

THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2006

# barnews



2006 Sir Maurice Byers Lecture:

The implications of the Constitution

The Junior Bar

Farewell the fair-go country

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This editorial was written soon after the Bench and Bar Dinner. That function each year, with over 700 in attendance, underlines the 'collegiality' of the profession and, also, the historic link between Bench and Bar. As has been observed on numerous occasions, that particular relationship is symbiotic and the competent and ethical discharge of the respective functions of Bench and Bar are rightly seen as essential ingredients in the administration of justice in NSW.

The relationship between Bench and Bar is often discussed in the context of judicial appointments with the Bar being, of course, the traditional breeding ground for the Bench. That is highly likely to remain the case for reasons which have nothing to do with professional preferment. Rather, it is for reasons that flow from the basic fact that, in our common law tradition, citizens' rights are determined by judges in court proceedings. Cases are conducted according to technical rules of evidence and procedure, which have profound and entirely legitimate rationales. In such a situation, it is not only entirely appropriate but essential that the person presiding on the occasion of the determination of rights and obligations has a deep familiarity with and mastery of the trial process.

That observation is not, however, to advance the proposition that the necessary skills for judicial office are to be found solely within the realm of

barristers. It is in that context that Justice McColl's recent paper 'Women in the Law', reproduced in this issue, warrants careful study and is a very valuable contribution to what is rapidly becoming an important public debate on the topic of judicial appointments, most notably in Victoria and, more recently, in the federal sphere. That debate will be given added piquancy in New South Wales if the March announcement by Attorney General Debus to put a Charter of Rights for NSW 'on the agenda for discussion' gains traction. Passage of such an Act would inevitably intensify media scrutiny of judicial decisions, making it all the more important that only judges of the highest calibre are appointed to the Bench.

Any erosion of confidence in the judiciary (including confidence in appointments to the judiciary, and the mode of such appointments) at state and/or federal levels inevitably undermines respect for the rule of law and the role of the courts as a bulwark of liberty. Any erosion of public confidence in the mode of judicial appointment also has the clear potential to undermine institutional morale. The matters touched upon in Justice McColl's paper are likely to excite and deserve further debate. *Bar News* invites contributions in forthcoming issues to that debate.

This issue of *Bar News* has as its focus the junior Junior Bar and it is hoped that

what is written will be of interest not only to junior practitioners but also to more senior members of the Bar involved formally or informally in the mentoring or tutoring of junior barristers. But there is much else besides in this issue which highlights the richness and diversity of the profession across many fields. In particular, there are a number of forcefully expressed opinion pieces, perhaps symptomatic of the fact that, in the current political era, there is an increasing call and role for the expression of articulate and independent points of view.

The engagement of members of the Bar in wider public affairs is exemplified by none more so than Hughes QC who, in this issue, contributes a reflection on former judges of the Supreme Court which, for younger practitioners, brings to life and lends colour to many of the names one reads in and cites from in the *New South Wales Law Reports*. This issue also features the publication of Jackson QC's masterly Sir Maurice Byers Address – 'Implications of the Constitution'.

The theme for the Summer Edition of *Bar News* will be expert witnesses, a topic that has recently excited not only debate but also changes in the rules and practices of certain courts. Contributions on this important practical topic, which also has potentially important implications in terms of principle for our adversarial tradition, are invited. They may or may not be placed in a hot tub.

Andrew Bell

## Apology to Justice Sheahan

The Summer 2005/2006 issue of *Bar News* published an article by Anna Katzmann SC entitled 'Restricting access to justice – Changes to personal injury laws: the New South Wales experience'.

The article was critical of the results of an inquiry, the terms of reference of which included identifying 'ways to reduce the incentive for pursuing common law claims'. In publishing

this material it was not the intention of either the author or the New South Wales Bar Association to criticise or call into question the integrity or independence of the chair of the inquiry, the Hon Justice Terry Sheahan AO.

The New South Wales Bar Association apologises for any unintended distress caused to Justice Sheahan from the publication of this article.

# The sesquicentenary of responsible government

By Michael Slattery QC



The one hundred and fiftieth anniversary of responsible government in New South Wales has passed, but with little public attention. It was an important anniversary, not only for the people of this state, but for our Bar as well. It reminds us that nineteenth century barristers expressed a vital, independent voice on the public issues of the day and nurtured sound law reform proposals for the benefit of the community. We still do.

The Bar's contribution to present day public debate concerning the administration of justice is remarkably similar to the one it made at the advent of responsible government. Then, as now, the Bar's role was to advance reasoned, expert opinion independent of party or factional interests. Let us look at both eras.

The New South Wales elections of March 2007 are looming. A frenzy of law and order issues has already surfaced in public debate. In the last six months mandatory life sentences for the killing of police officers, the indefinite detention of serious sex offenders after the expiry of their judicially imposed sentences and the introduction of majority verdicts have been proposed or passed into law. All were opposed by the Bar. Our judiciary has been attacked as a class for being 'lefties', 'soft' or mere 'political appointees'. The Bar has responded to these baseless descriptions of our judges.

The present agitation of law and order issues thrives because of the collective

assumptions that we are somehow beset by both increasing personal insecurity and judicial weakness. Both are inconsistent with two indisputable facts.

First, many types of serious crime, such as murder, have declined in this state over the last ten years. According to the Bureau of Crime Statistics and Research, there were 114 recorded murders in NSW in 1996. In 2005 the number had dropped to just 75. When adjusted for population growth over the same period, the murder victimisation rate declined from 1.9 to 1.2 per 100,000 people.

Secondly, between 1998 and 2005, the state's prison population rose by 2,800.

This average annual increase of 400 inmates is equivalent to one additional correctional centre *every year*. A probable explanation for the increasing prison population is that judges at every level have been sentencing more people to longer terms of imprisonment.

Together, these statistics indicate neither a decline in personal security nor any obvious judicial weakness. The Bar will continue to add its voice to the 'law and order' debate and draw attention to facts such as these, even though they are not being advanced by either side in politics.

In 1856 the barristers practising in this state were taking a similarly important and independent view of the public issues of the day. W C Wentworth, a leader of the Bar at the time, also led the movement for colonial responsible government, with a bicameral legislature and a directly elected lower house. So too did the eminent John Darvall QC, who fought the creation of a colonial aristocracy to fill the upper house of the new parliament. Another leading supporter of the cause was the attorney James (later Sir James) Martin who came to the Bar in 1856 and became attorney general and later chief justice of New South Wales.

Responsible government and the democratic ideas that it represented were deeply opposed by pastoral interests and the 'exclusives' who feared it would displace their influence with the

governors and the Colonial Office. They also feared democratic rule by the mass of emancipists. The writings and advocacy of the barristers of the day are not to be explained by any alignment with either 'exclusives' or emancipists. Whilst not always agreeing among themselves about the specifics, Wentworth, Darvall and Martin steered responsible government through committee hearings and legislative drafting from 1853 to 1856 with unique determination. Wentworth even traveled to London in 1855 with the final draft Bill to ensure that the Macarthur faction did not inspire any second thoughts in the Colonial Office.

Independent advocacy by barristers for the public good was an essential condition of the introduction of responsible government in this state.

## Anti-terrorist legislation and detention without trial

The events of the mid-nineteenth century also offer us a useful caution against any addition to modern legislation authorising the detention of citizens without trial for any purpose. Twice in the last six months, in the *Anti-Terrorism Act 2005* and the *Crimes (Serious Sex Offenders) Act 2006* the New South Wales legislature has empowered the state executive to detain citizens without trial. The Bar opposed the introduction of both pieces of legislation.

Barely thirteen years after the introduction of responsible government, New South Wales illustrated a very different approach to anti-terrorist legislation. It is not much remembered now, but a major terrorist attack took place in Sydney on 12 March 1868. On that day an alleged Fenian, Henry O'Farrell, shot and wounded Prince Alfred, Duke of Edinburgh and the son of Queen Victoria at Clontarf in Sydney. The prince survived. Though perhaps more mad than Fenian, O'Farrell was quickly tried, convicted and executed on 21 April. The young responsible government of New South Wales reacted to this incident by passing a piece of legislation, *The Treason-Felony Act 1868*, which was the nineteenth century equivalent of our



Calvert, Samuel, 1828-1913. Attempted assassination of the Duke of Edinburgh at Clontarf, NSW.  
Photo: National Library of Australia

2005 anti-terrorist legislation. With a sunset clause of two years it streamlined trial procedures for treason and added to local sedition laws (including the introduction of the rather quaint seditious offence of failing to stand during the loyal toast). This legislation was widely regarded as an over-reaction and was not renewed after the expiry of its sunset clause.

Most importantly though and in the face of an actual local terrorist attack in 1868, it did not occur to the mid-nineteenth

century mind to legislate for the detention of citizens without trial for any purpose, even the protection of the Crown and state officials. There was good reason for this. In 1868 the horrors of the French Revolution and the detentions of the Jacobin terror of the 1790s were still within living memory. The legislators of the time had a real appreciation of the potential dangers of an executive power of detention without trial and they did not authorise it. Perhaps our modern day legislators will need to experience the actual misuse of

the power conferred by the *Anti-Terrorism Act 2005* before it will be confined or repealed.

#### New barristers

Andrew Bell and the Bar News Committee are to be congratulated for presenting this edition with a special focus on the very Junior Bar. Bar Council has authorised the publication in this edition of the data gathered by the New Barristers Committee on early practice at the Bar better to inform those now starting at the Bar. I wish to thank the New Barristers Committee for all their work in collating and analyzing this information.

The articles here by Maragaret Holz, Hugh Stowe, Chris Wood, Kylie Day, Louise Byrne, David Ash, Paul Daley and Geoff Hull give excellent practical advice and convey some of the fear and excitement of starting an independent practice of one's own at the Bar.

It should be encouraging to our most junior members to know that the uncertainties and personal demands of life at the very Junior Bar still seem very close to what they were when I commenced practice in 1978. Creating a successful practice is as attainable now as it was then. Whatever the challenges, it should also be reassuring to know that the Bar is a community of scholars, a community of competitors and, most importantly, a community of friends.

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# Maintaining the rule of law

## The role of the attorney general

The Hon Bob Debus MP, Attorney General of New South Wales, delivered the following address at the World Conference of Advocates and Barristers in Hong Kong on 15 April 2006.

The role of the attorney general in common law countries, it has often been pointed out, is a strange hybrid of lawyer and politician. We straddle the world of the parliament, the judiciary, and the demands of public life. As hybrid beasts, we may find ourselves hunted like the crocodile and ravaged in the corn (in the words of Bob Dylan): the universal target of hunting parties, our hooves, pelts and horns the proud trophies of some media baron or political rival.

As attorney general, I find myself called upon to explain and justify the peculiarities of the law to my parliamentary colleagues: to explain to the judges the foibles and irrationalities of the media. And explaining – and where possible justifying – what I may venture to call the foibles and irrationalities of the law to victims groups and the wider public.

In the words of another singer, the Man in Black, we walk the line. And an attorney who strays from the line – who veers too far in the direction of populism or of politics – can play a serious role in undermining the separation of powers.

To mix my metaphors still further, instead of a Jedi Knight striving to preserve the rule of law and the liberty of the subject, it is too easy to go over to the dark side of the force: to become Darth Vader.

I venture to suggest that the current attorney general of the United States, using his knowledge of the law to find legal ways to justify and exonerate torture of suspects in the name of the war on terror, is well on the way to presiding over the Death Star.

### History and context

But before I elaborate on my ruminations on the role of the attorney general in modern society – for whatever value those may have – I should perhaps give you a little of the historical context as to the legal situation in the state of New South Wales.

NSW, like Hong Kong, is not only a former British colony, with the inheritance of English legal traditions and customs; but established as a former English penal colony, in effect a prison, our stately sandstone courthouses, police stations and prisons built on the labour and suffering of chained Irish revolutionaries, London pickpockets and Liverpool prostitutes.

The first attorney general of New South Wales was a half pay officer with service in the Napoleonic war, Saxe Bannister. Bannister arrived in the colony in 1824 and left two years later after fighting a duel with Robert Wardell, a lawyer and the editor of *The Australian* newspaper, an adventure from which both men emerged unscathed.<sup>1</sup>

The establishment of responsible government in 1856 altered the attorney general from a government official to an elected minister.

The question of whether the attorney general should be a member of the Cabinet was the source of some

disagreement in the colony. The attorney was in and out of Cabinet until 1878, when the premier of the day (Farnell), having found it awfully difficult to convince a member of the Bar from the lower house to accept the office of attorney general without a promotion into the Cabinet, did so.<sup>2</sup>

### Contrast with British AG

To this day the attorney general of NSW remains a member of the Cabinet. This is of course in contrast to the British circumstance.

Over the last 150 years the British position has moved closer to what has been described as 'independent aloofness'. This is taken to mean that the attorney general should not be involved in questions of government policy, should not engage in robust political debate except in relation to his portfolio, and should be generally non-confrontational with respect to party politics.<sup>3</sup> The attorney's role is intended to be that of a guardian of the public interest.

The present British attorney general, Lord Goldsmith, is perhaps best known for the advice he provided Prime Minister Blair on the legality of the Iraq War. He was widely reported at the time to have warned the prime minister that the use of force against Iraq may be illegal and suggested that UN approval be sought. What a sensible fellow.

The point perhaps is that detachment from the dictates of Cabinet solidarity can improve the transparency of critical decision-making processes. Much of course depends on the individual from whom the information is sought. The recent British experience stands in stark contrast to the apparent conduct of the attorney-general of the United States, who is in Cabinet and whose advice on a range of matters associated with the Iraq War was tendentious to say the least. I will return to this episode in US history shortly.

### Australia / NSW

Although there are striking practical and political differences between a British



'We are the Jedi Knights of the politico legal system'



and an Australian attorney general, Australia's adherence to the Westminster system has been powerful and remains so.

Our Supreme Court judges parade through the streets at the start of law term in their scarlet robes and long horse hair wigs, after attendance at a ceremonial Anglican church service. Only recently have services at the churches of other faiths been added to the pageantry of the calendar.

Our judges are appointed by the governor on the recommendation of the attorney general of the day, after discreet consultation but no public process – unlike of course the American system. We do not have a process where judicial nominees are vetted by a public committee – some may say to our detriment.

On the other hand, we do not have the spectacle of judges running for election and conducting million dollar advertising campaigns attacking each other's sentencing record – I am bold enough to assert that this is to our very great advantage.

I shall try not to weary you much further with our particular circumstances but it is also relevant to know that New South Wales is Australia's most populous state, and the one most afflicted by tabloid journalism. Indeed, New South Wales has the distinction of having exported to London and New York eminent practitioners of the tabloid art of which one of the main staples is the law and order scare or moral panic. Lenient sentences, paroled paedophiles, overly comfortable prison conditions are their meat and drink. It has been an essential feature of recent election campaigns that the major political parties seek to outdo one another in calling for tougher sanctions against offenders.

In our system as in many other Commonwealth countries, the attorney-general of the day, as I mentioned earlier, is called upon to straddle law and politics with differing degrees of ease and success.



The Hon Bob Debus MP, Attorney General of New South Wales delivers his address at the conference in Hong Kong.

#### Powers of a NSW attorney general

The attorney has the right to represent the state in major constitutional cases and indeed retains the right of appearance in a private capacity. My predecessor, an eminent QC, exercised the right to argue a case in person from time to time. It must be said to have had a very alarming effect when he appeared in full regalia, without warning to argue a routine case before a local magistrate or a perplexed Fair Trading Tribunal.

The attorney general in NSW until very recently decided who among the leaders of the Bar would be elevated to the ranks of silks or QCs. Several were audacious enough to confer this privilege upon themselves.

More seriously, the attorney in NSW until recently had the power to make key prosecution decisions, including the ability to 'no bill' cases. The creation of the director of public prosecutions in 1986 has greatly reduced the potential for politicisation of prosecution decisions, although the attorney retains residual powers which could be misused and are generally held in check more by convention than legislation.

The dangers inherent in political interference in prosecutions are, of course, only too acute.

#### Role of modern attorney general

Having now mentioned some of the mysteries of attorneys general past I propose to sketch an outline of what I consider to be the mark of a very modern attorney general.

I am a person of the left, a pre-New Labour Labor Party person who believes that in general the solutions to social problems do not lie in putting more disadvantaged people in prison. I am a person who believes in investing in more teachers rather than more police, more assistance for the poverty stricken single mother rather than alleging welfare theft. In the modern world these views are so marginal as to be extremely eccentric.

However, I have found that among other civil libertarians, like minded and educated people, there can be a very limited understanding of the media and the political process that result in increased sentences and a more punitive approach. The legal profession, and middle class professionals generally, I believe do not sufficiently understand the power and sophistication of forms such as talkback radio or tabloid newspapers.

As a lawyer I was trained in a rather stern black letter law school, which valued adherence to the principles of English law as back far as the Magna Carta and beyond. Our general credo was that if a

legal principle was good enough for William the Conqueror, it was good enough for us.

However, as attorney general I have also found it to be my role to ensure that legal principles are not preserved simply because they are venerable or reflect the stature of the court.

#### Sexual assault

In NSW less than 10 per cent of the more than seven thousand reports by victims of sexual assault result in guilty verdicts.

It's an entirely unacceptable record. And it is cold comfort to note that of other jurisdictions. *The Guardian* newspaper for example recently reported (30 March 2006) that about five per cent per cent of rapes reported in England and Wales ended in a conviction.

While the great majority of these complaints do not proceed as far as charges by police it is undeniably the case that for the small percentage of alleged sexual assault victims whose case reaches trial, the processes of the court and the legal profession can have a most traumatic effect.

The court's processes can be unsettling and can defeat the will of a spirited, honest complainant.

The adversarial system can mean that the victim is treated as at best an irrelevance,

whose interests are not consulted in the process of prosecution or of scheduling court dates. At worst, the victim of sexual assault will be treated by defence counsel as the enemy and be subjected to massive and hostile attack under cross examination.

The justifiable – indeed laudable – concern of our criminal justice system to preserve the rights of the accused and the presumption of innocence can and has resulted in multiple trials, retrials and appeals.

These cases have a propensity to become the catalyst for powerful media attacks upon the judiciary and the courts, the genesis of easy slogans attacking our legal system.

Many lawyers, and certainly the defence Bar, are inclined to dig in at this point. They see the protection of the rights of the accused as the pinnacle of the criminal law, and resist what they see as any erosion of those rights.

I on the other hand don't see much point in a sexual assault victim having anxiety and fear levels elevated as a result of arcane courtroom processes.

Victims of crime should not be treated as simply another witness in the parade of witnesses. This is not to say they should be treated with deference, but with simple respect and courtesy.

In NSW we have made changes to prevent – as best we can – the re-victimisation of a complainant. These include:

- ◆ preventing an unrepresented accused from cross-examining victims and ensuring that improper questions put to witnesses in cross-examination are disallowed
- ◆ enabling victims in sexual offence proceedings to use alternative arrangements for giving evidence, including CCTV or video link, and screens or other seating arrangements to shield the complainant from the accused.

Although these measures are opposed by various legal purists, they do not frustrate or distort the justice process. They assist it. Ultimately, we hope that a range of reforms – encompassing health, law enforcement and court processes – will see more people come forward and more safe convictions.

#### Victims

Very often, as I have already hinted, innovations are criticised by the legal profession as simply pandering to the mob. My experience, to the contrary, has been that it is more than possible to make reforms which accommodate legitimate community views without doing violence to principles we lawyers hold dear. Reforms of which even William the Conqueror would see the good sense.

The New South Wales Government has, for example, systematically introduced Victim Impact Statements into the courts. When these measures were first adopted, there was strong criticism from the profession that these statements would dangerously distort the conduct of a criminal trial. It was alleged that statements about personal loss would see an escalation of sentences and give too much weight to the victim's interests.

What has instead happened is that victims and their families are contented to read a short, court-approved statement that means they have not been entirely excluded from the trial process.



The Attorney General chats with Eric Martinega of the Zimbabwe Bar.



As another example, a matter now before the New South Wales Parliament is the introduction of majority verdicts in criminal trials. My government has proposed verdicts of eleven-to-one. There is considerable debate about this measure, with some claiming the change will result in the certain imprisonment of the innocent. I have had a most lively public debate with my local Bar Association on the subject, with whom I normally have the most cordial relations. We have been reduced to quoting bits of the Henry Fonda movie *Twelve Angry Men* at each other in the broadsheet press – to the bafflement of almost everyone under 40.

Others see it as an appropriate administrative reform that will have no impact other than to ensure that lengthy criminal trials are not aborted at the last minute due to one eccentric or frankly mad juror holding wildly insupportable views. I subscribe to the latter view.

In these situations, I see it as the role of the attorney to press for principled and well thought out law reform, alert to the legitimate concerns of the public but without succumbing to the more simplistic solutions, which may be proffered on talkback radio. This is not always an easy line to draw, and in my own case it will be for others, and history, to judge, as to whether I have succeeded.

#### Tabloid media

Talkback radio is a powerful phenomenon in Australia, as it is in a number of other countries. And it is a phenomenon we ignore at our peril.

Talkback radio is an important means by which conservative opinion, especially in the area of law and order, is galvanised. I have seen it described in a recent book by David Foster Wallace<sup>4</sup> as a form of electronic town meeting where emotions are inflamed and arguments are refined.

On talkback radio opinions about courts, judges and the law are aired, rephrased and boiled down to a series of propositions with which one may disagree but which are coherent in their

own terms and which are espoused in daily life with enormous confidence and energy. The liberal intelligentsia – at least this is true in Australia – are meanwhile reading broadsheet newspapers and listening to classical music on FM radio, oblivious to the debates raging elsewhere.

I know from personal experience that an intelligent and articulate talkback radio host, or tabloid newspaper editor, can muster a campaign virtually overnight of thousands of letters or hundreds of telephones and faxes. In one case in my personal experience after a magistrate imposed what was widely considered to be a lenient sentence upon a young man who had tortured a kitten, more than fifteen thousand letters were received in a week. I might say that this is fourteen thousand, nine hundred and fifty more letters than were ever received in my office protesting about atrocious treatment of a human being. But this is a curiosity of human nature.

The response of a lawyer in such a case may well be to ignore the fifteen thousand letters about the kitten: to say that under no circumstances should the torture of a kitten be accorded a harsher penalty under the law than the torture of a human being.

The response of a politician will be to assume that for every hundred people writing letters about the kitten, there will be ten thousand in the silent majority who think that the torture of a kitten is abhorrent, and who will welcome the announcement of new laws incarcerating perpetrators. And vote accordingly.

The thankless task of an attorney general is, somehow, to produce a principled outcome which nevertheless addresses the deeply felt concerns of the public.

The response of many well educated, liberally minded legal professionals to dilemmas of this kind is to adopt a tone of vague hauteur about the tendencies of the mass media and a lofty view that politicians should simply take the high moral ground and ignore such campaigns. As a twenty year veteran of this sort of culture war, I can say that such an attitude is simply impractical.

In a democracy, the public will not tolerate being told that its fundamental beliefs about law and the judicial system are wrong and that they should trust their betters to know what is good for them. We have to engage with publicly held beliefs and address, if we can, the underlying problems of social unrest and public disorder which are the circumstances that actually make people receptive to punitive and simplistic solutions. But this can never be at the cost of compromising our obligations to ensure the fairness and impartiality of the law.

Judicial and prosecutorial decisions in their nature depend on the fine balance of the use of discretion and of insight, based on the evidence, into individual circumstances. When the use of such discretion is tainted by raw political considerations – the desire to punish a political rival, to show leniency to a political enemy – the system totters.

The same is true when an offender is given a harsh sentence simply because his or her trial is heard in an election year.

For this reason, although many other politicians may never understand such a position, it is the traditional role of an attorney general to defend and preserve the independence of the judiciary. In Australia, this function has been the occasional subject of lively debate. The convention is that judges do not comment on their decisions outside court. Their reasons are given in their judgments, from the bench, and it would be entirely inappropriate – and possibly appellable for them to expand upon those reasons outside the courtroom.

When an individual judicial decision – a sentence perceived to be lenient, for example, causes outrage and front page headlines – convention has it that it is for the attorney-general of the day to speak out and defend the institution.

This is a convention that I have adhered to, I would say, with more zeal than many of my generation of attorneys general. In fact, my contemporary as Commonwealth attorney general, a

prominent QC in his own state and one steeped in the conventions of the law, explicitly took the view that in the modern age it was for judges to defend themselves as they may. He encouraged them to speak out if they felt so moved, but strongly asserted that if he disagreed with a judicial decision, far from defending the judiciary, he preserved his right to attack the errant judge on behalf of the executive.

As a contemporary attorney general, my view has been that it is not the role of the attorney to defend each and every decision. Some decisions can be in fact puzzling, and in that situation one can only throw oneself on the mercy of the appellate courts.

But I do defend the institution of the judiciary, and will stand against the torrent of ill informed and emotional attacks upon judges which pour out every day. Attacks often made by those who have not sat through a single day of evidence.

Why does this matter? I think it matters because we are at a juncture in our history when, under the threat of terrorism, the liberties of ordinary citizens are being stripped away. The judiciary is one of the vital defences of the liberty of the subject.

When preparing for today's discussion, I had before me some articles denouncing the recent role played by the attorney general of the United States, Alberto Gonzales, to whom I alluded earlier.

Thirty years ago President Richard Nixon and his attorney general were brought to ruin and disgrace when it was disclosed that they had supported illegal surveillance activities.

Today's White House has 'pushed the boundaries of executive power in ways that make Richard Nixon's White House look like a model for the system of checks and balances'.<sup>5</sup>

Under the ever expanding umbrella of response to terrorism, attorneys general across the Western world are being asked to sanction unprecedented expansions of police power.

Frequently, those who are to be the subject of torture, of surveillance, of preventative detention are unattractive, marginalised members of society. The ordinary citizen, seized by an entirely legitimate fear of bombs in subways and hijackers on planes, is very sympathetic to the claim that police need unprecedented powers.

It is the task of an attorney general, in my experience, to point out that there is no guarantee that such extraordinary powers will not be used in due course against the ordinary citizen. That they will not be used corruptly. It is all too easy for those engaged in the war against terror to erode and undermine the application of judicial scrutiny, the requirements for due process, for evidence, for checks and balances.

And I would argue that they are aided in this quest by the too easy acceptance of various popular slogans abusive of the judiciary.

There has probably never been a time in modern history that judges and individual judicial decisions were not criticised in newspapers, on street corners and in pamphlets. Some such criticism is surely an indicator of a healthy democracy.

But we ignore at our peril the vital role of the judiciary in protecting the freedoms of the citizen.

In the United States, we have recently seen the unedifying spectacle of an attorney general assisting the president in evolving a legal framework for torture and secret prisons; for warrantless surveillance of American citizens. He has done so in the face of opposition, particularly from Senator John McCain, a man who withstood violent torture over a period of five years by his captors in North Vietnam (withstood it, not least, because of his belief that his own side would not stoop to such barbarism).

Conversely, I was recently reminded by the American historian, Alfred McCoy<sup>6</sup>, who has written extensively on this subject, that late last year, the English House of Lords, when asked to consider the deportation of Muslims convicted on evidence which had been procured by

torture by foreign officials, set down as a 'bedrock moral principle' that torture was anathema to the English legal system.

### Conclusion

The rule of law is the foundation of civil society. Without it, we are reduced to a Hobbesian state of nature, red in tooth and claw. It is all too easy to undermine the faith of the citizen in the fairness and integrity of the courts, and also all too easy for an astute politician to distort the law and legal processes to his or her own ends.

Our present system to an extent depends on the creative tension between the courts and the parliament, and the scrutiny of the media. The role of the attorney general in many ways traverses this web of countervailing forces. From personal experience I can say that in the heat of battle the 'creative' element of creative tension is not always readily apparent. However, after more than a decade at the centre of the most heated Australian law and order debates, I can say that very few attorneys general have gone to the dark side. We are the Jedi Knights of the politico legal system and will strive to remain so.

<sup>1</sup> CH Currey, *Australian Dictionary of Biography*, Vol 1, 1788-1850, pp. 55-56.

<sup>2</sup> 'Parliamentary reports', *Sydney Morning Herald*, 29 March 1878, p.3.

<sup>3</sup> LJ King, 'The attorney general, politics and the judiciary' (July 2000) 74 *ALJ* 444 at 445.

<sup>4</sup> David Foster Wallace in *Consider the Lobster and Other Essays*, Abacus Books, 2005.

<sup>5</sup> see Ratner, M. *Above the Law* [www.salon.com/opinion/feature/2006/03/31](http://www.salon.com/opinion/feature/2006/03/31).

<sup>6</sup> McCoy's latest book is *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (Metropolitan Books, The American Empire Project, 2006). [Editor's note: A copy of McCoy's book will be reviewed by Toner SC in the next issue of *Bar News*].

# Farewell the fair-go country

By John de Meyrick MBE

There has always been some disagreement as to whether New Zealand, South Australia, New South Wales or the Australian Government was the first to establish a comprehensive system of industrial arbitration.

But there can be little doubt that from the outset in the early 1900s it was the Australian Government that introduced to the world this form of workplace justice. And although it was to be adopted and experimented with in some other countries it has never been embraced elsewhere with quite the same dedication or measure of acceptance.

Now, after more than 100 years in which it has been integral to the Australian way of life and its economy, and firmly embedded in its psyche of a 'fair go', that system has been effectively disrupted, if not altogether negated, by the changes which the federal government has made to its industrial relations laws.

So conscious is the government of the sensitivity of these changes that it spent over \$50m in a pre-legislation advertising campaign to soften up the public to what is to come. It also proposes to spend a further \$452m on their implementation.

According to the rhetoric (and the 691 pages of legislative amendments that have since been enacted) what is to come is not only good for the economy and good for employers, but also good for the workers who are going to prosper like they never have before. Indeed, it seems that what is proposed will unshackle workers from the chains of a system that has been holding them and the country back for years.

Now workers will be free to go out there in the market place and do some hard-nosed bargaining for themselves. Labourers, clerks, shop assistants, mechanics, juniors, et al, will be free to negotiate their own contracts with their employers who will be constrained to bargain in good faith under (quote) 'a fairer system with better balance in the workplace for employees and employers'.

So what's all the fuss about? Is it not a good thing if the system were simpler, fairer, more flexible with more choices, less rules, regulation and red tape, existing awards preserved, and with minimum wages, the right to join a trade union, and a number of specified conditions assured?

Why would this not make for a happier, fairer and more agreeable relationship

between employers and their employees? Why does it not make good sense for all concerned and for Australia?

For that matter, what is so precious about industrial arbitration? They don't have it in that powerhouse economy the USA; nor is it part of the system of any of our Asian neighbours. Are their workers any worse off for the want of it?

On the other hand, if the present system has been holding back the nation and the ability of its workers to do so much better for themselves, why has the Australian economy been booming now for so long, with very low unemployment and the lowest incidence of industrial unrest on record whilst many of our trading neighbours have not been so buoyant?

In short: has industrial arbitration and trade unions passed their used by date, or are we headed back to the 'bad old days' of social inequality and confrontation?

Let's revert for a moment to the pre-1850s. Up until then workers had suffered centuries of slavery then various forms of feudal serfdom and servitude before eventually there emerged in time for the Industrial Revolution and thereafter as the basis for workplace relations: the contract of employment.

Since then every employee throughout the industrialised world, from the lowest paid worker in the country to the managing director of the largest corporation, has a contract of employment, whether written on a piece of paper or just made by oral agreement and/or by performance.

The present changes have not been needed in order for employees to negotiate those contracts. Every worker has always been free to go out into the market place and enter into some hard-nosed bargaining as to the terms and conditions of their employment. After all, contracts are entered into by mutual agreement, and when one is (say) selling a used car or selling a house, one can



Industrial relations rally at Martin Place.  
Photo: Britta Campion NSW / News Image Library



always haggle for a better price. Why can't that be the case when it comes to negotiating one's employment?

Well, that is not quite how it works in the industrial relations market, especially at times during a labour surplus where employers have little difficulty in filling jobs. And the more ordinary the job and the larger the pool of applicants the more one-sided is the bargaining, if any.

The fact is few employers advertise a position on the basis of inviting applicants to sit down and work out the terms and conditions of their agreement. In virtually every case it is a matter of take it or leave it. Even at management level.

That's how it was for centuries, and to a very large extent still is. Although the gradual intervention of governments over the years has provided some commonly applied laws in relation to such things as workers' compensation, public holidays, annual leave, standard hours of work, superannuation, etc.

In Australia as elsewhere, contracts of employment have been made subject to a variety of these common rule conditions and requirements. Such regulation intrudes into the otherwise private bargaining relationship between the parties, with no employer or employee being able to bargain them away.

However, in addition to these common conditions, there has been since the beginning of last century in Australia (until the new changes were enacted) the overall supervision of industrial relations under a system of arbitration that has provided by way of industrial awards, a great deal more benefits and protections. Such conditions as minimum margins for skill, overtime penalty rates, casual work loadings, meal breaks, allowances for shift work and hazardous and dirty conditions, etc.

Leaving aside the kind of benefits that a government may care to apply to its citizens generally by way of legislation,

in all other such matters of employment it must be recognised that there are very few workers who are in a position, even with the help of a trade union, to negotiate with their employer the particular conditions of their contract on anything like equal terms.

Indeed, up until the mid-1800s there was very little government legislation of the kind referred to anywhere in the world, and what there was usually favoured the employer. Most certainly there was no statutory minimum wage or maximum ordinary hours of work, or other basic entitlements that are available today.

The parties were totally free to bargain. Not on any fair and balanced basis of negotiation but, as history shows, on the employer's terms.

In this, the traditional courts could not assist. Courts only exercise judicial authority and that does not allow them to decide disagreements between employees and their employers in any matter that is not strictly to do with the enforcement of their contracts, whatever that involves.

For example, if the contract was for (say) 12 pounds a year (as was the going rate for domestic service in the early-1800s) and the employee received only six pounds then, assuming the employee had the money and the fortitude to take the employer to court (and risk becoming unemployable thereafter), the court would uphold the contract and force the employer to pay up. But if the employee complained that the rate of pay and the hours of work were unfair and wanted the contract changed then that is not something a court can do. The same applies today.

