5 www.thepaisleysnail.com/information.shtml. For a snapshot of its relevance circa June 1991, see also Peter T Burns QC & Susan J Lyons (eds), *Donoghue v Stevenson and the Modern Law of Negligence - The Paisley Papers*, 1991, The Continuing Legal Education Society of

British Columbia. Sir Gerard Brennan is a contributor. For a crisp and thorough appraisal, one must still start with Heuston, op cit.

[6] [1932] AC, 578 per Lord Buckmaster.

[7] [1932] AC, 565 per W G Normand, counsel for the respondent, arguendo.

[8] [1932] AC, 565 per Lord Macmillan citing Cardozo J.

[9] See "Babylonian Law", Walker, *The Oxford Companion to Law*, 1980, Clarendon, p 105. A fact acknowledged by Lord Buckmaster: see [1932] AC 562, 577-578.

[10] 10 M&W 109.

[11] 10 M&W 109, 115.

[12] (1883) 11 QBD 503.

[13] (1916) 217 NY 382.

[14] 217 NY, 388.

[15] See eg 217 NY, 392.

[16] (1912) 106 LT 533.

[17] [1932] AC, 580.

[18] [1932] AC, 581.

[19] [1893] 1 QB 491.

[20] He was raised on 24 July 1885: *Dictionary of National Biography*, vol XXII, Supp, p 265.

[21] [1932] AC, 582.

[22] [1932] AC, 613.

[23] 11 QBD, 510.

[24] 11 QBD, 517.

[25] [1893] 1 QB 491.

[26] [1893] 1 QB, 497.

[27] (1869) LR 5 Ex 1.

[28] [1932] AC 570.

[29] [1913] 3 KB 351.

[30] Quoted in Geoffrey Lewis, *Lord Atkin*, 1983, Butterworths, p 14.

[31] [1929] SC 461, 479.

[32] [1932] AC, 578.

[33] Mr Justice Martin R Taylor, 'Mrs Donoghue's Journey', in Jones & Lyons, op cit, p 6.

[34] http://en.wikipedia.org/wiki/Donoghue_v_Stevenson.

[35] [1932] AC 562, 605.

[36] An averral appearing @ *Donoghue v Stevenson* [1932] SLT 317, but not, sadly, in the Appeal Cases report.

[37] See later in this article.

[38] "The Citations of Scottish Cases" (1933) 49 LQR 1.

[39] [1932] AC, 607. See Scott, *Ivanhoe*, ch 29, 'God assoilzie him of the sin of bloodshed!'

[40] Taylor, op cit, p 4.

[41] Taylor, op cit, p 7.

[42] [1932] AC, 580.

[43] Luke 10:25-37, particularly 29 and 37.

[44] Quoted in Lewis, op cit, pp 57-58.

[45] See for this reference and Lord Buckmaster's life generally Geoffrey Russell's entry in the *Dictionary of National Biography 1931-1940*, pp 119-121.

[46] Russell, op cit, p 120.

[47] Quoted by Lewis, op cit, p 91.

[48] The sketch of Lord Tomlin is drawn from Lord Uthwatt's piece in the *Dictionary of National Biography 1931-1940*, pp 865-866.

[49] [1932] AC, 600.

[50] *Government of India v Taylor* [1955] AC 491, 504.

[51] The sketch of Lord Thankerton is drawn from W Valentine Ball's piece in the *Dictionary of National Biography 1931-1940*, pp 929-930.

[52] Fender v Mildmay [1938] AC 1, 23.

[53] [1932] AC, 604.

[54] [1932] AC, 619.

[55] Quoted in Lewis, op cit, p 51.

[56] *Farr v Butters Bros & Co* [1932] 2 KB 606.

[57] Quoted to in Lewis, op cit, p 67. Lewis suggests that Evatt and Atkin were regular correspondents, and devotes Appendix 4 to a letter from Atkin to Evatt in 1940. In an otherwise excellent biography, the latter is designated '"Sir Herbert'.".

[58] See footnote iv, above.

[59] [1944] IR, 215.

[60] In *The Common Law*: see [1944] IR, 214.

[61] See generally en.wikipedia.org/wiki/George_Gavan_Duffy.

[62] *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387.

[63] 50 CLR, 440-441.

[64] Grant v Australian Knitting Mills Ltd (1935) 54 CLR 49.

[65] W Valentine Ball, *Dictionary of National Biography* 1931-1940, p 930.

[66] 54 CLR, 67.

[67] Spencer Bower, Turner and Handley, *Actionable Misrepresentation*, 4th ed, 2000, Butterworths.

[68] (1889) 14 App Cas 357.

[69] [1964] AC 465.

[70] *Candler v Crane, Christmas & Co* [1951] 2 KB 178.

[71] [1951] 2 KB, 178.

[72] [1951] 2 KB, 195.

[73] (1931) 255 NY 441, 445.

[74] 255 NY, 444. See *Bryan v Maloney* (1995) 182 CLR 609, 618 per Mason CJ, Deane and Gaudron JJ.

[75] Taylor, op cit, p 18.

[76] Quoted in Lewis, op cit, p 52.

[77] Quoted in Lewis, op cit, p 53.

[78] [1954] 1 WLR 1482, 1483.

atmitchell.com

By David Ash

The redoubtable Joe Cahill left school at sixteen to begin work in the Eveleigh Workshops, and yet it is he and not better educated leaders whose presence is felt in our cultural landmarks. He was the driving force behind Joern Utzon's Opera House, and so it is that one now drives on the Cahill Expressway past the white sails. The Cahill Expressway also passes Sydney City Council's new public library at Circular Quay and draws to an end just past the Mitchell Library.

If the Cahill Expressway is about as far as we can go with a roadway, and doubtless too far for some, then it is meet that the Mitchell Library has begun its own highway to a cyber future with its ambitious project, atmitchell.com. And it is ambitious: it aims to have the greatest online collection of Australiana in the world. There are six portals:

- History of our nation;
- Literature; arts in Australia;
- Law & government;
- Social studies; and
- Environment, science & technology.

The naming and placing of the portals is informative; history has repaid our federal government's concern for it by coming first, and it is surely no bad thing to have a library unafraid to promote Literature above the arts generally. And law can be happy. Not only does it pip the executive, but it leads all remaining liberal arts as well, and never mind the sciences.

The home page for 'Law & government' contains one of Anon's better known watercolours, *The Arrest of Governor Bligh*, c 1808, a highpoint neither for law nor for government, but an apt entrepot for the subject in colonial Australia. 'Law & justice' – the first subportal, if that is the word, of the 'Law & government' site – was launched by the chief justice on 7 August 2006.

The site is thematic rather than chronological, though doubtless over the years and decades ahead, the increasing sophistication of search engines will allow users to retrieve information in whatever form they like.

For now, the emphasis must be simply getting the material on. And that means digitising thousands upon thousands of photographs, diary extracts, books, journals, official records, correspondence and ephemera. Often, the primary document might be difficult to decipher, and the user will be presented not simply with the original script, but with a transcript.

There are thus far five subjects in the 'Law & justice' site,

- Establishing law and order;
- Convict life;
- Notorious felons;
- The law makers; and
- Practising the law.

As yet, there appear to be no plans for 'Notorious judges', although the nineteenth century provides fertile ground.

The first lawmaker to be profiled is David Collins, who arrived with the First Fleet with the designation deputy judge-advocate. There is a letter from the British politician and administrator Evan Nepean to Lord Sydney about Collins's appointment. Nepean records a discussion with Lord Howe, at that time in an illustrious career Pitt's first lord of the Admiralty. Nepean, after noting Collins's appointment with favour, says that:

> When I mentioned a civil & criminal court his Lordship seemed rather surprised as he had understood that the whole way to have been under military law, Convicts as well as soldiers, and though I attempted to convince his lordship that the former were not amenable to military discipline, he did not appear satisfied, but seemed to think perhaps without considering well the importance of the subject that they should be punished according to the discretion and judgment of the governor even in capital part. How far his Lordship's opinion upon this matter may be proper to be adopted I will not pretend to say, but I should think that such a discretion would occasion infinite clamour at home. However the matter will be talked over when the Cabinet next meet and I suppose something conclusive will be done.

Something was done, or at least whatever Howe wanted done, wasn't, to the colony's lasting benefit.

Under 'Practising the law', there is the day book of Edward John Cory, a solicitor. I'm not much familiar with Cory, but he is an advertisement for the elegance of the itemised bill: there is 'To attending you taking instructions relative to your defence before the coroner upon a charge of manslaughter of James Russell'; then there is the conscientious practitioner's delight 'attg. police office defending you when case was dismissed prosecutor not appearing'; there is 'A warrant having been issued against you for fraud to attendg. the mayor to see if he would take bail for your appearance on Monday morning'; and there is the enigmatic 'To attg. you as to the matter of your child' under the heading '(you v. faithful)'.

Further, from counsel's point of view, Mr Cory is a satisfactory instructor. Interspersed between these attendances are records of regular payments of brief fees, counsel of choice being one Mr Windeyer.

And the letter can be seen in all its facsimile glory, courtesy of the digitising process. A process which includes a rather neat function whereby the document is called up and the pages can be turned, all the while with the transcription to a Times New Roman font a click away. While it's not quite the real thing, it's a remarkable tool. Bear in mind, too, that the library probably wouldn't let you too near the real thing and that if it did, you'd have to wear gloves.

A piece which will satisfy the earnest devil is the Rules and orders of the Supreme Court from 22 June 1825. Again, these are in the facsimile form, complete with Sir Frances Forbes's handwritten additions continuing to 1831.

The site, along with the project as a whole, is a work-in-progress. It is organic, in that it is intended to adapt around the very information it is digitising. For the while, the amount of loaded content is small. But it will grow, and is already of interest to lawyer and lay alike. It is a feat worth our continuing support.

Lanark House

By John Mancy

Six 'Men of Lanark' recently marked the 50th anniversary of the demise of their former chambers.

In 1956, when Wentworth Chambers was completed, as former District Court judge Harry Bell recalled recently, most members of the Bar had been located in Chalfont Chambers (142 Phillip St), Forbes Chambers (150 Phillip St, 'known as 'Diggers' Inn' because the owner, Sydney City Council, leased rooms only to ex-servicemen'), Selborne Chambers (174 Phillip St), Denman Chambers (182 Phillip Street) and University Chambers, in the old Law School building.

Bell said that at Lanark House, 148 Phillip St, 'a somewhat dilapidated building which took its name from the place of origin of its structural steel: Lanarkshire, in the Scottish Lowlands', Meares QC, later Justice Charles Leycester Devenish-Meares, led a floor of 23 barristers clerked by Norman Calver.

Meares' predecessor, as floor leader, was R Cecil Cook, later Cook J of the NSW Industrial Commission., while John Brennan DCJ and Aaron Levine DCJ (father of David) had recently left us– as had David Hunter, Chief Justice of Tonga, and Stephen Smyth-King, who had joined what used to be called 'the Lower Branch.'

Meares' men - 'The Men of Lanark' – were, in order of seniority:

TP (Tom) Flattery, a much-loved lecturer in Roman law,

Edgar Martin,

Henry W (Harry) May, father of the scientist, Lord May.

JKW (Keith) Cowie,

PM (Phil) Woodward, later Woodward J of the NSW Supreme Court,

KA (Ken) Cohen, later Cohen J of the NSW Industrial Commission,

KFE (Ken) Torrington, later Torrington DCJ,

RJA (Bob) Franki, later Franki J of the Federal Industrial Court,

P Ayton (Peter) Leslie, later Leslie DCJ,

JB (John) Kearney, later Kearney J of the NSW Supreme Court,

HH (Harold) Glass, later Glass JA of the NSW Court of Appeal,

EF (Ernest) Byron, later Byron QC, public defender,

TW (Tom) Waddell, later chief judge in Equity, NSW Supreme Court,

RA (Bob) Howell, later Howell QC,

AL (Adrian) Bellemore, who became a solicitor

HH (Harry) Bell, later Bell DCJ,

BKW (Brian) Cowie,

Kevin O'Malley-Jones,

HL (Harvey) Cooper, later Cooper DCJ.

AE (Allan) Hogan, later master of the ACT Supreme Court and ADCJ (NSW)

Most of the above moved to 9 Wentworth Chambers in June 1956. The new floor, including a few men from other chambers, retained its old identity –the floor members still pay their clerk's fees into the Lanark House account.

When a floor member was elevated to the Bench, or took silk, a piano was hired for the floor dinner – always, of course, at the University Club. As well as the usual Gilbert & Sullivan fare, from 1953 onwards, all joined in the floor song, accompanied on the piano by either Meares or Woodward, to the tune of 'Men of Harlech'!

The first stanza ran:

Law's a wine that's strong and heady,

Lanark men are stout and steady,

Ever robed and ever ready

Are the Lanark Men!

Those who live in Selborne

Might as well be stillborn;

Chalfont gents pay fancy rents,

Denman by both wind and rain is well-worn;

Forbes is full of weary diggers,

'Varsity of student figures;

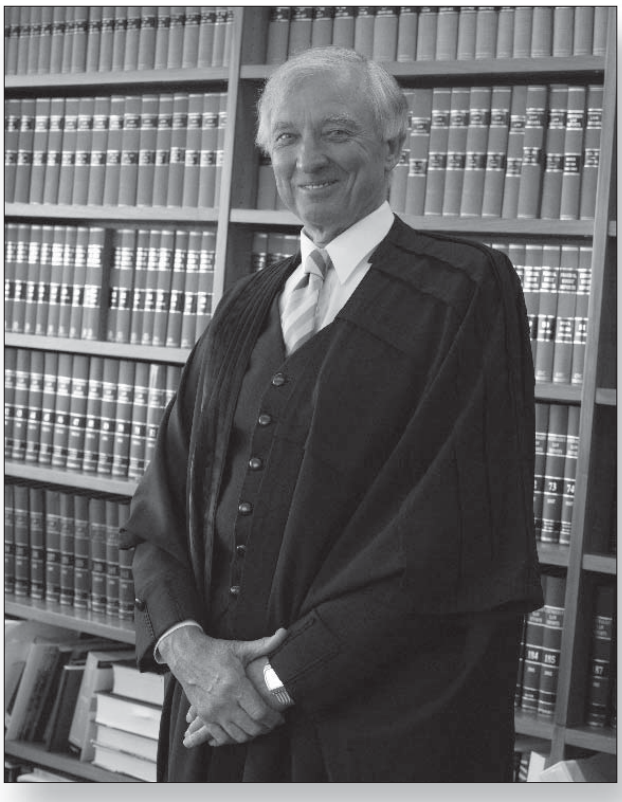
Lanark men all work like (under privileged folk) –

Drink to Lanark Men!

Harry Bell said all but one (Smyth King) of the seven surviving Men of Lanark (Kearney, Waddell, Bellemore, Bell, Cooper and Hogan) met for lunch in March – 'and to complete the cycle, invited the present leader of the 9th floor, G Barry Hall QC, to join them in marking the passage of 50 years from the death of the old floor and the birth of the new'.

L to R: Kearney, Bell, Hogan, Hall, Waddell, Bellemore, Cooper.

Farewell to the Hon Justice Murray Wilcox



The Hon Justice Murray Wilcox was farewelled as a judge of the Federal Court of Australia in Sydney on Friday, 22 September 2006.

Wilcox J graduated in law at Sydney University in 1960. His Honour completed articles at Sly and Russell and practised as a solicitor for four years from 1959. He was admitted to the Bar in 1963 and appointed senior counsel in 1977. His Honour specialised in town planning and local government law. He assisted Else-Mitchell's Commission of Inquiry into Land Tenures in 1973. His Honour was a member of the Australian Law Reform Commission, at various times, between 1976 and 1989, and its chair in 1984-5.