It is in that simple difficulty that industrial arbitration was born. For judicial authority can only enforce existing rights whilst arbitral authority can grant new rights.

It is also in that important difference between judicial authority and arbitral authority that the Devil is to be found in the changes to the present industrial relations laws.

For what those changes do not trumpet is that by exposing workers to the harsh reality of contract law they are reverting to the bad old days before arbitration, albeit with some props and safety nets that are obviously too well embedded, long conceded and too politically hard to remove.

To explain: In an ordinary contract for (say) the sale of goods or the provision of services, if there is no provision to meet any changes in costs or circumstances and one of the parties is losing on the deal, then the party that is disadvantaged is stuck with what has been agreed. A court cannot help. As the High Court recently held (in *Romanos v Pentagold Investments* (2003) 217 CLR 367 a court will not intervene 'to reshape contractual relations in a form the court thinks more reasonable or fair where subsequent events have favoured one side or the other'.

Yet that is precisely what arbitration can do and has been doing for centuries in matters of commercial contracts, from the days when merchants in Genoa and The Hague sought the help of a respected independent businessman or councillor to resolve their disputes and, if necessary to do so, on terms different to what they had agreed to.

It is also precisely what industrial arbitration can do and has been doing since its introduction in Australia in January 1905 as a response to the crippling decade of strikes and disturbances in the waterfront and shearers disputes during the severe depression that followed the 30 years 'long boom' of prosperity in Australia between 1860 and 1890.

*Judicial authority can only enforce existing rights whilst arbitral authority can grant new rights.*

Two years after its introduction, Justice H B Higgins in the (then) Commonwealth Court of Conciliation and Arbitration (the forerunner of the present Australian Industrial Relations Commission) set about establishing in the celebrated Harvester Case judgment of November 1907, a minimum (basic) wage in Australia, based on the average weekly living expenses of an unskilled worker with a wife and three children, for rent, groceries and other essential needs.

The result was to award the (then) landmark sum of seven shillings (70c) a day for a standard 48 hours, five day working week (ie., \$4.20 per week).

Employers were outraged but, based on that criterion, business and industry advanced and, with national tariff protection from the dumping of foreign goods, the economy grew. Rural production and manufacturing thrived and the 'common wealth' of the country was more fairly shared among its population. The concept of a 'fair go' was born.

With a system of regular indexation and adjustment that on occasions had stalled and had even gone down between 1931 and 1941, this basic wage lasted until 1967 when the commission introduced the total wage concept, and later the National Minimum Wage.

This process has had the effect of keeping an adjustable economic base under the nation's unskilled workforce, barely adequate as it is for many such workers, and upon which all other occupations have been able to maintain their margins for skill, including those covered by industrial awards. Even those in middle management and others who, although award free, have been provided with a base upon which to establish individual work value and to justify salary increases from time to time.

The government has not abolished this minimum wage process. It has only stifled it somewhat by taking it from the Australian Industrial Relations Commission (AIRC) and vested it in a

*According to the prime minister, people will look back later and wonder why on earth they were ever concerned about these changes, and will say how much better off they then are. Some may. But... business may look back and wonder if it quite turned out the way they expected.*

separate business-oriented and somewhat less than independent Australian Fair Pay Commission.

That new and additional body will also fix the minimum rates for award classification levels and for juniors, trainees, apprentices, casuals, piece workers and disabled workers. What will be left for the AIRC to do will be significantly curtailed, very little of which could be regarded as arbitration.

Over time, industrial awards, which are a form of tribunal-made statutory regulation, will cease to provide an underpinning economic and work-related social base for the wages and conditions of the nation's workforce.

Predictably, as this base begins to erode and to lose its relevance, the effect will be to create a growing underclass of workers unable to meet the basic standard of living (as Justice Higgins might have seen it), let alone keep up with the widening gap between that standard and the level of income needed to meet the ever increasing expectations of a consumer-driven society.

In effect, fewer will have more and far more will have less. That reverses some of the essential cogs and levers that presently drive the economy.

This, for a time, will push up the pointer on the business gauge marked 'profitability' but elsewhere on the economic machine the pressure gauge of 'social equity' will move down scale. Welfare demands (notwithstanding any justifiable welfare-to-work reforms) will rise significantly. Average household income will fall in real terms.

Expenditure will be curtailed. Debt levels will rise. Profitability will then weaken and fall away.

According to the prime minister, John Howard, people will look back later and wonder why on earth they were ever concerned about these changes, and will say how much better off they then are.

Some may. But the scenario just outlined would suggest that ultimately, business may look back and wonder if it quite turned out the way they expected.

The chief objects of the original *Conciliation and Arbitration Act 1904*, inter alia, were stated to be 'to promote goodwill in industry [and] to provide means for preventing and settling industrial disputes not resolved by amicable agreement...' Those objects have now been replaced, inter alia, with the object of 'ensuring as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and the employees at the workplace or enterprise level.' Full stop.

The abrogation of the role of the AIRC in this way, which it has discharged over the past 100 years and which is replicated with variations within the systems of each state (including Victoria prior to the Kennett Government giving up its industrial relations powers to the Commonwealth in 1996), will do more than just remove the power to fix rates of pay. It will prevent that tribunal from deciding other terms and conditions and independently settling disputes in relation to the particular circumstances of specific industries and occupations.

True it is that at times the AIRC's role has been abused by certain aggressive unions that have used strike action and industrial blackmail to gain unreasonable ends. But relieving the AIRC from its dispute settling and award-making powers will not avoid such action. It is more likely to exacerbate it. Also without recourse to a body with such powers the parties have only the ordinary courts to fall back on and, as indicated, those courts cannot resolve such disputes or do anything except impose sanctions. That rarely helps.

The arbitral functions of the AIRC (and of the respective state tribunals, if these new federal provisions are found to operate with paramount force, at least in respect of companies) have now been diverted back to the parties; not so much by providing some better means of resolving disputes, but rather by leaving the parties (including employers faced with hard-line union action) with no where to go for effective help.

In future, industrial disputes are to be resolved in the workplace, or taken to a private alternative dispute resolution service. The AIRC will be able to mediate industrial action (strikes) that will be a lot harder to engage in, but not to arbitrate and settle anything by way of an award. In this, powerless private mediation and arbitration organisations are no substitute for an independent sanction-backed statutory tribunal.

Under these changes certain long-standing and politically untouchable conditions (such as annual leave, long service leave, 38 hour week, etc.) have been preserved. Industrial awards have been frozen (except to remove some 'lurky' benefits such as union picnic day and paid trade union training). However, such benefits as public holidays, meal and rest breaks, annual leave loadings, allowances, penalty rates and bonuses, may be traded away in future contract negotiations.

A very significant and discriminatory change is that, except on certain

grounds (such as illness, racial discrimination, etc.), the current laws relating to unfair dismissal in future will not apply to businesses with less than 100 employees. Thus, there is not only a double standard introduced depending on the size of the enterprise, but the vast majority of employees involved will be subject to dismissal without reason, justified or otherwise, and without recourse to any kind of justice.

Even those employees who work for organisations with more than 100 staff members are vulnerable if the employer is able to show that one of the reasons (not necessarily the main reason) for the dismissal is based on an 'operational reasons'. (It is not yet clear but even recourse to the common law for breach of contract, which has never been a real alternative in most cases anyway, may also be denied.)

True it is that some employees are well deserving of dismissal. Also that some employers are distracted at times by unjustified claims of unfair dismissal which can be particularly disrupting for small businesses. But this is not a significant factor preventing employers from taking on more staff, as the Government claims. Nor is it a reason for denying justice in appropriate cases.

It is also ironic that statutory protections abound in providing recourse to consumer tribunals and the like for persons who may have been disappointed in the purchase of some product or the rendering of some service for a few hundred dollars but that the unfair breach of a contract upon which the livelihood, reputation and well-being of a worker depends can be statutorily denied.

These new changes also exempt employers from the unfair dismissal laws in respect of the first six months of every new employee's term of engagement. That may assist very small enterprises such as shops and cafes that are able to turn over staff anyway using casual labour. But for others it will also prevent many employees who are in

secure jobs from risking a move to improve themselves. Employers may find it necessary to offer greater incentives to recruit quality staff just to make the taking of that risk worthwhile.

What those who have never experienced it cannot appreciate is that whilst no one thinks badly about an employer who loses an employee to another job, if that employee is sacked unfairly and/or without reason, that employee carries a stigma thereafter; a question mark that hangs over that employee's future prospects of employment and career that has to be explained away in the next job application, and the ones that follow after that.

It also invariably has a devastating effect on the dismissed employee's ability to find another job, as well as that employee's family, personal health, finances and psychological well-being. This is all the more hurtful the older, more responsible and more dedicated the employee is to the position, and the more repercussions there are for that employee's life resulting from the termination.

So really what the government has done is to rule a line under the 'fair go' system as it has developed over the past 100 years, clamp down on areas where it is considered that employees have had it too good for too long, allow certain well-established processes to continue under tighter control, leave alone certain politically untouchable entitlements (some of which may be traded away) and generally bring back the contract of employment as the future means of conducting industrial relations in preference to an independent supervisory arbitral system.

It also hopes to have done this not only for workers under the federal system but, by using the corporation power under the Australian Constitution, to extend these changes to the state arbitration systems as well (at least in respect of companies).

That aspect of the changes is expected to be challenged in the High Court by the



states and by them also shoring up their own legislative provisions. Without going into an examination of the subject or speculating on the prospects of success, one wonders how the federal government may enlarge its power in respect of section 51 (xxxv) of the Constitution relating to the prevention and settlement of industrial disputes extending beyond the limit of any one state, by subsuming that power in a separately circumscribed and disparate provision, placitum (xx) relating to corporations? But well, watch this space.

Meanwhile these changes, or Work-Choices as the government has labelled them, have excited the passions of the Labor Party Opposition, the trade union movement (which could not have asked for a better cause to revive its declining membership), as well as the usual chattering classes, in an area that has been the quietest for some time. One must wonder why on earth the government needed to invoke such adverse political opportunity.

Certainly, there was a need for some changes in a system that had become overly regulated and inflexible, as well as unyielding to the reasonable and sensible present-day needs of both employers and employees. But there is little merit and no choices to be had in these WorkChoice changes. There is also nothing to suggest that the system will be made fairer and simpler. The opposite is already manifest.

Long-standing union barriers to sensible production needs and other restrictive

practices have been, in many cases, just bloody-minded impediments to the common good, whilst various benefits such as long service leave have long lost their original purpose and for most employees would be better cashed in or, preferably, paid as superannuation.

In many ways too, trade unions have done such a good job that they have virtually put themselves out of business. Progressive employers have come to realise that the value of their business lies in the way they value their staff. Strike action is also now regarded by the majority of employees as economically stupid and an unsophisticated weapon in achieving appropriate industrial relations outcomes.

But without the safety valve of an independent and effective industrial arbitration system that may all change. Who knows what the economic outlook may be ahead? Perhaps another depression like the 1890s, or the 1930s, or even a recession like we had in the 1980s? How long will our present buoyant economy continue? Who knows?

One thing is certain, the vast majority of employees are not going to be in an equal bargaining position with their employers, whatever the labour market and the economic situation may be.

No employer, large or small, is going to enter into individual negotiations with each and every employee and have a variety of arrangements to deal with in their enterprise. It will be one size fits

all, and for the majority of workers that will mean the basic cut-down, bare bones award or an award-free standard workplace agreement. Sign it or go.

That may appeal to many employers as restoring the balance of power they thought they had lost. But given time, it will prove to be a case of back to the future. It will all have to be redone again. Dispute after dispute. With nowhere to go for effective help.

Certainly it is true that many of our industries are unable to compete with other countries due largely to our labour costs. But then it is also true that because of our 'fair go' sharing of our Commonwealth we have created a way of life that many other countries envy.

Of course it must also be recognised that, by current world standards, our way of life is to some extent unsustainable. But the answer is not to develop a growing underclass of workers. Helping the people of other countries to achieve our standard of living is preferable to lowering ours to better compete with the world.

The Howard government that has done much to improve the economic prosperity of Australia has been badly advised in respect of these changes. They are ill-conceived. Far more would be achieved by way of taxation and business compliance reforms than by turning back the clock on industrial arbitration.

These so-called 'reforms' came into effect on 27 March 2006. A day which will be seen by many industrial relations historians as the day when justice and a 'fair go' were taken from the Australian workplace and workers exposed to the harsh reality of contract law.

Time will no doubt show that one does not mess about with the Australian way of life without inviting trouble. For no amount of political assurances will justify these changes to those who make the nation's wheels go round.

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# Turning back the clock

By John de Meyrick MBE

From 1860 to 1890, the Australian economy enjoyed a period of unprecedented prosperity that was to be known as the 'long boom'. But little of that prosperity was shared with workers. Having a job at all was considered to be enough. Workers and their unions had no means of seeking improved wages and conditions. The terms of employment were fixed by employers. The law was the law of contract. Ordinary courts could not assist.

Then followed 10 years of depression resulting in widespread unemployment and sustained periods of industrial unrest, mainly among maritime workers and shearers, until a 'cure' was eventually found in the introduction of industrial arbitration in the early 1900s and the establishment of the (then) Court of Conciliation and Arbitration.

In the *Waterside Workers' Case* in 1919 (13 CAR 599 at 619), Justice Higgins noted that: 'The responsibility of this court is very great; but unfortunately few people realise the operations of the court in the true perspective. This court transfers more money and affects directly more human lives than, probably, all the other courts of Australia together.'

The importance of industrial arbitration was also commented upon by Justice Power in 1920 (14 CAR vii at xii) in defence of the court which was coming under severe criticism at the time from both employers and unions: 'I think', he said, 'the need for compulsory arbitration is necessary so long as there are employers who insist on fixing any wage they like, or unreasonable unionists, and until employers and employees act on the precept 'to do unto others as you would that they should do unto you'.

He went on later in that preface to say, 'Few people recognise that the compulsory arbitration courts – federal and state [with] the power to enforce fair wages and conditions from all employers, fair and unfair, are the only safety valves which prevent the spread of social war, communism and Bolshevism in the Commonwealth to the extent they are spreading elsewhere.'



Certainly, these possibilities were festering within the Australian community at that time and not without some due cause, as subsequent events were to show. Whether, and if so to what extent, industrial arbitration served to mollify any such developments is debatable. Fortunately, times have changed and such fears are no longer with us. But one thing is indisputable: the level of wages and conditions and the standard of living that the average Australian enjoys today, not just workers, has been significantly due to our system of industrial arbitration.

The federal government, with its new industrial relations laws, has now turned back the clock. Arbitration is back in its box. Contract law is to the forefront once more.

Perhaps the present climate and the lessons learned, together with the remnants of a dismantled system will temper any return to the 'bad old days' of glaring social injustice and industrial strife. Well, at least whilst the present economic 'long boom' continues. But after that? Keep watching.

# Customary law and sentencing

By Professor Larissa Behrendt



When a public prosecutor raised issues of the high incidence of sexual assault in Aboriginal communities in the Northern Territory, it created a media frenzy.

Despite the fact that many reports have been written documenting this issue in Aboriginal communities across the country for decades, many written by Aboriginal women, it sparked a round of outrage by politicians and the knee-jerk reactions began. The federal government blamed the territory government (It was a law and order issue, they said); the territory government blamed the federal government (It was a result of underspending on housing, they said). And politicians and media alike mentioned that this violence was a result of Aboriginal culture.

Aboriginal people across the country were quick to say that physical and sexual abuse of Aboriginal women and children is not a part of Aboriginal culture and such behaviour does not represent the values of Indigenous culture.

This media frenzy coincided with the High Court hearing a special leave application in relation to the case of the *The Queen v GJ* in which a forty-year-old man had assaulted and sodomised a fourteen-year-old girl who had been promised to him as a wife. In sentencing the man, Chief Justice Brian Martin had balanced a range of factors including the severity of the crime and the fact that the perpetrator had thought that he had a right to act as he did under customary law.

I was amongst the Indigenous voices that called into question the original decision and agreed with the appeal court's decision to increase the sentence on the basis that too much weight had been given to the customary law defence. Aboriginal women have constantly asked the judiciary not to accept evidence given by defendants that violence and sexual assault are acceptable within Aboriginal culture and have also asked those undertaking the judicial process not to weigh customary practices that violate human rights above those of the victim. The appeal court increased the sentence and, as the chief justice himself pointed out, this was evidence that the appeal system worked to correct the error in this case.

Nowhere in the calls from Aboriginal women for the judiciary to reject so-called customary defences or to value the rights of victims more highly than cultural practices that breach human rights, was there a call for the blanket exclusion of customary law from the judicial decision-making process when determining a sentence. Those calls came from politicians.

The proposal to legislate to exclude customary law from the factors that can be considered in sentencing is dangerous. Like any attempt to restrict a judicial officer's capacity to weigh up all the relevant factors when sentencing, the inability to consider customary law at all will impede the capacity to ensure that a just sentence is given in each particular circumstance before the court. It is also a serious infringement on the judicial process by the legislature and, as such, has implications for the principle of the separation of powers.

But pointing the finger at the judiciary is an easy way for politicians to grand stand and score quick political sound-bites. Judges who hear criminal cases where violence has been committed against Aboriginal women and children are dealing with the symptoms of a far more complex social problem. And it is politicians, not the judiciary, who have the most power to profoundly influence the root causes of the cycle of violence and the breakdown of the social fabric in Aboriginal communities.

The situation in many Aboriginal communities, where there is chronic poverty and dysfunction, are the result of decades, even centuries of failed government policy and neglect. This neglect has occurred because of the failure to:

- ◆ provide basic essential services to Aboriginal communities across the country;
- ◆ provide adequate infrastructure in those same communities; and
- ◆ invest in human capital.

This neglect that has resulted in profound poverty, despondency and hopelessness. This creates an unravelling of the social fabric. An environment in which substance abuse and violence become normalised.

While the federal government claims to have a commitment to end the cycle of violence and abuse, it has also said that it will not put more money into the problem. It has been estimated that basic Indigenous health needs are under-funded by \$450 million. Of the \$100 million spent on its new policy of shared responsibility agreements, three-quarters was spent on administration. It does not spend adequately and when it does, it spends ineffectively. It abrogates its own responsibility for these issues while it blames state and territory governments and the judiciary for the problem. In the face of such a position, there is little hope that the root causes of violence in Aboriginal communities will be addressed. Judges will continue to be in the position of having to deal with the consequences of systemic and sustained government neglect.

The sad thing for many Aboriginal people faced with life in a dysfunctional Indigenous community is that, while this issue has captured the attention of Australians, the convenient finger-pointing at the judiciary and the blame shifting between governments does not bode well for the hope that something effective might be done to alter the situation.



## The need to know

Law, politics, the community, the profession, the media



On 31 March 2006 Nicholas Cowdery AM QC, Director of Public Prosecutions delivered a speech at the Bar Association's media awards lunch.

This is Law Week in Australia. It is the time when the community has the law and lawyers in its face, more than usual, for the purposes of highlighting the role of the law in our lives and informing the community about it. Today, as part of that exercise, we honour media professionals (as they are described in the entry criteria for the awards) for excellence in journalism related to law and justice – recognising the best among those professionals who, during 52 weeks in the year, may bring the law to the community and remind us of the importance of justice in our lives.

Media professionals inform and they comment and by those means provide an essential service to the community; but some are better than others. In the seventh Manning Clark Lecture on 2 March 2006, Father Frank Brennan said:

It is easy for all of us to be critical of our governments and of our media. But in a democracy we elect our governments and the media feeds us what we like to consume. When we elect leaders without pity, when our judges fail to show pity, when our civil servants act without pity, or when our media pursues ratings by denying pity and love, there is every chance that they are reflecting us back to ourselves.

We live in a democracy under the rule of law. It is not easy to describe that in a few words but I shall try, at least, to identify a few of its features. The rule of law connotes regulation by laws that are democratically made; laws that protect and enforce universal human rights; laws that are certain, being prospective, open, clear and relatively stable; laws that apply generally and equally to all, including (so far as possible) to the government; laws that can

be impartially, honestly and fairly applied and whose effects are subject to review by independent arbiters. In our system of government the separation of powers is vital. There must be an independent judiciary (as the third arm of government) and an organised and independent legal profession to ensure access to justice with procedural fairness. The process of regulation of society must be reasonably transparent and completely accountable and it is incumbent upon the media especially to foster an enlightened public opinion to assist all that to occur, to examine what happens and to complain if it goes wrong.

The public must also have confidence that differences between citizens and between citizens and the state can be resolved peacefully through a system of justice that enables all to obtain fair and impartial treatment. It is important that the media not do anything to damage that confidence without good cause, because without the general support of the community we lawyers are wasting our time.

The law is not to become the plaything of the powerful. The rule of law has little to do with law and order and it does not mean the law of the ruler (nor, I remind my legal colleagues, does it mean the rule of the lawyer).

The law is a living thing and it must be and remain reasonably in accordance with informed public opinion and general social values and there must be mechanisms for ensuring that occurs. The community therefore needs to understand what this essential aspect of government does and how, if at all, it should change. I say again: the media has a vital role to play in fostering this understanding.

To give an example of change: it was recently proposed in parliament by the premier that the attorney general be allowed to seek continuing detention orders for up to five years and extended

*In our state we have a government that (not uniquely) is media-driven, so you representatives of the Fourth Estate wield immense political power.*

supervision orders for repeat sex offenders after their sentences have expired. On its face, that is an extraordinary proposal; but where was there published an informative, critical article about it? The *Sydney Morning Herald* and the *Daily Telegraph* gave largely factual reports of the speech with a minimum of comment, as if the passage of such a law was a foregone conclusion. The presidents of the Bar Association and the Law Society were given some airtime to voice their concerns. But since when has our democracy regarded it as proper to impose preventative detention on individuals at the application of the executive? Yes, the official terrorism panic has put such provisions in place in that context (and much could be said about that) – but for ordinary criminals? Since when has it been acceptable to punish people for offences they have not committed? How does that stand alongside the pillars of the rule of law? But it seems that nobody undertook the enlightenment of public opinion on that important subject and I heard on the radio (the ABC, of course) yesterday morning that the law was passed on Wednesday night.

In our state we have a government that (not uniquely) is media-driven, so you representatives of the Fourth Estate wield immense political power. It is common to divide the media (in all forms) into the equivalents of broadsheet and tabloid. Politicians react to the tabloids in developing policy and legislation and in prioritising public expenditure. Tabloids are usually short on factual and contextual information sufficient for consumers to make informed decisions about the issues presented. The stories do tell them what to think about, but in a generally emotional or moral framework. They do not help consumers to form their own thoughts in an informed way or follow through to help the public fully appreciate and actively assess the competing range of responses to what is reported and their potential consequences. The broadsheets, generally, do more of the latter.

*It seems that a small and loyal group of a certain demographic, through symbiotic spokespersons, has undue influence over our political masters.*

Media professionals, as Michael Pelly said in a talk to the NSW Bar last year, are in the business of storytelling. They must inform; but they must also entertain; and they must do it in a compelling way so as to hold their audience. In newspapers, Pelly said, surveys show that four out of five readers never get past the first 180 words of any article. (I have spoken about ten times that number already.) So the lead must not be buried – and then the important bits can follow for those who can be bothered or who have the time to read on.

At present, by reacting to tabloid media headlines, politicians defer to incomplete expressions of views by an uninformed public and their sound byte spokespersons. They respond to self-selected comments, often to unrepresentative polls, all published in outlets that are known for their biases and ongoing agendas. There seems little chance that this will change and no politician can afford to be appearing to disregard the apparent will of the constituents. But it is only apparent and not real. While the latest radio ratings published this week show Alan Jones' station 2GB with a 13.4 per cent share of the total radio audience – not in itself a very high proportion – it is only fifth in the number of listeners measured (up from seventh last year). It seems that a small and loyal group of a certain demographic, through symbiotic spokespersons, has undue influence over our political masters.

There is more that we can all do and the winners of these awards today show the way.

The Local Court of New South Wales has an excellent programme of occasional workshops for junior journalists, showing them how the courts work and introducing them to some of the tricks

and traps of court reporting. The Homicide Victims Support Group held a media night last year to inform journalists about the impact of the media on the lives of victims – it was well-attended; but, it must be said, largely by those who knew the messages already and who observed them in practice.

The Bureau of Crime Statistics and Research publishes absolutely excellent work – more notice should be taken of it and weight given to its research findings.

All of us, in what we say, write and do, should bypass expressions of shallow, unconsidered, unrepresentative so-called public opinion and try to obtain informed public judgment on important issues. That can only follow from people engaging in an issue, considering all aspects, understanding the choices involved and accepting the consequences of the choices they make. The media must assist by giving us the information to work with; and you representatives will have an important role to play in relation to criminal justice, especially, in the year ahead with an election in sight. Accurate and complete information can help enormously to prevent knee-jerk reactions and hysteria in political responses to utterly mundane events.

The rule of law must be preserved and we can all do our bit.

# Keeping the Industrial Court of NSW focused on industrial relations

By Arthur Moses

*Fish v Solution 6 Holdings Limited [2006] HCA 22*  
*Batterham v QSR Limited [2006] HCA 23*  
*Old UGC, Inc v IRC in Court Session [2006] HCA 24*

On 18 May 2006 the High Court handed down three decisions that considered the unfair contracts jurisdiction of the Industrial Court of NSW<sup>1</sup> under Ch 2 Pt 9 of the *Industrial Relations Act 1996* (NSW), and also the impact of the privative clause in s179 of that Act. These cases are summarised below. The significance of these cases is also briefly considered in light of recent changes to industrial legislation at the Commonwealth and state levels.

## *Fish v Solution 6 Holdings Limited [2006] HCA 22 ('Fish')*

The first case, *Fish*, was an appeal by Nicholas Fish and Nisha Nominees Pty Ltd (a company controlled by Fish) against a decision of the New South Wales Court of Appeal. In 2000, Nisha Nominees agreed to sell its shares to Solution 6 Holdings Ltd for \$19 million. When the share purchase agreement was complete, Solution 6 was to pay Nisha \$18.5 million, and Nisha was to subscribe for 1,897,436 shares in the capital of Solution 6. The balance of the purchase price was to be paid three months after the completion of the contract. Fish was a party to the agreement, in which he guaranteed the performance of Nisha's obligations.

Under the share purchase agreement, completion was not to proceed unless Fish entered into an employment agreement with Solution 6. Fish then made an agreement with Solution 6 Pty Ltd, a subsidiary of Solution 6 Holdings, under which he was employed as Executive Manager of Enterprise Integration Services. The term of employment was fixed at three years, although it could be terminated earlier by Fish giving 12 weeks notice.

No provision had been made in the share purchase agreement for the possibility that the market value of the shares in Solution 6 Ltd, which were issued to Nisha at \$9.75 each, would drop between the exchange and completion of the contract. By the time the agreement was completed the shares were worth \$3.00 each.

In 2001, Fish was made redundant and had his employment with Solution 6 Pty Ltd terminated. Fish and Nisha Nominees later sought orders from the Industrial Relations Commission in court session including a declaration that the share purchase agreement was an unfair contract within the meaning of s106.

A conciliation conference before the commission was unsuccessful and the respondents applied to the NSW Court of Appeal for an order prohibiting the commission exercising its powers under s106 in respect of the share purchase agreement. The Court of Appeal allowed the application.<sup>2</sup> The court (Spigelman CJ, Mason P and Handley JA) agreed that the critical jurisdictional fact in relation to s106 was the identification of a contract, as defined in s105, whereby a person performs work in an industry. A contract would satisfy this test if it led directly to a person working in any industry. As far as s179 was concerned, Mason P and Handley JA added that the Court of Appeal should be slow to intervene before the commission has had an opportunity to determine its own

jurisdiction, but that intervention would be appropriate where restraint would render the court's supervisory jurisdiction irrelevant.<sup>3</sup>

The court held that even though the share agreement contemplated the creation of the employment agreement that the share agreement itself was not a contract whereby a person performed work in any industry within s106. The relationship between the agreement and the performance of such work was indirect or consequential.<sup>4</sup>

Fish was granted special leave to appeal to the High Court and it was dismissed with costs (Gleeson CJ, Gummow, Hayne, Callinan & Crennan JJ; Kirby and Heydon JJ dissenting).<sup>5</sup> The majority wrote a joint judgment. They concluded that the share purchase agreement was not a s106 contract. Under the employment agreement, Fish performed work in an industry. Fish did not perform work in an industry under the share purchase agreement. Thus, the share purchase agreement did not constitute a s106 contract. The employment agreement, not the share agreement, could be declared void or varied by the commission. It was not sufficient for the two contracts to merely relate to each other.

The majority reinforced this conclusion with the approach they took to s179. The majority said that unless the Industrial Relations Commission in court session was restricted to employment agreements, commercial arrangements which would otherwise fall within the jurisdiction of the state courts would be intra vires the commission and immunized from review by s179. In the absence of express provision to that effect, the parliament could not be assumed to have intended to limit the jurisdiction of the Supreme Court to determine matters ordinarily dealt with by that court. To adopt too broad an approach to s 106 in this context would increase the number of cases in which there would be no appeal to the Supreme Court, with the result that the role of these courts 'would be confined to granting relief ensuring the commission's compliance with jurisdictional limits when by hypothesis, the jurisdiction of the commission would extend to a very wide range of agreements the fairness or unfairness of which may have no industrial consequence'.<sup>6</sup> The majority contended that such an approach would also truncate the High Court's role contemplated by s73 of the Constitution.

Kirby J and Heydon J delivered separate dissenting judgments.

Kirby J held that the agreements were inter-related. They were created at the same time and were expressed to be dependent on one another: the 'notion that the two agreements were legally separate for the purposes of relief of the kind contained in s106(1) requires an artificial severance which the documents, their purposes and the history of their making (as proved to this stage) deny'.<sup>7</sup> Kirby J also noted that s105 extends to 'any related condition or collateral arrangement'. It would therefore be contrary to ss105-106 to characterize a 'contract' as separate to another on the mere basis that it appears in a separate document.



This would enable employers to bypass s106. Kirby J rejected as irrelevant the majority's concern that cases which might otherwise be brought before the Supreme Court and High Court might not be. That argument had been rendered redundant by the *Industrial Relations Amendment Act 2005* (NSW) (the relevant provisions are outlined below). In addition, Kirby J held that the list of 'appeals' which might be brought before the High Court (as identified in s73 of the Constitution) is not exhaustive. For these reasons the Court of Appeal should not have issued prohibition.

Heydon J held that s179 'reduces, almost to nil, the scope of judicial review for jurisdictional errors after an error occurs', but that there was no reason to conclude that s179 'increases the scope for review before an error occurs'.<sup>8</sup> In prohibiting the commission to determine its own jurisdiction as expressly permitted by the Act, the Court of Appeal had created a 'lack of harmony in the legal regime'.<sup>9</sup> Heydon J concluded that the fact that 'a particular s106 controversy was more 'commercial' and less 'industrial' was not a reason to depart from earlier Court of Appeal authority'<sup>10</sup>.

### *Batterham v QSR Limited [2006] HCA 23*

In the second case, Peter Batterham was promoter of a business arrangement whereby QSR Limited acquired a restaurant business, and was then floated as a public company. As a founding director of QSR, part of Batterham's remuneration package included one million options that could be exercised three years after they were issued subject to the achievement of a performance benchmark. The benchmark required a particular level of performance in each of the three years. The company performed better than the benchmark in the first two years, but slipped below the benchmark in the third. If the performance was assessed on the basis of aggregate performance over the three years the benchmark would have been satisfied.

Batterham commenced proceedings in the Industrial Relations Commission under s106 and sought orders to, amongst other things, have the option deed declared unfair, harsh, unconscionable and contrary to the public interest. QSR opposed the action on the ground that the Commission had no jurisdiction over the option deed because it was not a s106 contract.

The Court of Appeal held that the IRC had no jurisdiction over the option deed<sup>11</sup> and Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ dismissed the appeal.<sup>12</sup> Their Honours noted that Mr Batterham had performed work promoting the company, negotiating the purchase contract, arranging finance and then serving as a director. They also concluded that the option deed was of benefit to Mr Batterham and that he obtained that benefit because he was a promoter of the venture and of QSR. However:

As explained in *Fish v Solution 6 Holdings*[6], to decide whether the commission had jurisdiction to make the orders which the appellants seek, it is necessary first to identify whether Mr Batterham performs (or in this case, did perform) work in an industry. (It was not argued that anything turns on the fact that Mr Batterham was no longer performing the relevant work when he applied to the commission.) Having identified the work that Mr Batterham performed, the next inquiry is what was the contract or

arrangement (and any related condition or collateral arrangement) according to which (or in fulfillment of which, or in consequence of which) that work was performed? It is only that contract or arrangement which the commission may declare void or vary.<sup>13</sup>

The majority noted that the option deed made no explicit reference to the performance of the work. Their Honours held that because it was a pre-incorporation contract, and therefore concerned work that had already been done, the agreement could not be described as a contract, or an arrangement, *whereby* a person performs work in an industry: the work that was done 'was not done according to, or in fulfillment of, or in consequence of, that agreement.' The grant of the options was complete upon the execution of the deed. By describing the option deed as 'remuneration' for work done the appellants sought to connect the option deed with the performance of that work but this could not be achieved.

Kirby J's dissent in this case focused on s179, and its apparently wide ambit. His Honour emphasised that the Industrial Court of NSW is a constitutional institution under Part 9 of the *Constitution Act 1902* (NSW) and that in order to maintain confidence in the administration of justice, judicial institutions of equivalent status should exercise comity. By interfering with the decision of the trial judge, Peterson J, the Court of Appeal deprived a litigant of the right to present their case and to do so before an independent court or tribunal, as required by the rule of law.

*Old UGC, Inc v Industrial Relations Commission of New South Wales in Court Session [2006] HCA 24*

The third and final case concerned an agreement under which a Mr McRann was employed as managing director of the Australian affiliates of a group headed by Old UGC. McRann was entitled to a base salary, annual bonus and incentive compensation. His employment ended on 31 July 1997. A second compensation and release agreement (CRA) would come into effect if the employment agreement was terminated. The CRA was designed to resolve all disputes between McRann and UGC and provide McRann with compensation and benefits in exchange for giving up all legal rights and claims against Old UGC. The CRA was governed by the laws of the State of Colorado.

An application was made to the Industrial Relations Commission that the CRA was unfair, harsh or unconscionable. The Court of Appeal refused to grant a writ of prohibition, holding that the CRA formed part of 'a single contract of employment constituted by reading together the Employment Agreement and the [CR] Agreement'.<sup>14</sup> The Court of Appeal rejected a submission that because the CRA was governed by the laws of the State of Colorado, the contract was placed outside the jurisdiction of the commission under s106.

The High Court allowed the appeal by a majority of 4 to 3. In this case, unlike the others, Gleeson CJ also dissented, agreeing with the Court of Appeal that the CRA constituted a variation of the employment agreement, and an alteration of the remuneration to which McRann was entitled under the employment agreement.<sup>15</sup>

The 'jurisdictional focus' of the case was therefore the employment agreement, a contract whereby McRann performed work in an Australian industry, and therefore subject to s 106.

The majority was comprised of Gummow, Hayne, Callinan & Crennan JJ. Their Honours held that the Court of Appeal's conclusion that the CRA and employment agreement were a single contract of employment was erroneous. It was necessary to identify 'what contractual stipulations or other arrangements were to be regarded as related to one another'.<sup>16</sup> While the CRA varied the employment relationship between McRann and Old UGC, this did not lead to the conclusion that 'all the resulting stipulations and arrangements fell within the expression a 'contract whereby a person performs work in any industry''. The employment agreement was a contract whereby McRann performed work in any industry but the CRA was not of this character. Rather, the CRA merely stipulated the terms upon which McRann's employment was terminated. The fact that the CRA varied McRann's entitlements under the employment agreement did not alter that conclusion.<sup>17</sup> However, the majority did reject the 'proper law of the contract' argument.

## Concluding analysis

The High Court's decisions in *Fish*, *Batterham* and *Old UGC* purport to shrink the Industrial Court of NSW's s106 jurisdiction. However the practical impact of the decisions is limited due to legislative changes at the state and federal level.

The *Industrial Relations Amendment Act 2005* (NSW) inserted s106(2A), which reads:

- (2A) A contract that is a related condition or collateral arrangement may be declared void or varied even though it does not relate to the performance by a person of work in an industry, so long as:
- (a) the contract to which it is related or collateral is a contract whereby the person performs work in an industry, and
  - (b) the performance of work is a significant purpose of the contractual arrangements made by the person

This provision applies to a contract made before 9 December 2005 and to proceedings pending in the Industrial Court at that date that have not been finally determined by the Industrial Court. However, section 106 (2A) does not apply to any proceedings pending in any other court or tribunal on that commencement (viz., the three decisions discussed here).

The purpose of the s106 (2A) amendment was to clarify the true scope of the Industrial Court's jurisdiction under s106 of the *Industrial Relation Act 1996* (NSW). It reverses so much of the judgment of the NSW Court of Appeal in *Solution 6 Holdings Ltd v Industrial Relations Commission of NSW & Anor*<sup>18</sup> (affirmed by the High Court of Australia<sup>19</sup>) which established the principle as to the need for a collateral arrangement (such as share option agreements, superannuation arrangements and deeds of releases) to lead directly to a person working in an industry.

The test for a related condition or collateral arrangement to be within jurisdiction appears to be that it need not itself directly lead to the performance of work in an industry in NSW subject to:

- (a) the contract to which it is related or collateral is a contract whereby the person performs work in an industry, and
- (b) the performance of work is a **significant** purpose of the contractual arrangements made by the person.

The *Industrial Relations Amendment Act 2005* (NSW) also replaced the old s179 with a new s179:

## 179 Finality of decisions

- (1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.
- (2) Proceedings of the Commission (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal.
- (3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law.
- (4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:
  - (a) the Full Bench of the Commission in Court Session, or
  - (b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.
- (5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.
- (6) This section is subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law.
- (7) In this section: "decision" includes any award or order.

This amendment applies to decisions and proceedings of the commission made or instituted before 9 December 2005, and to proceedings pending in any state court or tribunal (other than the commission) on that commencement. However, those amendments do not affect any order or decision made by any such court or tribunal before that commencement.

The explanatory note which accompanied the Industrial Relations Amendment Bill 2005 stated that the purpose of the amendment to s179 was twofold:

- ◆ To reverse so much of the decision of the Court of Appeal in *Solution 6 Holdings Limited & Ors v Industrial Relations Commission of NSW*<sup>20</sup> which held that s179 did not prevent the exercise of the Supreme Court's supervisory jurisdiction in relation to proceedings or proposed proceedings before the Industrial Court of NSW if an application is made to the Supreme Court before the Industrial Court of NSW makes a decision in the proceedings; and

- ◆ To restrict the operation of s179 so that the Supreme Court's supervisory jurisdiction is available if a purported decision of the Industrial Court of NSW is alleged to be outside the jurisdiction of the Industrial Court, but only after the exercise of any right of appeal to the full court of the Industrial Court of NSW.

The upshot of these changes is that the High Court's decisions resolved the appeals but do not provide authoritative guidance on the scope of s106 in light of the changes effected by s106(2A) and s179.<sup>21</sup> And the Commonwealth's Work Choices legislation (the *Workplace Amendment (Work Choices) Act 2005* restricts the significance of that question even further. Section 16 of the Commonwealth Act excludes state and territory industrial laws, including 'laws providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair' (s16(1)(d)). The definition of 'state or territory law' specifically includes the *Industrial Relations Act 1996* of NSW'.

The Commonwealth law applies to all employees of foreign corporations, or trading or financial corporations formed within the limits of the Commonwealth within the meaning of s51(xx) of the Constitution. Since the great bulk of employment in NSW is done by 'constitutional corporations', this will have a massive impact on the Industrial Court's jurisdiction.

The validity of this provision has been challenged in proceedings before the High Court of Australia in *State of NSW & Ors v Commonwealth of Australia* (aka 'Workplace Relations Challenge') which reserved its decision on 9 May 2006.<sup>22</sup> A fair reading of the submissions before the High Court and the exchanges between the justices and counsel for the various parties, suggests that this provision may not survive the challenge. As Gleeson CJ noted during the course of argument, there is no provision contained in the *Workplace Relations Act 1996* (Cth) which purports to cover the field in respect of the variation or avoidance of unfair contracts of employment.

However, in the event that s16 (1)(d) of WorkChoices survives the current High Court challenge then the decisions in *Fish, Batterham* and *Old UGC* may soon become mere footnotes in the development of a modern system of Australian industrial law.

<sup>1</sup> The *Industrial Relations Amendment Act 2005* (NSW) has inserted s151A into the *Industrial Relations Act 1996* (NSW). The effect of the amendment is that the name of the Industrial Relations Commission in court session is to be the Industrial Court of NSW commencing from 9 December 2005.

<sup>2</sup> (2004) 60 NSWLR 558

<sup>3</sup> *ibid.*, at [138], [144], [145], [182], [183]

<sup>4</sup> *ibid.*, at [53], [59]-[64], [178]

<sup>5</sup> [2006] HCA 22

<sup>6</sup> *ibid.*, at [34]

<sup>7</sup> *ibid.*, at [76]

<sup>8</sup> *ibid.*, at [176]

<sup>9</sup> *ibid.*, at [177]

<sup>10</sup> *ibid.*, at [179]

<sup>11</sup> [2004] NSWCA 199

<sup>12</sup> [2006] HCA 23

<sup>13</sup> *ibid.*, at [13]

<sup>14</sup> (2004) 60 NSWLR 620

<sup>15</sup> [2006] HCA 24 at [10]

<sup>16</sup> *ibid.*, at [25]

<sup>17</sup> *ibid.*, at [26]

<sup>18</sup> (2004) 60 NSWLR 558 at [58], [59], [64], [67], [160], [161], [166] and [171]

<sup>19</sup> [2006] HCA 22

<sup>20</sup> *supra*

<sup>21</sup> On 30 June 2006 the NSW Court of Appeal delivered its judgment in *Kirk Group Holdings Pty Ltd & Anor v Workcover Authority of NSW & Anor* [2006] NSWCA 172 at [34] which makes it clear that the Court of Appeal will adhere to the intention of the NSW Parliament as to the application of the new s179 and will not exercise its supervisory jurisdiction until the Full Court of the Industrial Court has either decided the issue of jurisdiction or refused leave to appeal from such a decision.

<sup>22</sup> [2006] HCA Trans 218



## Strasbourg challenge to UK overseas pension rules

John Kernick reports on a challenge to UK pension rules and the evidence provided by Australian and Canadian governments to support the discrimination claim.

A number of United Kingdom expatriates and a returned Australian in receipt of UK state pensions have commenced proceedings in the European Court of Human Rights ('ECHR') alleging discrimination in the level of pensions they receive.<sup>1</sup> The proceedings follow the rejection of an appeal to the House of Lords by a South African-based pensioner in *R (Carson) v Secretary of State for Work and Pensions* [2005] 2 WLR 1369; [2005] UKHL 37 in which Ms Carson alleged that providing indexation of pensions to residents of certain countries but not others contravened the European Convention on Human Rights.

UK state retirement pensions are payable according to the extent of National Insurance contributions made during a person's working life. Recipients who are resident in the European Economic Area and certain countries where reciprocal agreements exist, including the USA, Turkey, Israel and Jamaica, have their pensions 'uprated' (indexed) in line with cost of living increases in the UK. Residents of other countries, including Australia, New Zealand, Canada, South Africa and Trinidad and Tobago, receive their pensions at the level applicable in the UK at the time of their retirement but the pension is frozen at that level for as long as they remain in a 'frozen' country. If they return to the UK or move to an 'unfrozen' country they receive benefits at the indexed level current while they remain there but on returning to a 'frozen' country their pension reverts to its former level.

Ms Carson unsuccessfully argued before the UK courts that freezing the level of her pension entitlement amounted to unlawful discrimination under the European Convention on Human Rights. The current proceedings before the ECHR in Strasbourg are brought by 13 applicants seeking a declaration of unlawful discrimination and compensation. The applicants include Ms Carson as well as a retired Sydney solicitor, Penelope Hill, and a number of other applicants resident in Australia and Canada. The applicants' case is being coordinated from Canada with the assistance of a Canadian law firm acting on a pro bono basis.<sup>2</sup> London counsel have been retained and they have prepared submissions to the ECHR on behalf of the applicants.

The lead applicant, Bernard Jackson, spent 50 years working in the UK and served in the RAF in the Second World War. He emigrated to Canada in 1986. He became eligible for a UK pension in 1987. His basic weekly state pension was then £39.50 and it remains fixed at that level. Had he received the benefit of indexation his pension would now be worth £82.05.

Mrs Hill was born in Australia and between 1963 and 1982 she lived and worked in the UK, during which time she paid applicable National Insurance contributions. She returned to Australia in 1982 but made further voluntary National Insurance contributions for the tax years 1992-1999 so that her basic pension would be greater. She became entitled to a basic state pension in 2000. Between August 2002 and December 2004 she spent periods living in London. During those periods her pension was increased to take account of indexation but when she returned to Australia the pension reverted to its previous level.

The Australian Government's evidence is that nearly all of 220,000 Australian residents in receipt of UK pensions are disadvantaged by the UK government's approach. The applicants' submissions suggest that more than 400,000 former residents of the UK overall are affected by the issues in the case.

### Discrimination under the convention

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is in the following terms:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

As noted in the House of Lords by Lord Walker of Gestingthorpe in *Carson* at [51]-[52]:

It is common ground that this prohibition...is not a free-standing prohibition of all discrimination. It prohibits discrimination in the enjoyment of Convention rights....Its enumeration of grounds does not in terms include residence (the ground of complaint [by] Mrs Carson) or age....The residual group, 'or other status' (in the French text, *toute autre situation*), is far from precise. The respondent secretary of state does not contend that the grounds of residence and age cannot be included within the scope of article 14. But it is clear from the jurisprudence of the Strasbourg Court that the possible grounds of discrimination under article 14 are not wholly unlimited; nor are all possible grounds of equal efficacy in establishing unlawful discrimination.

As to the convention rights, Article 1 of Protocol 1 to the convention ('1P1') provides, in relation to possessions:

Every natural or legal person is entitled to the peaceful enjoyment of his (sic) possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

It was accepted for the purposes of the House of Lords decision in *Carson* that an entitlement to a contributory pension was a 'possession' within the meaning of 1P1.

Article 8 of the convention (which was not relied on in *Carson*) provides protection in relation to private and family life in the following terms:

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### The House of Lords decision

Ms Carson had been unsuccessful at first instance (where the Australian Government intervened in support of her case)<sup>3</sup> and before the Court of Appeal<sup>4</sup> in asserting a breach of the convention as applied by *Human Rights Act 1998* (UK). Her appeal to the House of Lords was dismissed by a 4-1 majority. Lord Hoffman (in the majority) said that discrimination means a failure to treat like cases alike. He held that there was sufficient difference in the case of residents of the UK and of other countries where uprating was applied from those in the 'frozen' countries to justify different treatment. He said that Ms Carson had been under no obligation to move to South Africa but that in doing so she put herself beyond the primary scope of the UK social security system, which was to provide a basic standard of living for inhabitants of the UK. There was no obligation on the UK to pay pensions to persons outside the UK and parliament did not have to justify why it paid one sum rather than another: 'Generosity does not have to have a logical explanation.'<sup>5</sup> He also made the point that uprating was referable to the cost of living in the UK and that, although not means tested, pensions paid in the UK were subject to income tax. The comparison with treaty countries also failed as it was a matter for the government to enter into reciprocal arrangements and this constituted a rational basis for differences in treatment.

Lord Walker found that Ms Carson's situation was not sufficiently analogous to that of a pensioner resident in the UK or in a country which had the benefit of a bilateral agreement. At all events the government's position was justified as the issue was one of macro-economic policy within the province of the legislature and the executive.

Lord Carswell, in dissent, described, at [95], the matters in issue between the parties as '(i) whether the difference in treatment of pensioners residing in different countries amounted to discrimination, and (ii) if so, whether it was objectively justifiable.' He found, on the basis of the common factor between recipients of the contributory basis of the pension entitlement, that there was discrimination for the purposes of Article 14. Moreover, on the basis of a government memorandum that made it clear that containment of cost was the reason for not extending indexation, Lord Carswell found that the discrimination was not justified, stating, at [99]:

I do not find it possible to regard the selection of this class for less favourable treatment as a matter of high state policy or an exercise in macro-economics. It has the appearance rather of the selection of a convenient target for saving money.

### The applicants' case in the ECHR

All of the applicants in the case before the ECHR contend that the UK Government is in breach of Article 14 of the convention taken with 1P1 and of 1P1 standing alone. They argue that there is unlawful discrimination on grounds of both residence and age, with differences in pensions based on the age of individual pensioners (by reference to the level applicable when they reached retirement age) and the value of the pension in a 'frozen' country eroding with age as compared with that paid to a comparable resident in the UK or an 'unfrozen' country. The submissions cite a recent speech in the parliamentary chamber of the House of Lords in which Lord Goodhart, Vice President of the International Commission of Jurists, said of Lord Hoffman's observation that the primary function of the social security system was to provide benefits to inhabitants of the UK:

That is only partly true of retirement pensions because, by working in this country and by contributing to the economy, people deprive themselves of the chance of acquiring benefits in other countries. They have rights to UK pensions, which they should be able to take with them when they leave this country....The government could of course say that no pensions should be payable to anybody resident abroad. There are good reasons why the government do not say that. They would not get overseas workers to come here if they did. It would be an intolerable restriction on the rights of older people to move abroad. Instead they give the full pension that has been earned by the contributors at pension age and then slice a little bit off year by year. It is death by a thousand cuts....

Additionally, a number of the applicants argue that in relation to them there is also a violation of Article 8 taken with Article 14 in that they migrated to a 'frozen' country in order to join family members.

The applicants have filed witness statements in support of their case, including from the Australian and Canadian governments. The submissions cite UK government material to the effect that reciprocal agreements are not necessary for the purpose of uprating increases to pensioners living abroad and that there is no logical or consistent pattern in the selection of countries with which bilateral agreements have been made. They contend that the result is anomalous and a matter of historical accident retained solely on the ground of cost. In support, they cite evidence that Canada and Australia have each unilaterally provided for indexation of benefits to their expatriate pensioners in the UK and that there has been an unwillingness on the part of the UK government to enter into agreements with them for reciprocal uprating of UK pensions. The submissions argue that the significance of uprating is not simply to reflect cost of living increases in the UK but also to preserve the value of a pension in the currency in which it is paid. Any cost containment measures considered necessary should be applied in a fair and reasonable way that is not discriminatory.

The submissions contrast the treatment of expatriates resident in the (unfrozen) USA with those in economically comparable adjoining Canada. Similarly, they point out that a nurse originating from Trinidad/Tobago and returning there after a working life spent in the UK would receive a frozen pension whereas a person in similar circumstances returning to neighbouring Jamaica (both countries being members of the Commonwealth) would have the benefit of an indexed pension. It is contended that the resulting inequity involves an interference with freedom of movement and that this represents a significant obstacle to the UK Government on any question of justification.<sup>6</sup>

#### Further conduct of the proceedings

No early result in the Strasbourg proceedings can be anticipated – at least if there is to be the potential for a successful outcome for the applicants. The court's workload has increased with expansion of the Council of Europe to include former Soviet bloc countries. The ECHR in 2004 received 44,100 new applications. Although most applications to the court are ruled inadmissible or otherwise struck out at a preliminary stage, as at late 2005 the court had 82,100 cases pending, with this number projected to increase to 250,000 by 2010.<sup>7</sup>

The court nominally comprises one judge from each member state of the Council of Europe (currently 46 members) and sits in committees of three judges, in chambers of seven judges and in a Grand Chamber of seventeen judges, including the president, vice presidents and section presidents. When an application is lodged it is assigned to a rapporteur who refers it to a committee or a chamber. An application can be disposed of at a preliminary stage by being ruled inadmissible on grounds laid down by Article 35 of the convention, including that it is manifestly ill-founded. Such a ruling can be made by unanimous decision of a committee or the majority decision of a chamber<sup>8</sup>. If this does not occur the application is dealt with on the merits by a chamber, subject to referral in appropriate cases to the Grand Chamber if no party objects.<sup>9</sup> There is a right of appeal by way of referral from a chamber to the Grand Chamber within three months of a judgment, subject to acceptance of suitability of the case by a panel of the Grand Chamber.<sup>10</sup>

The submissions of the applicants in *Jackson* assert admissibility and address three earlier rulings against admissibility of applications in relation to the lack of indexation of UK pensions paid overseas.<sup>11</sup> Those decisions were made by the then European Commission on Human Rights, which exercised jurisdiction in relation to questions of admissibility prior to the ECHR being established as a full-time court in November 1998. The reasons given by the commission for the decisions in the three cases reflect a broadly similar approach to that of the majority in the House of Lords in *Carson*. The submissions of the applicants in *Jackson* argue variously that those decisions are distinguishable, wrong in principle and that the court's case law has developed significantly since they were decided, with the issue never having proceeded to the stage of an examination of the merits.<sup>12</sup> They also cite the far-reaching importance of the issue in the number of people affected

and the evidence of the concerned governments of Australia and Canada to the effect that they consider the UK government's approach to be discriminatory, in support of the case proceeding to a consideration of the merits.

<sup>1</sup> *Jackson and Others v United Kingdom* Application No 42184/05

<sup>2</sup> The proceedings are backed by a Canadian pensioner organisation with support from similar organisations in other countries involved. In Australia the supporting organisation is British Pensions in Australia Inc: [www.bpia.org.au](http://www.bpia.org.au); [jimtilley@bigpond.com](mailto:jimtilley@bigpond.com).

<sup>3</sup> *Carson, R (on the application of) v Secretary of State for Work and Pensions & Anor* [2002] EWHC 978 (Admin).

<sup>4</sup> *Carson & Anor v Secretary of State for Work and Pensions* [2003] EWCA Civ 797. The Australian Government was not a party in the appeal proceedings.

<sup>5</sup> At [26]

<sup>6</sup> The UK has signed but not ratified Article 2 of the Fourth Protocol to the convention, concerned with freedom of movement. It is also a signatory to the International Convention on Civil and Political Rights, Article 12 of which makes similar provision.

<sup>7</sup> *Report into Working Methods of the European Court of Human Rights*, December 2005, by Lord Woolf (former Lord Chief Justice of England and Wales): [http://www.echr.coe.int/Eng/Press/2005/Dec/LORD\\_WOOLFSREVIEWONWORKINGMETHODS2.pdf](http://www.echr.coe.int/Eng/Press/2005/Dec/LORD_WOOLFSREVIEWONWORKINGMETHODS2.pdf). Proposals under consideration to deal with the court's workload include the creation of a 'backlog secretariat': Woolf Report at 50.

<sup>8</sup> An amended process for dealing with admissibility is provided for in Protocol 14 to the convention but there is uncertainty as to when this will be implemented: Woolf Report at 13.

<sup>9</sup> Article 30 of the convention

<sup>10</sup> Article 43 of the convention

<sup>11</sup> *JW and EW v United Kingdom* Application No. 9776/82; *Corner v United Kingdom* Application No. 11272/84; and *Havard v United Kingdom* Application No. 38882/97.

<sup>12</sup> Hearings are held in only a minority of cases: see, e.g., <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Procedure/Basics+information+on+procedures/>



## Criminal law developments

The High Court has recently been considering cases involving two of the most common sub-groups of the prison population – the so-called ‘dogs’ (or informers) and ‘rock spiders’ (inmates serving sentences for sexual assaults involving minors).

It has long been the experience of counsel involved in criminal law that both of these categories of offenders are at risk of being targeted by vigilante groups of fellow prisoners with extremely violent results.

In *York v The Queen* (2005) 79 ALJR 1919 the High Court dealt with the case of an offender who had provided extensive assistance to the police and if imprisoned was clearly at risk of being killed. This led the sentencing Judge to impose on the offender a term of imprisonment for her own offence but the entire period of the sentence of imprisonment was suspended.

The Queensland Court of Appeal allowed a Crown appeal and ordered a term of actual imprisonment on the basis that the appellant’s problems in prison were not relevant in determining sentence.

The High Court disagreed. It found that there was no reason to interfere with the sentencing Judge’s sentence given the unusual circumstances of this case. It appears from the evidence on sentence that if the appellant had been given a full-time custodial sentence it would in all likelihood have been served in a prison without a protective custody section. McHugh J referred in terms to the need for protective custody for informers and sex offenders because of the generally accepted view that their safety in prison is often at risk. His Honour when considering the relevance of this to the sentencing process said:

That means that a sentencing judge must endeavour not only to protect society from the risk of a convicted criminal re-offending but also to protect the convicted criminal from the risk of other prisoners re-offending while in jail.

Callinan and Heydon JJ in a joint judgment said:

If the responsible authorities chose not to, or are unable to respond to the risks proved in a case, courts can and will be left with the impression, as the sentencing judge was here, that those authorities are indifferent to, or insufficiently concerned for the physical safety of incarcerated persons. The imposition of a sentence of a shorter duration, because of the risks to the appellant’s safety, than would otherwise be imposed, can do nothing to meet or reduce those risks except the period of exposure to them. The unusually strong and uncontradicted evidence in this case made it a special one.

The case of *New South Wales v Bujdoso* (2005) 80 ALJR 236 illustrates what happens when a high risk prisoner is not protected properly in the prison system.

Mr Bujdoso’s involvement with the courts began when he pleaded guilty to a number of counts of sexual assaults on males under the age of 18. He was sentenced to a term of imprisonment and during the course of that sentence was admitted to a prison work release program which involved him leaving the prison each day to attend

*The case of New South Wales v Bujdoso illustrates what happens when a high risk prisoner is not protected properly in the prison system.*

to his job. Because of various problems with security at the institution he was attacked one evening in his cell by a number of men wearing balaclavas and wielding iron bars. As a result of the attack he suffered serious injuries including a fractured skull.

The attack led to civil proceedings being taken on behalf of Mr Bujdoso. Evidence at the hearing of that claim revealed a long list of problems associated with his incarceration. He complained to authorities that he was repeatedly accused of being a ‘rock spider’ and he made various requests to be housed in parts of the prison system that might appear to offer him some safety. The judgment refers to a number of internal reports from prison officers that confirm the presence of weapons such as knuckle dusters in the gaol. There was also what can only be described as a fair amount of ‘buck passing’ between the prison staff regarding Bujdoso’s safety (see for example paragraphs [12] and [13]).

In the High Court the state was found to have breached its duty of care to Mr Bujdoso even though there was evidence that there were some difficulties within the prison system successfully preventing assaults of this type. The state argued that the general approach taken to classification and protection of prisons at the particular institution involved had led to a general view that inmates required little supervision and there had not been any earlier history of assaults.

The High Court referred to the duty of care owed by prison management in these terms:

It is true that a prison authority, as with any other authority, is under no greater duty than to take reasonable care. But the content of the duty in relation to a prison and its inmates is obviously different from what it is in the general law-abiding community. A prison may immediately be contrasted with, for example, a shopping centre to which people lawfully resort, and at which they generally lawfully conduct themselves (*Modbury Triangle v Anzil* (2000) 205 CLR 254; 75 ALJR 164). In a prison, the prison authority is charged with the custody and care of persons involuntarily held there. Violence is, to a lesser or a greater degree, often on the cards. No one except the authority can protect a target from the violence of other inmates.

It remains to be seen whether the judgment has led to a re-appraisal of inmates’ security in the New South Wales prison system.

By Keith Chapple SC

## Adams v Lambert (2006) 80 ALJR 679, 225 ALR 396

In 2002, Justice Gyles noted that a case before him exemplified 'the minefield that bankruptcy law has become for judgment creditors since the decision in *Australian Steel Co* [(2000) 109 FCR 33]'. In that full court decision, his Honour had been in dissent with Lee J.

In 2004, the issue came before his Honour again. His Honour duly applied *Australian Steel*, and the full court of the Federal Court duly dismissed the appeal. Now, the High Court has overruled *Australian Steel*, agreed with the analyses of the dissentients, and remitted the matter to Gyles J for final determination.

The High Court doesn't hear many appeals on defects in bankruptcy notices. The chastened creditor will usually wear the first instance defeat and start again. Fortunately for creditors, Mr Adams persisted and the High Court was prepared to grant leave, notwithstanding the likely absence of a contradictor. And, as things turned out, there was no oral argument from Mr Lambert.

The High Court gave its attention to defects in notices in 1955, when a Mr James took on that perennial creditor, the commissioner of taxation, and succeeded: see 93 CLR 631. In 1988, in *Kleinwort Benson Australian Ltd v Crowl*, it returned to the subject, this time allowing – over a strong and oft-cited dissent by Deane J – the creditor's appeal: see 165 CLR 71.

At first glance, the issue is a straightforward one. While the courts are mindful of the consequences of bankruptcy and have long insisted on strict compliance with the requisites of a notice, section 306(1) of the *Bankruptcy Act 1966* may allow relief upon consideration of whether the defect before the court has occasioned substantial injustice which is irremediable.

The authorities have long provided a test, namely whether the defect could reasonably mislead the recipient of the notice as to what was necessary to comply with it. Also, at least since *Crowl*, there has been separate test, whether the defect amounts to a failure to meet a requirement made essential by the Act.

It was the second test which provided the main difficulty identified by various full federal courts, including that in *Australian Steel*. The common factual problem to the full Federal Court cases and *Adams v Lambert* was the inclusion of an incorrect reference to the relevant statutory source for post-judgment interest. Prior to the High Court's judgment, this defect invalidated a notice.

As the court noted, 'the calculation of post-judgment interest is a well-known source of difficulty for some drafters of bankruptcy notices'. In the result, it came down firmly in favour of the minority in *Australian Steel*. The effect of the majority view, it said, was 'to attribute to the legislature an overwhelming preference for form over substance'.

*The High Court doesn't hear many appeals on defects in bankruptcy notices. The chastened creditor will usually wear the first instance defeat and start again.*

Where to now? Counsel appearing for creditors the victims of some defect or other in their notices will robustly urge their Honours' observation. Counsel appearing for debtors will no doubt observe that their Honours have made no change to the principles, they have merely disavowed the application of them by the Federal Court to a particular fact situation.

By David Ash

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## 2006 Sir Maurice Byers Lecture

### The implications of the Constitution

Delivered by D F Jackson QC\* on 30 March 2006

#### Introduction

It was in 1974 that I first met Maurice Byers. He was solicitor-general for the Commonwealth and I was a minnow, junior counsel for Queensland in a number of constitutional cases arising from the initiatives of Mr Whitlam's government.

The first group of those cases was argued in 1975. His skills as an advocate were obvious and impressive, his knowledge of the Constitution instructive. I took silk shortly afterwards and appeared on quite a number of occasions against him, and sometimes for similar interests, but unfortunately I did not ever have the privilege of appearing with him. I had a lot to do with him, too, when he was chairman of the Constitutional Commission and I was chairman of one of its advisory committees. We always got on well, he took with good humour the badinage of a youthful Queenslander – a term which he used quite frequently but not always as one of endearment – and he was kind enough to put some constitutional work my way.

Maurice Byers was a big man, and a man of big ideas. He could visualise the broader picture and the longer picture, and he could utilise the big sweep. One thing that he appreciated well was that whilst we have a written Constitution, the words cannot tell you everything. Some things have to be implied. How and what are the subject of this lecture.

#### What are constitutional implications?

First a question of definition. Obviously enough 'constitutional implications' refers to matters which are not dealt with by the express words of the Constitution. But not every principle or rule of conduct which deals with issues which might be regarded as 'constitutional' should be regarded as a constitutional implication.

I would exclude immediately some constitutional conventions. Some aspects of the relationship between the houses of parliament and their members, of the appointment, resignation and removal of ministers, of the role of the governor-general, and the position of the prime minister and cabinet are dealt with by provisions of the Constitution, or statutes made pursuant to constitutional provisions, but many aspects are not, being regulated by 'conventions'. Some such conventions may in reality be rules of law<sup>1</sup>, but if compliance with them is not justiciable, whilst a political scientist might describe them as implications of, or from, the Constitution, a lawyer, I think, would not.

A second area which reflects implications of the Constitution concerns the approaches to interpretation of the Constitution.

The question arises particularly, though not only, in relation to the legislative powers of the Commonwealth under s51 of the Constitution, which gives it the power to legislate with respect to thirty-nine enumerated subjects. Because valid Commonwealth legislation will render inoperative inconsistent state legislation, the approach taken to the legislative powers in s51 will affect the exercise or potential exercise of state legislative powers.



Jackson QC under the watchful eye of Sir Maurice Byers.

That gives rise to a number of questions of significance. Should the subject matter of a head of Commonwealth power be interpreted widely or narrowly? Is the meaning of the words fixed as at federation, or does it alter as concepts change? Is the presence of one head of power to be regarded as limiting the ambit of another? Is the validity of a law to be determined by looking at its operation as a matter of form, or of substance, or both? Other questions arise in relation to provisions other than s51: should constitutional prohibitions be read widely or narrowly?

It is possible, of course, to categorise issues of this kind as simply being questions of interpretation, and no more. But I think that does not give account sufficiently to the fact that the adoption of one interpretive approach or another does involve the making of an assumption as to the way in which the Constitution *should* work. That there is a relationship between the approach to interpretation and implications more commonly so called can be seen directly in the *Melbourne Corporation* doctrine, to the effect that the Commonwealth's legislative powers cannot be so exercised as to effect a sufficiently significant impairment of the existence of a state or the exercise by it of its powers. The need to apply such a doctrine will depend on the ambit of the legislative power in question, absent such a restriction.

What then are the characteristics of constitutional implications? I suppose that the simplest definition is that such an implication is:

- ◆ a principle of law derived by the courts from the Constitution which has constitutional force and effect; but
- ◆ which is not set out in the text of the Constitution in express terms.

Those two aspects mean that constitutional implications are amongst the most controversial issues in constitutional law.

\* I would like to acknowledge the considerable assistance of Patrick Flynn, barrister.



*One thing that he appreciated well was that whilst we have a written Constitution, the words cannot tell you everything.*

First, because a constitutional implication once made has the force and effect of an express constitutional provision, it means that that principle is entrenched, subject only to a subsequent High Court overruling or recasting of the decision, or to amendment by referendum. Thus the implication *In Re Wakim, Ex parte McNally*<sup>2</sup> that federal courts cannot be invested with state jurisdiction has the same legal effect as if those words appeared in the text of the Constitution. The cross-vesting scheme there under consideration could only be resuscitated by a referendum or if the High Court could be persuaded to re-open and overrule *Re Wakim*.<sup>3</sup>

These are important consequences. They occur in a setting where, because the principle the subject of the implication is *not* in the text of Constitution, there is immediately room for argument as to whether such a principle is properly the subject of an implication, and as to what exactly it should be. Whether a particular constitutional implication should be made will almost invariably be a question about which reasonable judges, constitutional lawyers and citizens can reasonably differ, sometimes with unreasonable vigour and quite unreasonably.

Secondly, because a constitutional implication is something 'not set out in the Constitution in express terms', there can be significant debate about where the process of determining the content of an express term ends and the process of making an implication begins, an issue also related to the propriety of making an implication.