His Honour was appointed to the Federal Court in 1984. He was subsequently appointed as an additional judge of the Supreme Court of the Australian Capital Territory, a judge in the Supreme Court of Norfolk Island and chief justice of the Industrial Relations Court of Australia. He was president of the Australian Conservation Foundation, between 1979 and 1984.

At Wilcox J's farewell ceremony, Solicitor-General David Bennett AO QC spoke on behalf of the Australian Government, Michael Slattery QC for the NSW Bar Association and on behalf of the presidents of the Australian Bar Association and the Law Council of Australia, Hugh Macken, Law Society Vice-President, for the solicitors of New South Wales.

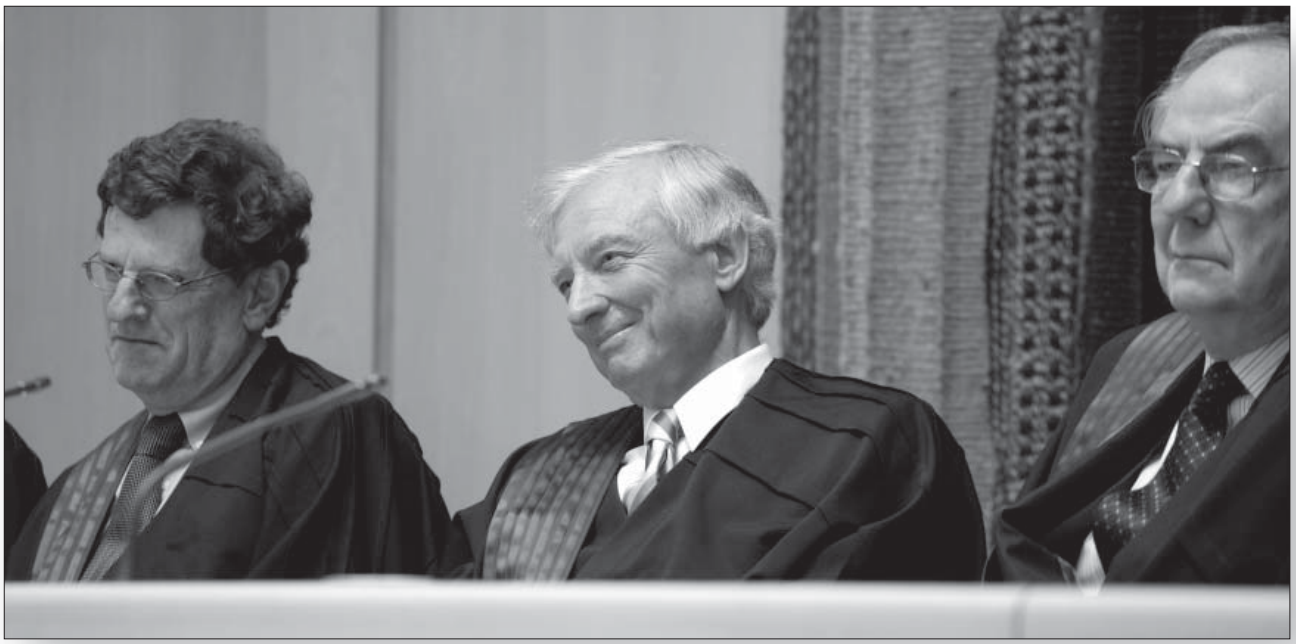
Bennett QC said Wilcox J was retiring after 22 years as the longest serving judge in the history of the Federal Court, adding that 'Unfortunately, however, your Honour will not hold that record for much longer. Justices Spender and Gray commenced less than a week after your Honour and will therefore overtake you shortly after you retire.'

Of his Honour's appointment as chief justice of the Industrial Relations Court of Australia, Bennett QC noted that:

> Before the Industrial Relations Court was formed your Honour was an opponent of its creation. When the then attorney-general, Michael Lavarch, offered you the chief justiceship you modestly reminded him of your public opposition to it. He replied that that was exactly why you were being appointed; you more than anyone else would know and avoid the pitfalls into which the court might otherwise stumble.
>
> In your time as chief justice of that court you introduced a number of innovations in case management, something recognised by the then attorney-general in his second reading speech, the legislation which transferred the jurisdiction back to this court.

Slattery QC paid tribute to his Honour's judgments and courtroom style as 'studies in elegance and economy':

> Your Honour has an easy, almost conversational, judgment style which has a special persuasiveness. Your Honour's judicial work in the field of administrative law was an immediate influence in Australian jurisprudence. Even today for thoughtful and accessible expositions on relevant legal principle in the field practitioners can hardly do better than to go to your Honour's earlier decisions in cases such as *Prasad v Minister for Immigration* in 1985 and *Minister for the Arts and the Environment v Peko-Wallsend.*
>
> One of your Honour's great capacities was to case manage large, multi-party litigation with a discipline but a deftness that left the parties with the rather pleasant illusion that they were actually managing it themselves. Your Honour's mastery of all the detail of the cases in your docket has never faded. Your Honour was ever ready to grasp a new challenge.
>
> In the *Kazaa* litigation last year your Honour was faced with the first case in Australia on infringement of copyright on the Internet. It involved complex technological as well as legal issues. Your Honour handled it in record time watched relentlessly by the commentators in the blogosphere who nicknamed the proceedings 'Kazaagate'.
>
> In March 2005 your Honour issued Anton Piller orders in the proceedings and by November you were conducting the final hearing with four sets of respondents, managing to hear all the evidence in just three weeks. By sheer force of character and judicial charm you always resolved the weekly interlocutory disputes in the proceedings doing so in most cases without the need to make orders or provide reasons.
>
> Kazaa really replicated the same efficiency that your Honour showed in the earlier litigation over the cotton pesticides spray Helix in the mid-1990s. The pleadings in Helix were a forest of claims and cross-claims. You ordered an initial trial of the common liability questions as against the respondent and then a second trial of the



Justices French and Wilcox with Chief Justice Black

cross-claims with the expectation of a third stage dealing with some test cases for quantum issues.

The first trial was completed in about 20 days and you produced a 240-page decision, then the cross-claims were settled on day two of the second stage of the trial. You ordered and supervised a process for mediating and then assessing damages claims for those group members whose claims had been found, in principle, not to be too remote. There were about 800 parties in that category. This was a remarkable exercise in judicial efficiency. Ten years later the feat has really not been repeated. Your approach has been followed in numerous other class actions including the *Longford Gas Case* in Victoria.

Your Honour has profound insight not only about the law but also about the parties and the counsel before you. Your hallmark courtesy though could never be mistaken for weakness. In one immigration case when your Honour found out that the department had deported the applicant during the proceedings you granted an injunction to protect him in mid-air pending the conclusion of the case. You understood and even felt the anguish of so many appearing before you.

Slattery QC concluded:

One of your Honour's early mentors was the late the Honourable John Lockhart. He would ask whether a judge had attained the very highest judicial rank, the highest rank of excellence, by putting the simple question 'But was he one of the poets'? Your Honour now justly retires as one of the poets of Australian law.

Hugh Macken spoke of His Honour's '"extraordinary capacity to get to the heart of the issue and distil complex legal principles and problems very quickly but thoroughly':

You are extremely efficient and have an unrivalled ability to produce long and complex judgments expeditiously. One judge couldn't believe it when in a full court matter your Honour gave an extempore judgment which was well reasoned, logical, well structured, just off the top of your head. A former associate always marveled over the sense of discipline that you had. She recalled the time that you handed down the *Kazaa* judgment which involved hours of work in preparation. Upon your return from delivering this judgment your Honour retired to chambers and immediately commenced writing another judgment.

Another colleague recalls your sense of enjoyment in finding the pithy phrase to underscore the ratio of your decisions. One in particular ended up in the full court, the decision in *Project Blue Sky* in 1996 where you said and I quote:

In light of this specific reference it is fair to assume that in enacting section 122 Parliament had the Closer Economic Relations Agreement in mind. That being so if there was any available construction of section 122, however strained, that would yield a result giving effect to the Closer Economic Relations Agreement in relation to the Australian content of programs we would adopt it but not even a strained construction is open. The truth of the matter is that Parliament has given the ABA two mutually inconsistent instructions. It has said, first, that the ABA is to provide for preferential treatment of Australian programs but, second, that it is to do so even-handedly as between Australia and New Zealand. The ABA has been put in the same position as the man instructed to be faithful to his wife and to love her above all others but to accord her sister no less favourable treatment.

Justice Wilcox, in reply, expressed regret that the improvement in technology since he first entered a law office, in 1954 ('when, not yet 17 years old'), had led to 'over-verbose material being put before the court':

> This creates a problem, in terms of the time that is required for the court to deal with cases and for judgments to be written, and the cost of producing all this material. These days a large team works on big cases. Everybody feels it necessary to justify their presence on the team by contributing something extra, and so the material grows. I was taught, and I've always believed, that the greatest attributes of good counsel are their ability to determine what is the central issue in the case and what points really need to be put to the court; and to then have the courage and ruthlessness to reject what is not necessary. That used to be the way it was. However, these days there's a tendency to accept everything. If the client wants a point put, the solicitor doesn't dare offend the client by saying no; and counsel says, 'yes, well, we'll put that in'.
>
> The difficulty about this approach is that the judge is then confronted with many unmeritorious submissions. What do you do? You read it and think, 'this is garbage'. Do I ignore it, in which case the first ground of appeal is, 'his Honour erred in failing to deal with that point'; do I shortly say it's garbage; or do I treat it as if it really matters and deal with it at some length. I've tended to take the second of those courses; I shortly say, it's garbage, and why.
>
> If there is one thing I would like to say today, particularly to the Bar, it is 'please regain control'. It is your job to decide what to put before the court. Be more selective in the evidence you tender and the points you put. If you look at the great advocates we've known in this city - some of them are no longer alive but some are - they are the people who had the ability to work out what to put.

Wilcox J recalled that, when he was first on the Bench, the then chief justice, Sir Nigel Bowen, said: 'The most important thing we do in this court is to hold the line between the individual and the executive government.'

> The statement struck me because I was aware that Sir Nigel had spent a number of years in the federal parliament. He'd been a minister and attorney-general for some time. He knew the propensity of government to push the exercise of executive powers to the limit and to cover its tracks wherever possible. When I say 'government' I mean all governments. Sir Nigel was talking about all governments.
>
> What Sir Nigel was saying is that, whilst we must always as judges honestly construe statutes and give full force and effect to what the parliament has clearly said - because that's what democracy is all about - we shouldn't strain the letter of the law to grant indulgences to the executive which are not provided by the law. We should draw the line at the right place. That was Sir Nigel's philosophy throughout his long career.

Two 'outstanding improvements in the running of this court have occurred in my time', His Honour said.

The first was when the government of the day gave to the court self management of its affairs:

> Self-administration was an enormous step forward. It has enabled us to use our resources more efficiently, to spend money on what the judges think we need, such as research assistance and improvements to the library, rather than on things we don't really need but somebody in Canberra might think to be a good idea.

The second great improvement was 'what we call the "individual docket system" which commenced, I think, in 1996':

> On a matter being filed at the registry, it is immediately allocated to a judge. In the usual course, that judge is responsible for the management of the case prior to the hearing and ultimately actually hears it. The parties know which judge will deal with it. They know who to contact if there are problems and I think they get a better feeling of the likely course of the case. The judge acquires knowledge at an early stage and doesn't come cold to the hearing. I am persuaded the docket system is the preferable way of administering the list. I hope it continues in this court.

Wilcox J spoke with enthusiasm of the Federal Court's increasing role in assisting foreign countries, particularly those in the Pacific region and south-east Asia:

> I've had some involvement in this work, mainly in Indonesia. It is challenging work but enormously worthwhile. In terms of the contribution that Australia can make to this part of the world, the cost is peanuts compared with its benefits. It is far better for Australians to be in there working at improving the institutions and the legal systems of foreign countries, helping their judges to do their work, than to have to provide troops, for long periods, when troubles break out. To its credit, the current government has been strong on supporting this role. I hope that will continue to be the case. I am sure the members of the court will continue to take up the challenge to do their part.

His Honour concluded with a plea for greater individual awareness of climate change issues:

> If you see the Al Gore film *An Inconvenient Truth*, you'll get an idea of why climate change matters. If you want further information read Dr Tim Flannery's book *The Weathermakers*. Climate change is a resolvable problem but it needs public opinion to bear on our politicians, for people to say to them 'hey, this is top agenda stuff'. Many scientists, who know far more about it than I do, say the devastating effects of climate change rank only below those of a world nuclear war. We try to prevent the proliferation of nuclear weapons but are not doing nearly enough on climate change. Some countries are making a reasonable effort, particularly in Europe, but in Australia we are not.
>
> If there's nothing else you take out of today, please put yourself in the frame on this subject. Please talk to your friends about it; encourage them to see the film, talk to politicians. If the politicians sense a groundswell of feeling, that this issue really matters to many people, they will act. To me there is no greater public issue. Climate change is far more important, in terms of its impact on humankind, than terrorism, devastating and horrible though that is. If the politicians get the message that we care, they will really start to take resolute action.

Calling it a day

By Geoff Hull

Ruth Ross, clerk of Thirteenth Floor Wentworth / Selborne Chambers retired in September after 25 years in chambers. *Bar News* charts the career path of one of Phillip Street's most experienced and highly respected clerks.

On 1 September, more than fifty people gathered at L'Aqua, in Cockle Bay, to mark the retirement of the clerk affectionately known to many as 'Ruthless'. Floor members past and present, such as Ian Harrison SC, Cecily Backhouse and his Honour Judge Bennett, were among those who gathered to say farewell.

Ruth began her career as a junior clerk at Ninth Floor Selborne Chambers. She was a 15 year old from Sans Souci, who had left Moorefield Girls High with a dream to travel overseas. Barristers and floor staff alike were quick to spot her natural aptitude for work in chambers. The clerk on adjacent Ninth Floor Wentworth asked her to work for him as a junior. She took up the offer and was soon promoted to receptionist, a role she filled for the next three years.

In 1981, Ruth accepted the position of clerk at Thirteenth Floor Selborne Chambers. She recalls the grilling she received at the hands of a selection committee, comprised of Backhouse, McLaughlin, Davies, Harrison and Hallen. Also on the floor at that time were Laurence Gruzman and Janet Coombs, who was renowned for her extensive array of hats.

The appointment to the Bench of Cecily Backhouse and John McLaughlin marked the beginning of the floor's transformation, with Davies SC, Hallen SC, Gruzman and Khan the only members who remain from the time she began as clerk.

The next stage in her career came in 1991, when Trish Hoff resigned as clerk of Thirteenth Floor Wentworth Chambers. It was resolved by majority vote that the time was right for the two floors to merge. Ruth was to become clerk for the new joint floor: a position she held for the next fifteen years.

The original Wentworth members still on the floor are Thomson, Henderson, Barrett and Gregory. David Davies SC, whom Ruth believes was a major influence on her career, was floor secretary when Ruth began and is now head of chambers.

Ruth would often have a 'walk past' of her office doorway between 8.00-8.30am. Readers and junior floor members, including those from the other side of the building, know this as the time for picking up briefs.

A quarter century affords a good perspective from which to reflect on the changing role of clerks at the referral Bar. Perhaps the most noticeable change, according to Ruth, is the decline in the day to day contact with list clerks and court officers. But barristers will always need a clerk, regardless of the changes to the job title.

Outside of chambers, one of Ruth's enduring interests has been swimming. For many years she swam at Sans Souci and played water polo for Cronulla. Lacking the time to go to the pool during the day, she would often swim at North Sydney at night. She has also taken part in many ocean races and whilst waiting for the starter's gun on a sunny Sunday morning, would often recognise other Phillip Street swimmers such as Malcolm Holmes, John Robson and Chris Simpson.