*Sue v Hill*<sup>4</sup> is an illustration of determining the content of an express term of the Constitution, as distinguished from drawing an implication. The High Court was concerned with s44(i) of the Constitution which disqualifies from membership of either house of the federal parliament a person who is a citizen of a foreign power. The issue was whether 'foreign power' in 1999 included the United Kingdom, bearing in mind the relationship of the Commonwealth of Australia to the United Kingdom as at federation, and that the Constitution is itself a statute passed by the United Kingdom Parliament. *Sue v Hill* raised the issue of the difference between meaning and its application, what is sometimes called connotation and denotation.<sup>5</sup> It was held that while in 1901 the United Kingdom was not a foreign power, developments since that time meant that in 1999 the United Kingdom was a foreign power. But, on any view, the case was an example of determining how the express term 'foreign power' in section 44(i) of the Constitution<sup>6</sup> was to be construed.

An example a little further along the continuum from construction of an express term of the Constitution towards an implication from it is *Cheatle v The Queen*.<sup>7</sup> In *Cheatle*, the question was

whether the words 'the trial on indictment of any offence against any law of the Commonwealth shall be by jury' in section 80 of the Constitution meant that the jury's verdict must be unanimous. The High Court expressed the issue in the case as being whether section 80 'carries with it a requirement' that a conviction be unanimous. There is a respectable argument that this question actually involves determining whether the words 'and any conviction shall be after a unanimous verdict by the jurors' should be *implied* into section 80.

Constitutional implications, however, more typically involve higher levels of abstraction, and wider considerations, to arrive at the subject of the implication. Again I use an example.

In *Hwang v Commonwealth*<sup>8</sup> McHugh J, sitting as a single justice on a strike out application, had to decide whether the parliament of the Commonwealth had power to enact the *Australian Citizenship Act 2005*. The question arose because there is no section 51 head of power relating to 'citizenship' in express terms, although there is an express power in section 51 to make laws with respect to 'naturalization and aliens' and an express power to make laws with respect to 'immigration'.

It was held that the parliament did have the power to enact the Act, there being two independent bases for that conclusion:

- ◆ First, the 'indisputable fact that Australia has emerged has an independent sovereign nation' was itself sufficient to authorize the parliament with respect to citizenship (which, McHugh J held, happened in 1942 at the latest, upon the adoption of the *Statute of Westminster*) given that the parliament has implied legislative powers 'arising from its nature and status as a polity'.<sup>9</sup>
- ◆ Secondly, the power arose by implication partly<sup>10</sup>:
  - out of the references to 'the people of the Commonwealth', a phrase which is found in covering clause 5, section 24 and section 25 of the Constitution;
  - out of the parliament's express powers to make laws with respect to immigration, naturalization and aliens, and thus to define who were the 'people of the Commonwealth'; and
  - out of the express and implied incidental powers of the parliament to make laws governing or affecting matters that are incidental or ancillary to the subject matter of other grants of power.

The first such basis – the sovereign nation concept – is on any view an implication. No part of the text of the Constitution expressly refers to the legislative powers of the parliament arising from its nature and status as a polity. Nevertheless that has been recognised as a source of power since the *Communist Party*<sup>11</sup> case in 1951. I mention it later.

The second basis on which McHugh J found the Citizenship Act valid is still an implication, but one more closely derived from the text of particular provisions of the Constitution, and hence more closely related to the construction of express terms of the Constitution. It illustrates the difficulty in drawing a bright line

between construction of an express term and deriving an implication from the text of specific provisions

Theories of implication in Australian constitutional law  
I move next to the tests which the High Court has applied in determining whether implications may be made. There is a preliminary question: should implications be made at all?

It may be thought obvious to say that implications are needed because it is impossible for the framers of any legal document to provide, in express terms, for every eventuality.<sup>12</sup> There was, however, a time in Australian constitutional history following the *Engineers' Case*<sup>13</sup> when, as Sir Owen Dixon pointed out in *West v Commissioner of Taxation (NSW)*<sup>14</sup>, a notion seemed to gain currency that no implications could be made in interpreting the Constitution because this was contrary to the *Engineers' Case*.

The *Engineers' Case*, decided in 1920, saw the rejection of the proposition that the Commonwealth's legislative powers in section 51 must be construed in accordance with the 'reserved state powers' doctrine. That doctrine had been to the effect that because section 107 of the Constitution saved the powers of the state parliaments as they were at federation, it was necessary to read the Commonwealth's section 51 heads of legislative power narrowly so as to avoid, if possible, intruding into an area 'reserved' for state powers. The court in *Engineers' Case* was very clear that:

The doctrine of 'implied prohibition' finds no place where the ordinary principles of constructions are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning.

You will note immediately the reference to 'expressed or necessarily implied' meaning. It is evident from this passage that *Engineers' Case* did not reject the process of making implications into the Constitution, but merely stated that the particular implication being contended for could not be discerned from the Constitution; that is, there was no implication that particular areas of legislative power were 'reserved' for the states, and therefore no implied prohibition on the Commonwealth legislating in those areas.

In *West v Commissioner of Taxation (NSW)*<sup>15</sup>, Dixon J commented in strong terms that *Engineers' Case* did not hold that no implications could be made in the Constitution, and that any rule that no implications were permitted 'would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied'. Eight years later, in 1945, in *Australian National Airways Pty Limited v The Commonwealth*<sup>16</sup>, he again stressed that the Constitution was an instrument of government and said:

We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications.

It is now clear from those and other cases that constitutional implications are part of Australian constitutional law. What then are the tests by which such implications have been drawn?

I first refer to 'necessity'. The passage noted earlier from *Engineers' Case* refers to meanings which were 'necessarily implied' from the *actual terms* of the Constitution. 'Necessity' is an established, though not the only, test of implication in Australian constitutional law.

One reason, I think, why such a test was applied was by analogy with the tests adopted for implying terms in contracts, and in the interpretation of statutes.<sup>17</sup> It is an approach with which lawyers are familiar and, as an established approach to interpretation, it could be pointed to as justification for making an implication.

Another, somewhat related, reason was that a more 'literalist' approach to constitutional interpretation was taken in earlier days. To adopt 'necessity' as a criterion implied that the High Court had no choice about making the particular implication, thus giving the implication greater 'legitimacy'.

As I have suggested, the adoption of any particular constitutional implication is subject to the criticism that it represents the choice of the members of the High Court at the time the question arises for decision, rather than being something which is truly 'already there' in the Constitution. Constitutional entrenchment of a doctrine can be an exception to the principle of parliamentary sovereignty, and is open to an objection that it is anti-democratic unless it can be rigorously justified. Sir Victor Windeyer was hardly a naïve man but even he felt it necessary to say, in *Victoria v The Commonwealth (the 'Payroll Tax Case')*<sup>18</sup> that 'our avowed task is simply the revealing or uncovering of implications that are already there'.

Despite such attractiveness as the 'necessarily implied from the express terms' test might have from a legitimacy point of view, it is clear that other criteria have been used by the High Court to give effect to implications. This was recognised by Sir Anthony Mason in the *Australian Capital Television Case*.<sup>19</sup>

There he pointed out that several important implications had been made which were not necessarily implied from the actual terms of the Constitution, as the test in *Engineers' Case* suggested was necessary. For example, he considered that the implied prohibition against the Commonwealth making a law which would prevent a state from continuing to exist, or destroy or curtail its capacity to function as a government (as first recognised in *Melbourne Corporation v The Commonwealth (The State Banking Case)*<sup>20</sup> and confirmed in later cases such as *Queensland Electricity Commission v Commonwealth*<sup>21</sup>) was derived from the 'federal nature of the Constitution' rather than being necessarily implied by the Constitution's actual words.

He went on to say that it might not be right to say that no implication will be made unless it is necessary, and that in cases where the implication is sought to be derived from the actual terms of the Constitution, it may be sufficient that the relevant intention is manifested according to accepted principles of interpretation, but that where the implication was structural rather than textual the term sought to be implied must be logically, or practically, necessary for the preservation of the integrity of that structure.<sup>22</sup>

Such a classification divided implications into two classes, textual implications where necessity was not the only criterion, and structural implications, where it was. I shall come in a moment to whether these tests establish the outer limits of when implications might be drawn, but I should first say a little more about each.

Textual implications shade, of course, into questions of construction of express provisions. That is particularly so where the question is really based on a single provision of the Constitution, as in the *Cheatle* example given earlier.

The test in such a case is whether the implication conforms to the accepted principles of interpretation, that is, principles of statutory interpretation, modified as appropriate to recognise that the instrument being construed is no ordinary statute but is a Constitution.<sup>23</sup> The issue is then closely related to construction of an express term.<sup>24</sup>

Structural implications, on the other hand, cannot be tied to specific words in specific sections (or if they can, must be tied to many sections), but depend on the structure of the Constitution. The most well-established structural implication in the Australian Constitution is the basal separation of legislative, executive and judicial powers. As Dixon CJ, McTiernan, Fullagar and Kitto JJ said in *R v Kirby; Ex parte Boilermakers' Society of Australia*<sup>25</sup>:

If you know nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chaps I, II and III and the form and contents of ss1, 61 and 71. It would be difficult to treat it as a mere draftsman's arrangement. Section 1 positively vests the legislative power of the Commonwealth in the parliament of the Commonwealth. Then s61, in exactly the form, vests the executive power of the Commonwealth in the Crown. They are counterparts of s71 which in the same way vests the judicial power of the Commonwealth in this court, the federal courts the parliament may create and the state courts it may invest with federal jurisdiction. This cannot all be treated as meaningless and of no legal consequence.

It is coming to be recognised, I think, that some constitutional implications may be made without satisfying either of the tests already referred to.

*APLA Ltd v Legal Services Commissioner (NSW)*<sup>26</sup>, decided in September last year, involved a challenge to the constitutional validity of a regulation made under the *Legal Profession Act 1987* (NSW), prohibiting lawyers advertising their services in relation to personal injury claims. It was part of the overall reforms made in New South Wales in response to what was seen as the 'insurance' crisis. It was common ground in the proceedings that the regulation purported to prohibit advertising by lawyers of their services in relation to personal injury causes of action provided under federal law, including the Trade Practices Act and class actions under the Federal Court of Australia Act, as well as causes of action arising at common law or under New South Wales legislation.

The challenge was made on four grounds, the one of present relevance being that the regulation was inconsistent with Chapter III of the Constitution. The challenge on that ground, was rejected 5-2, the dissentients being McHugh J and Kirby J. McHugh J (at [73]) stated that Chapter III gives rise to 'certain implications' and

those implications provide a shield against any legislative forays that would harm or impair the nature, quality and effects of federal jurisdiction and the exercise of federal judicial power conferred or invested by the Constitution or laws of parliament of the Commonwealth.

One of the particular implications was that the states could not enact legislation to alter or interfere with the working of the federal judicial system set up by Chapter III. McHugh J held that:

the provision of legal advice and information concerning federal law should be seen as indispensable to the exercise of the judicial power of the Commonwealth and protected by Ch III;

and that the Regulation at issue infringed that rule.

Kirby J agreed with that result although his reasoning was a little different. He considered that the *Lange* protection, to which I shall come, covered communications relating to the judicial branch of government as well as communications relating to the executive and legislative branches of governments.

The difference between McHugh and Kirby JJ and three judges of the majority (Gleeson CJ and Heydon J, and Gummow J), seemed in the end to turn on what was required by the nature of judicial power, rather than by any dispute as to the correct method of constitutional interpretation to employ. Those three majority justices seemed to contemplate an implied constitutional protection derived from Chapter III for communications between lawyers and their clients once the lawyer/client relationship was in existence, but not before. The basis upon which that protection was contemplated to exist is of interest.

Gleeson CJ and Heydon J said:

[30] The rule of law is one of the assumptions upon which the Constitution is based. It is an assumption upon which the Constitution depends for its efficacy. Chapter III of the Constitution, which confers and denies judicial power, in accordance with its express terms and its necessary implications, gives practical effect to that assumption. The effective exercise of judicial power, and the maintenance of the rule of law, depend upon the providing of professional legal services so that citizens may know their rights and obligations, and have the capacity to invoke judicial power.<sup>27</sup>

They said, however:

[30] ... The regulations in question are not directed towards the providing by lawyers of services to their clients. They are directed towards the marketing of their services by lawyers to people who, by hypothesis, are not their clients.

[32] ... It is not self-evident that the public interest requires an unrestricted capacity on the part of lawyers to promote their services.



More to the point, it is not required by the Constitution. It is a topic on which the Constitution has nothing to say in express terms. If it is said to be a matter of implication, then it is necessary to identify, with reasonable precision, the suggested implication. This has not been done.

[33] ... There is nothing in the text or structure of the Constitution, or in the nature of judicial power, which requires that lawyers must be able to advertise their services. It may or may not be thought desirable, but it is not necessary.<sup>28</sup>

They thus refer to three possible sources of the implications: the text of the Constitution, the structure of the Constitution (being Mason CJ's two limbs), and also 'the effective exercise of judicial power, and the maintenance of the rule of law'. But the nature of 'judicial power' is not fully described in the Constitution, and the 'rule of law' is not mentioned at all. Chapter III refers to the 'judicial power of the Commonwealth', but does not describe what judicial power is. Indeed, in *Nicholas v The Queen*<sup>29</sup>, Gummow J referred to the judgment of Windeyer J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*<sup>30</sup> to the effect that the concept of judicial power transcended 'purely abstract conceptual analysis' and 'inevitably attracts consideration of predominant characteristics', together with 'comparison with the historic functions and processes of courts of law'. He referred also to *R v Humby; Ex parte Rooney*<sup>31</sup> where Mason J said of the notion of '[u]surpation of the judicial power' by infringement of Ch III that it was a concept 'which is not susceptible of precise and comprehensive definition'. Similarly, in *Polyukhovich v The Commonwealth*<sup>32</sup>, Deane J said that the Constitution intended that the judicial power of the Commonwealth would be exercised by Chapter III courts 'acting as courts with all that notion essentially requires'.

In the APLA Case, Gummow J said<sup>33</sup> that the doctrines respecting the judicial power of the Commonwealth were derived from the actual terms found in Ch III. He went on to quote from the



## *Boilermakers' Case* joint judgment:

No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Ch III. The fact that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise was noted very early in the development of the principles of interpretation. In Ch III we have a notable but very evident example.<sup>34</sup>

He then said that the formulation of principle in that joint judgment also involved 'very general considerations' which 'explain the provisions of Ch III of the Constitution', and that accordingly, the body of authority concerned with judicial power did not readily 'observe any dichotomy that may have been posited by Mason CJ in *Australian Capital Television*'<sup>35</sup> and concluded:

It is neither of the essential nature of a court nor an essential incident of the judicial process that lawyers advertise. [The impugned Regulation] operates well in advance of the invocation of jurisdiction. It does not prevent prospective litigants from retaining lawyers, nor prevent lawyers or others from publishing information relating to personal injury legal services and the rights and benefits conferred by federal law.<sup>36</sup>

There thus appears to be recognition, by at least Gleeson CJ and Heydon J, and seemingly Gummow J, that there is a general implied prohibition upon legislation which abrogates any right which is essential for the effective exercise of judicial power, without the implication also needing to meet the test of being necessarily implied from the text or structure of the Constitution. The word 'essential' may be necessity in another guise, but the essentiality is tied to a concept at a high level of abstraction – the nature of judicial power, rather than to the text or structure of the Constitution.

Of course, it may be argued that this is merely a question of construction of the express term 'judicial power' in section 71 (a textual implication), and the continued effective exercise of judicial power is itself necessarily implied from the structure of the Constitution (a structural implication), and that these matters are so obviously the source of the implications derived from 'judicial power' that it is not necessary to recite the incantation of 'text and structure' to derive the implication in each case. But the point is that there does seem to be a negative implication derived from the nature of 'judicial power' as a free-standing concept.

The other interesting point revealed by APLA is that arguably Hayne J, and certainly Callinan J, were not convinced that questions relating to the nature of judicial power should be the subject of any real or perceived relaxation of the requirement that any implication be implied from the text or necessarily implied from the structure of the Constitution.

Hayne J discussed Mason CJ's criteria in *Australian Capital Television* for determining whether an implication could be made in the Constitution in the two categories of case (textual and

structural) and said<sup>37</sup> that it did not need to be decided whether it was necessary to show logical or practical necessity in every case where the structure of the Constitution was said to carry an implication. Nor was it necessary to decide whether attempting to distinguish between structural and textual bases for an implication (for the purpose of articulating different tests for when an implication is to be drawn) had difficulties that are insuperable. Rather he regarded the critical point as being that any implication had to be 'securely based'. Always, the question must be: what is it in the text and structure of the Constitution that founds the asserted implication?

Callinan J strongly favoured a necessity approach. He said:

[470] The particular, indeed rigorous, application of the 'necessity rule' to the Australian Constitution is required by reason of a number of features unique to our Constitution and its composition: the prolonged and fully recorded debates and deliberations preceding it to which modern lawyers have ready access and which show clearly, in most instances, why proposals were adopted or discarded; the substantial public acceptance in Australia of the Constitution before its passage through the parliament of the United Kingdom; its generally comprehensive and explicit language; the availability of one, and one only mechanism for its amendment, a referendum under s128; the reluctance, in many referenda of the people of Australia to change it; and, despite the last its enduring efficacy.

[471] A case of this kind, in which the question posed, among other things, as to the expansiveness of the power of the Court itself, and the impact of its decisions upon the respective polities of the Federation, is an occasion for especial caution and restraint.<sup>38</sup>

May I note in relation to the tests to be applied that one of the decisions of the High Court in which Sir Maurice Byers' advocacy was successful, albeit delivered to a not unreceptive High Court, was *The Commonwealth v Queensland*<sup>39</sup> (the 'Queen of Queensland' Case) in which Sir Johannes Bjelke Peterson's government had enacted legislation, the *Appeals and Special Reference Act 1973*, to enable matters, including constitutional matters, to go to the Privy Council otherwise than via the High Court.

I shall not, of course, notwithstanding the passage of years, say who gave advice to the premier that the law would be held valid by the High Court. Suffice it to say that it was not those who had to appear to support it, but rather persons of a more academic bent, not resident in this country.

The Appeals and Special Reference Act was held invalid, but it is interesting to note that the principal judgment, that of Sir Harry Gibbs, referred<sup>40</sup> to the legislation as violating 'the principles that underlie Ch III'. He said that it would be 'contrary to the inhibitions which, if not express, are clearly implied in Ch. III.' The principle underlying Chapter III, it was said, was that questions arising as to the limits of Commonwealth and state powers, having a peculiarly Australian character, and being of fundamental concern to the Australian people, should be decided finally in an Australian Court, the High Court of Australia. Some of that might be described as derived from textual analyses. Some might be described as based on structural considerations. What is interesting is that a relatively declamatory statement of

constitutional position was stated at the time to be founded on principles underlying Chapter III.

Constitutional law is an area which is dynamic, rather than static. Constitutional implications may derive from concepts (such as 'judicial power'), from negatives or positive implications from parts of the text, and from 'necessary' implications from the structure. Views change as new cases present themselves for decision. I think it possible that a broader, more overall, test may be adopted, perhaps akin to that mentioned by Hayne J, namely that the implication must be 'securely based' – always with the qualification (useful for 'legitimacy') that an implication must be 'founded in the text and structure' of the Constitution.

#### Some implications

Let me attempt to list the more significant implications which have been, sometimes might be, drawn from the Constitution. I shall start with Chapter III, the judiciary chapter, some of the relevant implications from which already having been mentioned.

#### *Implied prohibition upon state jurisdiction being vested in federal courts*

The negative implication against state jurisdiction being vested in federal courts which was held to exist in *Re Wakim, Ex parte McNally*<sup>41</sup> may perhaps be regarded as a textual implication, a negative implication deriving from the terms expressly used. In one sense, the negative implication arose inexorably from a textual conclusion reached as early as 1921 in *Re Judiciary and Navigation Acts*<sup>42</sup>, i.e. that Chapter III was the exclusive source for vesting judicial power in Chapter III courts. As Chapter III conferred the power of vesting jurisdiction on federal courts only on the Commonwealth parliament, it followed that a state parliament could not validly confer jurisdiction on a federal court.

It is interesting that although the decision in *Re Wakim* attracted criticism on the grounds that it was inconvenient for 'co-operative federalism', or wrong as a matter of technical construction<sup>43</sup>, one criticism which was not levelled at *Re Wakim* to any significant extent was that the High Court had usurped its proper judicial role. That is because of the greater 'legitimacy' of textual implications.

#### *Inability of a state to confer constitutional jurisdiction on the Privy Council*

This is the *Queen of Queensland Case* issue. It is no longer a live issue since the abolition of appeals to the Privy Council.<sup>44</sup>

#### *Continued existence of the state supreme courts*

Another implication is that of the continued existence of the state supreme courts. This is said to be implied from section 73(ii) of the Constitution, which gives a right of appeal from the Supreme Court of each state to the High Court. The implication arises because the right of appeal would be rendered nugatory if the Constitution permitted a state to abolish its Supreme Court.<sup>45</sup>

#### *Implications from the nature of judicial power*

The following implications arise in the Constitution from the nature of 'judicial power':

- ◆ That the judiciary shall be absolutely independent.
- ◆ An implied prohibition against parliament passing a bill of attainder.<sup>46</sup>
- ◆ An implied prohibition against Commonwealth laws authorising detention otherwise than by curial order, where that detention is properly characterized as punitive rather than incidental to a section 51 head of power.<sup>47</sup>
- ◆ An implied prohibition against state courts invested with federal jurisdiction from acting in a way which would undermine public confidence in the judicial functions of that court, such as by being seen as being party to and responsible for a political decision of the executive government.<sup>48</sup> This is, of course, the holding in *Kable v Director of Public Prosecutions (NSW)*, one of Sir Maurice Byers' forensic triumphs.

## Possible implications arising from the rule of law

A possibly fertile source for future implications may derive from Gleeson CJ and Heydon J's citation in *APLA*, with approval, of Sir Owen Dixon's statement in the *Communist Party*<sup>49</sup> case that the rule of law is one of the assumptions upon which the Constitution is based, and their statement that it is an assumption 'upon which the Constitution depends for efficacy'. Sir Owen Dixon had said:

it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.

Gleeson CJ, writing extra-judicially, has helpfully collected statements by High Court Justices of matters said to be required by the principle of the rule of law, some of which are<sup>50</sup>:

- ◆ that judicial decisions are to be made according to legal standards rather than undirected considerations of fairness<sup>51</sup>;
- ◆ that citizens have a right to privileged communications with legal advisers<sup>52</sup>;
- ◆ that the content of the law should be accessible to the public<sup>53</sup>;
- ◆ that access to the courts should be available to citizens who seek to prevent the law from being ignored or violated, subject to reasonable requirements as to standing<sup>54</sup>;
- ◆ that courts have a duty to exercise a jurisdiction which is regularly invoked<sup>55</sup>; and
- ◆ that the criminal law should operate uniformly in circumstances which are not materially different.<sup>56</sup>

No doubt there are other aspects. As I have said constitutional law is dynamic, not static.

## Continued existence and functioning of the states

The relative importance of the states has diminished markedly since federation. Some of this is due to the financial dependence

of the states on Commonwealth revenues, but much is due to the greater exercise by the Commonwealth of its legislative powers.

*Melbourne Corporation* dealt with Commonwealth legislation which purported to direct that state governments use only the Commonwealth Bank for banking business. The structural implication which saw that law being held void, as later explained by Mason J in *Queensland Electricity Commission v The Commonwealth*<sup>57</sup> had two elements:

- ◆ an implied prohibition against discrimination which involved placing on the states special burdens or disabilities (as developed by Dixon J in *Melbourne Corporation*); and
- ◆ an implied prohibition against laws of general application which operate to destroy or curtail the continued existence of the states or their capacity to function as governments (as held by Rich J and Starke J in *Melbourne Corporation*).

The manner in which the *Melbourne Corporation*<sup>58</sup> structural implication was derived was described by Dixon J as:

but a consequence of the conception upon which the Constitution is framed. The foundation of the Constitution is the conception of a central government and a number of state governments centrally organized. The Constitution predicates their continuing existence as independent entities. Among them it distributes the powers of governing the country. The framers do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived of the states as bodies politic whose existence and nature are independent of the powers allocated to them. The Constitution on this footing proceeds to distribute the power between state and Commonwealth and to provide for their inter-relation, tasks performed with reference to the legislative powers chiefly by ss51, 52, 107, 108 and 109.

These tests can be difficult to satisfy, as the *Native Title Act Case (Western Australia v The Commonwealth)*<sup>59</sup> demonstrates.

In more recent cases a question has arisen whether there are in reality two tests, namely:

whether, looking to the substance and operation of the federal laws, there has been, in a significant manner, a curtailment or interference with the exercise of state constitutional power.<sup>60</sup>

## Implied freedom of communication on political and government matters

The High Court was subjected to a good deal of criticism as to its proper judicial role as a result of its decisions in *Nationwide News Pty Ltd v Wills*<sup>61</sup>, *Theophanous v Herald and Weekly Times Ltd*<sup>62</sup> and *Australian Capital Television v The Commonwealth*.<sup>63</sup> The implied freedom of political communication held to exist in those cases is an example of an implication which has retreated to somewhat less controversial shores, by moving to become more a textual, perhaps structural also, implication.

The implied freedom of political communication there held to exist was drawn from the principle of representative government, arguably an unexpressed assumption underlying the Constitution. As stated by Deane and Toohey JJ in *Nationwide News*:

The implication of the Constitution which is of central importance in the present case flows from the third of these general doctrines of government which underlie the Constitution and form part of its structure. That doctrine can be conveniently described as the doctrine of representative government, that is to say, of government by representatives directly or indirectly elected or appointed by, and ultimately responsible to, the people of the Commonwealth.<sup>64</sup>

Following the disquiet at the perceived use of a somewhat free-standing concept of 'representative government' to make implications in the Constitution, the Court in a unanimous judgment in *Lange v Australian Broadcasting Corporation*<sup>65</sup> re-cast the reasoning underlying the implied freedom of political communication so as to anchor the reasoning back more firmly to the text and structure of the Constitution. There was a focus in *Lange* on specific sections of the Constitution:

Sections 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.

In addition, the presence of s128, and of ss6, 49, 62, 64 and 83, of the Constitution makes it impossible to confine the receipt and dissemination of information concerning government and political matters to an election period. Those sections give rise to implications of their own. Section 128, by directly involving electors in the states and in certain Territories in the process for amendment of the Constitution, necessarily implies a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal parliament.<sup>66</sup>

The *Lange* test for determining whether the implied freedom of political communication is now to the effect that a law which effectively burdens freedom of communication about government or political matters by its terms, operation or affect will be invalid if the law is not reasonably appropriate and adopted to serve a

legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.<sup>67</sup>

As McHugh J said in *Coleman v Power*<sup>68</sup>, of the implied freedom of political communication, as reformulated in *Lange*:

the text and structure of the Constitution enable the court to determine whether the freedom has been infringed without resort to political or other theories external to the Constitution.

#### *Principles of interpretation*

I mentioned earlier that the principles of interpretation of the Constitution are themselves in a significant way implications.

In relation to Commonwealth powers in s51 the current approach can be seen for example in *Grain Pool of Western Australia v The Commonwealth*<sup>69</sup> where it was said that the general principles included the following:

First, the constitutional text is to be construed 'with all the generality which the words used admit'. Here the words used are 'patents of inventions'. This, by 1900, was 'a recognised category of legislation (as taxation, bankruptcy)', and when the validity of such legislation is in question the task is to consider whether it 'answers the description, and to disregard purpose or object'. Secondly, the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates. Thirdly, the practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power. Fourthly, as Mason and Deane JJ explained in *Re F; Ex parte F*

In a case where a law fairly answers the description of being a law with respect to two subject-matters, one of which is and the other of which is not a subject-matter appearing in s51, it will be valid notwithstanding that there is no independent connexion between the two subject-matters.

This passage was referred to with approval by Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ in *Bayside City Council v Telstra Corporation Ltd.*<sup>70</sup>

Executive power; powers deriving from the Commonwealth's existence as a polity.

There is some overlap between these topics. The executive power of the Commonwealth is the power in the Constitution with the least definition, section 61 simply providing that:

The executive power of the Commonwealth is vested in the queen and is exercisable by the governor-general as the queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

On one view, determining the content of the phrase the 'executive power of the Commonwealth' is an simple exercise in construction of an express term of the *Cheatle* kind. But the express terms are, in this case, at such a high level of abstraction that it is strongly arguable that something closer to implication is occurring when a court determines the bounds of Commonwealth executive power.





In *Barton v The Commonwealth*<sup>71</sup>, Mason J said that the executive power:

enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.

The statement that the Crown can undertake 'all executive action which is appropriate to the position of the Commonwealth under the Constitution' again envisages some pre-existing concept of the nature of 'executive action' embodied by the Constitution.

It was this pre-existing concept of the nature of executive action which led the full court of the Federal Court in the *Tampa* case<sup>72</sup> to hold that the executive government of the Commonwealth had power under the Constitution to prevent the entry of non-citizens into Australia in the absence of any legislation providing this power. As French J said:

The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the government of the nation would lack under the power the conferred upon it directly by the Constitution, the ability to prevent people no part of the Australian community, from entering.<sup>73</sup>

That is speaking of executive action. The existence of the Commonwealth as a polity has been regarded as potentially giving rise to a power to legislate to protect its own existence and the unhindered play of its intimate activities.<sup>74</sup> The ambit of the doctrine remains to be determined.

## Other parts of the Constitution

I have dealt so far with the chapters of the Constitution dealing with legislative, executive and judicial powers. There are, of course, other parts.

Chapter 4, 'Finance and trade', has given rise to many issues of interpretation, particularly of ss90 and 92, but they seem not properly to be regarded as implication, rather than interpretation.

Chapter 5, 'The states', contains a number of provisions which might be a source of implications. Thus there is s116 (no establishment of a religion or religious test, free exercise of religion), s117 (no discrimination by a state against a resident of another)<sup>75</sup>, and s118 (requiring the recognition throughout the Commonwealth of the laws etc of every state).

It has sometimes been suggested that these provisions, together with some fragments of others, are instances of a further underlying principle of, to put it shortly, equality. That is they should be seen not as islands standing separately in the ocean, but rather as the above surface projections of a reef of underlying principle.

My skills at leading the High Court along such a path were not those of Sir Maurice. In *Leeth v The Commonwealth*<sup>76</sup> I was able to attract three justices along that path, but three out of seven is not enough. The heresy was later put down in *Kruger v The Commonwealth*.<sup>77</sup>

## Conclusion

The division of the Commonwealth's powers into legislative, executive and judicial powers is the Constitution's striking structural feature. As was said in the *Boilermakers Case* this is not 'a mere draftsman's arrangement'.<sup>78</sup> This division can only be given practical effect if some implications are made about the nature and attributes of the three types of power. It is difficult to see *all* the incidents or attributes of each type of power properly described as either implied from the text of the Constitution according to the accepted rules of construction or necessarily implied from the structure of the Constitution. Many of them seem base it. The course of judicial discussion will determine the extent to which those assumptions become part of it.

\*I would like to acknowledge the considerable assistance of Patrick Flynn, barrister.

<sup>1</sup> See *Egan v Willis* (1998) 195 CLR 424.

<sup>2</sup> (1999) 198 CLR 511.

<sup>3</sup> Unlikely, given that *Re Wakim* was itself a reventilation of *Gould v Brown* (1998) 193 CLR 346.

<sup>4</sup> (1999) 199 CLR 462.

<sup>5</sup> See McHugh J in *Re Wakim* 198 CLR at 551- 552.

<sup>6</sup> One would expect, of course, that the subject matter was such as to require the adoption of the view that 'foreign power' was to be construed as at the time when the issue arose.

<sup>7</sup> (1993) 177 CLR 541. The example was first used to illustrate this point by Jeremy Kirk in 'Constitutional implications (I) nature, legitimacy, classification, examples' (2000) 24 MULR 645 at 648, the first of two articles containing a very useful discussion of the topic, sufficiently comprehensive if I may say so as to leave little to implication.

<sup>8</sup> (2005) 80 ALJR 125; (2005) 222 ALR 83.

<sup>9</sup> *ibid* [9].

<sup>10</sup> *ibid* [10].

<sup>11</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

<sup>12</sup> Implications are familiar in the law of contract, where there is a substantial body of law determining when implications can be made in a written contract. They are also familiar in the construction of ordinary statutes. A fortiori a constitution.

<sup>13</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

<sup>14</sup> (1937) 56 CLR 657 at 681.

<sup>15</sup> 56 CLR at 681-2.

<sup>16</sup> (1945) 71 CLR 29 at 85, quoted by Mason J in *Australian Capital Television Pty Limited v The Commonwealth* (1992) 177 CLR 106 at 134.

<sup>17</sup> *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26; *Codelfa Construction Pty Ltd v state Rail Authority of NSW* (1982) 149 CLR 337 and Callinan J. in *APLA Ltd v Legal Services Commissioner* (2005) 79 ALJR 1620 at 1710, [470].

<sup>18</sup> (1971) 122 CLR 353 at 401-402.

<sup>19</sup> *Australian Capital Television Pty Limited v The Commonwealth* (1992) 177 CLR 106 at 134-5.

<sup>20</sup> (1947) 74 CLR 1.