For many years Ruth also competed in the Sydney Opera House Biathlon with her team mate, Ian Harrison SC. Ruth would take on the swimming leg of the course, leaving Harrison to do the run. A keen rival in the biathlon was fellow clerk, Paul Daley. Harrison recalls one year in which Ruth built a commanding lead over Paul's swimming partner, who was still in the water long after Harrison had set off. Daley chased Harrison for the whole eight kilometres but could not run him down. Harrison credit's the victory to Ruth's swim and not to his running speed. In the same event in the years that followed, Paul and his partner never gave them the same start again.

In 1995, Ruth decided to undertake some further study and enrolled at the University of Technology, Sydney, where she began a Bachelor of Social Science degree, part time. She graduated in 2000.

Ruth's plans for retirement include travel, perfecting her golf swing, spending time with family and friends, as well as part-time work. To be sure, there are many people who will miss her calming presence around chambers and her friendly disposition. We wish her all the best for the future.

The Shand family

By Andrew Bell and the Hon Justice Jacobson

JW Shand KC. Photo: State Library of New South Wales / Ron Golding

After 52 years of continuous practice, Alec Shand QC has retired from practice at the New South Wales Bar.

This event, significant in itself, is even more so when it is appreciated that his retirement brings to an end a century of legal professional lineage. A member of the Shand family has been in practice at the New South Wales Bar since the admission in the mid-1880s of AB Shand QC who also practised for over 50 years.

As a junior, AB Shand appeared in some of the earliest cases reported in the *Commonwealth Law Reports*: see *Mountney v Smith* (1904) 1 CLR 146 and *Rankin v Scott Fell & Co* (1905) 2 CLR 164. In 1912 he appeared in *The King and the Attorney General v The Associated Northern Collieries* (1912) 14 CLR 387, a case which ran for 73 days in submissions and evidence and required a further three days for the reading of the judgment. The case arose from an alleged contravention of the *Australian Industries Preservations Act 1906* (Cth). Over the following 30 years, he continued to appear regularly in the High Court.

AB Shand QC was the father of JW Shand KC, who practised at the New South Wales Bar from 1920 until his death in 1958, having taken silk in January 1943. Jack Shand Chambers is named after him. Of JW Shand KC, the *Australian Dictionary of Biography* records:

> Shand became adept at compensation cases and an expert on laws of libel and contempt. He won against (Sir) Garfield Barwick in several important commercial suits and proved formidable in criminal cases. His reputation as a courtroom tactician rested not only on his many victories, but also on his willingness to accept difficult and often seemingly impossible briefs. Tenacity and a preparedness to take risks counted in his professional success. He was appointed KC in January 1943.

In 1946 Shand defended Major Charles Hughes Cousens, a popular radio announcer who had been compelled, while a prisoner of war, to make propaganda broadcasts for the Japanese and was subsequently charged with treason. Shand cast enough doubt at the committal hearing for the charge later to be dropped. Between 1947 and 1949 he reputedly earned £12,000 from assisting government investigations, including the Air Court of Inquiry (1948) into the crash of Australian National Airways Pty Ltd's airliner *Lutana* and the royal commission (1949) into certain transactions in relation to timber rights in the Territory of Papua-New Guinea.

At the 1951 royal commission into the case of the shearer Frederick Lincoln McDermott who had been sentenced to life imprisonment in 1947 for the murder (1936) of a Grenfell storekeeper, Shand reduced a detective-inspector to tears in cross-examination and persuaded the commission that the trial had miscarried. McDermott was freed in 1952. In other notable successes, Shand secured the acquittal in 1951 of Thomas Langhorne Fleming, a wealthy grazier accused on strong circumstantial evidence of murdering his wife by lacing her beer with cyanide, and in 1954 of Shirley Beiger, a model who shot her lover at point-blank range outside Chequers Restaurant, Sydney.

Even Shand's warmest admirers saw his courtroom demeanour as unprepossessing – his style was often contrasted with that of his tall and handsome father. Jack Shand was short and stout, red-faced and freckled. He sometimes seemed to mumble, and in later life became hard of hearing. Barwick observed that 'Shand had a thin-piped voice but great vigour as an advocate and the capacity of insinuation in tone which could annoy and bring a witness into antagonism'. Others heard him as shrill and piercing, with a slight lisp. Nevertheless, he was brisk to the point of rudeness when necessary and widely acknowledged as the most successful criminal barrister in Sydney.

By the time of his last big case Shand had only a few months to live. He appeared before the South Australian royal commission in regard to Rupert Max Stuart, an Aborigine convicted in April 1958 of the brutal murder of a nine year-old girl. The commission was chaired by the chief justice Sir Mellis Napier who had earlier heard the unsuccessful appeal against Stuart's conviction. The case became a test of South Australia's criminal trial procedures and the retention of capital punishment. Shand clashed frequently with Napier. Eventually, after being stopped during cross-examination of a witness, he withdrew, in effect accusing Napier of making it impossible for a proper inquiry to be held under his chairmanship. Although Napier protested at this 'sabotage', Shand's tactics heightened public controversy and made it unfeasible for Stuart's execution to be carried out.

JW Shand QC's son, Alec Shand, was called to the Bar on 12 February 1954. His full name is Alexander Barclay Shand but he was usually

called Alec. His admission was moved by Tony Larkins QC, then a prominent silk with a large defamation practice.

Alec read with TEF Hughes. It is not thought that the pupil spent long hours in the library researching or drafting written opinions for his master. That was not the way of the Bar in the 1950s. Most of the work of the Bar consisted of appearances, much of it before juries. Even personal litigation cases were conducted with a jury.

Alec Shand soon developed a reputation as an accomplished advocate, particularly in jury trials. In those days, before the development of the paper chase, all barristers were generalists. Alec appeared in a wide variety of civil and criminal cases, both at first instance and on appeal. If he had a specialty, it was in defamation cases.

He took silk on 14 November 1973. His name was not recorded on appearance slips or in law reports as Alec Shand QC but, like his grandfather, as AB Shand QC, to whom he seems to have borne some resemblance.

The description of Alec Shand as an advocate reads much like that which is set out above for his father, except for his physical appearance and courtroom demeanour. In the latter respect, he was more like his grandfather. He was a tenacious and formidable advocate who was willing to accept briefs in the most difficult cases. He followed in his father's footsteps in his expertise on the laws of libel and contempt and he appeared in a number of royal commissions.

Much of his libel work was for the Murdoch press. In the 1970s he successfully defended the *Daily Mirror* in a famous libel case brought by Juni Morosi.

Alec's success in defamation work led him to other areas of practice, in particular to work under the Broadcasting and Television Act. He successfully obtained a review of an adverse decision of the Australian Broadcasting Tribunal thereby enabling News Ltd to obtain control of Channel 10; see *Re Control Investments Pty Limited v Australian Broadcasting Tribunal* (1982) 39 ALR 281.

He appeared for the premier of New South Wales, Neville Wran, in the Street Royal Commission in the 1980s. He had little difficulty in persuading Sir Laurence that the premier was not on the phone. He was less successful in another royal commission when he appeared for the former minister of prisons, Rex 'Buckets' Jackson.

Alec Shand was one of the last of the true general practitioners at the New South Wales Bar. He would accept a brief in a commercial cause as readily as he would a criminal trial. Perhaps he did not relish the volume of paper generated in modern litigation, but he won cases through the force of his advocacy at the Bar table. To be cross-examined by him was harder, and longer, than spending 15 rounds in the ring with Muhammad Ali. Only the fittest and most verbally adept survived.

Ian Harrison SC, Alec Shand QC, Michael Slattery QC and Philip Selth.

The Berne Education Centre

There are students who are not coping with our education systems. As such, they are at a high risk of poverty, suicide and falling into the criminal justice system. Difficulties for the individual child may be caused by family problems, learning difficulties, emotional problems or drugs. In extreme situations, such students find it impossible to function within the normal school system.

The Berne Education Centre is an independent Catholic school owned and operated by the Marist Brothers. It has established an education program for students who are unable to function within the conventional education system, whereby students may complete an educational level or trade that is suited to their individual needs.

Ongoing support is provided for former students who have completed their education with Berne and who may be experiencing difficulties in coping with problems arising in their lives. A buddy and mentor system for young people is available as well as a parent support program.

Over 300 students have been through the centre in its nine years of operation. There are currently 42 students enrolled.

There is limited government funding for the centre. Such fees as are charged are nominal and do not approach the costs of its program. Its continued operation is dependent upon donations and fundraising.

If you would like to support this cause please forward your donation to the following address:

Berne Education Centre
Thomas Street
Lewisham NSW 2049
Phone: 9560 9260 (office)
E-Mail:bernecen@tpg.com.au

All donations are tax deductible.

The Hon Justice Derek Price

The Hon Justice Derek Michael Price was sworn in as a judge of the Supreme Court of New South Wales on Monday, 28 August 2006.

Price J was educated at St Ignatius College and at the University of Sydney, graduating with bachelor of laws in 1972 and obtaining a master of laws with honours in 1974 with a thesis entitled *The Efficacy of Parole as a Sentencing Method*. During his university years Price J was an articled clerk at J J Carroll, Cecil O'Dea & Co and his Honour continued as a solicitor with Carroll & O'Dea until going overseas in 1973. Upon his return, he moved to Dubbo, becoming a partner with Peacocke, Dickens and King in 1974, president of the Dubbo Law Society and president of the Orana Regional Law Society.

In 1988 he was appointed a Local Court magistrate. In 1999 his Honour became an acting judge of the District Court of New South Wales, an appointment made permanent in February 2000. He was appointed chief magistrate of New South Wales in 2002. He was a member of the Governing Council of the Judicial Conference from 1997 to 2000 and chairman of the Legal Aid Review Committee from 1998 to 2000.

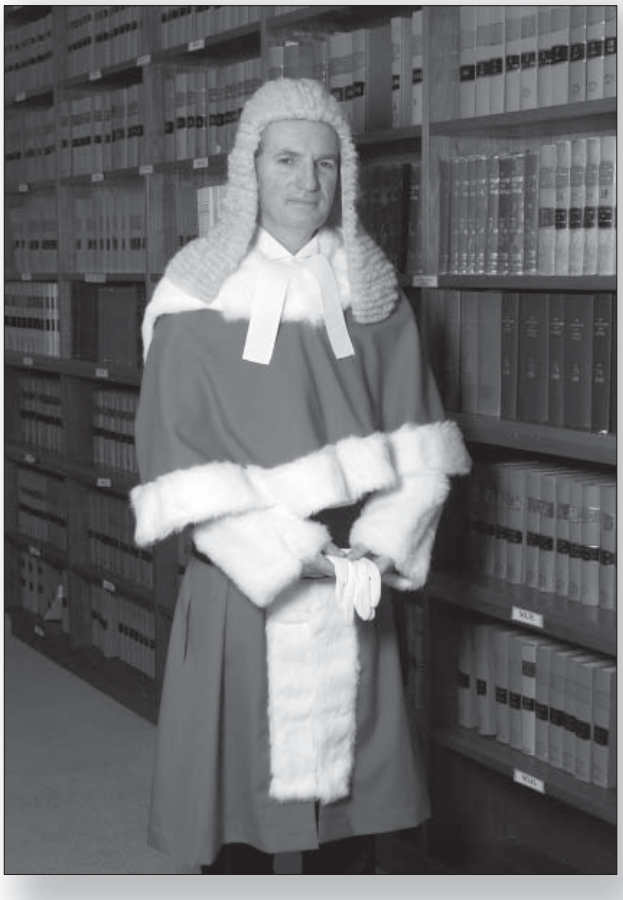
The Hon Bob Debus MP, Attorney General of New South Wales, noted at the swearing in ceremony that Price J was 'one of the few people in this state who have been appointed to more than two courts':

> You have, to speak colloquially, struck the trifecta.
>
> This is a somewhat more tasteful trifecta than those known to many defence lawyers, which is 1) offensive language, 2) resist arrest, 3) assault police. This trifecta seems to involve incarceration instead of celebration which, of course, is the purpose of being here this morning.

Quoting Ian Harrison SC, the Attorney said Price J could be described as 'the Jerrold Cripps of the modern era', bringing to the court 'a wealth of experience ... laden with sound judgment, steadiness and intellect'.

As chief magistrate, his Honour had overseen many significant changes to the Local Court. Mr Debus continued:

> The changes include: changes to criminal procedures flowing from the repeal of the 100 year old Justice's Act; the continued increase in the number of women appointed to judicial office in the Local Court, now about 50 per cent of appointments; changes to civil procedures which now mean that local courts operate under the same set of rules as the Supreme and District courts; and the change to the salutation of magistrates and the introduction of the use of robes by them. Here we saw magistrates move from being worshipped to being merely honoured.
>
> The changes to criminal and civil procedures have had a massive effect on local courts and we are now seeing the benefit of streamlined and uniform procedures there.
>
> Your leadership and support was critical to the successful implementation of these changes. In another guise your leadership and commonsense was, I understand, of great assistance to your fellow members of the Judicial Commission.
>
> You have also studiously assisted the government and your fellow court officers with a range of criminal justice measures that have created new ground in terms of sentencing. Here I speak of youth conferencing for those between 10 and 18 years of age; young adult conferencing for those between 18 and 25, a system now operating on a pilot basis; and circle sentencing, for aboriginal offenders which is now operating out of a growing number of regional courts. Without the willing participation and skill of the Local Court, each of these measures may easily have foundered on the rocks of what passes for modern debate about crime and justice.
>
> I believe these kinds of confronting processes have a greater and more lasting impact on offenders than brief incarceration in terms of rehabilitation, by way of yielding genuine remorse for misconduct that has harmed others.
>
> I am grateful that you have worked closely with me and others to see these important measures produce effective justice. The proof of their success is that they appear now to have been accepted by all but the most bloodthirsty in our community, which is an exceptional feat.
>
> Having said that, your Honour's tenure in the Local Court occurred at a time of incredible scrutiny by all manner of commentators. You, with your fellow senior court administrators, have maintained morale and passed all but the most bizarre and tendentious tests.
>
> Your Honour, as you move to the next phase of your career I have total confidence that the same qualities that have lead to your success so far will continue to serve you into the future. Like a good day at Randwick, this is a trifecta that is well worth honouring.



Law Society of New South Wales President June McPhie spoke of his Honour's 'zest for country life' having practised in the Central West for fifteen years.

Mrs McPhie recalled that at Peacocke, Dickens and King 'you were considered a prize recruit, not for your legal knowledge, of which you had much, but because you addressed a particular lack of cricketing prowess in the solicitors' team at the time'.

> Your Honour was responsible for evening up the scores between the Dubbo doctors, who couldn't believe their eyes when this new recruit came in and lashed the ball delivered by their best bowler.