- <sup>21</sup> (1985) 159 CLR 192.
- <sup>22</sup> 177 CLR at 135.
- <sup>23</sup> See Gleeson CJ in *Singh v Commonwealth of Australia* (2004) 78 ALJR 1383; (2004) 209 ALR 355; [2004] HCA 43 at [20].
- <sup>24</sup> McHugh J's second basis for upholding the Citizenship Act in Hwang was a textual implication, and the method of constitutional implication it exemplifies undoubtedly conforms to well-established notions of constitutional interpretation.
- <sup>25</sup> (1956) 94 CLR 254 at 274.
- <sup>26</sup> (2005) 79 ALJR 1620.
- <sup>27</sup> 79 ALJR at [30].
- <sup>28</sup> 79 ALJR at [30], [32]-[33].
- <sup>29</sup> (1998) 193 CLR 173 at 233 [148].
- <sup>30</sup> (1970) 123 CLR 361 at 394.
- <sup>31</sup> (1973) 129 CLR 231 at 249-250.
- <sup>32</sup> (1991) 172 CLR 501 at 607.
- <sup>33</sup> 79 ALJR at [241].
- <sup>34</sup> 94 CLR at 270.
- <sup>35</sup> 79 ALJR at [241].
- <sup>36</sup> At [248].
- <sup>37</sup> 79 ALJR at [389].
- <sup>38</sup> 79 ALJR at [470] – [471] *In Bayside City Council and ors v Telstra Corporation Limited* and ors (2004) 216 CLR 595 at 663, [146]-[149], however, he appeared to give a broad application to the Melbourne Corporation principle.
- <sup>39</sup> (1975) 134 CLR 298.
- <sup>40</sup> 134 CLR at 314-5.
- <sup>41</sup> (1999) 198 CLR 511.
- <sup>42</sup> (1921) 29 CLR 257 at 264 – 267.
- <sup>43</sup> See, to take but one example, Rose 'The bizarre destruction of cross-vesting' in *The High Court at the Crossroads: Essays in Constitutional Law*, Stone and Williams (eds), Federation Press, Sydney, 2000.
- <sup>44</sup> Australia Acts 1986, s11.
- <sup>45</sup> *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 114.
- <sup>46</sup> *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.
- <sup>47</sup> *Chu Ken Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562.
- <sup>48</sup> *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.
- <sup>49</sup> *APLA v Legal Services Commissioner* (NSW) 79 ALJR at [30] (footnote 21), citing Dixon J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.
- <sup>50</sup> Gleeson, 'Courts and the rule of law' in Saunders and LeRoy (eds) *The Rule of Law*, Federation Press, Sydney, 2003 at 180-181.
- <sup>51</sup> *Federal Commissioner of Taxation v Westraders Pty Limited* (1980) 144 CLR 55 at 60 per Barwick CJ.
- <sup>52</sup> *Baker v Campbell* (1983) 153 CLR 52 at 71 per Gibbs CJ; *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319 at 346 per McHugh J; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 161 per McHugh J.
- <sup>53</sup> *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 672 per Windeyer J.
- <sup>54</sup> *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 28 at 35 per Gibbs CJ.
- <sup>55</sup> *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 239 per Brennan J; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76 per Gaudron J.
- <sup>56</sup> *Taikato v The Queen* (1996) 186 CLR 454 at 465-466 per Brennan CJ, Toohey, McHugh and Gummow JJ.
- <sup>57</sup> (1985) 159 CLR 192.
- <sup>58</sup> *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 1 at 81-82.
- <sup>59</sup> (1995 ) 183 CLR 373.
- <sup>60</sup> *Austin v The Commonwealth* (2003) 215 CLR 185 at 249, [124; 265, [168] per Gaudron, Gummow and Hayne JJ.
- <sup>61</sup> (1992) 177 CLR 1.
- <sup>62</sup> (1994) 182 CLR 104.
- <sup>63</sup> (1992) 177 CLR 106.
- <sup>64</sup> 177 CLR at 70.
- <sup>65</sup> (1997) 189 CLR 520.
- <sup>66</sup> 189 CLR at 561
- <sup>67</sup> The Lange principle is a limitation on legislative power. The limitation applies to invalidate both state and Commonwealth laws.
- <sup>68</sup> (2004) 220 CLR 1 at [88].
- <sup>69</sup> (2000) 202 CLR 479 at 492, [16].
- <sup>70</sup> (2004) 216 CLR 595 at 625, [28].
- <sup>71</sup> (1974) 131 CLR 477.
- <sup>72</sup> *Ruddock v Vardalis and Others* (2001) 110 FCR 491
- <sup>73</sup> 110 FCR at [193].
- <sup>74</sup> See *Burns v Ransley* (1949) 79 CLR 101 at 106, *R v Sharkey* (1949) 79 CLR 121 at 148-149, *The Communist Party Case* 83 CLR 187-8, *Davies v The Commonwealth* (1988) 166 CLR 79.
- <sup>75</sup> The provision which allowed Mr AW Street to break down the 'dingo fence'. *Street v Queensland Bar Association* (1989) 168 CLR 461.
- <sup>76</sup> (1992) 174 CLR 455.
- <sup>77</sup> (1997) 190 CLR 1.
- <sup>78</sup> (1956) 94 CLR 254 at 274.

## Women in the law



In this address to the Anglo-Australasian Society of Lawyers on 3 May 2006, the Hon Justice Ruth McColl AO critically examines the entrenched notion of judicial appointment based exclusively on ‘merit’ and concludes that Australia should adopt the British model if it is to redress racial and gender imbalances on the Bench.

In Alan Bennett’s play *The History Boys*<sup>1</sup> there is an exchange between the history boys and the only female character, Mrs Lintott, a history teacher in which she asks them, rhetorically:

Can you, for a moment, imagine how dispiriting it is to teach five centuries of masculine ineptitude? ... History’s not such a frolic for women as it is for men. Why should it be? They never get round the conference table. In 1919, for instance, they just arranged the flowers then gracefully retired. History is a commentary on the various and continuing incapacities of men. What is history? History is women following behind with the bucket.

What does this exchange say about my allocated topic *Women in the Law*? It reminds us (should we need reminding) that it is men who have substantially shaped our world. That it is a world in which, historically, women have played a supporting part – a bit part – rather than taken centre stage. And thirdly it suggests, perhaps states, that not all of those men can be regarded as successful, exemplary or worth emulating.

This extract from *The History Boys* seemed an apt introduction to this address, in the light of some rather dispiriting exchanges in the media recently concerning the appointment of women to the judiciary. These exchanges suggest that, in the minds of some lawyers, the correct model of the legal profession is one in which women continue to follow behind with the bucket.

What has inspired this outpouring? In February the attorney-general of Victoria, the Hon Robert Hulls, announced the appointment of Professor Marcia Neave to the Victorian Court of Appeal. Professor Neave is a distinguished academic lawyer with an enviable national, indeed international, reputation. I do not doubt that she will be a great jurist.

However even she anticipated her appointment might attract controversy commenting, ‘some people will wonder if my appointment is appropriate’. Never a truer word was spoken. The immediate occasion for controversy was the fact Justice Neave had never practised law.

One commentator Andrew Bolt of the *Herald-Sun*, (who many would regard as rather on the conservative side of journalism) observed that once one had to ‘have practised in the Supreme Court

for years to be even considered’ for the Court of Appeal. He opined that the Victorian attorney-general, whom he christened the government’s Robespierre, ‘had the eligibility rules changed so that lots of Supreme Court experience was no longer required’.<sup>2</sup> He attacked the attorney-general as ‘a man who seems too eager to smash the culture of our courts to replace it with one that’s more activist and less democratic.’ The radical step the attorney-general had apparently taken to achieve this outcome was to feminise the law. In gasping tones, Mr Bolt trotted out the list of women who filled almost every top legal job in Victoria: chief justice, Children’s Court president, solicitor-general, Law Reform Commission chairman and CEO of the Legal Services Board as well as the chief commissioner of police. ‘Justice in Victoria’, Mr Bolt said ‘now wears a dress’.

It would be easy to dismiss Mr Bolt’s rather predictable article as an exemplar of shock-jock, headline-grabbing journalism. But, to my mind, his comments should not be too readily dismissed. The *Herald-Sun* has, I believe, the largest circulation of any Australian newspaper. Mr Bolt’s remarks may well raise concerns in the minds of a significant proportion of those readers about how justice is administered.

The controversy was taken up a month or so later in the *Australian Financial Review* in a article entitled ‘Hulls takes on the old guard’ which picked up Mr Bolt’s theme of the ‘politically correct’ steps Mr Hulls was said to be taking in his judicial appointments.

Mr Hulls was described as refusing to be intimidated by the ‘boy’s club of the Bar complaining about sexist judicial appointments’. He was quoted as saying robustly: ‘The train of reform to bring the legal profession into the twenty-first century has well and truly left the station. There are some at the Bar with an insular nineteenth century mindset who have clearly missed that train.’<sup>3</sup>

*A belligerent approach to the ‘old guard’ is not a particularly constructive way to achieve change.*

A flurry of letters to the editor of the AFR ensued. All were from male lawyers, substantially asserting that Mr Hulls's appointments breached what one correspondent described as the 'gold standard for a judge': the 'core qualities of intellect, personality and experience.' All three were said to 'make up the only relevant criterion for appointment: merit'. This correspondent blithely then tossed in the observation (some might regard as a trifle defensive) that:

Gender just doesn't come into it. When the merit criteria is downgraded because the government wants to advance gender equality or multiculturalism or political acceptability, it is litigants who suffer.

He rounded off his letter by saying that:

Using any criterion other than merit in judicial appointments will not just shake up the boys' club. It will lower the quality of the judiciary and interfere with the due administration of justice.<sup>4</sup>

I will not subject you to the remainder of the correspondence which proceeded in like vein.

It is a sad fact that at least half a century, if not more, of debate about deconstructing entrenched ideas about what constitutes 'merit' in terms of suitability for judicial appointment does not appear to have any effect upon these (all male) correspondents, who cleave to a model of judicial appointment which would comfortably exist in the world described by Mrs Lintott – where only men got around the conference table, or in this case should I say, got to the Bench?

As Dame Brenda Hale has pointed out, '[t]he word "merit" only emerges when the appointment of women and other non-standard candidates (to the judiciary) is being discussed.'<sup>5</sup> And yet many informed commentators recognise that 'merit is a constructed idea,

not an objective fact, and that judicial appointments based on "merit" are largely mythical.'<sup>6</sup>

Indeed, according to a paper delivered by Justice Jim Wood to the AIIA, '[t]he convention by which appointment on merit was established in England is in fact relatively recent' having occurred during the Attlee government (in 1946) when Lord Jowitt was lord chancellor.

Lord Halsbury, at the turn of the century, was said to have packed the Bench with judges of his own political complexion, apparently considering that service to the Tory Party was sufficient qualification for appointment to the High Court Bench. No less than seventeen Tory MPs or candidates attracted his favour.<sup>7</sup>

Once embraced, however, 'merit' tended to be 'defined by senior lawyers [who saw] no exception to the general tendency for people to see merit in those who exhibit the same qualities as themselves' with the unsurprising result that the people appointed 'tended to be those who had a traditional practice and profile: male, silk, and all-round decent chap' to the exclusion of women and members of other disadvantaged groups.'<sup>8</sup>

It is indisputable that Mr Hulls is concerned to set aside this aspect of legal culture. While I do not criticise his motives, I suggest, with all due deference, that while a rather bull in a china shop approach may be suitable for the rough and tumble of politics, a belligerent approach to the 'old guard' is not a particularly constructive way to achieve change. Controversy of the sort stirred up by the AFR article cannot assist public confidence in the administration of justice. Further, it may well be counter-productive in terms of discouraging eminently qualified, but what I will call non-standard, candidates from considering judicial appointment.

What is really needed, in my view, if notions of 'merit' are to be dragged into the twenty-first century is a thorough review of the judicial appointments process to establish a system which is transparent, accountable and which, while based on appointment on merit, acknowledges and is able to accommodate issues of diversity.

I suggest that one of the reasons the correspondents to the *Financial Review* appear to be relatively unreconstructed or, to use a more neutral expression, traditionalists in their ideas of judicial appointment, is because there has been relatively little governmental consideration in Australia of the system of judicial appointment, let alone the role diversity plays in that process.

There was a flurry of such discussion, albeit brief, in the early nineties in the last years of the Labor government. In 1993 the attorney-general, Michael Lavarch, released a discussion paper on judicial appointments which recognised that the fact men of Anglo-Saxon or Celtic background held nearly 90 per cent of all federal judicial offices indicated 'some bias in the selection process, or at least a failure of the process to identify suitable female and persons of different ethnic backgrounds as candidates'.<sup>9</sup> The Australian Law Reform Commission looked at the issue in its 1994 report on *Equality Before the Law* and supported a judicial commission, in the nature of an advisory



Victorian Attorney General Rob Hulls.  
Photo: Shannon Morris/News Ltd Image Library



body, as the preferable method of judicial selection. It saw such a body as 'offer[ing] the best chance of achieving greater diversity on the Bench'.<sup>10</sup>

The Senate Standing Committee on Legal and Constitutional Affairs also considered judicial appointments in 1994 as part of its examination of the issue of Gender Bias and the Judiciary. It recommended that criteria should be established and made publicly available to assist in evaluating the suitability of candidates for judicial appointment, that the Commonwealth attorney-general establish a committee to advise on prospective appointments to the Commonwealth judiciary and urge the attorneys-general of the states and territories to follow that course too.<sup>11</sup>

None of these recommendations went anywhere. To all intents and purposes the subject died.

Most recently, however, Justice Sackville took up the cudgels in 2004 in his discussion paper, prepared for the Judicial Conference of Australia, in which he identified the advantages of an independent judicial commission with responsibility either for actually making judicial appointments or, at least, making recommendations to government concerning appointments.<sup>12</sup>

In contrast the last decade has seen significant work in the United Kingdom to transform the process of judicial appointment. How has the United Kingdom reached this point?

Early in the British Labour Party's first term in government, the lord chancellor, Lord Irvine, launched a consultation paper to explore the proposal that a judicial appointments commission should be established. One of the concerns this consultation process was to address was that the judiciary was seen as 'too white, male, middle class, privately and/or Oxbridge educated'.<sup>13</sup>

Significantly while Lord Irvine always made it clear that he regarded the overriding principle for judicial appointment as merit, he did 'not regard advocacy experience as an essential requirement for appointment to judicial office'.<sup>14</sup>

In 2001, following upon recommendations by Sir Leonard Peach the Commission for Judicial Appointments was established to act as an independent auditor of the process of judicial appointments. One of its functions was to review the processes of judicial appointment to establish whether appointments were being made in accordance with the principle of selection on merit.<sup>15</sup> Its work has complemented and informed the work undertaken by the Department of Constitutional Affairs which was also reviewing the judicial appointments system.

None of the commissioners was, or had been, a practising lawyer or a holder of any judicial office. Early in the piece they recognised that, as at 2001, the judiciary comprised 'overwhelmingly white, male[s] from a narrow social and educational background' and did not reflect the makeup of 'the potential pool of applicants ... (thus raising) questions about equality of opportunity'.<sup>16</sup> It accepted 'there [were] strong arguments in favour of increasing the diversity of the judiciary' while ensuring 'the principle of selection on merit

... continue[d] to be of paramount importance, if the public [was] to retain confidence in the integrity and ability of the judiciary'.<sup>17</sup>

Significantly the commission recognised that '[f]undamental questions of how 'merit' [was] defined and how it should be measured [were] far from clear cut' and that 'there [was] scope for widely diverging interpretations about the meaning of 'merit' generally'.<sup>18</sup> It commented that while it had 'no reason to believe that the present system result[ed] in the appointment of people who do not have the required qualities, ... for judicial office ... [t]he issue [was] whether others, who also [had] the required qualities, [were] not being fairly considered or selected due to flaws in the processes and systems, and how this impact[ed] on confidence in judicial appointments and consequently the whole legal process'.<sup>19</sup>

By 2003 the commission had concluded the system of judicial appointments was biased against women and ethnic minorities. It rejected the notion that the 'trickle-up' effect could redress gender and ethnic imbalance in the judiciary. It had concluded there was a need for an independent judicial appointments commission to achieve, among other goals, overcoming obstacles to diversity in the judiciary. On 12 May 2003 the British Government announced its intention to create such a body.<sup>20</sup>

By the time the commission had been in existence for four years it had identified 'diversity concerns [as] an integral and essential element of selection on merit'<sup>21</sup> a view shared by Lord Falconer, Lord Chancellor and Lord Woolf of Barnes, Lord Chief Justice.<sup>22</sup>

Lord Falconer, in particular, decried the notion that 'merit' required candidates for judicial appointment to conform to a stereotype. He said that appointments made in the image of predecessors, looking and sounding like a judge has always looked and sounded, ... [was] the enemy of diversity'. He saw 'appointment on merit [as meaning] that decisions are made with all the assessments of the candidate available, against published competencies or criteria for the post, and substantiated by clear evidence of the candidate's suitability for appointment'.<sup>23</sup>

A month ago, on 3 April 2006, the independent Judicial Appointments Commission, established pursuant to the *Constitutional Reform Act 2005* (UK) commenced operation. It will, at the lord chancellor's request, conduct a selection process and then recommend candidates for appointment to judicial office in England and Wales. This selection process will apply to appointments from the lord chief justice down. Selection must be solely on merit but, subject to that requirement, the commission will also be required to have regard to the need to encourage diversity in the range of persons available for selection for appointment.<sup>24</sup>

One of the objectives of establishing the Judicial Appointments Commission is to open up the Bench to candidates who might not have thought it worth applying in the past and to provide better transparency and accountability in the selection process.<sup>25</sup>

The Commission for Judicial Appointment's remit ended in April with the advent of the Judicial Appointments Commission. It concluded its final report on a rather despondent note, however,

observing that 'the culture of the professions and the judiciary may prove to be hard to change; and it is culture, rather than process which acts as the real brake on diversity'. It saw '[a]chieving change ... as be[ing] as dependant on the continuing commitment of the lord chief justice and the lord chancellor to the publicly proclaimed ambition to achieve a more representative judiciary as on the leadership of the Judicial Appointments Commission.' And it saw a continuing need 'to challenge the culture and behaviour which impeded progress towards a more representative judiciary, not just to reform the selection processes.'<sup>26</sup>

The commission's work provides a telling insight into how entrenched attitudes perpetuate discriminatory selection processes. Its conclusion that change is as much a matter of altering the culture of the legal profession (and, no doubt, society too) as well as the process may not be remarkable but, having regard to the depth of work the commission undertook in its five years of operation, should critically inform any review of the judicial appointments process in Australia.

None of what England's Commission for Judicial Appointments learned over its five years of operation would come as any surprise to most of you, I suspect.

However what is remarkable is that while the United Kingdom has undertaken this profound examination and reform of its judicial appointments process, including meeting head-on the issue of the extent to which that system accommodated women and ethnic minorities, virtually nothing of a formal nature to address these issues has taken place in Australia since the early nineties.

It may be that Mr Hulls is seeking to implement his own system of judicial diversity, but how much better would it be if any reform to the process of judicial appointments in Australia was undertaken in the transparent and accountable manner the English have adopted.

I would commend the English reforms to the both government and opposition parties at both federal and state levels. It seems to me at least, to be highly desirable to consider whether a judicial appointments process similar to that adopted in the United Kingdom can be adopted in Australia. A uniform approach is clearly desirable. Merit should clearly be the criterion for appointment, but 'merit' as Lord Falconer had outlined it, not as the traditionalists would have it. I accept that the federal structure makes a uniform approach difficult, but if SCAG can agree on uniform defamation laws, it strikes me that agreement on a uniform judicial appointments model, subject to any constitutional issues, should not be impossible to achieve.

But, as the Commission for Judicial Appointments recognised, a judicial appointments commission is not the only solution to issues of diversity in the legal profession, let alone on the Bench. Cultural change is needed too.

I swore when I started to prepare this address that it would not become, as so many speeches concerning women in the law do, yet

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another recitation of indigestible and depressing statistics contrasting the number of women graduating from law school with outstanding academic qualifications with the number of women in the profession, let alone on the Bench. Some of us, I am sure, could recite these statistics in our sleep.

An examination of these statistics reveals, what we all instinctively know, that change is not linear, let alone straight-forward but, rather, can be 'unpredictable and dynamic ... chaotic, messy and full of conflict and compromise'. Those who have practised at the coal face of the legal profession as well as been intimately involved with not only its politics, but also the politics of the women's movement, know that it can be truly said that 'change can be a dance, though not very smooth, with three steps forward and two tugs backward, one pulled sideways and onward.'<sup>27</sup>

Senior members of the profession, having regurgitated these statistics, have for years exhorted solicitors to make their workplaces more attractive to women practitioners in a bid to stem the 'trickle-out' effect and to brief more women in order to ensure not merely equality of briefing practices but, too, that they obtain the experience said to be an essential prerequisite for judicial appointment.

A reading of such exhortations over the comparatively recent period of 1997–2004 convinces me that they are to little, or no avail. Real change will never, or at least rarely, come from within the ranks of the legal profession. It is only when leaders of the profession drive the process of change that the position will really improve and it will be recognised that 'merit comes differently packaged'.

Traditionalists decry change and call for a return to the model of judicial appointment with which they are comfortable – a model which has substantially ensured that the profession and the judiciary they see is one that reflects the image they see in their mirror – one which reflects the white male pool of lawyers which was the only available pool some 30 or so years ago, but which has been increasingly eroded by women and ethnic groups.

The time has long past for that model to be abandoned. The legal profession of 2006 bears no resemblance to the legal profession of even twenty or thirty years ago. It is a false hope to cling to the notion that the Bench should reflect a bygone era.

I would hope that the English reforms provide a stimulus for a formal and thorough examination of the process of judicial appointments in Australia. If such a process is undertaken with the

transparency and honesty with which the topic has been addressed in the United Kingdom then, it might be truly be hoped that the position of women in the law in Australia (and I should add any non-traditional group) and, in turn, the administration of justice will be well-served.

If I could adapt Mrs Lintott's metaphor, no longer will women's usual role be that of trolley pushers or juniors, but, rather, they should, and will, achieve their rightful place of equality in the legal profession.

I cannot leave this address without observing, what, of course, we all know, that whatever the system of appointment, no judicial officer is free of frailties. Few can live up to all of the lofty criteria said to be essential to occupying judicial office.

For example, Lord Eldon, said to be one of the great, and most famous, lord chancellors. was said to have a dilatory disposition.<sup>28</sup> Administrative difficulties plagued the Chancery during his period, '[a] situation in practice' said to have been 'far worse than could have been foreseen due in no small measure to Lord Eldon's vice of perpetual vacillation and insufferable dithering. Cargoes rotted while the great man cogitated.'<sup>29</sup>

Closer to home, Philip Ayres, has revealed in his recent biography of Owen Dixon, that the man widely regarded as one of the greatest jurists of the twentieth century, wrote judgments for another High Court justice, Sir George Rich.<sup>30</sup> On one occasion, having prepared a dissenting judgment in *R v Brislan* (1935) 54 CLR 262, he assisted Rich J write his non-dissenting judgment.<sup>31</sup> In another case, which he felt no compunction about noting in his diary, he wrote Rich J's judgment at first instance<sup>32</sup>, then sat on the appeal, upholding (as, too, did Latham, and McTiernan JJ) Rich J's (his own) first instance judgment.<sup>33</sup>

It is singular that when Ayres' biography was published these episodes were recounted with wry amusement as more of a comment on Rich J than Dixon J. I hesitate to think how a revelation of judicial conduct of that nature would be treated in today's media. I leave the headlines to your imagination. Let alone the letters to the editor!

- <sup>1</sup> Alan Bennett, *The History Boys*, Faber and Faber Limited, 2004 at pp. 83 – 85.
- <sup>2</sup> Andrew Bolt, 'Law wears a dress', *Herald-Sun*, 1 March 2006.
- <sup>3</sup> Katherine Towers, 'Hulls takes on the law's old guard', *Australian Financial Review*, 6 April 2006.
- <sup>4</sup> Letter from David J Jackson QC, Brisbane, Queensland, *Australian Financial Review*, 11 April 2006.
- <sup>5</sup> The Rt Hon. Dame Brenda Hale, 'Equality and the judiciary: Why should we want more women judges?' [2001] *Public Law* 489 at 493.
- <sup>6</sup> Cheryl Harris, 'Whiteness as a property', 106 *Harvard Law Review* 1709 (1993); K Johnson and L Fuentes-Rohwer 'A principled approach to the quest for racial diversity on the judiciary', UC Davis Legal Studies Research Paper No 33 (February 2005), cited in 'Judicial diversity in the United Kingdom and other jurisdictions', by Dr Cheryl Thomas, a review commissioned by the Commission for Judicial Appointments, November 2005 at 66.

- <sup>7</sup> 'Selection and induction of judicial officers', paper delivered by Justice James Wood to the 17th AJA Annual Conference at 6.
- <sup>8</sup> See Commission for Judicial Appointments, *Annual Review 2005* at 25, para 3.22 quoting the chief justice of Canada, Beverley McLachlin PC.
- <sup>9</sup> Attorney-General's Department Judicial Appointments - Procedure and Criteria, Canberra, AGPS, 1993.
- <sup>10</sup> Australian Law Reform Commission, Report 69, Ch 9, paras 9.39-9.41; recommendation 9.3.
- <sup>11</sup> *Gender bias and the judiciary*, Report by the Senate Standing Committee on Legal and Constitutional Affairs, at xvi.
- <sup>12</sup> Sackville J, 'Judicial appointments: a discussion paper', 14 *Journal of Judicial Administration* 117.
- <sup>13</sup> Judicial Appointments Commission, *A Consultation Paper*, 1997, p. 2 (<http://www.dca.gov.uk/constitution/reform/draftconsult.pdf>)
- <sup>14</sup> Dame Brenda Hale, op. cit, at 496
- <sup>15</sup> ibid. at 5
- <sup>16</sup> Commission for Judicial Appointments, *First Annual Report*, 2002, para 6.10
- <sup>17</sup> ibid. at 6.11, 6.14-6.15, 6.18.
- <sup>18</sup> ibid. at 6.24.
- <sup>19</sup> ibid. at 8.6.
- <sup>20</sup> Commission for Judicial Appointments, *Annual Report*, 2003 at 5.43, 5.47, 5.5, 5.6.
- <sup>21</sup> ibid. at para 3.2.
- <sup>22</sup> ibid. at 3.3-3.4.
- <sup>23</sup> ibid. at 3.23.
- <sup>24</sup> See Constitutional Reform Act 2005 (UK), ss61-96.
- <sup>25</sup> Department of Constitutional Affairs, *Increasing Diversity in the Judiciary*, consultation paper, 25/04 at 1.23.
- <sup>26</sup> ibid. at para 6.6 -6.7.
- <sup>27</sup> Last Word – How does Change Happen, Development 2006, Vol 49 at 156.
- <sup>28</sup> Meagher, Gummow and Lehane *Equity, Doctrines and Remedies*, First ed. at [114].
- <sup>29</sup> Rossiter, CJ and Stone, Margaret, 'The chancellor's new shoe,' (1988) 11 *University of New South Wales Law Journal* 11 at 12-13.
- <sup>30</sup> See Owen Dixon, Phillip Ayres, the Miegunyah Press, 2003 at 57, 73 and 93-94
- <sup>31</sup> ibid. at 73.
- <sup>32</sup> *Associated Newspapers Ltd v Commissioner of Taxation*
- <sup>33</sup> *Sun Newspapers Ltd & Associates Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337.

## Challenges facing the Junior Bar

By Christopher Wood & Kylie Day

In the early years of practice, barristers face a variety of practical challenges and decisions. Foremost among these are acquiring good accommodation, building good relationships and a self-sufficient practice, and managing one's practice effectively and efficiently. At a time when the number of practising barristers is in flux, with some reassessing or reinventing their practices in light of the effect of recent legislative reform, what has been the perceived wisdom on some of these matters in the past may be ripe for review.

### A room of one's own

The question whether to license or purchase a room on a floor, and if so, where and when, can be a vexed one. Moreover, it may need to be answered swiftly when an opportunity presents itself. And how does one find out about such opportunities, if one is interested? Although the Bar Association web site includes a page listing chambers for sale or license, and sometimes flyers are sent to members directly, it seems that many opportunities to license or buy a room arise by word of mouth or invitation only. So, should one take the initiative and express interest in a particular room or floor? And if so, how?

If there is a particular floor you are interested in joining, you can approach the clerk. There is no reason not to express an interest in a floor, and ask to be notified if a room is likely to become available.

Whether any particular choice of accommodation is a long term one or a short term one, what the nature of the barrister's commitment is, and what the implications may be for a barrister's practice, are also matters of speculation and concern. In particular, you need to decide whether the arrangement being offered, be it leasing, buying, licensing or floating, meets the current needs of your practice and that what is on offer (including non-obvious costs) meets your budget.

Understandably, there is a desire among new barristers to be as informed as possible about the range of accommodation options, and their advantages and disadvantages. The New Barristers Committee recently organised an evening seminar, in which Mary Walker SC and Geoff Hull, the clerk of 8th Floor Wentworth Chambers, addressed frequently asked questions in relation to licensing and purchasing chambers. One of the key points that emerged from this seminar is the need to research the right questions to ask, and the factors that will affect the level of overheads in the short and medium term.

### Building relationships in and out of court

One of the challenges in the early years of practice is to move from devilling for others, to having an independent practice supported by relationships with solicitors, barristers, clerks and others, from whom work flows to the barrister in his or her own right. Many of the contacts a barrister will initially have are with regional practitioners and small firms. One of the toughest challenges facing young barristers is developing a relationship with the larger or specialist firms. These contacts may be sought after for a number of reasons, including access to larger and more lucrative cases, and an improved ability to build a practice in a specialised area.

Equally important to a new barrister's practice is getting into court regularly, so as to become comfortable in the role of advocate, and to learn those things only experience can teach. It is also the best way to develop relationships of trust with the Bench and court staff, and with practitioners acting for other parties.

At a recent CPD seminar on 'Marketing your practice', Paul Daley, the clerk of Eleventh Floor Wentworth/Selborne Chambers and Fifth Floor St James' Hall Chambers, commented that one source of new work may well be those on the other side of a matter. So getting into court regularly may also be one way of meeting the challenge of expanding and improving sources of work.

### Practice management

For many, commencing practice at the Bar coincides with a transition from being an employee to running one's own practice. That may involve dealing directly with matters such as accounting, billing, GST, professional liability insurance, and recovery of fees, for the first time. While presentations are given on some of those topics to readers during the Bar Practice Course, and there are now available software packages tailored specifically to barristers, matters relating to practice management remain of concern to new barristers, as is reflected in some of the projects being undertaken by the New Barristers Committee.

### Other challenges

Like any other modern workplace, the junior bar faces the challenge of balancing work and family commitments, while maintaining one's health. Being in control of your diary and the work you accept (to some extent), has the potential to allow greater flexibility in this regard than many other fields of work.

## Taking up the challenge

By Louise Byrne

The challenges faced by women coming to the Bar are to a large extent the same challenges faced by men coming to the Bar. Those challenges were aptly summed up by Christine Adamson SC in her address to the 2004 Bench and Bar dinner:

I regard the Bar as a good place to practice law, whether one is male or female, if one has a certain temperament and intellect, and doesn't mind anxiety attacks, insomnia, working on Sundays and irregular cashflow.<sup>1</sup>

It is salutary for new barristers to bear in mind the downsides while not being discouraged, because, on balance, the Bar is to be highly recommended as a good place to practice law. It can even be fun at times.



However, I can't escape the fact that I am a woman and I have been asked to provide specific advice to new female barristers and, let's face it, as Justice Michael Kirby has said, 'women are not just men who wear skirts... women bring a different perspective to the practice and content of the law'.<sup>2</sup>

In the same paper Justice Kirby reproduces – from the records kept by the High Court Registry – what can only be described as dismal figures on female appearances in the High Court in 2004 and 2005. I note that I am a statistic as I appeared in an appeal in 2004 and was accordingly one of only seven women (out of a total of 161 = 4.3 per cent) who appeared in appeals in 2004. The figures were somewhat better for 2005 as 70 women (out of a total of 547 = 12.8 per cent) appeared in appeals. As his Honour comments, the figures remain low and the statistics do not reflect 'speaking parts'.

I venture to add that throughout the judicial hierarchy of courts and tribunals in NSW women are not getting the 'speaking parts' that they not just deserve, but need, to develop themselves fully as good advocates and barristers. Until this has been redressed, gender issues will remain on the agenda because the flow on effect is that the Bar has not been able to deliver equal numbers of suitably qualified and experienced men and women for judicial appointment to the intermediate and superior courts.<sup>3</sup> The Bar risks being further sidelined by attorneys-general when judicial vacancies arise.

My advice to new women barristers therefore focuses on, not surprisingly, getting themselves into court. If you don't like advocacy then the Bar is not for you. It is important to take every opportunity to get yourself on your feet. Sometimes you will feel somewhat beyond your depth, but seek advice from someone more senior and don't be afraid to take the challenge. Courage is a fundamental quality of a barrister and preparation is the cure for nerves.

Foster contacts with a good silk or senior junior who practices in your area of interest. Bear in mind that the good silks usually have no shortage of people wishing to be their junior. It is highly

competitive but the Bar is highly competitive. If you are willing to make yourself available at short notice, work long hours, and prove to the silk or senior junior that your research and submission writing skills are good and can be relied on, you will be remembered. The silk or senior junior will expose you to good solicitors who may then give you other work either with that silk or junior work that does not need a silk's attention.

Most importantly the silk or senior junior will expose you to interesting cases, exposure which if you have a genuine interest in the law – and I would suggest that if you don't the Bar is not for you – gives you the necessary professional development to transcend to the next level from being a new barrister.

As to personal qualities, I agree with Adamson SC that a certain temperament helps and I would add that you need to have a thick hide to be a barrister, to roll with the punches and not be too sensitive to criticism, but take criticism on board if it is warranted and constructive. I perceive that women often let themselves down in this regard.

Hopefully if you work hard, keep your instructing solicitors and their clients happy, dress appropriately and don't upset the bench too much with your skilful argument, you will then be eligible to apply for silk in about 14 years time, and the appointment of a woman as silk will be so commonplace as to not make a story in the legal affairs sections of the newspapers.

<sup>1</sup> Taken from edited version of speech by Adamson SC 'Equity is equality', *Bar News*, Winter 2004, NSW Bar Association, 2004, Sydney, pages 33-34.

<sup>2</sup> The Hon Justice Michael Kirby AC CMG, The Dame Ann Ebsworth Memorial Lecture, 'Appellate advocacy – new challenges', delivered in London, 21 February 2006, available at [HYPERLINK "http://www.hcourt.gov.au/"](http://www.hcourt.gov.au/) www.hcourt.gov.au/

<sup>3</sup> On the need for greater diversity on the Bench see the speech by Judge Gay Murrell SC 'Judicial appointments – diversity, transparency and quality' delivered to NSW Young Lawyers and NSW WLA, 13 October 2005, available at [www.womenlawyersnsw.org.au/](http://www.womenlawyersnsw.org.au/)

## Questions answered – A clerk's perspective

By Paul Daley & Geoff Hull

A key factor to being a good junior barrister is reliability. As a clerk you must know that junior barristers and readers will be there when you need them to be. First thing in the morning before court, you need to see their faces. Last thing in the afternoon after court, they need to at least be contactable. Being contactable is an important part of being able to be briefed. There are generally numerous barristers in chambers practising in the same or similar jurisdictions and those who are contactable at the point in time required will be briefed.

Aside from callovers, mentions and directions, a portion of work that is able to be allocated happens when another barrister becomes jammed. Accepting briefs from the clerk in any jurisdiction and getting on top of the matter in short order is a healthy practice to adopt in one's early years at the Bar. These situations generally occur during the afternoon, when a barrister realises his or her current matter is not going to finish and will run over to the following day. On occasion, a solicitor may overlook a court commitment that will require a barrister to attend on short notice.

Solicitors are appreciative when matters are picked up at the last minute and run well, and are generally happy to brief the junior barrister again. Clerks are also appreciative when matters are picked up by a floor member on short notice, and it serves as a vehicle to promote the floor as a whole.

So, reliability is a key factor that clerks look for. And, while the views of solicitors are set out in a separate article, it is always helpful for juniors to remember that an important communication point between themselves and solicitors will always be the clerk.

Reporting promptly to solicitors and clerks on the outcomes of any appearance that has been attended is a practice management issue that should be religiously adhered to from commencement of practise at the Bar.

Rates are an important factor that solicitors will enquire about. Rates are something to discuss with the clerk. Solicitors' choices as to which counsel to brief are frequently based upon the level of expense the client wishes to engage in. A barrister should make clear whether he or she is willing to accept briefs on a contingency basis.

Especially in building a practice at the Bar, it is imperative to be flexible with rates. In particular, solicitors who are sole practitioners may not have the resources that the larger national or international firms have, and flexibility with rates and payment terms can also be a deciding factor on which barrister they are able to brief.

Rates are determined on the level of experience a barrister has, the level of workload he or she is currently briefed with, and the jurisdiction that the brief will be heard in. A clerk's expertise in this area should be utilised by junior barristers and should the barrister in question not be available at the required point in time to determine a rate for a particular brief, the clerk should be permitted to negotiate a rate on the barrister's behalf.

Reliability, rates, and relations with solicitors are not the only factors which will determine whether a barrister is successful. However, they are each necessary factors to consider, and barristers who don't seek their clerks' advice and input are missing out on expertise in each of these things.

## A solicitor's view

By David Ash

In 1992, the Law Society of New South Wales published its excellent *Working with barristers: A Solicitor's Guide to Relations with the Bar*. I understand that an updated version is in the pipeline, and trusting it will be of the same quality, it will be compulsory reading for practitioners of either ilk involved in litigation.

Meanwhile, *Bar News* has relied on its spies among the state's solicitors to pass on what they have found to be the main things a solicitor is looking for, when considering whether to brief a junior barrister. Some other aspects of relationships with solicitors are dealt with through a clerk's eyes, in the article by Paul Daley and Geoff Hull.

From the big firm's point of view, the main role of that species known as 'the junior junior' will be to work on large cases in which one or possibly more are briefed. These firms might not generally use a junior junior for advocacy except in relation to less important interlocutory matters and may shy from briefing a junior junior alone.

Inferentially, a junior junior is likely to be dealing with and writing documents. There is a need to write well and analytically. There is a large role to play in drafting written submissions. Then there is an eye for detail. The junior junior will be involved in reviewing documents and selecting those for tender. That in turn means a thorough grasp of the wider case.

Attitude is important. When big firms are running large and lengthy matters, partners will keep an ear to the attitude of their own employed solicitors to counsel. While acknowledging that the

work barristers are permitted to do is sometimes circumscribed, solicitors in big matters are likely to favour barristers who are happy within those parameters to do whatever needs doing.

Smaller firms in particular will use junior juniors as cost effective representation in civil and criminal litigation in the Local and District courts. Often in commercial litigation, it will be more cost effective to have counsel involved from the outset. In turn, more junior solicitors learn from the experience, ultimately benefiting the client and all involved.

Solicitors, unsurprisingly, will have professional acquaintances and friends at the outset of their careers, and will grow professionally with those people. In the usual way of things, friends who are barristers will move on to become senior members of the outer bar, or take silk, and a litigation solicitor however senior and in whatever area will always welcome the appearance of a good new junior.

Gap years are all the rage, but solicitors will look for someone with a wider experience of life outside the law. Also, while some barristers never practise as a solicitor, such practice can be useful.

There is always a place at the junior bar for a generalist or someone willing to step outside their comfort zone or traditional area of practice, provided that there is a frank exchange of views about the difficulties in the matter. If it is too difficult and too important, the young barrister should indicate their unease.

Ultimately, it is the solicitor who has a direct relationship with the client. A solicitor is looking for someone who they can work with, so that they in turn can bring the best to their own relationship with their client. A junior barrister may have excellent advocacy skills, but he or she must also possess a clear perception of professional obligations and within those obligations a realistic appreciation of the expectations of an instructing solicitor.

## The new barrister's library

By David Ash

In time, the new barrister will earn a room, or something near to one. The room may have shelves. In former days, these shelves would have contained an exotica of reports, the Britannic blue of the All Englands, the imperial calf of the more expensive CLRs, and the olive green *New South Wales Reports* of the 1960s.

The new barrister may not need the reports. There may be access on the floor, in a neighbour's room, or on the net. So what about the shelving? Do you leave them empty? Do you cover them with photographs of your spouse or with your child's pottery? What will instil confidence in a doubting solicitor or a nervous client? And what is useful for you? This is one man's potted guide.

There are plenty of books on advocacy to wile away the briefless hours. An early effort of the College of Law, *The Advocacy Book*, was published in 1985, and its distinguished list of authors includes Tony Bellanto [QC] (then a crown prosecutor), Hidden [J], Norrish [DCJ], Foster and Timmins. I also like the older books, for advocacy itself has its own history, its own development and change. Birkett's *Six Great Advocates*, published by Penguin in 1961, has marvellous – and marvellously dated – sketches of Erskine, Marshall Hall and the rest. Birkett himself, it will be recalled, was the one who asked that question about the co-efficient of brass.

Penguin also published Richard Du Cann's *The Art of the Advocate*. Du Cann, who died in 1994, had the distinction of being born in Gray's Inn, so he is likely to know something. I am fond of Judge J W Donovan's *Tact in Court*, containing 'sketches of cases won by art, skill, courage, and eloquence, with examples of trial work by the best advocates, and hints on law speeches'. It exists in various forms; the one on my shelf is the sixth enlarged edition from 1915.

As for fiction, the traditionalist will opt for the collections of A P Herbert and Henry Cecil, while the young[er] gun might settle for Grisham or Turow. O's *Forensic Fables* are good. Whether you put Rumpole on your shelf is a quandary, but at any rate, if there is to be poetry, it should be compiled by the only QC worth anything to that old hack, Arthur Quiller-Couch. My copy of his compilation of Victorian verse is an \$8.50 edition from Tyrell's Book Shop at Crows Nest. Published by the Oxford University Press, it is inscribed 'to my future friends and pupils at Cambridge: this propitiatory wreath'.

Which touches on an important point: how do the impoverished build a library? The sources are few. Misguided relatives. Helpful colleagues. Retiring colleagues. Colleagues helpfully retiring. And the secondhand bookshop. The last can be in realtime. It can also be online. At abebooks.com, the searcher will find used copies of *The Advocacy Book* from a Newport dealer and from Goulds in Newtown.

As to texts, there is no shortage of legal publishers telling the new barrister what new products to buy. Much of it is topnotch stuff. But the simple fact cannot be avoided. New texts are expensive.

Make a virtue out of necessity. Provided you realise the limitations of the products, build up a good secondhand library. Go into colleagues' rooms and have a look at the books they will only give you on a blood oath to return, and you will have the idea.

Everyone will have their peccadilloes. To my mind, a good general out-of-print library includes the 12th edition of *Bullen & Leake*, Greig & Davis's *Law of Contract*, Starke's *Assignment of Choses of Action in Australia*, Glanville Williams's *Joint Obligations* and Helmore's *Law of Real Property in NSW*.

If I am looking at crime, I generally get my bearings by stealing a glance at the now replaced green three-volume Butterworths looseleaf, *Criminal Law and Procedure: New South Wales*. Only then do I badger someone who knows what they're talking about.

If you have finally received your first fee, or if there is a legacy somewhere from a maiden aunt, two works are well worth getting. The first is Quick & Garran's work on the Constitution. Apart from its continuing relevance,<sup>4</sup> it is the acme of a work of annotation. The best entrepot is probably a copy of the 1995 facsimile reprint by Legal Books. The other, of course, is Blackstone, something which in one form or another should be available at a very reasonable price, although if my irrationality is anything to go by, the older the edition, the more comfortable you feel. These four volumes of stale ancient leather stand up well to senior colleagues' Johnny-come-lately law reports, whatever they bind them in.

As to reference works, if you are writing on a regular basis, you should have a style guide. The Australian Government's *Style Manual* is the best option, proof that common sense and consistency do not have to be privatised in a globalised world. I have a fourth edition, although the sixth was published in 2002. You have to have a *Fowler's*, it's only a question of whether you opt for Sir Ernest Gowers' second edition revised, or R W Burchfield's third edition. You can split your own infinitive as to which is better.

*If you have finally received your first fee, or if there is a legacy somewhere from a maiden aunt, two works are well worth getting. The first is Quick & Garran's work on the Constitution ...The other, of course, is Blackstone.*

As to dictionaries, the *Macquarie* is becoming commonplace. I refer above to the High Court's use of Quick & Garran in a 2006 decision. In the same case, the court refers not once but twice to the *Macquarie*.<sup>5</sup> Being a case involving constitutional words, their Honours were of course scrupulous to use the 2001 Federation edition.

The other work I like is Megarry's *Miscellany-at-Law*. While there was a second similarly-named work turning other turf in the same ground, it is the first especially which reminds us that the practice of law is largely about wit. Not the ill nature which passes among too many observers as wit,<sup>6</sup> but a real and warm understanding of humanity coupled with a mastery of words.

The first copy I found when I went to abebooks.com is listed as being in good condition, for US\$6.33 plus US\$6.06 postage, from a bookshop in Faulconbridge. You need to read it, because otherwise you might miss Scrutton LJ's observation that 'counsel appearing before us, each of whom said his case was too plain for argument, and took a long time in arguing it, buried the court under authorities, to a few of which I must refer.'<sup>7</sup> His Lordship's judgment was reversed.

<sup>4</sup> See eg *Dalton v NSW Crime Commission* [2006] HCA 17, [26].

<sup>5</sup> *Dalton v NSW Crime Commission* [2006] HCA 17, [117].

<sup>6</sup> As to which see Addison's essay for the 13 September 1711 issue of *The Spectator*, found in the Everyman's Library edition published by Dent.

<sup>7</sup> *Reckitt v Barnett, Pembroke and Slater Ltd* [1928] 2 KB 244, 258; revd [1929] AC 176.

## New barristers survey: December 2005

By Margaret Holz & Hugh Stowe

In late 2005, the New Barristers Committee conducted a survey of the background, life and practice of barristers of six years call and under. The survey was conducted to:

- ◆ establish benchmarks against which members of the junior bar can compare their own practice, and thereby assist practice management and development;
- ◆ compile information relevant to a decision to come to the Bar, for use in career presentations to students and solicitors;
- ◆ examine the extent of career satisfaction, and the nature of work-life balance at the junior bar; and
- ◆ compile information relevant to CPD programs offered by the Bar Association.

This short article summarises key findings of the survey. References to 'barristers' or to 'the Bar' are to those surveyed, unless the context is otherwise.

### Response rate

The total survey group was 607. Of those, 224 barristers responded, representing a very respectable response rate of 37 per cent. Obviously, this is only a sample of individuals who chose to respond to the survey, and not a census of all barristers in the group. There is no way of telling whether people of a particular income, work load or overall satisfaction were more likely to respond to the survey. However, it does provide some useful insights for barristers to take into account in the management of their practices.

### Intake and attrition

Over the last eight years, the average annual intake of new barristers has been 87, of whom 27 per cent have been women. Of all new barristers admitted from 1998, the total attrition rate has been 11 per cent (being 15 per cent for females, and nine per cent for males).

### Demographic

The median age of persons coming to the Bar is 33 years (being 34 for men, and 33 for women), with five per cent being under 26 and eight per cent being over 48 years. New barristers come from a wide range of backgrounds with the median level of prior legal experience being four years. Some nine per cent of new barristers report having no prior legal work experience at all. A further four per cent have less than one year prior experience. Thirteen per cent having had more than 15 years of experience in the law.

### Income

The median taxable income (i.e. gross less expenses) over the first six years of practice was as follows:

Up to 1 year	\$78,000
1 year	\$90,000
2 years	\$80,000
3 years	\$140,000
4 years	\$130,000
5 years	\$200,000
6 years	\$120,000

Gender differences were apparent in the income results. The median taxable income is \$130,000 for men and \$77,000 for women. This compares with a pre-Bar median income of \$85,000 for men and \$75,000 for women.



## FEATURES: THE JUNIOR BAR

Average Bar income compares favourably to average pre-Bar income. Bar income as a multiple of pre-Bar income and charging rates were reported as follows:

Completed practice years	Bar income as per cent of pre-Bar income	Median hourly rates	Median daily rates
<1	113 per cent	\$170	\$1,200
1	150 per cent	\$200	\$1,600
2	113 per cent	\$220	\$1,700
3	235 per cent	\$220	\$1,800
4	230 per cent	\$250	\$1,800
5	327 per cent	\$300	\$2,200
6	308 per cent	\$250	\$2,000

### Charging practices

Twenty-four per cent of new barristers charge for court work on an hourly, rather than a daily, rate. Of those who charge a daily rate, 52 per cent charge for additional work done after a certain time of day. Daily rates were on average a multiple of eight times the hourly rate. On average, barristers included an entitlement to charge cancellation fees in 30 per cent of their cases. Ninety-one per cent of barristers modify their daily rates according to factors such as the nature or value of a case and the jurisdiction in which it is to be argued. On average, 10 per cent of a barrister's work is charged on a contingency basis.

### Bad debts

The average percentage figure for 'bad debts' was 10 per cent. This comprised the amount of annual fees 'unlikely to be recovered' (excluding contingency fees) as a percentage of annual gross income. The average payment time for accounts is 60 days. The average proportion of fees outstanding for more than 90 days is 33 per cent. Thirteen per cent of all barristers commenced recovery action for fees in the previous year.

### Expenses

Median total expenses for the first six years of practice, expressed both in dollar terms and as a percentage of gross earnings, are as follows:

Completed practice years	Median expenses	Median expenses (per cent of gross)
Up to 1 year	\$20,000	20 per cent
1 year	\$30,000	22 per cent
2 years	\$44,000	33 per cent
3 years	\$56,000	28 per cent
4 years	\$53,000	28 per cent
5 years	\$77,000	25 per cent
6 years	\$55,000	29 per cent

### Accommodation

Of the total survey group, 47 per cent own their own rooms; 40 per cent licence or rent a room; and 13 per cent float. In the first two years, the figures are 35 per cent (ownership), 50 per cent (licence), and 15 per cent (float). There are some gender differences in relation to the nature of accommodation. Only 38 per cent of all female barristers surveyed own their own rooms, as opposed to 51 per cent of males. By contrast, some 20 per cent of women 'float' as opposed to nine per cent of men.

### Secretarial support

Only five per cent of those surveyed have exclusive use of a secretary; nine per cent share a secretary while 20 per cent use contract typing services. Sixty-seven per cent of new barristers have no secretarial support at all. The figures are fairly consistent over all years with 62 per cent of barristers of six years standing having no secretarial support. Of those surveyed, 70 per cent use computers for their accounting.

### Hours worked

For each year group, the median number of hours presently worked is 50 per week, Monday to Friday, ranging between 10 and 80 hours per week. In addition, new barristers work on average, another four hours at the weekend (range zero to 16 hours). There are no significant differences between male and female barristers in this regard.

### Career satisfaction

There is a very high level of career satisfaction amongst members of the junior Bar. Eighty-nine per cent are either 'very satisfied' (37 per cent) or 'satisfied' (52 per cent). This compares very favourably with equivalent figures for pre-Bar career, in which 54 per cent were either 'very satisfied' (six per cent) or 'satisfied' (48 per cent). There are no significant differences between men and women in relation to career satisfaction.

### Right decision to come to the Bar?

Ninety-one per cent of barristers consider that the career decision to come to the Bar was the 'right decision' (comprising 94 per cent of all females, and 89 per cent of all males).

### Life balance

Despite the significant number of hours worked by barristers in their first years at the Bar, 66 per cent of new barristers are either very satisfied (14 per cent) or satisfied (52 per cent) with their work/life balance. Only three per cent are very dissatisfied. There were no significant differences between genders, or persons of different experience levels.

### CPD

Sixty-two per cent believed that CPD program satisfied the needs of the junior Bar. (28 per cent were unsure, and 10 per cent disagreed). Sixty-six per cent would like to participate in advocacy training, for a modest fee.

### Practice development

A broad range of strategies are widely used for practice development. As judged by the persons who utilise them, the most successful strategies were social networking (69 per cent thought it was effective), initiating contact with other barristers in a chosen field (66 per cent), entertaining briefing solicitors (66 per cent), presentation of talks and papers (55 per cent), informing clerk of professional interests (50 per cent) and writing articles (47 per cent).

The article is not an exhaustive description of the survey results, but a snapshot of the highlights that form a useful practice management tool. The committee proposes shortly to conduct a seminar later in the year, in which the survey results will be examined more closely.

The author acknowledges the work of the 2006 New Barristers Committee in getting together the survey, in collating the results, and in assisting in this article.

## Verbatim

*Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] HCATrans 353

**Heydon J:** 'I think with Justice Kirby 12,000 miles away, I can say that reference to Law Reform Committee reports is just an aid, nothing more.'

*Batistatos v Roads & Traffic Authority NSW; Batistatos v Newcastle City Council* [2006] HCATrans 4

**Kirby J:** The disability preceded that.

**Mr Toomey:** It preceded it, your Honour. Since he was a child he had been disabled. In 1938 he had actually been scheduled under the old Mental Health Act in New South Wales and - - -

**Kirby J:** Lunacy Act.

**Mr Toomey:** Lunacy Act, your Honour is quite right, but your Honour is so much older than I.

**Kirby J:** Indeed. I learned lunacy at law school but it was gone by the time you arrived, Mr Toomey.

# New Barristers' Committee

By Christopher Wood & Kylie Day

What was formerly the 'Young Barristers' Committee' is now the 'New Barristers' Committee', in recognition of the fact that it represents barristers young in experience at the Bar, rather than necessarily young in age or mind (although, of course, they may have youth of all kinds).

More particularly, the New Barristers' Committee represents the 'under 5s' – barristers of, at most, five years standing at the Bar. It is the only body that is devoted exclusively to their concerns and interests.

Following on from the good work of the Young Barristers Committee, under the chairmanship of Hugh Stowe in 2005, the New Barristers' Committee aims to be responsive to any concerns raised by new barristers, to be proactive in taking initiatives in order to assist new barristers, and also to be proactive in raising issues of policy which arise in the experience of new barristers. Some of the committee's recent activities in these areas are discussed below.

### Assisting in the transition from readership, and early years of practice

The New Barristers' Committee is considering ways that it can assist new barristers in the transition from readership, and in the early years of practice. Difficulties may confront barristers, in their second year of practice in particular, when they lack the support, supervision and goodwill offered by the readership program. Of course, the reader/tutor relationship should continue, with former tutors and colleagues on the floor providing continued assistance on difficult matters. However, the combination of a significant increase in overheads, and the expectation that second year barristers will largely generate their own work, can lead to more difficult times than the year of readership.

Finding suitable accommodation, particularly after readership, can be another challenge. The New Barristers' Committee recently organised an evening seminar, in which Mary Walker SC and Geoff Hull, the Clerk of 8th Floor Wentworth Chambers, addressed frequently asked questions in relation to licensing and purchasing chambers. This was the first in what is hoped will be a series of seminars, specifically targeted to the practical needs of new barristers.

### Costs disclosure and recovery

The regulation, and recovery, of costs is an important matter for every barrister, and perhaps a daunting one for those starting out in practice. The New Barristers' Committee plans to make available on the web site of the Bar Association some sample costs disclosure documents, for the assistance of new barristers in particular. We are also working with the Bar Council on the issue of ways to facilitate more efficient recovery of outstanding fees.

In 2005, the committee commissioned a survey of new barristers covering matters such as income and work satisfaction. Publication of the results of the 2005 survey of new barristers is discussed elsewhere in this edition of the *Bar News*. The results

concerning issues of practice management, such as time for payment of invoices, and the amount of invoices outstanding, should assist new barristers to assess how the business side of their practice compares to that of others at a similar level of experience.

### Development of procedural guides

One of the challenges that constantly confronts new barristers is appearing at short notice in unfamiliar courts or in unfamiliar areas of law. The New Barristers' Committee is compiling a set of practical reference materials on courts, lists and applications in which new barristers commonly appear, to shorten the time for new barristers to get up to speed on the workings of unfamiliar courts and lists.

### Issues of policy

The New Barristers' Committee is keen to work with others within the Bar Council, and independently where appropriate, to provide comment and submissions for reform in substantive areas of the law. At present, the committee is drawing upon the regular exposure that new barristers receive to procedural applications to provide ongoing input to the Civil Procedure Working Party. The committee is also developing a proposal for reconsideration or reform of the law of undue influence in the area of probate.

### Fostering the collegiality of the junior Bar

Earlier this year, Phil Greenwood SC raised for the committee's consideration the issue of how we can better foster the collegiality of the Bar, particularly in light of the closing of the Bar Association's dining room and bar. The New Barristers' Committee is keen to provide some regular and low-key opportunities for barristers to meet with other colleagues at the Bar, in a social context. The committee has decided to organise a series of informal drinks over the course of the year, and in various locations. Informal drinks were held at Bar Europa on 6 April 2006. The committee aims to organise similar and regular informal functions, to which all members of the Bar will be invited, throughout the year.

### International exchanges

At the request of the president of the Bar Association, the New Barristers' Committee is also exploring the possibility of new barristers working at the Bar in other common law countries such as England and Hong Kong, perhaps by way of an exchange programme. Any barristers who may be considering practice overseas, or who have experience in practice as a barrister overseas, should contact Christopher Wood or Travis Drummond, if they are interested in assisting with this proposal.

### What are your ideas?

The New Barristers' Committee is keen to hear from the members it represents, or from anyone with ideas about issues concerning new barristers. If you have any suggestions for the committee to consider, please feel free to pass them on to a member of the committee.

## Judges and art

On 28 March 2006 the Hon Justice Michael Kirby AC CMG delivered an address at the Art Gallery of New South Wales, titled 'Hanging judges and the Archibald Prize'. The following is an extract from that address.

Most judges – indeed most lawyers – have no particular skills for deciding what is art and what is not. Yet art, and specifically portraiture, occasionally present legal problems. In a rule of law society, such problems have to be resolved, ultimately, by judges. We may like it or lump it. But cases do not go away because judges, or others, doubt the judicial suitability to decide such cases. Rightly or wrongly, in a society such as ours, contests of a legal character have to be decided by people like me.

Occasionally, the issues arise in the absurd context of customs and excise law. In October 1926, sculptures were sent from France to be exhibited in the Brummer Gallery in New York. They included large works by Constantin Brancusi. One of them 'Bird in Space', was an object four feet tall. It was made of shiny and heavy yellow bronze. As a work of art, it was exempt from customs duty. But the United States customs officials were unimpressed. They applied an enormous tariff applicable to manufactured objects of base metal.<sup>1</sup> The gallery objected. The case went to the United States Customs Court. The judges pressed the gallery owner with questions based on their rustic experience:

- Judge:           Simply because he called it a bird does that make it a bird to you?
- Owner:          Yes your Honor.
- Judge:           If you would see it on the street you would never think of calling it a bird would you?
- Owner:          ... (A contemptuous silence).
- Other judge:    If you saw it in the forest, you would not take a shot at it?
- Owner:          No your Honor.

Despite the ignorance manifested in these questions, the judges ultimately ruled in favour of the artist. They held that the work was 'beautiful and symmetrical in outline'. It was thus entitled to free entry to the United States. Heaven knows what would have happened if the judges had found the work ugly. Perhaps they would have felt the need to protect their fellow citizens from it.

Obscenity is another area where judges and artists have come together. To overcome accusations of obscenity, artists have often resorted to contending that their work has literary, artistic, political or scientific value. In *Pope v Illinois*<sup>2</sup>, a judge in Chicago had had enough. He instructed the jury that the work in question was without 'value'. The Supreme Court of the United States held that the jury needed to be told that a work, allegedly obscene, did not need to enjoy civic approval to merit protection from the



Josonia Palaitis and Kirby J: artist and subject.

criminal law. The proper inquiry was not whether an ordinary member of the community would find the work of serious value, although allegedly obscene, but whether a *reasonable* person would find value in the work, taken as a whole. This was a liberal decision of the Supreme Court. Whether it would still represent the law in the United States in these conservative judicial times must be a matter of doubt.

Another field of law that frequently involves judges evaluating works of art is the law of copyright. Typically, that law protects the creator's interest in works of artistic craftsmanship. Questions have often arisen as to whether a particular work falls within such a classification and is therefore worthy of copyright protection.<sup>3</sup>

Connected with this question are countless disputes over taxation law. In Australia, the former law of sales tax exempted works of art from its burdens. Many a time, judges have struggled over disputed questions as to whether a particular work is deserving of the description of artistic craftsmanship. In *Commissioner of Taxation v Murray*<sup>4</sup>, the Federal Court of Australia concluded that the proper test for determining whether a work was a 'work of art' was primarily an objective one. If the objective test left room for doubt, the doubt could be resolved by reference to the subjective impressions of the judge as to whether the work in question is 'utilitarian and artistically pleasing'. Lawyers tend to dress such issues up in words (the paint and oils and crayons with which lawyers work), to give them the appearance of objectivity, certainty and incontestability. However, often little more is involved than the aesthetic sense of the decision-maker who, ultimately, in a court, must be a lawyer sitting as a judge.

In the Federal Court, Justice Sheppard quoted Sir Zelman Cowen's description of the libel action brought by Whistler against Ruskin in 1878.<sup>5</sup> Ruskin had written of a painting by Whistler:



I have seen and heard much of Cockney impudence before now, but never expected to hear a cockscomb ask two hundred guineas for flinging a pot of paint in the public's face.

Whistler won. But he only recovered nominal damage of a farthing. His costs must have been huge. Sir Zelman Cowen concluded, in words that ring down the years for the Archibald Prize:

Whistler, though subjected to ridicule and attack in his own day, has now achieved well-merited recognition. The scorn poured upon the impressionists has now turned to praise. Those facts should serve as a warning to those who laugh to scorn contemporary art.<sup>6</sup>

Perhaps Whistler's mistake was bothering to sue Ruskin in a court of law, knowing, as he must, that this would necessitate relying on the opinion of judges or jurors who might sometimes hold 'barbarian' views, reflecting, in a sense, the diverse opinions of their fellow citizens.

On the Archibald Prize for *portraiture*, little is left to be said since the publication of the illustrated history of the prize, *Let's Face It*.<sup>7</sup> As Edmund Capon says, in his foreword to that book:

The Archibald Prize is indelibly etched into the history and psyche of twentieth century Australian art. Indeed, the Archibald is far more than an art award: it is the most improbable circus which, like so many imponderables, succeeds mightily against all odds.<sup>8</sup>

So far, there have been three great law cases about the Archibald Prize. Yet outside the courtroom, legal opinions have often been taken as to what J F Archibald's will requires. The first such enquiry concerned what was meant by 'resident in Australasia'. In 1921, Mr Langer Owen KC expressed the view that the precondition of residence meant that the artist must have a place or country which is the artist's home. This advice expelled, at first, the works of some famous artists, like Lambert and Longstaff. They worked in England, although they were undoubtedly regarded as Australians.<sup>9</sup> Notwithstanding this advice on the 'residency' question, Longstaff was awarded the prize in 1925 for his portrait of the actor Maurice Moscovitch. The trustees must have put art above Mr Owen's opinion. The point was not challenged in court.

*Despite Barwick's brilliance, the team for the trustees led by Frank Kitto KC won the day. Kitto was subsequently to become the father-in-law of Kevin Connor, whose portrait of Kitto won the Archibald Prize. Kevin Connor's visage is present again in the 2006 exhibition.*

Other disputes have arisen over what J F Archibald meant by saying that the prize should 'preferably' commemorate a person 'distinguished in arts, letters, science or politics'. What did 'preferably' require? What did 'distinguished' mean? Again, these points have not come to judgment. So far.

The greatest battle was joined when the Archibald Prize was awarded in 1943 to William Dobell for his portrait of his fellow artist Joshua Smith.<sup>10</sup> This time a challenge was brought in the Supreme Court of New South Wales. It contested the opinion that the work was a 'portrait' at all. Mr Garfield Barwick KC assumed the burden of showing that it was not a portrait but a caricature. He propounded the thesis that these two concepts were completely contradictory.

John Olsen, then an art student who like all of his colleagues was 'wildly pro-Dobell, of course', remembers singing boisterously at parties of the time, to the tune of *Champagne Charlie*<sup>11</sup>:

William Dobell is my name,  
Painting portraits is my game,  
At distortion I'm just whizz, whizz, whizz  
I'll twist every face there is, is, is.

The challengers considered that Dobell's portrait of Smith went a twist too far. The case was heard by a noble and sensitive Supreme Court judge, Justice David Roper. Despite Barwick's brilliance, the team for the trustees led by Frank Kitto KC won the day. Kitto was subsequently to become the father-in-law of Kevin Connor, whose portrait of Kitto won the Archibald Prize. Kevin Connor's visage is present again in the 2006 exhibition.

The decision of Justice Roper is reported in the law reports.<sup>12</sup> It is a clear decision, easy to read and to understand. It is as if the judge decided to drop as much legalese as possible and to speak directly so that the public and artists would comprehend his reasoning. He pointed out that the word 'portrait' had been used in Mr Archibald's will in a context that was addressed to the trustees 'eight persons, all highly qualified to express an opinion on the meaning of the word, as it is understood by artists'.<sup>13</sup> The judge was satisfied that, amongst artists, the word 'portrait' did not have a technical meaning, different from the ordinary meaning amongst the laity. He concluded:

The picture in question is characterised by some startling exaggeration and distortion, clearly intended by the artist, his technique being too brilliant to admit of any other conclusion. It bears, nonetheless, a strong degree of likeness to the subject and is I think undoubtedly a pictorial representation of him. I find as a fact that it is a portrait within the meaning of the word in this will ... Finally, I think that it is necessary to state my opinion of the claim that the portrait cannot be included ... because it is proper to classify it in another realm of art or work – as caricature ... or as fantasy ... It is, I think, unnecessary to consider whether the picture could properly be classed as a caricature or a fantasy. If it could be so classed that would only establish to my mind that the fields are not mutually exclusive, because in my opinion it is in any event properly classified as a portrait.

To the end of his life, Sir Garfield Barwick was still bristling over this notable failure. He put it down to his own 'poor advocacy'.<sup>14</sup> He thought that he had good material to establish that the work was not a 'portrait' as required by the will. He concluded that he had tripped up the experts for the trustees. Alas, many advocates, perhaps a few artists, fall in love with their own brilliance and blame others when they do not win.

We now know that the prize of 1943 had a sad aftermath. Dobell hid the portrait in his flat. It was partly eaten away by silverfish. Eventually, it was sold to an owner in whose possession it was burnt, almost to destruction. When it was restored, only five per cent of Dobell remained.<sup>15</sup> Meantime, Joshua Smith felt cursed by the affair. He resented what he saw as Dobell's presentation of him as an ugly cartoon. Even forty years later, he still choked up and shed heavy tears when he spoke of the portrait.

Nor did the traditional artists who challenged Dobell come off lightly. Donald Friend, a close confidant of Dobell, loved to tell the story of Mary Edwards, one of the challengers. According to Friend, she wore 'voluminous dresses and braided hair coiled like two telephone receivers'. One day she discovered an artificial penis in the garden of her home. A sculptor resident had hurled it out of a window instead of a bone, seeking to exercise his dog. Ever one to be easily alarmed, Mary Edwards called the police. She said there had been a murder and that she had the evidence.<sup>16</sup> But on this occasion, in 1943, the unconventional won the day in court.

In September 1983, Justice Michael Helsham<sup>17</sup>, in the second case, concluded that a painting by John Bloomfield of Tim Burstall did not qualify because the artist had never met the subject. In Justice Helsham's view, the reference in J F Archibald's will to a 'portrait' meant a work that was painted from life. In fact, the portrait in question had been painted from a photograph. Whilst acknowledging that the judge had assembled some compelling reasons for saying that painting from life was a requirement of Mr Archibald's will, a distinguished legal commentator, in the *Australian Law Journal*, concluded that, there being no express requirement to that effect, 'an equally compelling case can be made to support a conclusion that the [Bloomfield] portrait should not have been disqualified'.<sup>18</sup> He remarked:

If a live sitting were the primary criterion, there would be difficulty in accepting as portraits the self-portraits of Rembrandt and Rubens in, respectively, the Victorian National Gallery and the Australian National Gallery at Canberra. These must have been painted on the basis of images in a mirror; is there any distinction of significance between a photographic image and a mirror image? A self-portrait cannot possibly be done from a live sitting.

The decision in the Bloomfield case was condemned in the legal journal as 'being in conflict with the inherent factors of artistic creation'.