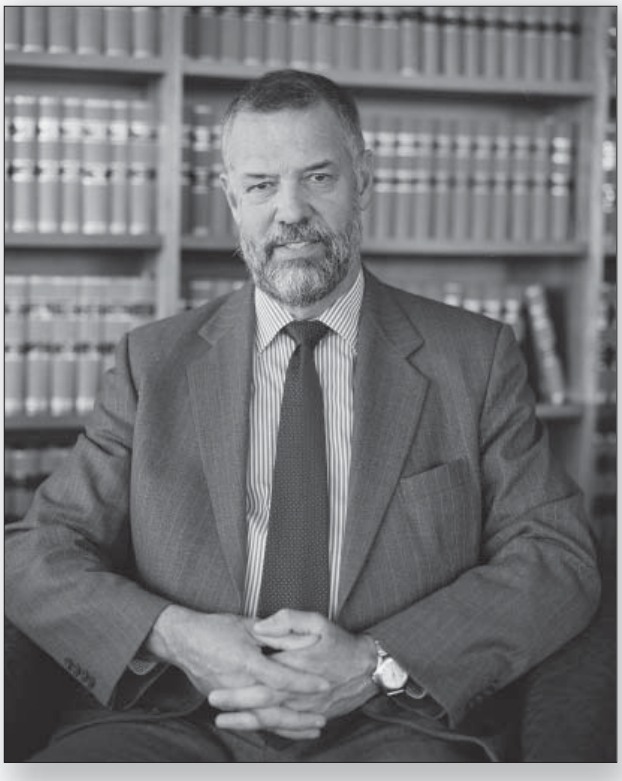
Price J said he had 'observed during my judicial odyssey that there is much that courts can learn from one another':

> The exchange of ideas between jurisdictions on issues of significance to the judicial system has indeed been encouraged by the chief justice and the attorney. The *Civil Procedure Act 2005*, the *Uniform Civil Procedure Rules* and the *Equality before the Law* bench book are the product of cross-jurisdictional collaboration.
>
> As the attorney stated, innovative work has been undertaken in the Local Court in the field of sentencing. Programs are being developed with the aim of diverting offenders from the crime cycle.
>
> These programs include young adult conferencing, which brings an offender and victim together, and circle sentencing, based on traditional indigenous forms of dispute resolution and customary law, with community involvement in the sentencing process.
>
> Consideration might be given, in my view, to extending these initiatives in appropriate cases beyond the jurisdictional limits of the Local Court. For example, at the present time an indigenous offender who commits the crime of break and enter and steals $14,000 from a dwelling house at Nowra may be sentenced with the assistance of a circle court, whereas should the same offender steal $16,000, the offender is sentenced in the District Court.

Price J said that while it was 'an extraordinary honour ... to serve as a judge of this court', he had 'some knowledge of the challenges that await me':

> In 1999 when I was an acting judge of the District Court I met the chief judge in a lift in the John Maddison Tower. It was a beautiful sunny day outside. By way of pleasantry, I exclaimed: 'What a lovely day, chief judge!' The chief judge, without hesitation, responded: 'It is said that the judges of my court never see the light of day.' I related this conversation at my District Court swearing in. The chief judge, I regret to say, was correct.
>
> More recently, when I was thanking the chief justice for his support for my appointment, the chief justice said that I should not thank him as the workload of the judges of this court is immense. I have come to accept without reservation the wisdom of heads of jurisdiction.
>
> In conclusion may I very shortly quote from the 14th century allegorical poem *Piers Plowman*, thought to have been written by William Langland (at Passus IX):
>
> Do well my friend, is to do as law teaches;
> To love your friend and your foe, believe me that is Do Bet;
> To give and to guard both young and old;
> To heal and to help, is Do Best, the greatest.
>
> I will do the best that I can to do well as a judge of the Supreme Court.

The Hon Justice Robert Buchanan



On 14 September 2006, Robert John Buchanan QC was sworn in as a judge of the Federal Court of Australia.

Justice Buchanan had a long and distinguished career at the Bar prior to his judicial appointment. He was a highly respected advocate and highly esteemed colleague and member of Frederick Jordan Chambers.

Justice Buchanan graduated from the University of Sydney with degrees in arts and law. He began his legal career in 1974, when he was admitted to practice in the Supreme Court of New South Wales. In 1975, his Honour commenced practice at the Bar. He read with Charles Cullen QC, who subsequently became a judge of the NSW Industrial Court and David Hodgson QC, now Justice Hodgson of the NSW Court of Appeal. Justice Buchanan was elevated to queen's counsel in 1988.

Justice Buchanan practised at the Bar for over 30 years prior to his appointment to the Federal Court. He practiced predominantly in the employment law and industrial areas, and was regarded as a leader in this field. He is a superb lawyer and a highly respected advocate and tactician. On behalf of the Hon Philip Ruddock MP, Commonwealth Attorney-General, Mr David Bennett AO QC, Solicitor-General, said the following in respect of Justice Buchanan's status as leading counsel in the industrial and employment law areas and his independence as counsel:

> You practised primarily in the areas of employment and industrial law in which you were regarded at the forefront of the national profession. You were also regarded as a great tactician despite an occasional tendency to enjoy provoking judges: a practice which your Honour is unlikely to continue.
>
> What is most significant about your industrial practice is that, although you appeared mainly for employers, you frequently appeared for unions and workers, particularly as Defence Force Advocate. Sadly, industrial law is an area of law where barristers tend to appear on one side or the other. Your Honour's success in breaking this mould should be an example to others in that jurisdiction.
>
> On one occasion during a conference with a group of corporate executives about an industrial case they started discussing another industrial case involving an associated company. Your Honour had to stop them on the basis that you were appearing for the union in that case. When they expressed some surprise your Honour gave them a lecture on the importance of the cab rank rule and that's an incident of which your Honour is entitled to be proud. The ability to appear for either side in such a strongly adversarial area is a skill which more than anything else demonstrates your suitability for the Bench.

These sentiments were echoed by the president of the Bar Association, Mr Michael Slattery QC, who also referred to his Honour's immense legal talent and independence. He said:

> Your Honour appeared in so many of the great industrial cases of the 1980s and 1990s perhaps commencing with the *Robe River Iron Associates* dispute when your Honour was first at the Bar followed by the *Cooperative Bulk Handling* case, the *Shell Superannuation* dispute and other cases about defined benefit superannuation funds, the APPM dispute at Burnie in Tasmania and in more recent years the Boeing dispute. All of these and other cases many of which were created or shaped by your Honour's professional creativity helped redefine Australian industrial law.
>
> To all of these cases your Honour brought special qualities of directness, of highly disciplined economy with words and ideas and a refreshing bluntness with both your opponents and the Bench. Your Honour was a leader of the Bar who in the most testing of circumstances inspired everyone around you with confidence that you knew the way through.
>
> Your Honour is a superb lawyer with flawless insight not only into industrial law but any legal subject that falls to your analysis. However, your Honour was never content with just the mastering of your legal environment. You took an active personal interest in the strategic decision-making of all your corporate clients. You always thought from the perspective of what your clients ultimately wanted to achieve in the long term. With perhaps the good generalship of a Sir John Monash you always grasped the strategic

> big picture but you were relentless in letting no detail escape your grasp. You could marshal complex facts but simplify them to the comprehensible and the persuasive.
>
> Despite these great abilities in your dealings with your clients you demonstrated a modesty and a humility for which we lawyers are not widely known to be famous. Again and again clients such as Peko-Wallsend, North Broken Hill, BHP, Rio Tinto, APPM and many others came back to you and often at short notice. You were a trusted adviser who had the confidence of successive chief executives of these companies. You well understood the dynamics of the industries in which each of your corporate clients were competing whether it be woodchips in Tasmania, coal in Queensland or grain handling in Western Australia.
>
> In both federal and state industrial jurisdictions where speedy, tactical decision-making was at a premium your background in the law and in these industries meant that you were renowned for being to mount an accurate, comprehensive and persuasive argument at little more than an hour's notice.
>
> It should not be thought that this account of your Honour's forensic career that your Honour is some kind of blueblood Tory; far from it. Your Honour was a proud exemplar of the cab rank rule and had the same passion for your union and individual clients as for your corporate clients. You regularly acted for the Health Services Union and its predecessors, you regularly appeared in demarcation disputes and you were a specialist in bringing unfair contract claims.

In addition to the demands of his very successful practice, Justice Buchanan also served as Defence Force advocate. In this role, his Honour prepared Defence Force submissions to the Defence Force Remuneration Tribunal and represented it in proceedings before the tribunal and also appeared for individual members of the ADF.

Over the years, Justice Buchanan has also developed many wide ranging interests and talents, including martial arts, and has become fluent in French. His Honour's true passion is sailing. In relation to the latter, Mr Bennett AO QC commented:

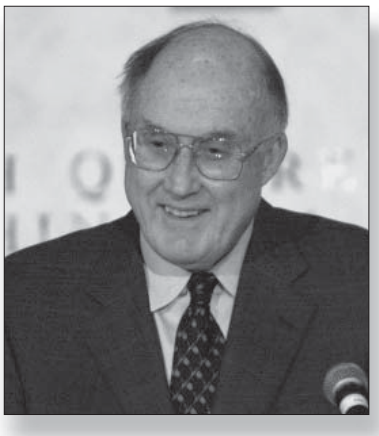
> Your Honour's skill in this sport is demonstrated by your selection to compete at the 2007 World Championships in Poland in the single-handed dinghy competition.
>
> Though, as with any sport, there have been ups and downs your Honour on one occasion won the New South Wales Bar Association's Great Bar Boat Race on a boat called *City Shoes* no doubt so that your receptionist could say that 'He's in city shoes today' when asked. Indeed, this is the second occasion on which I've made a speech of congratulation to your Honour; the first was on Stawell Beach in December 1995 when as president of the Bar and dressed somewhat less formally I presented you with the rather large Chalfont Trophy.
>
> However, on your Honour's sail home your boat capsized, trophy and all becoming water borne. It was only by good fortune that the trophy was recovered largely intact. I trust your Honour will take better care of this morning's memorabilia. I would, however, strongly advise the district registrar not to entrust the court's silver oar mace to you when you are going sailing.

For all 30 years of practice at the Bar, Justice Buchanan practised from Frederick Jordan Chambers. He was a very popular and esteemed member of chambers and a highly respected mentor and friend to present and past members. He will be greatly missed by colleagues within chambers. We wish him all the best in this well deserved appointment and are sure that he will be equally as respected and popular on the bench as he was at the Bar. His competence in martial arts will stand him in good stead, deterring even the most recalcitrant members of the Bar.

William H Rehnquist

The sixteenth chief justice of the US Supreme Court

By Jeffrey Phillips SC



When William Hubbs Rehnquist died last September (3 September 2005) he had served on the US Supreme Court either as an associate justice or as chief justice for a period of over thirty three and a half years.

He was first nominated to the court by President Richard Nixon and sworn in during January 1972. He became chief justice in September 1986, nominated by President Ronald Reagan. He continued as chief justice until his death from thyroid cancer, having reached the age of 80 years.

He had served in World War II in the Army Air Corps in North Africa. After the war, having obtained two masters degrees, he was head of his class in law school at Stanford in 1952. Thereafter, he served as a clerk to Justice Robert Jackson in the US Supreme Court. A few memos he had prepared, which he later said were at the insistence of the judge, in civil rights cases, came back to haunt him during his confirmation hearings in 1971 and 1986.

After his clerkship ended he commenced as a lawyer in Arizona where he became involved in Republican Party politics. He assisted Barry Goldwater in his candidacy for president in 1964 in particular, writing speeches for the senator attacking the legacy of the liberal Warren court. He later served in the Nixon administration in the Justice Department as assistant attorney-general. Notwithstanding his dress sense, which had come to the attention of the president, who had referred to him as that 'clown Rensburg', his abilities led to his appointment to the court replacing Justice John M Harlan.

He was an instinctive conservative who favoured pluralism over centralising power in the federal government. His conservatism was of an older, milder strain to those of later 'culture war' radicals such as justices Scalia and Thomas.

His preference for state rights over federal intervention can be easily detected in his majority opinion for the court in *National League of Cities v Usery* 426 US 833 (1976).

That case has remarkable similarities to the High Court challenge mounted by some Labor state governments against the Howard government's WorkChoices legislation. At issue was a 1974 federal statute that extended the maximum hours of minimum wage provisions of the Fair Labor Standards Act to most state and municipal employees. The Act as it applied to 'states as states' was struck down as an unconstitutional interference with an essential 'attribute of sovereignty attaching to every state government' (p845). Even though it was subsequently overruled in *Garcia v San Antonio Metropolitan Transit Authority* 496 US 528 (1985) as chief justice, Rehnquist continued to stress the theme of local as opposed to federal control in a host of important areas.

He, like our own Justice Dyson Heydon was suspicious of judicial activism. In an obituary[1] written by Linda Greenhouse, the *New York Times* Supreme Court correspondent and author of the recently published biography of Justice Harry Blackmum (reviewed in 79 ALJR 723), it was said of Rehnquist:

> the courts were simply one institution among others, with no claim to greater wisdom or moral authority. This view was in sharp contrast to the judicial liberalism that was dominant when Chief Justice Rehnquist came of age as a young lawyer, when the federal courts were thought to have - or behaved as if they had - an almost oracular ability to discern the hidden meaning of the Constitution in light of the public good (shades of Justice Heydon's criticism of the Mason High Court).

In his early years, he was often in respectful dissent from the majority opinion of the court. His most famous dissent was in the right to abortion case of *Roe v Wade* 410 US 113 (1973), a case which has become a touchstone of all Senate questioning in confirmation hearings of subsequent members of the court. Despite his controlling influence as chief justice and the growing conservative majority in the court since his appointment, he was never able to put together a majority to overrule it.

William Rehnquist also formally presided over the impeachment trial of President Clinton. His role was mainly procedural rather than substantive. For his part, in what could have been a dangerous polarising position, he was applauded by both majority and minority leaders in the Senate for his carefully neutral contribution.

More controversial was his concurrence with the majority opinion (5-4) in the Florida vote count case, *Bush v Gore* 531 US 98 (2000) which decided the US presidential election of that year. The decision was, as could be envisaged, one steeped in controversy, which, over the remaining period of his occupancy as chief justice, was largely dissipated.

His amiable, efficient and pragmatic nature made his court more successful and respected than the court ran by his predecessors, the 'pompous' Warren Burger and the court ran by the liberal Earl Warren, whose appointment President Eisenhower said was his 'worst mistake'.

Justice Rehnquist also wrote a number of books about the court, most notably a history of the Supreme Court in 1987. He also, like our own Justice Callinan, tried his hand at a murder mystery novel, albeit unpublished.

His significant contribution to the court, particularly in his last ten years, makes a nonsense of the early and compulsory retirement of federal judges in Australia at seventy years of age as required by section 72 of the Constitution.

Justice Rehnquist's replacement, Judge John Roberts was a Rehnquist law clerk. If he lives as long as his former boss his obituary will be not be written until sometime in 2036.

[1] *New York Times*, 4 September 2005.

The premiers

By David Ash

Bar News has previously celebrated institutions with a series of clerihews. In recognition of the High Court's centenary year, the winter 2003 issue carried clerihews of appointments through to its 50th year, 1953. The summer 2005/2006 issue carried clerihews of New South Welsh chief justices from Sir Frances Forbes to the incumbent, Jim Spigelman AC.

The *Oxford English Dictionary* defines a clerihew as 'A short comic or nonsensical verse, professedly biographical, of two couplets differing in length.' *Wikipedia* gives as an example the harsh assessment 'George the Third / Ought never to have occurred. / One can only wonder / At so grotesque a blunder.'

This year of 2006 is the sesquicentenary of responsible government in New South Wales. In recognition, *Bar News* traces *the premiers*, first of the state and then of the colony.

Morris Iemma
Current premier
His job is to give a 12-year-old government starch
To survive the battle set for next March.

Robert John Carr
A surprise star
There remains debate about his legacy
Yet his reign saw in Sydney as an international city.

John Joseph Fahey
Enjoyed a personal popularity
An early Liberal to support a republican fix
He jumped upon Sydney winning the Olympics.

Nicholas Frank Greiner
An ideological redesigner
He solidly sold his solid reforms
But found himself battered by political storms.

Barrie John Unsworth
Returned to basics, back to earth
He faced the electorate braced for a fall
And took responsibility for it all.

Neville Kenneth Wran
Labor's archetype for Modern Man
A decade when everything seemed to occur
Not least the flying of considerable fur.

Eric Archibald Willis
Was shocked when he was pipped by Lewis
A parliamentarian close to the grass roots organisation
But his snap election was, in hindsight, a miscalculation.

Thomas Lancelot Lewis
A year in office
He achieved things with the public service
But he made some of his own party nervous.

Robin (but Sir Robert) William Askin
Knew public opinion
Yet that very beast links him with organised crimes
Due to a profile, a fortnight after he died, in the National Times.

John Brophy Renshaw
Elected in '41, knew the score
But his party had ruled for 24 years
And the electorate decided to change its gears.

Robert James Heffron
Examples the notion of progression
Although, like others he did get a little waylaid
In the vexing issue of state aid.

John Joseph ('Old Smoothie') Cahill
Did not by Labor's split get ensnarled.
And the Opera House that he got underway
Can be seen from his expressway.

James McGirr
Houses over public works did prefer
Though Labor was ill with Cold War infections
He led them through two elections.

William John McKell
Ran it all very well
Later a controversial name for governor-general
Yet revealed himself as a natural.

Alexander Mair
Lacked flair
He tried hard with a tired administration
But faced a reinvigorated opposition.

Bertram Sydney Barnsdale Stevens
Pushed his barrow over Bavin's
Yet he too was caught by the Depression
Losing the leadership in a prewar session.

Thomas Rainsford Bavin
Learnt to take it on the chin
He was a Liberal in the Deakinish way
Tough work, in times when moderation seemed passé.

John Thomas Lang
Offered a little Sturm und Drang
For some a god, for others an unholy thistle
Whichever, he suffered dismissal.

George Warburton Fuller
Could have sought a life much duller
Neither premiership was a bed of flowers
The first lasting for only seven hours.

James Dooley
Dealt with Labor getting unruly
Exhausted, years later he could not resist
Declaring himself 'a political atheist'.

John Storey
Another who boilermade in lieu of being Tory
He was challenged by the party's executive factions
For supporting the Cabinet's and caucus's actions.

William Arthur Holman
As a Labor stalwart began
He fell foul on the issue of conscription
To end up of the Nationalist description.

James Sinclair Taylor McGowen
One of Labor's working men
From boilermaking in an earlier year
He became the party's first premier.

Charles Gregory Wade
An all-rounder by ill-health betrayed
Moving eventually to the Supreme Court
A term less than three years short.

Joseph Hector Carruthers
Can be seen as one of Menzies' mothers
He founded the Liberal and Reform Association
A Liberal Party in anticipation.

Thomas Waddell
Did not raise hell
An efficient but rather limited Tory
He put integrity well above glory.

John See
Let things be
His party was called Progressive
But his will was unaggressive.

William John Lyne
Saw the sign
The first prime ministership was offered to NSW's premier
But, unable to find a cabinet, he had to undeclare.

George Houstoun Reid
Large in girth, large in deed
Early, he called on Labor support, later an anti-socialist beacon
Although in this role he was eclipsed by Deakin.

Patrick Alfred Jennings
Had less than a one-year innings
But his place in the pantheon is automatic
As premier, being the first practising Catholic.

George Richard Dibbs
Was hardly 'his nibs'
Though for business, he enacted the forerunner of conciliation
And viewed sectarianism with condemnation.

Alexander Stuart
Though a Scot, increased the colony's debt
A large public program, with land for stock
He also secured Garden Island for the navy, as a dock.

James Squire Farnell
Grandson of the brewer, yet not himself remembered well
His obituary in The *Australasian* did not even declare
That he had once been, briefly, premier.

Henry Parkes
Left huge marks
Congratulated upon his seventeenth son as his last
He replied 'Don't say "my last", you fool, say "my latest"'.

James Martin
His tastes, epicurean
His critics held that he had been raised from the sludge
He repaid their concern by ending up as chief judge.

John Robertson
Took the squatters on
Known as Free Selection Jack
In retirement, he took an anti-federation tack.

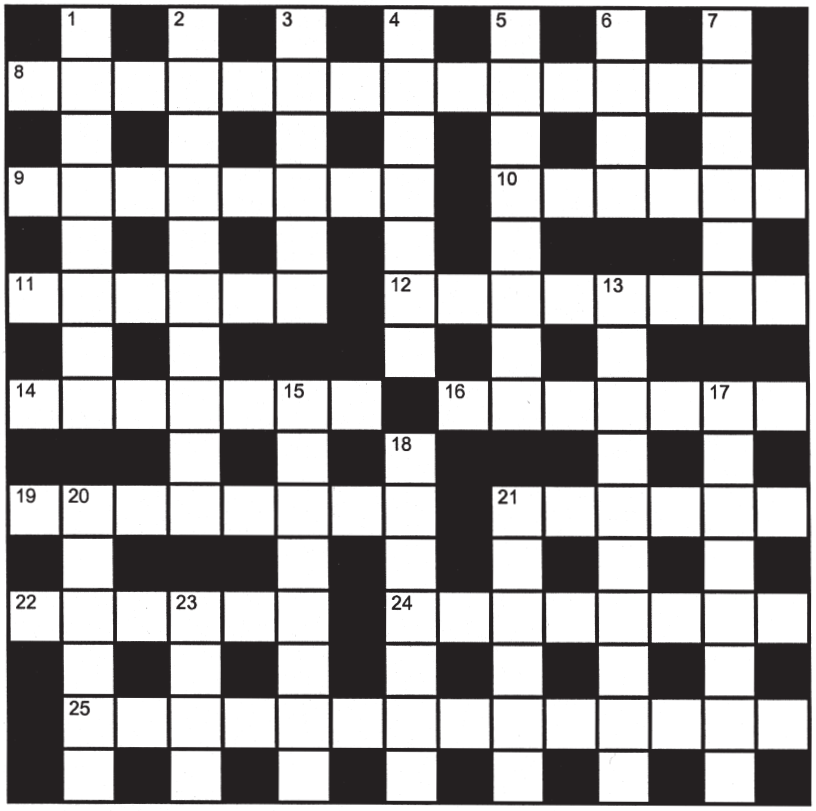
William Forster
With three volumes to his credit maybe poetry did prefer
As a politician, it was politics he lacked
Or, as the Herald said, he had 'more virtue than tact'.

Henry Watson Parker
Married the daughter of John Macarthur
Liberals he opposed with confused aplomb
Later, at Home, he ran against Gladstone, GOM.

Charles ('Slippery Charlie') Cowper
Adroit in his quest for power
First of three to be a five-time office holder
He ended as agent-general in a clime somewhat colder.

Stuart Alexander Donaldson
Dueled with Sir Thomas Mitchell
First premier by compromise begotten
A term of two months 19 days forgotten.

CROSSWORD BY RAPUNZEL



Across

8 Potomac hill hog kind of related to looking into peeper problems. (US) (14)

9 Shapeless, or merely without class? (8)

10 Truman chopped, getting the end of the boot? (6)

11 With quiet good fortune, brave. (6)

12 At this time in the political calendar, there no elite at sixes and sevens around the head of the clan. (8)

14 I sprain pulverised pain relief.

16 Yaps way out around preserve, for something to fall asleep in. (7)

19 Shakespeare heads her wish, not properly the type he tamed. (8)

21 And 1 down. If there is but one case on expert evidence, do impostors walk a wreck? (6)

22 Drawn a novel country for a inspiring hotel. (6)

24 Flourishing Frank found around French plonk. (8)

25 Aloneness bears questionable rationality. (14)

Solution on page 113

Down

1 See 21 across. (8)

2 Coal pit! Me? I?! Ridiculous. Nuclear reactor. (6,4)

3 Dined within twisted damp. (6)

4 Hess mad? Shaky relations between England and Germany after the Blitz, anyway. (7)

5 Our leader story drops to admit coffee. (8)

6 Are his clubs made of lego? (4)

7 Loves being about court, a middleman with volume, yet the size of a page. (6)

13 A hurdle or a sprint, but follow the first woman to Kakadu. (5,5)

15 I'm Ms Buttrose? Rot! Back to copier. (8)

17 To set at sea, perhaps, Noah sits at sea. (8)

18 With Mal frisky, he is followed by Mal. (7)

20 Hard to be around Opposition Leader (and, perhaps, the workers leader), but he has managed it for a decade. (6)

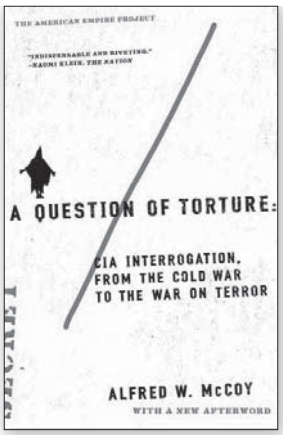
21 Ramble over recrystallised limestone. (6)

23 Tidy ante upset. (4)

A Question of Torture:

CIA Interrogation, from the Cold War to the War on Terror

Alfred W McCoy | Metropolitan Books, 2006



On 28 June 1914 Gavrilo Princip shot dead the Archduke Franz Ferdinand and his wife Sophie. Princip was almost certainly a member of the Black Hand, a terrorist group run by the chief of the Intelligence Department of the Serbian Army. Its political aim was the independence of Bosnia-Herzegovina from the Austro-Hungarian Empire. Princip and his allies were probably not acting at the direction of the Serbian State.

The killings were terrorist acts to advance the ambitions of the Black Hand. Of themselves the assassinations were not state-destroying nor did they have that potential. As with almost all terrorist activity the murders were symbolic.

The events that followed were from decisions of states purportedly in response to these killings. No one really suggests that the terrorist Princip caused the First World War. The lunatic chain of events triggered it.

My point is this: that historically the worst effects of terrorism have been caused by the response of the state to it.

Since 11 September 2001 there have been elements in the response of some Western governments, including Australia, which reflect this phenomenon. We now have laws which permit detention without suspicion, charge or trial, and trials where neither the accused nor his/her counsel are permitted to know the evidence led against them.

In the years following the Second World War Western leaders, no doubt scarified by the recent horrors, proclaimed treaties and declarations starting importantly with the Universal Declaration of Human Rights 1948. The preamble says in part:

> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
>
> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Article 5 reads:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 8 reads:

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10 reads:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

A year later the Geneva Convention III relating to the treatment of prisoners of war was ratified by the United States. It banned, inter alia, corporal punishment, imprisonment in premises without daylight, and in general any form of torture or cruelty. (Article 87).

In 1966 the International Covenant on Civil and Political Rights was passed.

Article 7 reads in part:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

In 1984 the Convention Against Torture was adopted.

Now we have the timely appearance of Professor Alfred McCoy's book *A Question of Torture: CIA Interrogation from the Cold War to the War on Terror, 2006*, Metropolitan Books, New York.

I do not suppose it should really surprise us that the covert instrumentalities of the major Western power now the world's only superpower should have been steadily working on interrogation techniques.

McCoy's book explores the history and development effectively from the exotically named *Kubark Counter Intelligence Interrogation Manual* in 1963 (digesting and codifying the techniques of psychological torture) tracking its refinement allied to increasing physical barbarity in Vietnam and now Iraq and Afghanistan, Guantanamo and the various places to which the CIA has rendered its 'high value' detainees.

The book is, of course, principally concerned with the Unites States. Of Western countries one should not ignore the contributions to torture including France in Algeria in the 1950s and Britain in Northern Ireland in the 1970s. (No, I do not ignore the barbarity of others, such as China, but the book concerns the 'West' and the affront that torture is to our values).

Perhaps the most sinister practice in use is rendition. This is the contracting out of torture. It allows for the transportation of persons to countries who torture with little if any restraint (the grand hypocrisy is that one of the countries used by the United States is Syria) and permits plausible deniability - at least until it all unravelled.

The Syrian technique (acknowledged by the United States State Department) includes: 'electrical shocks; pulling out fingernails; the forced insertion of objects into the rectum; beatings.'

It is not well known that the practice of 'extraordinary rendition' was initiated during the Clinton administration where the CIA kidnapped terror suspects in Bosnia from where they were taken to Cairo for interrogation under torture.

It was probably done because the CIA may have been a little out of practice since the end of US involvement in Vietnam.

After 11 September they quickly made up time. Immediately after those events there was support for torture (and extreme forms of it) in certain circumstances from some surprising quarters: Professor Dershowitz from Harvard and Justice Richard Posner.

In Australia Professor Bagaric of Deakin Law School in Western Australia in an article for *The Age* on 17 May 2005 equated killing by police of a potentially murderous hostage taker with justifiable torture. The example he gave was:

> Will a real-life situation actually occur where the only option is between torturing a wrongdoer or saving an innocent person? Perhaps not. However, a minor alteration to the Douglas Wood situation illustrates that the issue is far from moot. If Western forces in Iraq arrested one of Mr Wood's captors, it would be a perverse ethic that required us to respect the physical integrity of the captor, and not torture him to ascertain Mr Wood's whereabouts, in preference to taking all possible steps to save Mr Wood.'

True enough, there were some ballistic responses to the piece. Alexander Downer told ABC Radio: 'I don't think we want to encourage a world in which torture is justified.'

McCoy has graphically described the confused and morally debilitating legal gymnastics arrayed by the Bush Administration to employ the use of torture. In August 2002 Assistant Attorney General Bybee wrote a 55-page memorandum to the then White House Counsel Gonzales (now US attorney-general).

To quote McCoy (quoting and paraphrasing Bybee at 121): -

> To constitute torture under US statue, the physical pain must, he said ' be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.'

One asks: 'What's left?'

It is rather difficult to read this statement compatibly with the convention and covenant principles.

This document generated directives which resulted in the application of 'brutal methods by both CIA and military interrogators'

> In the next few years of the war on terror, the toll from President Bush's orders, as conveyed in these memos and others still secret, would be chilling - some 14,000 Iraqi 'security detainees' subjected to harsh interrogation, often with torture; 1,100 'high-value' prisoners interrogated, with systematic torture, at Guantanamo and Bagram; 150 extraordinary, extralegal renditions of terror suspects to nations notorious for brutality; 68 detainees dead under suspicious circumstances; some 36 top Al Qaeda detainees held for years of sustained CIA torture; and 26 detainees murdered under questioning, at least four of them by the CIA. Adding to the causalities from this covert war, Bush hinted at torture and extrajudicial execution during this State of the Union address in January 2003, when he spoke about '3,000 suspected terrorists ... arrested in many countries. Any many others have met a different fate. They are no longer a problem for the United States.' (McCoy pages 124-125)

And yet exposure of the techniques at Abu Ghraib was depicted as the aberrant work of a few low ranking, over enthusiastic personnel and said not to represent US policy or practice.

As McCoy notes many of those who were authors of or sanctioned the Bybee memorandum were promoted or remained in office.

Bybee himself has been appointed to the Ninth Circuit, Gonzales is attorney-general, Wolfowitz now heads the World Bank and Rumsfeld remained secretary of defense until last month.

After the 2004 presidential elections there was substantial congressional inquiry and criticism into and of Abu Ghraib, and as McCoy notes, a retreat from Bybee's memorandum by a new directive from Justice on 30 December 2004 which began: 'Torture is abhorrent both to American law and values and to international norms.'

At page 168 McCoy reports:

> In its first official tally, the army reported that 27 detainees had been killed in US custody in Afghanistan and Iraq, and that 21 soldiers faced charges in connection with those deaths. Another 17 soldiers, the army said, would not face trial, for want of evidence. Adding the three detainee deaths investigated by the navy and four more involving the CIA would bring the official toll for deaths in custody to well over 30. Of this total, there was only one death at Abu Ghraib.
>
> ...
>
> Despite these disturbing numbers every senior officer investigated to date, save one, has been exculpated.'