On 9 July 1985 Justice Philip Powell, in the third case, ruled that the Archibald Prize should be retained in perpetuity by the Art Gallery of New South Wales.<sup>19</sup> In response to a challenge after the death of Gladys Archibald, the last surviving beneficiary of J F

Archibald, the judge decided that the prize could continue as 'a good and charitable bequest'. This meant that the capital of the bequest would be transferred to the trustees of this gallery rather than to the Australian Journalists' Association, whom Archibald (one-time editor of the *Bulletin*) had named as the residuary beneficiary. Justice Powell declared that the object of the bequest was 'the continuing production and exhibition to the public of portraits of high quality, painted by artists resident in Australia'.<sup>20</sup> He rejected the journalists' submission that the Archibald Prize had become so irrelevant that it 'was like giving a prize for cave painting'.<sup>21</sup> Justice Powell ruled that 'those who came but to stand and stare must learn something'.

There is another, fourth, case involving a claim that has followed the award of the 2004 prize to Craig Ruddy. As that case is pending in the Supreme Court of New South Wales, I will say no more about it. It concerns whether the winning portrait of David Gulpilil was a 'painting'.<sup>22</sup> According to reports it is listed for hearing mid-March 2006. So watch this space.

The contribution of the Archibald Prize to the popularity of art in Australia in general, and to portraiture in particular, cannot be denied. Even the controversies that have surrounded the prize winners, and the other portraits chosen for exhibition, are generally a good thing. The great liberal justice of the High Court, Lionel Murphy, famously defended agitators and trouble-makers. He declared in a case brought against the Aboriginal activist, Percy Neal, that 'Mr Neal is entitled to be an agitator'.<sup>23</sup> In the realm of art, the lesson of most of the Australian cases on painting and law is that judges have normally held that artists may also be agitators. They may be creative. They may push the envelope. They may do strange and challenging artist things. They may be odd and unconventional. They may be, dare I say it, queer.

I honour the artists in our midst. They come from the world of the spirit. It is a wonderful experience, for which I will always be grateful to J F Archibald and his prize, that I have come to know a number of them. As a citizen I cherish them and their works. I acknowledge my debt to this gallery, its trustees, the director and the workers and volunteers for presenting us annually with this circus, this provocation, this stimulation and this controversy. Such controversies should always be present in the world of the spirit. The Archibald Prize is no exception.

<sup>1</sup> S Giry, 'An odd bird', *Legal Affairs* (September/October 2002).

<sup>2</sup> 481 US 497 (1986).

<sup>3</sup> See e.g. *George Henschel Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64. See also P H Karlen, 'What is art? A sketch for a legal definition' (1978) 94 *Law Quarterly Review* 383 at 399.

<sup>4</sup> (1990) 21 *Federal Court Reports* 435.

<sup>5</sup> In Z Cowen, 'An artist in the courts of law' (1945) 19 *Australian Law Journal* 112 at 112.

<sup>6</sup> *ibid.*, p.113.

<sup>7</sup> P Ross, *Let's Face It: The History of the Archibald Prize* (Art Gallery of NSW, 1999).

<sup>8</sup> *ibid.*, p.7.

<sup>9</sup> N Borlase, *Quadrant* (March 1982) 51 at 53.

<sup>10</sup> The story is told in Z Owen, 'An artist in the courts of law' (1945) 11 *Australian Law Journal* 112.

<sup>11</sup> In J Hawley, 'A portrait of pain', *Good Weekend*, 18 August 1990, 19 at 22.

<sup>12</sup> *Attorney-General v Trustees of National Art Gallery of NSW (1945)* 62 WN (NSW), 212.

<sup>13</sup> *ibid.*, p.215.

<sup>14</sup> G E Barwick, *A Radical Tory* (1995), pp.48-50.

<sup>15</sup> J Hawley, 'A portrait in pain', *Good Weekend*, 18 August 1990, 19-28; cf D Bagnall, *The Bulletin*, 4 May 2005.

<sup>16</sup> Hawley, above n 11, 22.

<sup>17</sup> *Bloomfield v Art Gallery of New South Wales*, Supreme Court of NSW, unreported, 23 September 1983 per Helsham CJ in Eq; cf R Coleman, 'Why courts are being asked to chart the Archibald Prize's future', *Sydney Morning Herald*, 8 March 1982, p.7.

<sup>18</sup> J G Starke, 'Literary and artistic competitions' (1984) 58 *Australian Law Journal* 52 at 53.

<sup>19</sup> Ross, above n 6, 148.

<sup>20</sup> *ibid.*, p.86.

<sup>21</sup> *Johansen v Art Gallery of New South Wales Trust* (NSW Supreme Court, Case No 2867/04). See *Sydney Morning Herald* 23 July 2004.

<sup>22</sup> *ibid.*

<sup>23</sup> *Neal v The Queen* (1982) 149 CLR 305 at 317.

## Court in the act

### Keith Chapple SC reviews the latest photographic exhibition by Mark Tedeschi QC.

What do barristers do when they are not being barristers? Some sail, others golf, some look after the family. I suppose one or two may even do all of the above. And I know there are a few literary novices who write articles for magazines.

When he is away from life at the Bar, Mark Tedeschi QC takes photographs and he does this very well indeed. Over many years at the Bar, Mark has been involved in many high profile criminal trials and holds the office of senior crown prosecutor for NSW.

Since 1988 he has pursued what he describes as a passion for photography. There have been numerous solo and joint exhibitions of his photographs and they now form part of the collections in the NSW Art Gallery, the National Library in Canberra and the NSW State Library. His images have appeared in many books, including Lucy Turnbull's *Sydney: A Biography* and the authority on Australian photography *Eye for Photography* by Alan Davies.

His work covers many themes and he often uses a group of photographs to explore the subject matter from a number of angles.

The topics are diverse: the people and buildings on *The Block* in Redfern, abstract landscapes from the Blue Mountains, portraits of Australian Holocaust survivors and the people who saved them and recently many images from a trip to Italy exploring his heritage.

'Court in the Act' was an exhibition of photographs of court scenes and legal identities on display at the Justice and Police Museum at Circular Quay earlier this year. Mark had been allowed virtually unrestricted access to photograph court interiors and court staff in Sydney and colleagues in the legal profession. The result was an extraordinary range of scenes inside and outside court.





Justice 'Roddy' Meagher, Justice Brian Sully and Justice Reg Blanch appeared in a series of portraits which projected an interesting mix of distinction and warmth. There were iconic shots of Chester Porter QC and Winston Terracini SC, the latter framed by one of the magnificent windows of the Darlinghurst Court complex, so well-known to those at the Sydney Bar.

In other portraits Nick Cowdery QC wore an unruffled look, Judge John Nicholson gave a wry smile in the middle of a difficult trial and Margaret Cunneen appeared, robed, at her kitchen sink representing the uncertain blending of professional and domestic life at the Bar. There was even a poignant view of the late Bruce Miles, relaxing outside Central Local Court, as usual with newspaper in hand.

Many other photographs featured sheriff's officers and other staff at work in different parts of the court system.

The programme described the exhibition as 'an insight into the cloistered world of the justice system'. No doubt it was, but it had major historical significance for the large number of lawyers who attended the magnificent dinner on opening night.

The event was hosted by the Historic Houses Trust of NSW. The fabulous restoration of the old Phillip Street courts has been overseen by Jill Wran and the well-known heritage architect Howard Tanner and their colleagues on the trust. It has to be seen to be believed and is well worth visiting for the permanent exhibitions there as well. It was perfect as a venue for a display of this type.

Mark Tedeschi QC has shown what can be done with artistic flare and imagination. His 'other life' is thriving and it is a privilege to view the results.

*Mark had been allowed virtually unrestricted access to photograph court interiors and court staff and colleagues in the legal profession.*





## Family support and childcare at the Bar

The Equal Opportunity Committee continues its work to ensure that all barristers have the opportunity to meet both work and family obligations. A range of regular and emergency family needs can now be met through McArthur Management Services. Melissa Fisher and Kate Eastman of the Bar's Equal Opportunity Committee describe the expanded Family Support and Childcare Scheme.

The childcare scheme provided to the Bar by McArthur Management Services has been expanded to offer a greater range of family support services.

The childcare scheme was launched in 2004 with the main aim of providing emergency childcare for barristers in situations where the barrister's regular childcare arrangements had broken down. Under the scheme, barristers registered with McArthur have access to qualified and screened child-carers at short notice.

Over the two years of the scheme's operation, it has become apparent that there is a need amongst members of the Bar for family support other than emergency childcare, for example assistance with the care of elderly parents.

The emphasis of the scheme has now broadened to family support. This is a welcome development for members of the Bar with diverse (and sometimes onerous and overwhelming) family responsibilities.

The aim of the expanded scheme is to assist members of the Bar in managing the clash between their professional commitments and their family responsibilities.

### Expanded services

The expanded services include:

- ◆ assistance for barristers with responsibilities for aged relatives (for example, taking the relative shopping, to a medical appointment or providing domestic support in the home);

- ◆ childcare and domestic support where a spouse or partner is sick or hospitalised;
- ◆ childcare and domestic support when a new baby arrives;
- ◆ assistance for a spouse or partner where a barrister is interstate or overseas for an extended period of time;
- ◆ childcare during school holidays;
- ◆ childcare on weekends;
- ◆ recruiting and placing full-time nannies (the nanny can either be employed directly by the barrister or by McArthur, depending on the needs of the barrister);
- ◆ providing a short-term nanny for the period of a trial or while the regular nanny is on holidays.

Changes have also been made in relation to the provision of emergency childcare:

- ◆ it is not necessary for a barrister to be registered with McArthur prior to calling for emergency assistance (although registration remains highly desirable);
- ◆ it is no longer a requirement that a barrister engage a carer for 4 hours per fortnight for baby-sitting in order to have access to emergency childcare. However, a barrister who regularly engages a carer in this way will pay a lesser hourly rate in an emergency situation.

### Registration

All barristers with family responsibilities should give consideration to registering with McArthur as soon as possible – even if they do not currently envisage needing the service. Prior registration facilitates the provision of assistance in a stressful emergency situation.

Registration is free. All that is required is for the barrister to complete the registration form (which can be found on McArthur Management Services web site [www.mcarthur.com.au](http://www.mcarthur.com.au) or obtained by phoning McArthur on (02) 9252 0799) and for a McArthur consultant to visit the home where the care or assistance is



Kate Guilfoyle (left) and Jane Needham SC (right) with their girls Imogen, 2, and Stella, 1, 30 April 2004. Photo: Wade Laube/Fairfaxphotos

to be provided. This latter requirement is primarily for occupational health and safety reasons but presents a good opportunity to meet face to face with a McArthur representative.

Upon registration, McArthur organises for the family to meet one or more potential carers. McArthur's carers are qualified and screened. The family indicates to McArthur their preferred carer. When care is required, all the barrister need do is call McArthur to book the carer. McArthur is contactable 24 hours a day, seven days a week. Generally, 24 hours notice is required to book the carer, but it is accepted that this is not always possible in an emergency situation.

#### Further Information

For further information, see the Bar Association web site or go to [www.mcarthur.com.au](http://www.mcarthur.com.au) or phone McArthur on (02) 9252 0799.



Kate Guilfoyle (left) and Jane Needham SC (right) with their girls Imogen 2, and Stella 1, 30 April 2004. Photo: Wade Laube/Fairfaxphotos

## Kate and James

### Kate and James's experience with McArthur

Kate Eastman (6 & 7 St James Hall) and James Crisp (Ada Evans) arranged a carer for their 16-month old daughter, Georgia, through McArthur. Georgia is in day care three days a week, but when both Kate and James were in long running trials, they needed a nanny for an additional day a week. James contacted McArthur. A home safety check was undertaken the following week. McArthur then organised three potential carers to meet the family. All the carers had excellent qualifications and experience. They then arranged a permanent booking one day a week for three months.

Kate said: 'We are impressed with the service offered by McArthur and that Georgia is in safe hands. Clemonce, our carer, has been flexible with times. She had been able to start early and stay a little later if needed. Georgia has benefited from the one-on-one care.'



James and Georgina Crisp.

## As time goes by

A speech delivered by the Hon T E F Hughes AO QC to the justices of the Supreme Court at the opening of the 2006 law term.

Chief justice, you have asked me to speak about judges of this court before whom I have appeared. I am honoured by the invitation and thank you for it. I have decided that I must observe some self-imposed ground-rules. They are:

- ◆ (with two exceptions) to say nothing about the living; and
- ◆ to disregard the injunction *de mortuis nihil nisi bonum* so far as may be necessary in the interests of candour.

To look back 57 years, to 11 February 1949, the date of my admission to the Bar, is a long retrospect. It looked even longer when, in the course of preparing for this speech, I discovered in *Who's Who* that two judges of this court were not then born. I appeared before each of them last year. Sir Frederick Jordan presided in the old Banco Court on that day. Bruce Macfarlan moved my admission. My father had briefed him from time to time and rightly held a high opinion of his ability. As counsel, Macfarlan – he was then a senior junior – had a grave and courtly manner. His hallmarks were thoroughness and hard work, leading to a complete mastery of the many briefs on his table. He became a judge of this court in 1959 after a successful career as silk. When the Court

of Appeal was established in 1966, he was offended by the figurative separation of sheep and goats that the new system entailed. He was not alone. There was a substantial schism which took time to heal. Some of the non-anointed were heard to refer to a particular member of the anointed as 'King Rat'. But Macfarlan was not given to name-calling.

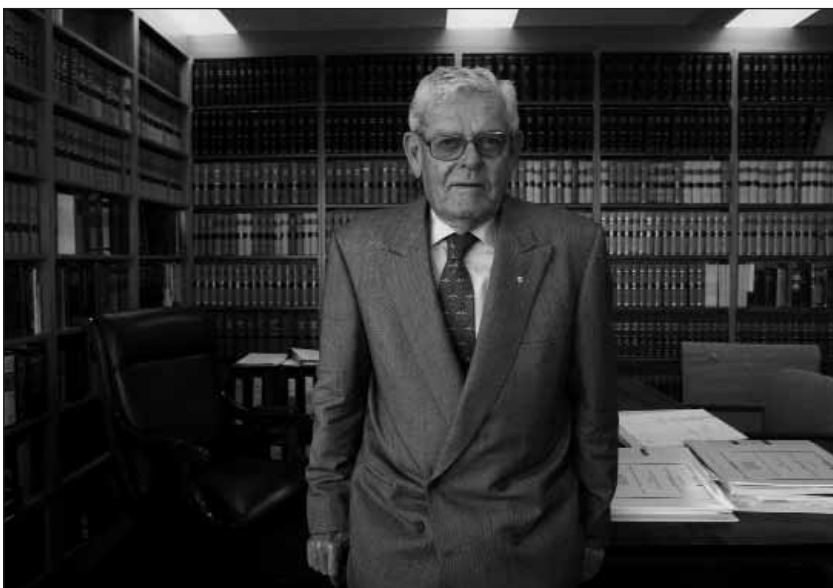
I had but one conversation with Jordan. It was not a forensic occasion. At the end of the Second World War, I applied unsuccessfully for one of two Rhodes scholarships that were open for 1946. He was chairman of the Selection Committee. To get to the interview in time, I had flown from the UK as a passenger in the back of an Avro York, reclining on mailbags that were part of the cargo. After a leisurely journey – it lasted about 14 days via Malta, Cairo, Bahrain, Karachi, Negombo, Cocos and Perth held up by engine trouble at Negombo during which time I visited the HQ of South East Asia Command, also known as Supreme Example of Allied Confusion – I arrived in Sydney on 14 December 1945 and scarcely had time for a shower and change of clothes before going to Government House for the interview. Sir Frederick presided.

Jack Slattery, his associate, (this was my first meeting with him) conducted me into the interview room. Any tendency on my part to be overawed by the occasion was dispelled by the cordiality of the interviewers.

However, cordiality to strangers was not a characteristic of Sir Frederick. He did not exude warmth or geniality in public; he was known as Frigidaire Freddy; he could be mordant, as when in giving judgement in a divorce appeal, he described the respondent and co-respondent as having committed adultery 'al fresco, as it were, in a motor car'; or as, when a timid counsel explained apologetically that his hesitant reading of an affidavit was due to the near illegibility of the copy in his brief, Jordan intervened by observing that by accident counsel must have been provided with one of the copies intended for the court.

Jordan's mastery of the principles of equity was renowned. Who, as a student of the Sydney University Law School, will forget his *Chapters on Equity*, even if not remembering much or anything of its contents? His judgmental technique was didactic: he approached the questions for decision by means of a compact and lucid essay upon the principles established by the relevant authorities. So vast is the flow of modern judicial decisions that his judgments are not often referred to these days. But they are well worth reading as models of conciseness and a treasure trove of learning. In his valedictory speech, Dixon paid high tribute to him: see (1964) 110 CLR xi.

He died in office on 4 November 1949, after nearly 16 years as chief justice. His judgments show that his command of principle was not confined to equity, which had been his chosen metier at the Bar. He had not come from a privileged background. He joined the civil service on leaving school at Balmain, putting himself through Sydney University in Arts and Law while earning his living. Those who knew him well testified to his possession of an earthy sense of humour in the tradition



Tom Hughes AO QC in chambers.



Kenneth Street, ca. 1931.  
Photo: Falk Studios/State Library of New South Wales

of Rabelais. He was fluent in French and Italian.

On 6 January 1950, Sir Kenneth Street – then senior puisne – became Jordan’s successor. Sir Kenneth had held office as a judge of the court for nearly 20 years. His successor as senior puisne – AV Maxwell J (of whom more later) – welcomed him at a formal sitting of the court soon afterwards. CE Weigall KC, the state solicitor-general, spoke at that ceremony on behalf of the Bar. He was as deaf as a beetle and used an ear trumpet as an elementary form of prosthesis. This was not an effective aid. He appeared regularly in criminal appeals. The level at which those instructing him had to speak on these occasions invested the proceedings with a pantomimic quality hardly conducive to the maintenance of decorum or legal professional privilege. As well as being very deaf, Weigall was at this time very old; his views were lacking in contemporaneity, as illustrated by a statement, in his welcoming speech, that ‘there has never been a time *in the history of the colony* when it has been more essential that the traditions of the Bar should be maintained’: see the memoranda section of 1960 SR (NSW).

As my practice developed, appearances before Sir Kenneth Street in the full court became gradually less infrequent. He commanded great respect as chief justice, also great affection. He was a patient, considerate and courteous team leader who left the court in good shape at his retirement on 14 December 1959. To all these sterling qualities there was the added bonus of a deep sense of humour. At the time of his appointment the court had eleven puisne judges; when he retired, the number had increased to 21.

The appointment of his successor was not good for the morale or the performance of the court. There was a strong professional consensus in favour of the appointment of the senior puisne, WFL Owen J.

But that was not to be. The Labor Party in the federal sphere was then in a state of convulsive turmoil because of the split that had led to the formation of the DLP. HV Evatt, the leader of the opposition, was not free of responsibility for the split. His capacity for divisiveness was formidable. His performance, appearing as counsel in the Petrov Royal Commission, had been troublesome, to put it mildly. Could a place be found for him outside politics?

The party managers prevailed on the state government to appoint Evatt to the vacant office of chief justice. He was sworn in on 15 February 1960.

As senior puisne, it fell to Owen to speak on behalf of the Bench on this inauspicious occasion. His words were brief: no expression of congratulations or welcome: only a pledge of aid and assistance by the judges and officers of

others were Philp J and Ligertwood J) appointed as royal commissioners into espionage following the defection of Vladimir Petrov in 1954, Owen had had to deal with Evatt’s increasingly erratic behaviour as counsel appearing before them. They withdrew his leave to appear. Evatt’s forensic antics in the Petrov commission had made a deeply adverse impression.

Owen J plugged on unhappily as senior puisne judge, honouring his pledge until mercifully and deservedly relieved by appointment to the High Court in September 1961.

During his brief period of office as chief justice of NSW (he retired on 24 October 1962), Evatt was suffering from an illness (in lay terms lack of adequate blood supply to the brain) that impaired his mental faculties to the point of disabling him from the effective discharge of his judicial duties. He can hardly be castigated for having taken the appointment: for I doubt whether he appreciated his lack of capacity. I appeared before him in the full court on several occasions. He had no grasp of the case in hand. It required some dexterity to deal with his interpositions in argument because they were often scarcely rational and seldom, if ever, relevant. If you search the *State Reports*, you will find that all the judgments in his name were delivered jointly. His contribution to them was nominal.

Owen J (born 1899) occupies a special place in my pantheon of judges, and that for several reasons, not least his helpful influence on me as a young lawyer.

*Cordiality to strangers was not a characteristic of Sir Frederick. He did not exude warmth or geniality in public; he was known as Frigidaire Freddy.*

the court ‘to the limits of their ability’. Owen’s remarks occupy nine lines of print in the ‘memoranda’ section of (1960) SR (NSW). This economy of speech was hardly surprising. As chairman of the trio of judges (the

He took silk in 1935, after 12 years of practice. He was appointed an acting judge of this court in 1936. In October 1937, his appointment became permanent and he served in that office for 24 years. His father and grandfather



held judicial office, each in their time as a judge of the Supreme Court. His youth was unconventional in that he ran away from Shore at the age of 15 to join the 1st AIF. At 16, when serving in France, he was wounded in action; after returning to the lines he was wounded again, this time by gas. He recovered to join the newly formed Australian Flying Corps in which he received a commission as lieutenant. On discharge in 1919, he toyed briefly with the idea of becoming an engineer before opting to study law. He passed the Bar examinations and was admitted to practise in August 1923. His practice soon took off.

I knew him well: his father and mine were contemporaries and great friends. He was my father's best man. For several years after the Second World War he came trout-fishing with us in a remote and beautiful place called 'Yaouk', on the Upper Murrumbidgee. He was an accomplished fly-fisherman. He was a shy man: only those who knew him well were able to penetrate his polite reserve. Once you did that, his friendship was warm. I was his associate during 1948, learning much at his feet. His mind was incisive. He had an enviable capacity for succinct expression. He took no more than 20 minutes to charge a jury in a straightforward case.

In his contributions to the administration of justice and public affairs, Owen was not just a lawyer. His talents spread into other areas where his services were in demand by government.

Between 1942 and 1945 he served as chairman of the Central Wool Committee, responsible for the acquisition and marketing of the Australian Wool Clip. In this task he succeeded Sir Owen Dixon, who regarded him, as did Menzies, as a suitable prospective appointee to the High Court, where he ultimately arrived.

Barwick was not given to generous praise. Commendation from him was hard earned. His recitation, in the eulogy (reported in 125 CLR) upon the occasion

of Owen's death is rightly replete with unstinted appreciation of his public service:

(T)hroughout all his judicial life he exhibited those qualities which are most sought in a judge: unrelenting devotion to duty, a sound grasp of legal principle, a proper sense of fairness and right, and good and sound judgment.

Ill-health dogged him. He had an agonising affliction of a facial muscle caused by a disordered trigeminal nerve. Towards the end of his judicial career he suffered the partial amputation of a leg. He was only 71 when he died.

I have mentioned three chief justices – Jordan, KW Street and Evatt. The latter's successor was Sir Leslie Herron. He shouldered with ability the task of restoring balance and direction to the court after the departure of Evatt. He was appointed chief justice in October 1962 after many years as a puisne. He was, without being of great intellectual bent, an effective, albeit verbose, judge respected and liked by those who appeared before him. Before going to the Bench, he had a very large practice on the North Coast. He was affable, given to rather banal puns off the Bench such as:

'In speaking to you tonight I feel like a castrated glow-worm: delighted'.

A statement illustrative of the occupational pressures to which Bench and Bar are subjected now compared with those of bygone times appears from a few lines in the valedictory speech made by SV Toose J on the occasion of his retirement in October 1953. He recorded a piece of advice imparted to him when young at the Bar by Sir Alexander Gordon, whom he described as 'a very great man and a very great judge'. The advice was 'to start work at 9am and be there until 5.30pm'. Few barristers today would regard adherence to this tempo as adequate obeisance before the altar of the goddess of ambition. How many of you – I suspect none – could carry on your work effectively by keeping those hours?

WR Dovey QC succeeded Toose as judge in Divorce. Dovey's life on the Bench was somewhat turbulent. He had been a powerful, forceful and very successful advocate. He had a sonorous voice. He was adept in grasping facts on the run, after only a short excursion into his brief. He possessed great power of verbal expression. He had an imposing



Doc Evatt and his wife at the time of his appointment as chief justice of NSW, Mosman.  
Photo: Jack Hickson / Australian Photographic Agency collection, State Library of New South Wales

physical presence. As a young man he had taught English before embarking in 1914 on military service to deal with the German colony of New Guinea. He and JW Shand were legendary exponents of forensic brawling in their encounters against each other. One morning, in the concluding stages of such a case, someone who saw Dovey taking the air after 10am at the doorway of the old Selborne Chambers, asked him: 'Why aren't you in court, listening to Shand's address?' The response came in the form of a rhetorical question: 'Why should I listen to John Wentworth Shand pouring a verbal shit-can all over me?'

In 1956, Dovey came under heavy criticism from the media because of his authoritarian conduct as royal commissioner into the arrest, and treatment by the police of one Studley-Ruxton, an Englishman dwelling on the fringe of society for whom my friend Antony Larkins QC, appeared, paid by Frank Packer. Dovey raised eyebrows by remaining vice-chairman of the AJC after his appointment to the court. As such, he heard racing appeals in the exercise of the club's statutory appellate jurisdiction. His capacity for terrifying witnesses, by peering and glaring at them through his monocle, was legendary. For him the transition from advocate to judge was not easy. While in office he suffered the humiliation of being voted off the AJC Committee.

One of Dovey's last briefs before appointment to the court was as senior counsel assisting AV Maxwell J as royal commissioner to inquire into the liquor industry. The inquiry lasted more than two years and was a bonanza for the participants from the Bar. Gordon Wallace earned 1000 guineas per week as counsel for Tooths. This was stratospheric remuneration. His junior silk, Richard Ashburner, was on 600 guineas. Victor Maxwell was a judge of unrivalled sharpness of mind. He had a big practice as silk in the late 20s and until his appointment to the court in 1934. He was under consideration for the appointment that Jordan got. Off the



Justice Victor Maxwell.  
Photo: Herald & Weekly Times Ltd Portrait Collection/State Library of Victoria

Bench, Maxwell was engaging and amusing, displaying warmth and charm which he did not replicate in court. There he elevated asperity and impatience to the level of an art form. When he retired in August 1957 to take an appointment as chairman of Channel 7, then in the Fairfax stable, Harold Snelling QC, then solicitor general, told a whopping fib in the course of the customary valedictory eulogy: he described him as having been 'at times a little impatient'.

There was one incident in the liquor commission that I well remember. I had a junior brief in it at 20 guineas per day until boredom inspired me to seek a release, which Brian Page, my instructing

solicitor granted, to enable me to do other work. Maxwell and Dovey were set upon bringing down a well-known liquor merchant ('L') who was under suspicion as having possession in a secret location of a large quantity of illegally acquired liquor. He stoutly denied the accusation. He was stood down and another witness ('X') interposed, who gave some inconsequential evidence unrelated to the particular allegation against L, who was then recalled. Dovey continued to hammer him unavailingly for a while, until the commissioner interposed with this deadly and wholly inadmissible question: 'Mr L what would you say if I were to tell you that X has just told us that you had an arrangement to purchase the liquor from him and that he let you inspect the stock? Confronted with this quite false statement, L thought that he was compromised and confessed to possession.

Athol Railton Richardson was appointed to the Supreme Court in 1952. He had no practice, having been Liberal member for Ashfield in the Legislative Assembly for some years. But he had a silk gown, the basis for which must have been his status as a member of parliament. The government of the day saw a chance that if his seat were to become vacant, Labor might pick it up on a by-election. Richardson accepted the appointment so that when the by-election was being fought he was Richardson J. Labor cleverly selected as his successor a man with the same

*Athol Railton Richardson was appointed to the Supreme Court in 1952. He had no practice, having been Liberal member for Ashfield in the Legislative Assembly for some years.*

*The government of the day saw a chance that if his seat were to become vacant, Labor might pick it up on a by-election.*

surname Jack Richardson – he had been in the same year as myself at law school. Rather cleverly he picked as his campaign slogan the words ‘Judge Richardson on his merits’. He won the by-election but did not last long in the seat. Once ensconced in judicial office, Athol Richardson demonstrated orderly habits: he devised a card index system that he utilised to structure his directions in a jury trial. There were neat topic headings such as ‘contributory negligence’, ‘*volenti non fit injuria*’, ‘how to define negligence’. There was probably a card with suggestions about how to deal with Clive Evatt QC, who in those days was riding high. Richardson’s problem was that he was not adept in the choice of the cards to be used. So, for instance, he would pick the ‘contributory negligence’ card for use when that was not in issue. Richardson was a well-meaning man who gained marks only for sincerity and effort. He lived in my electorate of Parkes. To my slight surprise I found that even when on the Bench he remained a paid up member of the Liberal Party.

I had the good fortune to read with Kenneth William Asprey during 1949 and 1950. He was an innovative and energetic advocate who prided himself, with full justification, on his ability as a cross-examiner. He was not plagued with doubts about his ability.

His method of advocacy was distinctly thespian; of his many forensic successes he was given to regaling people with vivid descriptions, the extravagance of which was alleviated by his flair as a raconteur.

It was part of his training method to give his pupils very difficult tasks, as when he sent me on one occasion to seek an ex parte injunction to restrain infringement of an industrial design. David Roper, chief judge in Equity, gave me short shrift, but gently so. I think he identified my pupil master as the instigator of this exercise in forensic hardihood. Ken had a habit of taking a blue bag, stuffed with briefs, home every night to Pymble. They must have been the most peripatetic papers in Phillip Street. His easy confidence as a trial counsel was not so evident in the appellate arena, where his adherence to a written argument created a slightly wooden presentation. He was appointed to the court in June 1963 after several months (from October 1962) as an acting judge. The general impression was that his ebullience and egocentricity would tell against his success on the Bench. The doomsayers were completely wrong: he deployed his considerable talents as an actor to play the part of judge. He was a great success on the Bench, both at first instance and in the Court of Appeal, to which he was one of the first appointees on its establishment (1 January 1966). Asprey was able to adapt his strong personality to the exigencies of judicial office. In sum, he was as good as he thought he was.

Frederick George Myers was appointed in 1953 as a judge to sit in Equity. The memoranda section of 1970 SR (NSW) records him as having retired voluntarily on 28 July 1971. He lived into his nineties and was an occasional writer of letters to the *Sydney Morning Herald*. One of his notable characteristics

was the possession of physical courage and powers of endurance. He had a disability which required him to wear a cumbersome surgical boot. This did not prevent him from engaging in military service in World War II and from climbing the Kokoda Trail. He had a successful equity practice as silk when appointed to the Bench. Unfortunately his approach was towards creating rather than solving problems. He was unaffectionately and cruelly known as ‘funnel web’. One member of the Bar, Michael Helsham, knew how to handle him. He was able to engage in a process of self-abasement, describing the magnitude of the difficulties that faced him in the presentation of his case. Thus he was able to appeal to a miniscule constructive streak in Myers’s nature. It was an effective but not much admired way of dealing with a difficult judge. Michael Helsham at the Bar had an unusual but very large practice: it was equity work, GIO work and constitutional work for the New South Wales Government. In due time, he became an equity judge, succeeding to the office of chief judge. He ran an efficient court somewhat idiosyncratically. He had the commendable habit of giving ex-tempore judgments with greater frequency than his brethren. He served with distinction in the RAAF in World War II.

No treatment of my subject would be complete without making reference to two judges, one long dead – Cyril Walsh – and the other happily still amongst us, in good health at the age of 87 – Jack Slattery.

Cyril Walsh was appointed on 8 March 1954 at the age of 45. He became a judge of appeal upon the establishment of the Court of Appeal on 1 January 1966. He was translated to the High Court of Australia on 3 October 1969.

His career before assuming judicial office was academically brilliant. On admission to the Bar in 1934 he

*Frederick George Myers was appointed in 1953 as a judge to sit in Equity. The memoranda section of 1970 SR (NSW) records him as having retired voluntarily on 28 July 1971.*

practised on the equity side of the court. In the main he had what used to be called a Friday practice. My perspective of him was that he was not given to professional over-exertion, perhaps because his talents were such that he took in his stride work that would have taxed others more heavily. He was seldom in chambers after 5pm.

His intellectual powers came into full blossom on the Bench. His temperament was completely suited to judicial office. Appearing before him, one gained a strong impression that one of his main aims was to enlist counsel's involvement in a co-operative exercise designed to expose and unravel the problems, factual and legal, thrown up by the case in hand. He was scrupulously polite, except when a step out of line by counsel would provoke a curl of his lip and a deserved rebuke. He displayed an incisive and inquiring mind; he was patient. I had the good fortune to appear quite frequently before him. My chief recollection of him after this lapse of time is of his participation in the *Concrete Pipes* case in 1971 in which I led a team, who, in order of seniority at the time were Bob Ellicott, Bill Deane and Murray Gleeson for the Commonwealth. On Walsh's untimely death at the age of 64, Barwick delivered a eulogy of unstinted, wholly deserved praise capturing all his outstanding qualities. You will find it at the front of 128 CLR.

Earlier I mentioned Jack Slattery and told you when I first met him. Later we were juniors in opposite sides in October 1955 in the Mace/Murray custody litigation when it went to the Privy Council. Mace was the natural mother, supported by Ezra Norton; the Murrays were the adopting parents, supported by Frank Packer.

To adopt modern jargon, I describe Jack Slattery without hesitation as a living national treasure. His record of judicial service is unsurpassed. He served on this court from 1970 to 1988. When he



Portrait of Mr Justice Cyril Ambrose Walsh seated in chambers.  
Photo: Mulligan, J A (John Aloysius), 1927-1996/National Library of Australia

*On Walsh's untimely death at the age of 64, Barwick delivered a eulogy of unstinted, wholly deserved praise capturing all his outstanding qualities.*

reached the then statutory retiring age of 70 he was chief judge at Common Law. The government wisely decided that his services to the state were too valuable to lose so soon. Hence the Slattery Act, which enabled him and others to serve on as acting judges to age 75. He was an astute and highly successful trial judge. He remained in judicial office until 1992. Apart from strictly judicial work, he gave sterling service to the state on numerous commissions of inquiry and in courts of Disputed Returns.