Nobody above the rank of sergeant has gone to gaol.

At Guantanamo Bay many of the prisoners are graduates from rendition. The president has recently stated that rendition is at an end. There is reasonable doubt about such a statement.

The techniques of interrogation used at Guantanamo are those denied over many years. They are torture and clearly violate the conventions.

Guantanamo remains.

Prisoners are indefinitely detained. The military tribunals as a source of justice is flawed to the cusp of farce.

In the end, as McCoy states, the efficacy of torture is dubious not merely as being morally reprehensible but because in a practical sense it produces questionable outcomes.

As McCoy demonstrates torture - whether it be brutally physical, relentlessly psychological or a combination of the two - produces unreliable information and dubious confessions. That conclusion is demonstrated beyond doubt. As this is so, it is militarily, politically and legally dangerous to rely on such material.

Secondly, it essentially destroys the forensic worth of such material.

Even though the Australian attorney-general doubts this proposition it seems to this lawyer indisputable (see Article 14 of the Convention Against Torture).

Recently Chief Justice Gleeson[1] said:

> Many laws, whether made by a parliament or judge-made, represent an accommodation between competing rights or interests. Often, the accommodation that is reached is inconvenient for some; sometimes it is inconvenient for the government. The rule against the admissibility of involuntary confessions is no doubt an inconvenience for those who enforce the criminal law. It is an inconvenience they are obliged to accept. The alternative, that is to say, receiving evidence of forced confessions, is a price we are not willing to pay in order to secure convictions. Laws regulating official surveillance, or search and seizure, are carefully structured to reflect what parliament regards as a just compromise between the rights of individuals and the public rights and interests protected by the criminal law. People may disagree about whether an appropriate balance has been struck, but some form of balance is necessary. Very few public policies are pursued at all costs.

Professor McCoy's book demonstrates the profound dangers of unfettered power disguised as legitimate action.

Powerfully McCoy quotes an FBI Agent Dan Coleman. The FBI rejects torture: 'Brutalization doesn't work...We know that. Besides, you lose your soul.' (page 203)

These acts of state are said to be part of the war on terror. The acts themselves challenge the core value of a liberal democratic state - the rule of law.

Our institutions are jeopardised not by the acts of terrorism but by the response of the state to them.

Reviewed by Robert Toner SC

1 'A Core Value' Speech at Judicial Conference of Australia Annual Colloquium, Canberra, 6 October 2006.

Estoppel by Conduct and Election

The Hon KR Handley AO | Sweet and Maxwell, 2006

On 1 November 2006, his Honour Justice Heydon launched the most recent text on the prolific production line of Justice Ken Handley AO entitled *Estoppel by Conduct and Election*.

Justice Heydon also wrote the foreword to this text, observing that:

> During his many years of intense practice at the Bar, and his decade and a half on the New South Wales Court of Appeal, Mr Justice Handley has built up a high reputation as a legal scholar. From his earliest days at the Bar, he was wont to deflate many confident but loose assertions by others in the lift or the corridors by instant reference to contrary decisions. In court his elegantly composed and scholarly submissions, based on notes in the most neat and beautiful handwriting, are still well remembered. His learned, but succinct, judgments have been a valuable contribution to the law. The publication in 1996 of his third edition of Spencer Bower and Turner's *Res Judicata* and in 2000 of his fourth edition of Spencer Bower and Turner's *Actionable Misrepresentation* were signal events. This latest work on Estoppel is a worthy companion to those books. There is a full and rich coverage of the English and Australian position, and appropriate reference to authorities in many other common law jurisdictions. His long and deep experience as counsel and judge, and a resulting confidence and vigour of assertion, give unusual authority to his criticism, and to his observation of trends to and fro.

Justice Heydon has kindly consented to the publication of his remarks on the occasion of the Australian launch of *Estoppel by Conduct and Election*.

> It is not irrelevant to the launching of Ken Handley's latest book that his career at the Bar was extremely busy and successful. It is not an exaggeration to call that career glittering. He was amongst the cream of an outstanding generation. Over 14 years as a junior and 17 years as a silk he speedily built up a towering reputation across many fields of litigation, in many courts, and using many techniques of the barrister's craft. His fields of activity extended beyond equity and commercial work, into intellectual property and industrial relations as well. He appeared on numerous occasions in the High Court and the Privy Council. One great victory can be selected out of many: *Schaefer v Schuhmann* [1972] AC 572. It is striking in three ways. First, alone and without a leader, he successfully persuaded a majority of the Privy Council to reverse one of its own decisions – a rare event. Secondly, he got them to allow an appeal brought directly from a decision of Street J – a hard judge to overturn.

The authority of the prose stems from a lifetime's practical experience of solving the relevant problems in and out of court, as counsel and judge, and a lifetime's informed reflection on those problems.

> Thirdly, he did this over the opposition of N C H Browne-Wilkinson, then one of the most prominent counsel in Lincoln's Inn – a formidable antagonist. Ken Handley was feared greatly by opponents – not just for his learning, his dedication and the pitiless precision of his addresses, but also for his first-rate skills as a cross-examiner of experts in recondite fields of knowledge. It was not only his opponents who feared him. He was also, it must be admitted, greatly feared by his juniors, with whom he habitually worked late into the night, sparing neither them nor himself.
>
> Putting on one side the little matter of helping Di to raise four sons, it should be added that he coupled his professional labours with hard, important and time-consuming community work of various kinds – for the Bar, culminating in his presidencies of the New South Wales and Australian Bar associations; for the Presbyterian Church, in resolving disputes over property when some parts of it joined the Uniting Church; for the Anglican Church, in many roles, but particularly as chancellor of the Diocese of Sydney; for Cranbrook, on the council of which he served from 1974.
>
> Ken Handley could only carry out all his activities by the most ruthless exploitation of any available opportunity to do something useful – whether it was reading the latest parts of the law reports on the ferry, or fighting the greenhouse effect by turning out any lights unnecessarily left on, or by spurning the lifts in favour of walking up the stairs of any building he entered, or walking about the city wherever possible.
>
> When Ken Handley joined the Court of Appeal 16 years ago, one might have thought that he would relax from his labours. He did not. To put it rather euphemistically, he habitually tested counsel's arguments with extreme thoroughness.
>
> Quite apart from his conscientious performance of judicial duties – and, then as now, the Court of Appeal has more than ample work to use up a lot of judicial energy, which in his case was dedicated to elegant and concise judgments of great learning – he continued as chancellor and in due course he became president of the Cranbrook Council. But he also developed a new line of activity.
>
> In 1996 he published the third edition of *The Doctrine of Res Judicata*. That work had first appeared in 1924 from the pen of a scholarly Inner Temple barrister, George Spencer Bower, then aged 70. The second edition had been prepared by a most distinguished New Zealand lawyer, Sir Alexander Turner, President of the New Zealand Court of Appeal, and

had been published in 1969. Principles associated with the types of estoppel which can arise from prior judgments – res judicata, issue estoppel, the *Anshun* doctrine, autrefois convict, autrefois acquit, and so forth – present formidable difficulties of comprehension. There were two particular difficulties which the new editor had to face. The first arises from the fact that the task of preparing an edition of a work which was originally written by another is hard, particularly when many years have passed and yet another editor has intervened. It is hard to reconcile different styles and different approaches. The second stems from the attempts of an author based in Australia not only to deal with the Australian authorities, but also to expound the law of England and Wales fully – for as the common law becomes more Balkanised, it becomes harder to see unifying themes in it. But these are challenges which Ken Handley triumphed over. He presented a most lucid, comprehensive and masterly survey.

Four years later, he revised another of Spencer Bower's books, *Actionable Misrepresentation*. The first two editions, in 1911 and 1927, were prepared by Spencer Bower; the third, in 1974, by Sir Alexander Turner. The fourth edition reached the same standard as *The Doctrine of Res Judicata*.

Tonight we witness the breaking of new ground. Ken Handley has now prepared a third book. He has done so independently of any precursor. *Estoppel by Conduct and Election*, of course, does have affinities with *The Doctrine of Res Judicata* because that too rests on estoppel principles; and it has affinities with *Actionable Misrepresentation* because in part it deals with the effects of representations. What is more, perhaps it would have been close to impossible for a sitting judge to have written the third book without having passed through the refining fires experienced while preparing the first two. However that may be, the publication of these three works is an achievement which must be regarded as unique, in the strictest sense, for a sitting judge. There are examples of judges who wrote distinguished books before their appointment: one thinks of the recently deceased and lamented Sir Robert Megarry. Some have published both before and after appointment: our own Justice Hodgson is an excellent example. But I cannot at present recall any whose literary career did not begin until after appointment to the Bench, and certainly none who, after appointment, produced a trilogy of the quality attained by these three books.

There are, I think, two fundamental reasons for the quality of these books, and in particular for the quality of that which is being launched tonight.

The first is that although the author cites many authorities, and immerses himself in the detail of close analysis, he does so with a peculiar masterfulness and trenchancy of assertion – with a striking authority of manner. It is seen both in his elucidation and explanation of fundamental propositions, and in his criticism of the wrong turnings which some courts have taken. The authority of the prose stems from a lifetime's practical experience of solving the relevant problems in and out of court, as counsel and judge, and a lifetime's informed reflection on those problems.

The second fundamental reason for the quality of the book is the author's intellectual rigour. It is something he shares with the Australian judge he admires most, Dixon CJ. One remembers how in the Court of Appeal the cry would go up from our author, as counsel cited some case for a particular proposition: 'Yes, yes, that's all very well, but isn't there something better from the Dixon court?' And, usually in a short time, with his extraordinary recall of case law, rivalled in our days only by McHugh J, Ken Handley would remember the name and volume number of some better case from the Dixon court, and have it brought from chambers. Now rigour in legal analysis is at a discount in the 21st century for many reasons. It survives in Australia perhaps better than in England, where imprecision flows inevitably from the Human Rights Act and the Strasbourg jurisprudence, the 'principles' of which seem to seep into areas quite remote from their primary fields of operation. Rigour certainly survives in this book. For that reason, the author has been able to point in modern case law to various instances of unhistorical reasoning, fusion fallacies, erroneous reductionism, category confusion and other types of loose thinking – even in the minds of the most exalted.

Let me conclude by warmly recommending this thoughtful and powerful work. It should be on the shelves of every barrister – and on the shelves of every judge. What is more – and I acknowledge here the influence of Justice Kirby, who recently, in launching a book, went to considerable lengths to praise its beauty – it is a volume which is both handsome and compact. It has a pleasing weight in the hand. It is easy to carry on public transport. If it cannot be described, in Oscar Wilde's words, as something sensational to read on the train, it is certainly highly stimulating in many ways.

With great pleasure, I launch it upon what I hope will be a career even more successful than those of its two predecessors.

At the launch, Justice Handley acknowledged Justice Heydon for agreeing to launch the book and penning the foreword, and thanked the state of New South Wales for granting sabbatical leave to its judges, noting that, without that privilege, none of his books would ever

Many estoppel and election cases have come my way over the years but I was surprised to find how much I did not know.

have been written. In his speech, Justice Handley explained the genesis of his extra-judicial activity and provided an enticing insight into the content of his latest work. His Honour's remarks are reproduced below.

> I undertook new editions of Spencer Bower's books on *Res Judicata* and *Actionable Misrepresentation* because these projects were manageable and three months sabbatical leave would be enough for each book. I always had in mind in due course that I would attempt a new edition of Spencer Bower on *Estoppel by Representation*, but I knew that such a book would take several years. It had to be attempted last.
>
> When I lined up for a new edition of *Estoppel by Representation* I discovered that Butterworths had let the contract eight years before and were not interested. I had to take the courageous and arduous course of writing a first edition and starting from the beginning.
>
> Many estoppel and election cases have come my way over the years but I was surprised to find how much I did not know. I will only give three examples. I discovered that an estoppel in pais, which was part of the land law in the time of Lord Coke, means an estoppel in the country, pais in Norman French, pays in modern French. It referred to conduct which was notorious in the district such as a livery of seisin, or an entry.
>
> I discovered that estoppel by representation, outside the land law, was not a legal doctrine which equity dutifully followed, but an equitable doctrine dating from 1683, that was adopted by the common law, without acknowledgement, in *Pickard v Sears* in 1837. Its equitable ancestry was reviewed by Kay LJ in *Low v Bouverie* in 1891 and was mentioned by Lord Macnaghten in 1902. It was referred to in the first edition of Ashburner the same year, and was discussed by Holdsworth in his *History of English Law*. It was not judicially noticed again in England until the judgment of Potter LJ in *National Westminster Bank v Somer International* in 2002.
>
> The equitable ancestry of estoppel by representation and its adoption by the common law were noticed by Sir Frederick Jordan in 1935, and again by Sir Anthony Mason and Sir William Deane in 1983. Unfortunately those same judges forgot this history when writing their judgments in *Waltons Stores v Maher* in 1988, and the *Commonwealth v Verwayen* in 1990.
>
> This history is not an arcane irrelevancy. It should inform the modern law. It leaves no scope for equity to trump such an estoppel because, for example, the remedy is thought to exceed the detriment. It also leaves no scope for the introduction of a further requirement of unconscionability because this is already subsumed within the elements of the estoppel.
>
> I had previously accepted the statement of Denning LJ in *Combe v Combe* in 1951 that a promissory estoppel was not a cause of action but I discovered that it was. The speeches in *Hughes v Metropolitan Railway* in 1877 and the judgment of Bowen LJ in the *Birmingham Land* case in 1888 would themselves suggest that Denning LJ must be wrong, but the judgments in *Hughes* in the Court of Appeal settle the issue.
>
> In that case the landlord had enforced a forfeiture and obtained judgment in ejectment at law, but the company applied for a stay on equitable grounds under the provisions of the Judicature Acts which had just come into force. James LJ said, in a judgment that was approved in the House of Lords: 'This case must be treated in the same way as if a bill in equity had been filed for relief against the forfeiture after a judgment had been obtained at law'. A bill could only be filed in Chancery if the plaintiff had an equity or equitable cause of action.
>
> I have always been a great admirer of Sir Owen Dixon, whose long career on the High Court culminated in his term as chief justice from 1952 until 1964. I had the privilege of appearing before him in 1963. He tried me in Greek, then in Latin. I was clearly no classicist and lost but for other reasons.
>
> His great contribution to estoppel by representation was his judgment in *Grundt v Great Boulder Mines* in 1938, which has frequently been approved overseas. It was the basis of the 1982 decision of the English Court of Appeal in the *Texas Bank* case which upheld an estoppel by convention that could trump the contractual text. I believe that some of the implications of his judgment in *Grundt* have not yet been fully accepted. It has a lot to say about the attempts in recent years to graft unconscionability into estoppel by representation and estoppel by convention.
>
> Professor Maitland said that English judge-made law was developed by the application of strict logic and high technique. This was Sir Owen Dixon's judicial method. His famous lecture at Yale in 1954 'Concerning Judicial Method' published in the ALJ and 'Jesting Pilate', examined the potential for development offered by estoppel by convention 30 years before the *Texas Bank* decision. It remains instructive today.
>
> When I began this project I had a general knowledge of the three decisions of the Mason Court dealing with estoppel *Waltons Stores v Maher, Foran v Wight, and Commonwealth v Verwayen.* I accepted them at face value and was satisfied that the actual decisions were correct. I had argued *Foran v Wight* for the appellant.
>
> I left these three cases to last because of the length and complexity of the judgments, particularly the 110 pages of *Verwayen*. Thus when I came to study them I had a working knowledge of the earlier case law. As I read and reread these judgments I had increasing misgivings.
>
> These cases are discussed over a number of chapters in the book. This does not matter elsewhere but it would have been useful here if the discussion could have been brought together. This has been done in an article which will appear in the November issue of the ALJ.

The estoppel and negligence tides were in full flood in the Mason era but both are now ebbing here and in England. It seems to me that the result in *Waltons Stores v Maher* is best supported today on an orthodox proprietary estoppel by encouragement, that *Foran v Wight* is best supported on an orthodox estoppel by representation, and that *Verwayen* is best supported on an orthodox estoppel by convention.

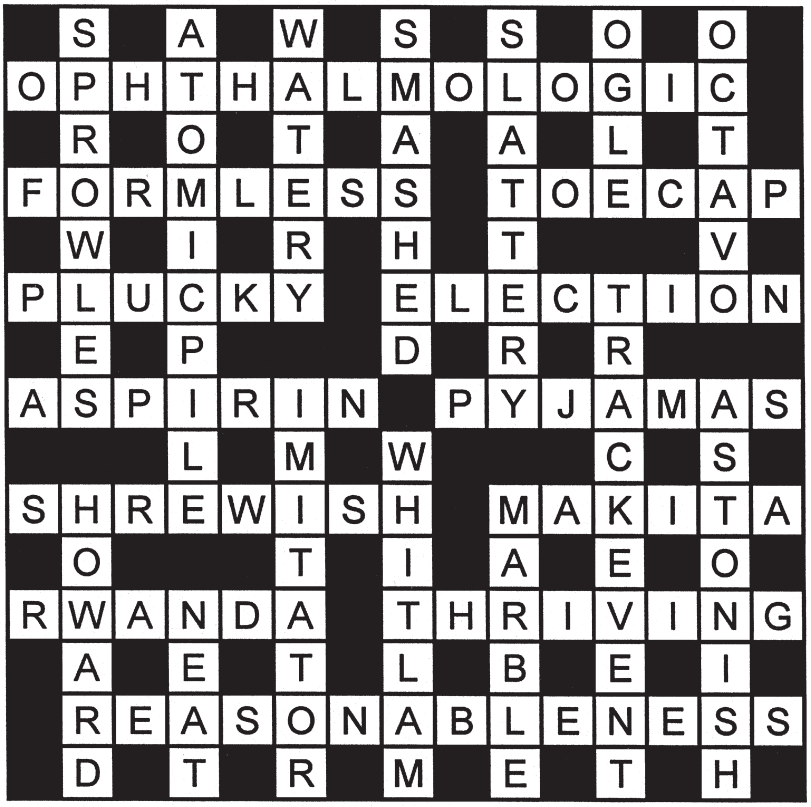
Savigny, the great civil lawyer, said in 1815: 'The purpose of legal scholarship was the adaptation and rejuvenation of inherited legal materials, creating an indissoluble community with the past, and fostering organic legal development.'

This is even more important in our system of judge made law.

This book attempts to keep one foot on the other side of the Channel and one on the ground here. This carries the risk of failure in both places. Hopefully it will facilitate an exchange of ideas and encourage consistent development.

My generation at the New South Wales Bar practised under a pre-Judicature Act system until 1972 when we made the great leap forward to 1875. For 12 years before the change the 3rd edition of Bullen & Leake 1868, and the 5th edition of *Daniell's Chancery Practice* 1871, which were matters of legal history elsewhere, were part of my tools of trade. The book reflects something of the experience of practising under both systems.

An author does his or her best and fashions a baton which others can take up. They may run further, and faster, and in different directions but if the author has done a passable job they can start where the author finished instead of at the beginning.



How Can You Appear for Someone You Know is Guilty?

Bar News notes that its distinguished restaurant critic, John Coombs QC, has turned author. Under the title *How Can You Appear for Someone You Know is Guilty?* his book was launched in the Bar Association by Chief Justice Gleeson on 21 November 2006. According to its publisher, '*How Can You Appear for Someone You Know is Guilty?* fits somewhere between a legal textbook, selected memoirs and an autobiography. This is a book of memories of 40 years as a barrister and QC, told in a charming and unaffected way. It is a delightful read.'

The book tracks John Coombs's career as a barrister, includes memories of his famous father HC 'Nugget' Coombs, and surveys a range of his forensic experiences, from the serious to the hilarious. As Coombs QC himself would say, enjoy this book on your Christmas vacation, accompanied by some pan-seared seafood washed down with a bottle of chilled New Zealand sauvignon blanc, followed by a tarte *tartin* and a Rutherglen sticky!!

The Last Mughal:

The fall of a dynasty: Delhi, 1857

William Dalrymple | Bloomsbury Publishing, 2006

Dalrymple is a Scot and an impressive scholar of Islamic history and culture. His early travel writing – *From the Holy Mountain, In Xanadu and City of Djinns* – was often both humorous and erudite. *The White Mughals*, published in 2002, was a fascinating and delightful insight into a different breed of Englishman – a more tolerant late eighteenth century variety. The tone of *The Last Mughal* is more serious, appropriate to its sombre subject matter.

The Indian mutiny of 1857 has been much written about. But what Dalrymple has produced is a study which focuses on the wanton destruction of Delhi itself, the decline and brutal extinction of the Mughal empire and the British religious and cultural imperialism which brought it all about.

Until 1857 Delhi was, and had been for 332 years, a great Mughal city, a centre of Islamic culture and refinement, and a tolerant and pluralistic society where Hindus and Muslims lived peacefully together. The Mughal emperor was Bahadur Shah Zafar, a direct descendant of Genghis Khan and of Akbar. He was a sensitive unheroic man, a poet, a calligrapher and a creator of gardens.

The mid-Victorian era British were at their imperialist worst in 1857. Senior officers and officials were frequently imbued with an intolerant Christian evangelicalism and most lacked cultural sensitivity. The British reaction to the mutinous events of 1857 in Meerut, Cawnpore and Delhi brought down upon their heads, and those of Hindus and Muslims, a religious war of terrible violence and depravity. By 1858, Delhi was physically destroyed and the Muslims were driven out never again to flourish in the city as they once did.

The primary origins of the war were prosaic and are well known – the cartridges for the new Enfield rifles coated in grease made from a mixture of cow fat (offensive to the majority of sepoys who were high caste and vegetarian Hindus) and pig fat (an unclean animal to both Hindus and Muslims); the rumours that this was part of wider East India Company conspiracy to break the sepoys' caste and racial purity before embarking on a project of mass conversion to Christianity; the 300 mutinous sepoys and cavalrymen from Meerut who rode into Delhi killing Christians and declaring Zafar to be their leader.

Soon tens of thousands of jihadis and mujahadeen flocked to Delhi from all over to fight the Christian enemies. Innocent women, children and civilians were slaughtered. The fanatical axe wielding jihadis took a solemn oath that they would fight and if necessary die, but never retreat. Zafar found himself the leader of an uprising that he suspected from the start was doomed. He was right of course but he could not have anticipated the degree of retribution which was later exacted.

This is a massive work of scholarship, the product of four years' collaboration. Dalrymple has had access to a vast amount of primary material in Persian and Urdu, virtually unused since 1857, or at least since it was rediscovered and catalogued by the National Archives of India in 1921. This is not to say that the book is in the least heavy going. It fairly races along. Salman Rushdie is right to say that Dalrymple is that rarity, a scholar of history who can really write.

What painfully emerges from Dalrymple's study of British administrators, company officials, missionaries and armed forces, is a prevailing and profound contempt for Indian Muslim and Mughal culture coupled with a frightening propensity to exact violent revenge. And revenge there was, of a scale that half a century earlier Wellington would neither have countenanced nor contemplated. When word reached England, Disraeli told the House of Commons: 'I protest against meeting atrocities with atrocities'. On the other hand, the foreign secretary, Lord Palmerston (whom Florence Nightingale thought was pure humbug) called for Delhi to be deleted from the map and that 'every civil building connected with the Mohammedan tradition should be levelled to the ground without regard to antiquarian veneration or artistic predilections'. It was not until April 1858 that Chief Commissioner Sir John Lawrence was able to report that he had 'stopped the different civil officers hanging at their own will and pleasure'.

The trial of the Mughal Emperor was chaotic and the outcome was predictable. The prosecuting officer, Major Harriott, alleged that Zafar was the evil genius behind an international Muslim conspiracy stretching from Constantinople, Mecca and Iran to the walls of the Red Fort. His intent, declared the prosecutor, was to subvert the British Empire. The judges retired for only a few minutes before unanimously declaring Zafar guilty of all and every part of the charges. The unsatisfactory legal process reminds one of J J Spigelman's recent quip that military justice bears as much relationship to justice as military music bears to music.

After the British reprisals, almost nothing remained of the Mughal civilisation in Delhi. The members of the royal family who were not executed were reduced to wandering India destitute and homeless. Zafar was deported to Rangoon and buried in an unmarked grave. With the loss of the Mughal Court went much of the city's reputation as a centre of culture and learning. Its libraries were looted, its precious manuscripts lost. The madrasas were almost all closed. A permanent shift of power from Muslim elite to Hindu financiers and merchants was brought about. Hindus and Muslims grew apart and religious intolerance increased. What started in 1857 became irretrievable and permanent at Partition in 1947.

Dalrymple has written an engrossing book with a different emphasis to much of the literature on the subject which has preceded it. It is not merely a major contribution, it is also timely. Dalrymple is justified in concluding with Edmund Burke's celebrated words that those who fail to learn from history are always destined to repeat it. He is alive to worrying parallels with some recent events – the influence of Christian fundamentalism, the readiness to characterise armed resistance to invasion and occupation as 'evil', the inability to recognise the damaging effect of one's own foreign policy and the haste with which opponents are labelled as fanatics. But there is nothing didactic about Dalrymple's exposition. It is subtly and sensitively constructed.

Reviewed by M A Pembroke

Pilu at Freshwater

Three former Tamworth Circuiteers and their wives took a favourite attorney from that city and his wife to lunch to celebrate his 50th. There was some early nostalgia for fortnights when we rendered fees equivalent to a BAS quarter these days. Nor is the legal profession the only sad group. The annual two or three million dollar boost to the Tamworth economy is much mourned by those who sell tractors and other farm equipment amongst others.

But Pilu at Freshwater dispelled any gloom. Set in the old kiosk building, it is spacious and airy and takes wonderful advantage of wall to wall windows overlooking the beach. The building, although tarted up, is structurally unchanged except for the superb new kitchen.

One of our party was Sue Jenkins of Accoutrement and Giovanni Pilu made quite a fuss of us accordingly. Eight sardine fillets, marinated in olive oil with fresh capers appeared from nowhere, one each and quite delicious.

Attentive waitfolk brought drinks, outlined the specials and said, 'Only three rosti Porci left'.

'We'll have them', was the chorus.

Annette doesn't like pork and I've had it twice before so we let the rest fight it out, which they did amicably enough.

Entrees included a boned and stuffed quail, crisply cooked and pronounced, 'The best quail I've had ever eaten'.

But he wouldn't share so I can't tell you what was in the stuffing. There was nothing left on the plate.

Another highlight was Ensalata Tomate, a special made with sliced, large Black Russian tomatoes and other tiny tomatoes with Buffalo mozzarella and a light dressing of basil and garlic with decorative greens. I had not had the Black Russian tomatoes before and enjoyed the new experience.

The three who had the pork loved the slow cooked suckling pig with very special juicy crackling. Other mains included grilled swordfish, thickly cut and fresh with mash and greens. It was a bit dry for me, I thought.

Annette and I shared the Zuppa del Pescatore, a melange of crab, mussles, prawns, calamari and fish fillets in a tomato, garlic, fresh herbs and white wine broth. It was plenty for two and blew us away. It came with Sardinian crisp and thin bread called Carte de Musica.

We drank Sardinian beer and wine, both white and red, which were all very acceptable.

Sweets included pannacotta with a special honey based sauce and a shared meringue based dessert whose name I forget. The pace was slow which suited us as Sunday afternoon 12.45 until four or so with that view and attentive service drifted to its happy conclusion.

Pilu at Freshwater
Moore Road
Harbord
Ph: (02) 9938 3331
All major cards accepted

The Cove Seafood Brasserie

Another eatery that takes full advantage of a great site is The Cove Brasserie on Manly wharf. It is spacious and bright with superb views of the harbour side of Manly, enlivened by parasailers, the ferries and small craft.

I have eaten there two of three times and enjoyed the standard menu, oysters, seafood crepes and very fresh fish, but as I went by this week I was drawn by the specials menu to try again. I rounded up my daughter (by a former party of the second part) and her party of the second part and we went for lunch.

I had a window table and a James Boag's in my hand before the young ones had finished parking the car! Whilst the three of us read the menu, warm Italian rolls and wine by the glass were delivered (Redwood Marlborough sauvingnon blanc and Oak Ridge pinot from an excellent wine list, the Pinot opened for one glass although not listed as by the glass. Very good.)

Then to the specials: we shared a duck, apple and thyme sausage, served with saffron mash and orange/ginger marmalade. This was novel, tasty and we were all keen to have the last bit!

Next we tried the fettucine tossed with fresh beetroot, asparagus and goat's cheese in virgin olive oil. Again creative and very good.

My son-in-law had the seared lamb back strap filet with sauteed red cabbage and mint infused yoghurt, which he devoured happily.

I had and shared the snapper pie, baked with potatoes and winter vegetables – carrot, peas and parsnip – topped with puff pastry. Delicious and very filling. It was reminiscent of the Boathouse pie, but quite different. Truly, it would feed two or even three and was still hot after 15 minutes.

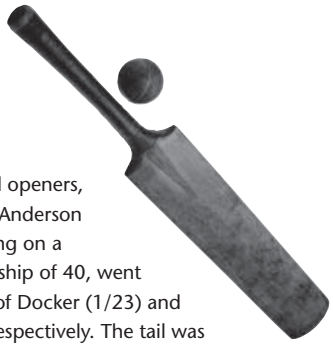
The last indulgence was a shared flourless chocolate and walnut slice with raspberry coulis and double cream. Lighter than expected and plenty for three. Coffee washed it down.

I think this is cooking of the finest order. Ride the ferry over and give it a try.

The Cove Seafood Brasserie
210 Manly Wharf
Manly
Ph: (02) 976 2400.
All major cards accepted.

NSW Bar v Qld Bar

By Lachlan Gyles



On 15 October 2006 the NSW Bar cricket team played its annual match against the Qld Bar at the picturesque Hordern Oval, Cranbook.

The match has been played every year since 1973, and in the recent past has been strongly influenced by a home ground advantage. The last seven matches have been won by the home side.

This year there was an added feature to the match because a number of players who had been team mates on the Australian Bar Hong Kong Tour during Easter were pitted against each other for the first time since that trip.

NSW won the toss and batted on a coolish spring day. Bilinsky (53) and Steele (44) got the locals off to a great start, combining for a century opening stand off about 16 overs. They then went quickly, and following the loss of Docker shortly thereafter to the bowling of Williams, Queensland were back in the game.

Carroll (26) and Scruby (19) then steadied the ship before being dismissed with the score not far short of 150 with eleven overs to go. A total score in the region of 190 or 200 looked like the best NSW might hope for.

However, a flamboyant 53 by Stowe, including four sixes, supported by Gyles (21), Durack, Bova and Hodgson, saw the home team to 8/243, having scored almost 90 off the final ten overs of the innings. The pick of the bowlers for Queensland were Williams (2/36) and Collins (4/33).

It had the look of a winning total, unless the Queenslanders could get away to a strong start. However, a miserly opening spell by the evergreen Naughtin (3-20) and debutante Eastman (1/26) saw the visitors on the back foot at 4/50 off 16 overs.

The Queensland openers, Taylor (33) and Anderson (29), after putting on a fighting partnership of 40, went to the bowling of Docker (1/23) and Durack (3/21) respectively. The tail was then set upon by Bova, Carroll and Gyles who, together with Durack, each bowled leg spin in a variety of shapes and styles that would have bought a tear to the eye of Tiger O'Reilly, or even perhaps former Queensland Colts leggie Callinan J, whose Gray Nicholls Scoop was kindly donated by him on his retirement from the Queensland side in 1993 to be used as the trophy for the fixture.

The Qld skipper Egan (13), Nase (21n/o) and Collins (7) all fought hard for the cause. But when Murphy, called back into the side after a short but unjust absence, went first ball in fading light, victory was secured for NSW.

The hostilities will resume in Queensland in 2007.

The QLD team.

Queensland vanquished

Gyles and the Callinan 'Cup'

Bench & Bar v Solicitors annual chess match

By John Mancy

Solicitors exchanged checks with the Bench & Bar across 13 boards in their annual Terrey Shaw Memorial chess encounter at the Bar Association common room on 21 September 2006. The result was a 7.5 to 4.5 win for the solicitors.

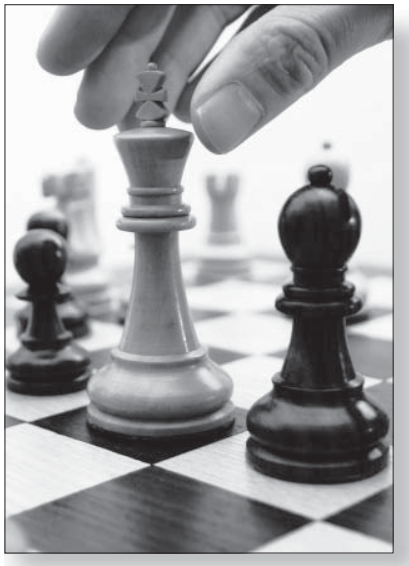
The Bench & Bar team included six members of the side that took part in the inaugural 1993 match: Robert Colquhoun (captain), John Purdy (former Australian champion), the Hon Justice Steven Rares, Gordon McGrath, Malcolm Broun and Ken Pride.

Terrey Shaw organised the inaugural 1993 contest and captained the first Bench & Bar team. Shaw, an international master and former Australian champion, represented Australia at a record nine biannual Chess Olympics, winning gold and silver medals. He read with current captain Colquhoun.

'I suggested we should have an annual Bench & Bar v Solicitors match and Terrey got the tournament off the ground. Terrey rang a solicitor, Ron Burnie, he had known since they were at North Sydney Boys High,' recalled Colquhoun. 'The Bench & Bar won the first five matches. The sixth was a tie and the solicitors have generally had the upper hand since.'

Terrey Shaw died on 5 December 1997, aged 51. In 1998 the trophy was renamed the Terrey Shaw Memorial Trophy.

The 2006 team was: Robert Colquhoun, Dion Accoto, Andrew Bulley, Alex Feldman, Paddy Jones, David Knoll, Tamir Maltz, John Mancy, Gordon McGrath, Ken Pride, John Purdy, the Hon Justice Steven Rares and Martin Watts.



Bar Hockey

By Edward Muston

The Legal Eagles still going strong at 50

This year marks the 50th anniversary of the Legal Eagles, the Gordon Hockey Club 6th grade team which was commandeered by Leycester Meares QC (as he then was), Gordon 'Bunter' Johnson and a colourful assortment of barristers, solicitors and students-at-law, 'shanghaied in various states of inebriation at the University Club on the night before each game' in 1956.

Since that fateful day, the Legal Eagles has maintained its status as a landlocked sovereign state within the confines of the Gordon Hockey club, primarily drawing many of its players from the NSW Bar and the ranks of Sydney's solicitors.

Over the years, the Legal Eagles' line-up has included many of the true giants of the sporting Bar. Justices Fox, Holland, Gyles and Graham and the likes of Masterman QC, Bellanto QC, Collins QC, Ireland QC, Callaghan SC, Pritchard, Ridley and Larkin have all taken the field for the Legal Eagles. Despite this, the team has been cruelly described as 'a sporting team that is not drawn together by the old clichés of athleticism or competitive spirit'. The inaccuracy of this statement is nowhere more apparent than the team's less than impressive record before the Sydney Hockey judiciary (which, thankfully, has in recent years been variously presided over by Callaghan SC, Pritchard and Larkin) and the strict adherence by team members to the Legal Eagles' code of conduct. Since its inception, the Legal Eagles has been governed by two important rules:

1. first, it is compulsory to go for a drink after the game; and
2. secondly, training of any sort is strictly prohibited.

As unconventional as this formula may seem, it obviously works. In the last 50 years, the Legal Eagles have managed to amass an impressive three felt pennants, having won grand finals in 1966, 1976 and 1997.

In what was shaping up to be a fairytale end to the team's 50th season, the 2006 Legal Eagles (which included McManamey, Scotting and Muston) successfully secured a spot Grand Final. Unfortunately, on this occasion the stars did not align (and I refer here to the aforesaid McManamey, Scotting and Muston) and the Legal Eagles were defeated by Monterey 5:1.

In no way perturbed by the disappointing end to the season, Legal Eagles past and present gathered together for a black tie dinner to celebrate the team's anniversary. The night was a great success. Amongst those in attendance were Brent Livermore (the current captain of the Australian hockey team who, fittingly, had two days earlier been defeated 4:3 by Germany in the World Cup final) and a 'wide' range of players from each of the Legal Eagles' five decades.

Everyone in attendance had assumed (if not hoped) that it would be a very long night. However, when Callaghan SC stepped up and invited five former players to each speak for a decade, no one expected that those representing the earlier years would take the invitation literally. At one stage it looked like the dinner may have to be stood-over part heard to enable further argument on the various amendments to the rules of hockey made between 1961 and 1964. Fortunately, at some point during the late 1970's things started to speed up and, by the time the Tattersall's Club threatened to call in the police to eject us from the premises, the legends, lies and various other gems which might loosely be described as the Legal Eagles' oral history had been well and truly shared.

Before the evening was formally brought to a close, a jersey signed by the current Australian Team was auctioned, with the sale proceeds going to the advancement of junior hockey in Sydney. Without wishing to detract in any way from Justice Holland's very generous purchase, one cannot help but agree with the observation of Collins QC that, if any of those in attendance were seriously concerned about the advancement of hockey in Sydney, they would have caused the Legal Eagles to be disbanded decades ago.

New South Wales Bar v Victorian Bar 28 October 2006

On a windy afternoon in late October, the New South Wales Bar and their Victorian counterparts met at the Kyeemah RSL hockey pitch in their annual battle for the Rupert Balfe-Leycester Meares Cup.

In what has become almost as much a tradition as the game itself, the Victorian Bar comfortably defeated the NSW Bar 4:1, thus walking away with the cup for yet another year.

While some may say that after six years the NSW Bar should be used to suffering defeat at the hands of the Victorians in this annual fixture (and to some extent they would be right), this year's loss was particularly disappointing.

The Victorians are at their most vulnerable when playing the away game. Having been informed that they would be a little short on numbers (and lets face it, the Victorians who turn up every year are not getting any younger) there were a few amongst us who saw this as an excellent opportunity for the NSW Bar to snatch a rare win.

Leading up to the game, the NSW selectors devised a team which, on paper, had all of the elements needed to take full advantage of the Victorians vulnerability.

Ridley had been brought up from the Yarra Valley to inject his aggressive style of play into the game or (at the very least) to start a scrap with one or more of his now fellow Victorians if the need for diversionary tactics arose.

Perpetual ring-in and former Malaysian national team member, Ganasan Narianasamy, was chosen to reinforce the NSW forward line.

Lawson and McWilliam were brought in on debut in the expectation that their inclusion would not only force the Victorians to play the game with some level of decorum but also:

- substantially add to the collective playing ability; and
- at least halve the average age;

of the team fielded by the NSW Bar.

In something of a coup, the selectors had managed to lure Gibson away from the NSW Solicitors' team in an off contract transfer, thus avoiding the need to pay any transfer fee. While Gibson claimed that he had 'let himself go' in the fitness department, the selectors had no hesitation in pairing him up with Giagios to create what should have been an impenetrable defensive wall.

Otherwise, the selectors were happy to again rely on the striking power of Callaghan SC, McManamey, Warberton, Jordon and Muston; the solid midfield combination of Scotting and Larkin; and a goalie who had to be issued an honorary practicing certificate for the day on the undertaking that he would not otherwise pass himself off as a member of the New South Wales Bar.

What the selectors had not banked on was the fact that Larkin (in a moment of weakness) had organised a number of ring-ins for the visitors. For reasons which shall forever remain a mystery, the individuals chosen to boost the Victorian Bar's numbers had actually played the game before and were pretty good. Prior to hit off, it was even suggested that Larkin had been observed passing a water bottle to the captain of the Victorian team. The allegation was quickly denied by Larkin, who assured his team mates that each of the ring-ins had 'been given appropriate instructions'. Whatever those instructions may have been, it quickly became apparent that they had not been 'appropriate' in any sense of the word.

Despite the unexpected opposition, the NSW Bar put up a good fight. In fact, while it may not have been reflected in the score line, the home side truly dominated the early part of the game. From hit off, the ball was channelled beautifully through the midfield by Scotting, tapping it off to Muston who, in turn, unleashed a full blooded shot on the back stick which, although poorly aimed, did make a nice sound when it hit the fence about three metres to the right of the Victorian's goal.

It was at this point that things took a turn for the worse. About two minutes into the game, the NSW team succumbed to the obvious effects of physical exhaustion, allowing the Victorians (or at least their ring-ins) to assume control. While it was hoped that 'fresh' legs from the interchange bench may have allowed the NSW Bar to claw back the advantage, sadly, not even Callaghan SC was able to turn the game around.

Just when it appeared that things could not get worse, Jordan was struck down by a mystery injury. With Australia's loss to Italy in the FIFA World Cup finals still fresh in their minds, the visitors cried foul, accusing Jordan of having taken a dive. Were he anywhere near the goal, the ball or any other player at the time of his fall the umpires may have agreed. However, in the end he unceremoniously dragged himself from the field and play was allowed to continue.

The home side tried everything. One of the Victorian ring-ins had turned up in a navy blue shirt. Certain that the confusion caused by the navy blue shirt (as opposed to NSW's sky blue and Victoria's black) had been responsible for at least one of Victoria's goals, Gibson demanded that the offending shirt be removed. In response to this, the umpires ordered that the offending shirt be removed from the field of play, but still things did not improve. In fact, a brief straw poll following the game would tend to suggest that the said player was far more off putting without his shirt than with it on.

Despite his injury, Jordan managed to again take the field in the second half. One suspects that he may also have suffered from an ear injury in his fall as, despite repeated offers of substitution, followed by requests and thereafter demands from Warburton that Jordan leave the field, Jordan battled on, appearing not to have heard the loud howls emanating from the NSW Bar's dugout.

Finally, towards the end of the game NSW broke through the Victorian defensive line. In fact, it was Scotting who, having received an uncharacteristically graceful pass from Ridley, tapped in a face saving goal for the home side.

After the game, we all enjoyed an excellent array of icy cold beverages and fried food (that was more fried than food). It was pleasing to see that, despite the typically heated battle which had just been played out on the field, the friendship and camaraderie that has come to characterise these games over the past years is still alive and well.

Thanks to the Victorians for travelling this year and particular thanks to Scotting who, as usual, did an excellent job of organising the event.

The Legal Eagles' 1966 Grand Final Winning Team

Fifth annual Supreme Court Concert

Banco Court, Monday 30 October 2006

Review by François Kunc

'We are sure of our case now' were the first words of the aria which began the fifth annual Supreme Court Concert. Bass Matthew Thomas opened the concert with the count's aria about litigation from Mozart's *Marriage of Figaro* to a capacity audience in the Banco Court on Monday, 30 October 2006 in the presence of Chief Justice Spigelman and Mrs Spigelman.

As it was the fifth such event, it is fair to say that this concert has become a regular fixture on the court's calendar. Organised (and genially compered) by Justice George Palmer, the concert brought together five professional opera singers at the start of their careers and an orchestra of about twenty young musicians. The concert draws on the resources of Pacific Opera, a not for profit company which seeks to bridge the gap between tertiary musical studies and the world of professional opera.

The orchestra was conducted by Heinz Schweers, an economics and law graduate from Sydney University now pursuing a career as a conductor and composer. In a finely judged performance of Mozart's *Divertimento in F* the orchestra proved itself to be a 'court' orchestra in both senses of the word, giving a real sense of the size and sound of an orchestra of the kind Mozart might have heard, as well as having the peculiar distinction of playing in a court room. The Banco Court displayed an excellent acoustic no doubt rarely utilised by its daytime occupants.

In nearly an hour and a half of music, many periods and styles were presented. Opera favourites included two Puccini classics - Mimi's aria from La Boheme sung by Catherine Bouchier and *O Mio Bambino Caro* from *Gianni Schicchi*, as well as a stirring rendition of *Eccomi prigionero* by tenor David Corcoran from Verdi's otherwise forgotten opera *Il Corsaro.*

While the overall standard of the evening was very high, for this reviewer there were three particular highlights.

First, mezzo soprano Margaret Plummer gave an outstanding performance of *Una voce poco fa* from Rossini's *Barber of Seville*. The quality of both her vocal and character acting as she sang this fiendishly difficult aria gripped the audience. She is an artist who deserves to be watched in the years ahead as her voice reaches its full maturity.

The second highlight was the participation of Marshall McGuire. Marshall is Australia's foremost harpist and enjoys a major international reputation. In addition to playing as a member of the orchestra, Marshall performed a movement of Handel's *Harp Concerto in B Flat* and three movements of Benjamin Britten's *Harp Suite in C*. He also accompanied soprano Harriet Marshall (a criminal lawyer before she commenced her musical studies) in her fine performance of *O mio bambino caro*.

Finally, there were three examples of work by Justice Palmer himself. Since 'going public' several years ago, his Honour has been recognised as one of Australia's leading composers. Members of the orchestra turned soloists to play the third movement of his effervescent *Wind Quintet*. We also heard the singers and orchestra in two extracts from the Mass '"A Child is Born' which will be released with other Palmer works on a new CD from ABC Classics during 2007.

If this fifth annual concert is anything to go by, the sixth should not be missed. The event provides a wonderful opportunity for the legal profession to support the rising generation of classical performers. The music lovers among us owe Justice Palmer and his collaborators a debt of gratitude.

Verbatim

State of New South Wales v Ibbett [2006] HCATrans 463

Mr Garnsey: Yes, your Honour. The cases that I am about to take your Honours to do consider punitive damages, even though they are noted under the heading of 'Aggravated damages'. The two cases are *May v Western Union and Brame v Clark*. They are noted in note 31 on page 93 under paragraph 123. Could I hand your Honour nine copies of *Brame v Clark*. I should preface this with saying this is a 1908 case so - - -

Gummow J: They were better then.

Mr Garnsey: The rationale, we say, is applicable here and now. The precise expression of views is perhaps not what would be considered entirely appropriate in this day and age, if your Honour pleases. Looking at *Brame v Clark*, your Honour, in the second column on page 418 at the top there is the complaint set out which gives the facts:

> the defendant . . . did unlawfully and forcibly, wickedly, and maliciously enter upon a certain lot or parcel of land, then in the possession and occupancy as a residence of plaintiff, with the unlawful, malicious, lascivious, and wicked intent and purpose to seduce, debauch, and carnally know one Lovetta Brame, the wife of plaintiff - - -

Gleeson CJ: You mean that would nowadays be expressed more briefly.

Mr Garnsey: I beg your pardon?

Gleeson CJ: It does not matter.