This has been a selective recollective ramble. Time prevents treatment of other admired performers of the judicial

art, such as Charles McLelland and his son Malcolm who retired too early and had the potential for appointment to the High Court. Denys Needham was one of the most impressive judges before whom I ever appeared. We were colleagues at law school, he with a much better academic record than I. I equate his style with that of Cyril Walsh.

I have witnessed a long procession of judges through the halls of justice and propose to continue. I regret having been critical of a few – although very few. But history and sugar coating go ill in hand.





President Michael Slattery QC.



Ms Junior, Kate Morgan.

The Bench and Bar Dinner was held on Friday, 5 May 2006 at the Westin Hotel.

The Hon Justice Susan Crennan was guest of honour. Ms Junior was Kate Morgan, while Tony Bannon SC was Mr Senior.



The Hon Michael McHugh AC QC and Ian Harrison SC.



Kate Morgan, Tony Bannon SC, the Hon Justice Susan Crennan and President Michael Slattery QC.



Two generations: the Hon Jack Slattery AO QC and President Michael Slattery QC.



The Hon Justice Peter Jacobson, Bruce Oslington QC, John West QC.



The Hon Justice Susan Crennan.



Robert Gray and John Maconachie QC.



His Honour Martin Blackmore SC DCJ and Ian Harrison SC.



The Hon Justice Susan Crennan, Michael Slattery QC, and Chief Justice Gleeson AC.



Front row (L to R) Sophie York, Lloyd Babb, Sarah Huggett.  
Back Row: Nicole Noman, his Honour Judge A M Blackmore SC.

## Readers 01/06



**Top row, left to right**

Liam BYRNE  
Gary DOHERTY  
Nick KABILAFKAS  
Duncan MACFARLANE  
John WILLEY  
Andrew RIDER  
Tom BRENNAN  
Jeremy GILES  
James EMMETT  
Ben O'DONNELL  
Tom JONES

**Second row, left to right**

Sinclair GRAY  
Andrew FOX  
Robert CLYNES  
Francois SALAMA  
Hamish BEVAN  
Douglas BARRY  
Marilyn CORONEOS  
Bridie NOLAN  
Michael HOLMES

Stephen FREE  
Kristen DEARDS  
Bruce ADAM

**Third row, left to right**

Rod MCPHERSON  
Darren JENKINS  
Nick EASTMAN  
Michael TANEVSKI  
Nove ANGELOVSKI  
Miranda MOODY  
Stephen BARNES  
Paul BATLEY  
Stephen IPP  
Michelle ENGLAND  
Anna MITCHELMORE

**Fourth row, left to right**

Peter HARTLEY  
Brett LONGVILLE  
Bernadette O'REILLY  
Theresa BAW  
Rohan HARDCASTLE

Rachael DOLAND  
Kalina ROSE  
Bettina ARSTE  
Joanne SHEPARD  
Craig LENEHAN  
Suzin YOO

**Front row, left to right**

Bernadette BRITT  
Sang-Whan CHO  
Helen DURHAM  
Anastasia TSEKOURAS  
Susan LEIS  
Sally ORMAN-HALES  
Julian COOKE  
Verity MCWILLIAM  
Edwina HOLT  
Clare BESEMERES  
Anne HORVATH  
Absent: Ruth HIGGINS



## Naida Jean Haxton – barrister and law reporter



In July of this year, Naida Haxton will retire after twenty-five years of dedicated service as assistant editor and then editor of the New South Wales Law Reports. Francis Douglas QC paints this portrait of her life and career.

Naida Jean Haxton was born in Brisbane on 9 December 1941. She attended her primary and secondary schooling in Queensland and matriculated with distinction from Somerville House in the senior examination in 1959. She studied a combined arts/law course at the University of Queensland from 1960 and was admitted to the degree of bachelor of laws in the University of Queensland in 1965. In the meantime she found time to carry out three years under articles of clerkship with the firm of Brisbane solicitors, Flower & Hart, attending university in the early mornings and evenings. She was also admitted to the degree of bachelor of arts having majored in English. Whilst at university she was prominent in debating, athletics and Inter Varsity Mooting. She came to the Bar at the end of 1966.

Naida's going to the Bar was an unusual event in Queensland. No women had previously practiced at the Bar there. Inquiries were made as to the appropriate clothing to be worn by a female barrister in court. Gibbs J, (as he then was) researched the matter as much as he was able. He came up with a description of Bar jacket, wings and collars, and 'shoes with buckles'. Roma Mitchell, then a prominent female practitioner in South Australia, when asked for advice, wrote stating that on occasions when one needed to go to court a hat was essential. Janet Coombs, of the NSW Bar, wrote explaining what was worn by herself and other female members of the NSW Bar at the time, including diagrams, and drawings of collars with wings and bands.

As a consequence of this, and taking into account the perceived requirement to share a robing room with the all male Bar, Naida had designed and made a black suit the jacket of which, when worn under robes, presented as a Bar jacket but was suitably styled so as to be worn in the street. This meant that she did not have to disrobe in the presence of the 110 male members of the Bar. The chambers she was joining included amongst others, David Jackson and Ian Gzell.

Naida was admitted on 30 August 1966 before a Bench consisting of Gibbs J and Lucas J and my father. She asked the court to waive compliance with some of the rules relating to the admission of barristers of the Supreme Court of Queensland in relation to time to be served as a student-at-law prior to admission as a barrister, which decision is reported in the *Queensland Law Reports as Re Haxton*[1966] QWN 36. The report of the *Courier Mail* at the time recorded Gibbs J's congratulations to Naida on her admission as a barrister saying, amongst other things, 'At yesterday's sittings of the full court Mr Justice Gibbs congratulated Miss Haxton on her admission as a barrister. He said 'You are the first of many women who will in time undoubtedly practice at our Bar. I think it is nearly forty years since a woman was first admitted to the Queensland Bar. Although women have long practiced with success as solicitors in Queensland, you will, if you carry out your present intention, be the first woman to engage in private practice as a barrister in this state. In this respect, we in Queensland have been behind the trend of the times. In some of the other states as in England, women have achieved eminence in practice at the Bar'.

Unusually, for that time, the president of the Bar Association W B Campbell QC gave a ruling in relation to press interviews in

*Being a member of the Queensland Bar in those days, for a female, was a somewhat daunting experience.*



which Naida was given permission to conduct one interview with the press and one interview on radio, but was not to be photographed for press or television in her wig and gown. On her first morning at the Bar, she was greeted with a huge bunch of flowers from the members of the Bar, and at lunch time she was invited down to the members' dining room and invited to share in the convivial lunches which at that stage were a very important part of the life at the Bar of Queensland.

She conducted her first brief in the Supreme Court in an undefended divorce matter in chambers, at which my father had cause to congratulate her. Naida was treated as something of a rarity and all of the members of the Bar, with some exceptions, were anxious to make her feel welcome. Even then, there was recognition by the male members of the Bar that it was important that women take up the practice of the profession.

Being a member of the Queensland Bar in those days, for a female, was a somewhat daunting experience. Many of the barristers in active practice had managed to survive, in various ways, the rigors of the Second World War and

Japanese prisoner of war camps. Others were graduates of the 1950s who were not adverse to both smoking and the 6.00 o'clock swill. The robing room where all of the barristers used to robe, so as not to parade up and down George Street, was downstairs in the old Supreme Court building, where there was hung court dress for the various members of the Bar. Much of it had not received the attention of a laundry or a dry cleaner for some time. The stench of nicotine hung heavy in the air, and some members of the Bar were not unknown to exude the somewhat repugnant odour of stale beer (and indeed, in some cases more recently partaken refreshments) in the morning crush before proceeding to the various court rooms.

As an associate on the Queensland Supreme Court during the time that Naida was in busy practice, I had the opportunity to see her in action quite frequently. Prominent young practitioners against whom she appeared included David Jackson, Ian Gzell, Tony Fitzgerald, Ian Callinan, Geoff Davies, Bill Pincus and Bruce McPherson. It was a time of renewal at the Queensland Bar and even at that time, one perceived

that these young practitioners as a group would ultimately have a profound influence upon the practice of law in Queensland.

Naida appeared on a number of occasions in chambers before my father when I was his associate. It is not possible to adequately describe the intimacy of chambers practice during the late 1960s. The old Supreme Court building having been burnt down, the judges had no court rooms for civil work and conducted most of it in their chambers in rented accommodation. A chambers practice became precisely that. Naida did a wide range of work including, motions and summons in equity, common law and commercial matters and some matrimonial work which was then handled by the Supreme Court. She had good knowledge of land law having lectured at the university in this subject, as well as commercial law which she lectured in the Department of Accountancy.

In 1971 Naida married David Boddam-Whetham and became step mother to his three teenage boys. They had their own son, James in 1974. She moved to Sydney in 1971 and joined the NSW Bar in a set of chambers in Phillip Street whose members were responsible for setting up the first Frederick Jordan Chambers. She continued to lecture in real property for the Law Extension Committee of the University of Sydney and commercial law in the Faculty of Business Studies for what is now UTS.

In this year, Naida was invited to become editor and from 1974, sole reporter of the PNGLR. This position was sadly relinquished by her in 1993 when the Council of Law Reporting in PNG decided the reports should be edited and published from thereon, in PNG.

However, this venture into law reporting proved to be a turning point in Naida's life. Thereafter, it became the focus of her professional life. From 1981 to 2000 Naida was the assistant editor of the NSWLR and from 2000 to 2006 she was the editor of those reports. In these

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**Editor**  
**N J HAXTON**  
***Barrister***

**CASES REPORTED IN THIS PART**

*Naida's skill as an editor and law reporter strongly influenced the development of the reputation of the NSWLR.*

positions, she was the honorary minute secretary of the council and somehow became an ad hoc CEO, and in that capacity, I had the opportunity to more fully renew our former acquaintance.

During most of the 1990s I was a member and then subsequently chairman of the council. During this time, Dyson Heydon was the editor immediately preceding Naida. Historically, the deliberations of the body were essentially torpid, sometimes languid, and usually overly lengthy. I tried to change this with co-operation from Heydon. Naida was the spirit who drove the business and kept the predatory legal publishers at bay. With Heydon's ruthless approach to reportability, and Naida's organisational and financial acumen, the cost of the NSWLR was kept at a price that was and has remained substantially cheaper than any other similar series in Australia.

But perhaps most importantly, Naida's skill as an editor and law reporter strongly influenced the development of the reputation of the NSWLR. She was a worthy successor to Dyson Heydon as editor, and a great support to him as assistant editor. Never one to circumlocute, she had the uncanny knack of being able to summarise the most complex factual and legal analysis into a few short paragraphs and to 'fillet' judgments down to their relevantly reportable essence.

She was virtually single handedly responsible for instigating a policy strategy for the council under which it was to become self publishing in both electronic and paper format. This electronic database is now licensed to third party publishers so that NSWLR are readily accessible on the internet in their standard format from a number of

different publishers. She subsequently advised the Incorporated Council for Law Reporting for Queensland on its move to electronic publishing. As a result of her endeavours in this regard, the council has the copyright in all published volumes of the NSWLR and is likely to retain that copyright.

Naida has also been the editor of other series of reports and involved with a number of other legal publications as editor. She completed and published a *Manual of Law Reporting* firstly in 1991 (2nd ed 2005), which is now widely used throughout Australia, New Zealand and the Pacific and is used as a model for similar models for the Republic of South Africa, and more recently Singapore. She was a member of and advisor to the Australian Judicial Administration Working Group on the production of a *Guide to Uniform Production of Judgments* published in 1992 in the AJIA for distribution to judicial officers throughout Australia. She has provided advice to the Compensation Court of NSW on the publication of the *Workers Compensation Reports*, and to the judiciary and profession in the Republic of Vanuatu on the publication of a series of reports for Vanuatu and to the Singapore Academy of Law. She has conducted seminars on law reporting in New Zealand and has otherwise been involved in presenting papers and giving lectures on judgment writing and law reporting to a number of bodies, both in Australia and overseas. She has been an active participant in the activities of the Consultative Council of Law Reporting Bodies.

Last year marked the centenary of the passing of the *Legal Profession Act 1905* (Qld) which Act permitted women to be admitted and to practice as barristers, solicitors and conveyancers in

Queensland. During that year, Naida was honoured at a ceremonial sitting of the Supreme Court of Queensland and profiled in a publication to celebrate that occasion. She had a set of chambers named 'Haxton Chambers' after her by the director of public prosecutions in Brisbane. She has had a strong involvement in community activities but has more recently become an amateur traveler. She sees travel as providing one with all the opportunities to study things not studied before and consequently has become amongst other things an archeological addict.

Her son – James now runs an IT business and an advertising agency. David died of pancreatic cancer in June 1994. Naida plans to take a long break from editing and from paper generally and hopes to regenerate perhaps on an archeological dig as far away from Phillip Street as possibly imaginable.

As a personal recollection, I believe that there were many possibilities for Naida's life to have taken a different direction. Having known her off and on during virtually the entirety of her professional career, it is always been my opinion that she is a person of outstanding ability who would have succeeded in any field of legal endeavour. She certainly would have been appointed to the Supreme Court Bench in Queensland if she had remained at the Bar there. Whilst her decision not to continue in active practice at the Bar was based more on personal considerations, and in particular her desire for a full family life, she has been a trail blazer for women in the legal profession and a role model to be proud of. We will all miss her, not least the judges whom she has discreetly visited and advised on matters of grammar, punctuation, relevance and other matters appropriate to the successful writing of judgments, whilst carrying out her law reporting responsibilities.

## David Rofe QC

by M A Pembroke SC



On 10 February 2006, David Rofe QC celebrated fifty years since his admission to the New South Wales Bar, aged 24 years.

From the outset, his circumstances were propitious for a future career at the Bar. His father, Wyndham, was a well-known solicitor.

His mother, Florence, was a member of the Shand family. School days at Scots College were followed by degrees in arts and law at the University of Sydney and the obligatory year abroad – in the United Kingdom, France, Spain and Morocco. In 1974 he took silk in an eminent batch which included Gleeson, Meagher, McLelland and O’Keefe.

He has been seen by some as a scion of the establishment. But nothing is ever quite that simple. It is true that he has lived all his life in Woollahra and served as its mayor and deputy mayor. It is also true that he has never been known to display affection or enthusiasm for modernist tendencies and leftist politics. But in the conduct of his practice as an advocate, and in the pursuit of occasional personal crusades, David Rofe has invariably acted with a fierce sense of independence and determination.

His independence of mind, always admirable, was however sometimes quixotic. It is illustrated by the case that probably represents the apogee of his professional career – *Sankey v Whitlam* although it should not necessarily be assumed that his career has yet concluded. The theory of that case was typically visionary. It was alleged that in December 1974 a criminal conspiracy occurred between the prime minister (Mr E G. Whitlam), the treasurer (Dr Jim Cairns), the attorney-general (Mr Lionel Murphy), and the minister for minerals & energy

(Mr F X Connor). The unlawful purpose was said to be the borrowing by the Commonwealth of Australia from overseas sources (Mr Tirath Khemlani was the go between) of the modest sum (by current standards) of up to \$4 million. It was said that the borrowing was contrary to the Financial Agreement Act and the Constitution and was achieved by misleading the governor-general as to its temporary nature. The informations were laid under the Justices Act on 20 November 1975. It was a bad month for the then former prime minister whose commission had been withdrawn nine days earlier.

Ultimately, the prosecution faltered and the conspiracy was never proved. Malcolm McLelland, who was Rofe’s colleague on the 12th Floor of Wentworth Chambers, appeared for E G Whitlam. As well as McLelland, Rofe’s contemporaries on the 12th Floor of Wentworth Chambers from that era included many talented and respected figures. There were four presidents of the Court of Appeal: Jacobs, Moffit, Kirby and Mahoney, as well as Holmes, Needham, Powell, Rogers, Finlay, Allen, Ireland, Levine and Rolfe. There was also the sage and gentlemanly Forbes Officer QC, the late W W Caldwell QC and, until they found larger rooms elsewhere, a young Hope and a younger Handley.

Very few of us could contemplate, let alone have the stamina to achieve, fifty years in practice as a barrister. David Rofe has now passed a magnificent milestone and there is no sign of any change of direction. Save for an act of God, there will probably never be one. He deserves our recognition and our congratulations.

*His independence of mind, always admirable, was however sometimes quixotic.*

## The Hon Justice Jayne Jagot



Jayne Margaret Jagot was sworn in as a judge of the Land and Environment Court of New South Wales on Wednesday 1 February 2006.

Her Honour paid tribute to her parents, who as children in London had survived the Blitz during the Second World War, and after marrying, had brought their young family to Australia, prizing above all the opportunity their children were given for a formal education. Her Honour acknowledged having received a very fine education in the public school system of NSW and later at Macquarie University and the University of Sydney. Her Honour said that she seriously doubted that those opportunities would have been available to her if her parents had not come to Australia and was 'honoured to be able to acknowledge and give thanks for what Australia has given me'.

Her Honour had an outstanding academic career, having graduated with a bachelor of arts (first class honours) from Macquarie University in 1987, followed by a bachelor of laws (first class honours) from the University of Sydney in 1991. Her Honour was awarded an 'embarrassing' number and range of prizes, leading the attorney general, the Hon RJ Debus MP, to say that '[y]our Honour attained scholarly prizes the way Roger Federer collects tennis titles.'

In 1991 upon admission her Honour commenced employment at Mallesons

Stephen Jaques, where she was a partner from 1997 to 2002. Her Honour acted for numerous major private and public institutions and local government authorities across a wide range of matters, primarily involving environmental planning, local government evaluation, administrative, real property and tort law.

Justice McClellan has described her Honour as a woman of exceptional talent, one of the significant intellects of her generation. It is little wonder that in 2002 when her Honour joined the Bar one of her colleagues at Mallesons said '[i]f you must leave then the least you can do is leave us your brain in a jar'.

When admitted to the Bar her Honour inherited many of Justice McClellan's retainers upon him being appointed to the Bench at about the same time. Her Honour enjoyed a varied practice while at the Bar, appearing in a number of courts, including the High Court, and on a broad range of matters. The fact that many major companies were willing to retain such a relatively junior barrister reflected the high regard in which her Honour's expertise was held and the formidable reputation her Honour had built up while working as a solicitor.

Her Honour spoke of the excitement she felt when as a 'lowly' summer clerk at Mallesons she attended her first conference with queen's counsel, Murray Tobias QC, now Justice Tobias. Her Honour acknowledged Justice Tobias as an inspiration to her in the practice of law. Her Honour also acknowledged the many barristers who she had the privilege of briefing when a solicitor, and who subsequently gave her valuable guidance when she went to the Bar, in particular: Peter McClellan, a former chief judge of the Land and Environment Court, now chief judge at common law; Peter Hanks QC of the Victorian Bar; Malcolm Craig QC and Bret Walker SC. Her Honour described herself as a 'latecomer' to the Bar and said that she was not overly filled with confidence

about her prospects when coming to the Bar and remembered with fondness her first brief from Vivienne Ingram solicitor.

Her Honour was a member of the 11th Floor St James' Hall and paid tribute to the barristers and staff on that floor, describing the floor as 'filled with dynamic, gifted and very good humoured barristers'.

Ms McPhie the president of the Law Society of New South Wales spoke of her Honour's brilliant and incisive mind, her carefully considered advices which were a pleasure to read and said that her Honour was a gifted advocate. Her Honour was described as having people skills of a high order.

On a personal side, her Honour is an excellent swimmer, with a love of the English language and its literature, and who enjoys attending the Australian Open tennis and the Sydney Festival. Her Honour's penchant for topping up her sugar levels at morning tea breaks was referred to and speculation raised as to whether there would be a discreet drawer in her Honour's new chambers for a chocolate flake or a couple of musk sticks. The attorney general noted that he 'cruelly enjoyed', if only for a moment, the allegation that her Honour has difficulty driving a manual car (while acknowledging that this may no longer be true).

The attorney general said that her Honour was joining the Land and Environment Court at a time of change and of opportunity. Her Honour described the 'interactions of people and their environment and the regulation of these interactions' as being of 'fundamental importance to our society'. Her Honour recognised the significance of the opportunity she had to contribute to the jurisprudence of the Land and Environment Court and promised to approach this task recognising her responsibility, with a large dose of humility and a commitment to do her best.



## The Hon Justice Dennis Cowdroy OAM

On 15 March 2006 the Hon Justice Dennis Cowdroy was sworn in as a judge of the Federal Court of Australia.

His Honour was an acting judge in the Land and Environment Court of New South Wales from 1997 to 1999 and was appointed as a judge of the Land and Environment Court on 1 July 1999. His Honour is a commander in the Royal Australian Navy Reserve.

Cowdroy J was educated at Sydney Church of England Grammar School at Sydney, attended the University of Sydney, completing a degree of Bachelor of Laws in 1967, and from 1968 to 1969 studied at Kings College at the University of London, completing a Master of Laws and a Diploma of Air and Space Law. His Honour commenced articles with Fisher McKemmish with JT Ralston and Son in February 1962 and was admitted as a solicitor in 1967, working with J D Moors of JT Ralston and Son. In 1971 his Honour was admitted as a barrister and in 1989 appointed as queen's counsel. His Honour was also called to the Bar in both Lincolns Inn and Ireland. He is an honorary life member and National Trustee of the RSL, and was closely involved in the establishment in 1993 of Australia's Tomb to an Unknown Soldier at the Australian War Memorial. His Honour was awarded the Order of Australia Medal in 1995 for services to the RSL, the law and the community.

The Commonwealth attorney general spoke on behalf of the Australian Government, Glenn Martin QC for the Australian Bar Association and the Law Council of Australia, Michael Slattery QC for the New South Wales Bar Association, and June McPhie for the solicitors of New South Wales.

Of his Honour's immensely varied practice, covering industrial relations, trade practices, corporations law, defamation, family law, equity and common law, Slattery QC said

As soon as you came to the Bar in 1971 you developed the kind of practice as junior counsel that attracted the admiration of your contemporaries. You regularly appeared in the High Court on behalf of the Commonwealth with that master of the Constitution, Sir Maurice Byers, in challenges to the validity of the Trade Practices Act, the Family Law Act, and other Commonwealth statutes, and you frequently advised as Sir Maurice's junior. ... Federal Court jurisdiction became something of a specialty practice area for your Honour. Your Honour practised in bankruptcy, aviation law, matters under Part IV of the Trade Practices Act, and in Admiralty. Your Honour appeared in the Amann litigation, in *Concrete Constructions New South Wales v Nelson* and in *Hawkins v Clayton*.

In the late 1980s and throughout the 1990s, any barrister briefed to appear against a major New South Wales Government authority such as Pacific Power, the Roads and Traffic Authority and the Sydney Port Authority, often had the civilised experience of encountering your Honour as a redoubtable opponent.

None of this happened, of course, without hard work. Your Honour was renowned as a diligent and detailed planner of all your cases and an industrious producer of paperwork. This quality was just what was



Justice Cowdroy in chambers.

required in one of the great cases of the 1980s in which you were involved.

The attorney had noted that in the mid-1980s his Honour appeared as junior counsel to Mr Ian Callinan in the landmark Mudginbury litigation. The attorney said:

This matter arose from an industrial dispute at the Northern Territory meatworks where workers negotiated pay and conditions directly with their employer. The subsequent union picket line lasted four months and sparked litigation that continued for over two years, proceedings on appeal several times from the Federal Court to the full Federal Court and then to the High Court of Australia. It set precedents for matters arising under the Trade Practices Act, particularly where the secondary boycott provisions, the law of damages and the law of contempt of court were involved.

Your Honour also appeared in a number of other Trade Practices cases, particularly in the areas of business relationships, market share fair trading, and misleading and deceptive conduct.

Cowdroy J recalled Sir Maurice:

Sir Maurice was a larger than life character, substantial in build and presence, yet with a mild voice. He would often analyse a statutory provision, often considering a single word for hours in order to determine its correct interpretation. The respect with which he was held by the High Court Bench was awesome. I recall in one matter, Sir Maurice rose to his feet and said to the full Bench, 'Your Honours, this case raises a matter of some importance.' Sir Garfield Barwick replied, 'We assumed that by your presence here, Sir Maurice.' What a rare treat it was to witness such an exchange.

During my life at the Bar and on the Bench it became very apparent that legal principles continue to be developed and refined and that judicial minds may differ. For example, at the Bar I appeared for the

plaintiff in a professional negligence case, *Hawkins v Clayton*. The case was unsuccessful before the Supreme Court judge and was also unsuccessful 2:1 in the Court of Appeal. The High Court, however, upheld the appeal and decided in my client's favour by a majority of 3:2. In all, nine excellent judicial minds had heard that case, yet five of the nine decided the case differently to the majority of the High Court.

His Honour also referred to the creation of the Federal Court:

The Constitutional debates refer to the Federal Supreme Court and other federal courts. The Federal Supreme Court was created in 1903 by the Judiciary Act, and is now known as the High Court of Australia. Since the High Court was invested with both appellate and original jurisdiction, the creation of this court lay dormant for over 60 years. However, in 1964, two barristers of the Sydney Bar, Maurice Byers and Paul Toose, published an article drawing attention to the need to create the Federal Court.

Its creation in 1976 by the Federal Court of Australia Act was timely. In 1975, I appeared in a matter in the original jurisdiction of the High Court. The hearing lasted 10 weeks. It could scarcely be contemplated today that the High Court could hear such a case. Instead, the Federal Court now hears such disputes. Additionally, the volume of Commonwealth law is rapidly increasing. When created, this court had jurisdiction in respect of 17 statutes. That number has increased to 167.

The Act creating this court in 1976 was the 4882nd Act passed by the Commonwealth Parliament. Now, more than 10,700 Commonwealth statutes have been enacted. This means that the number of laws passed by the Commonwealth in the last 30 years is more than the entire number passed in the preceding 75 years.

## Sydney University Law School new building appeal

By Peter Garling SC & Andrew Bell

The New South Wales Bar and the University of Sydney Law School have an extraordinarily strong historical association. The law school has provided well over half of the current members of the New South Wales Bar and, prior to the establishment of law schools at the University of New South Wales, Macquarie University, the University of Technology and elsewhere, it was from the University of Sydney Law School that the vast majority of New South Wales barristers received their legal training.

The relationship has been far from 'one-way'. Over its entire life, the Bar has supplied any number of lecturers and tutors to the University of Sydney Law School. That tradition continues today. It is a tradition which has been made practically possible by the close proximity of the law school to the Bar. As is now well known, that proximity will largely cease in 2009 when the Faculty of Law will move to the main university campus (although most post-graduate courses will still be taught from Phillip Street). This move has been much debated over a significant period of time. It is no longer up for debate. In the words of Professor Ron McCallum AO, Dean of the Law School:

The ambitious new law complex will give students access to

purpose-built facilities and the latest technology supporting innovative teaching and cutting-edge research. A state of the art moot court, mediation training rooms and the comprehensive law library will provide much needed resources that are critical to the teaching and understanding of law and legal issues in the new millennium. ... As Australia's oldest law school, we have made an enormous contribution to the country's intellectual and legal life. Now we have the opportunity to generate fresh ideas, set new standards and raise the bar for every future law student. Coming home to the campus community will give our students a more-rounded education that will help them develop their values, reach their potential and become passionate and informed members of our society.

These are worthy aspirations and it is hoped that the philanthropic tradition which has and continues to underpin and enrich the greatness of both Oxbridge and the universities of the United States of America will recommend itself to members of the New South Wales Bar. A donation of as little as a day's fees (fully tax deductible) will greatly enhance the achievement of this worthy and worthwhile project.

Details in relation to, and images of, the new building are available at [www.law.usyd.edu.au/about/new\\_building.shtm](http://www.law.usyd.edu.au/about/new_building.shtm)

Gifts may be given online at [www.alumniandfriends.usyd.edu.au/unauthmakegift.asp](http://www.alumniandfriends.usyd.edu.au/unauthmakegift.asp)

Any enquiries to Guy Houghton at [ghoughton@vcc.usyd.edu.au](mailto:ghoughton@vcc.usyd.edu.au)

## The Hon Justice Steven Rares



The Hon Justice Steven Rares was sworn in as a judge of the Federal Court of Australia on 3 February 2006.

Rares J was educated at Knox Grammar School in Sydney and at Sydney University, graduating with Arts and Law degrees. His Honour completed articles at Dudley Westgarth and Co and worked closely with its then young partners, Henry Herron and Andrew Stevenson. He was admitted to the Bar in 1980 and appointed senior counsel in 1993. His Honour practised extensively in the areas of defamation, media law, trade practices, commercial and corporations law, administrative law, maritime and aviation law. Rares J had been a member of the Judicial Commission of New South Wales, a member of the board of Counsel's Chambers Limited between 1995 and 2005, chairman of the board between 2002 and 2005 and a member of the board of Gofund, which raises funds to support research into and awareness of gynaecological cancer.

At Rares J's swearing in, Attorney General Ruddock spoke on behalf of the Australian Government, John North spoke for the Law Council of Australia, Glenn Martin QC for the Australian Bar Association, Michael Slattery QC for the New South Wales Bar Association, and June McPhie for the solicitors of New South Wales.

Of Rares J's early practice at the Bar, Slattery QC said:

Your Honour immediately developed a reputation for prodigious energy, tenacity, legal creativity and a strong sense of justice and humanity. All of this was fuelled by a ferocious work ethic. At least two of your Honour's contributions to the law deserve special mention. Your Honour became one of a very rare group who has argued several cases as juniors in the High Court. One of these cases is *Tanning Research Laboratories v O'Brien*, decided in 1989, which still stands as a leading authority on the enforcement of international arbitration awards in Australian domestic law.

In your Honour's case, necessity was ever the mother of legal invention. In your earliest years, one evening your Honour was passed a brief to appear the next day in a bail application in a criminal matter before his Honour Judge Joe Moore of the District Court. Faced with what appeared to be very serious charges, but over very longstanding events, the man's liberty seemed in jeopardy. With your Honour's typical thoroughness, your Honour then did what perhaps no other lawyer of your generation would have done. Your Honour went back to the words of Magna Carta:

*And we will not deny or defer to any man either justice or right.*

Your Honour sought a stay of the charges, and your Honour's client was granted bail. And that, as Mr Martin has said, became *McConnell's case*. As a result, your Honour founded a whole field of jurisprudence ultimately culminating in *Jago v The District Court of New South Wales*, decided by the High Court in 1989."

Rares J said of this case, and his interest in judicial independence:

Indeed, I remember before I ran that argument that I rang Bob Ellicott up and said, 'Am I mad to do this', and he said, 'Well, why don't you look at the International Covenant on Civil and Political Rights', and gave me another line of argument to support it.

The promise that was made in Magna Carta ensured that the king's courts would be open to all; that they would be impartial and speedy in hearing and determining any case brought before them. Today these values are enshrined throughout the common law world, including Chapter 3 of the Constitution of our nation. Thus, Lord Denning, who was the chairman of the Magna Carta Trust, could say that in *R v McConnell*, Judge Moore 'had made a decision after my own heart'.

Our Constitution guarantees that judges and courts are independent not only from the parliament but from the executive and also all extraneous influences, including public opinion and the media. The only influences upon courts can be the requirements of justice, which must be done and must be seen to be done according to law.

As has been mentioned, I have long had an interest in judicial independence because it is a bulwark of liberty. Its counterpoise is the principle of open justice; that is, the requirement that courts exercising judicial power must sit in public, exposed to full scrutiny by all. The right to know or criticise what goes on in courts and the decisions they make ensures that the community can be confident that the trust reposed in judges and the judicial process is transparent.

This is vital, because a judgment in a case lays down the law as a means of resolving a dispute, whether it be between individuals or between an individual and government, or between governments. Where legislation governs the issue in dispute, courts interpret the legislation and apply it to the facts of the case, thus doing justice according to law.

In other cases, the rules of common law or equity may need to be applied in order to resolve a dispute. But however the court decides an individual case, it does so as an independent arm of government acting according to law, as explained in the reasons for judgment. The Constitution establishes that independent status as an arm of government in courts such as this exercising the judicial power of the Commonwealth.

On this topic, Mr North quoted from a speech his Honour gave to the Inaugural World Congress of Barristers and Advocates in Edinburgh in 2002, entitled 'The Independent Bar and Human Rights':

To be a barrister is a privilege. To fight someone's case to establish their right to be equal before the law is an honour members of our honourable calling accept every day, often times for little or no fee. This we do before courts which value our independence and whose independence we in turn revere. Neither judges nor members of the independent Bar can choose the easy case; we must take whatever comes and give our all. The hard won privilege of our independence should remind us of our responsibilities to seek to uphold fundamental human rights, however hard that may be, for if we are silent, who will speak?

## Verbatim

*Three Rivers District Council and others and Bank of Credit and Commerce International SA (in liquidation) v The Governor and Company of the Bank of England* [2006] EWHC 816 (Comm)

**Mr Justice Tomlinson:** It may be helpful if I explain what moved me to remark that it had been a matter of surprise to me for about a year that the action was being pursued. This reflects the fact that towards the end of November or at the beginning of December 2004, after I had been listening for many weeks to Mr Stadlen's opening submissions in answer to the liquidators' claim, I became so concerned about the case that I decided both to consult and to warn the lord chief justice about it. I told the lord chief justice, then Lord Woolf, that the case was a farce. I told Lord Woolf that it seemed to me that allegations of dishonesty were being levelled against officials or former officials of the bank for no better reason than that if their conduct was presumed to have been honest it represented an insuperable obstacle to the liquidators proving their case. By the close of the liquidators' case the logic of that case as I have already pointed out had driven them to level accusations of dishonesty at over forty officials of the bank. I told the lord chief justice that the case as it was being pursued before me bore little or no relation to that which the House of Lords had considered fit to proceed to trial. I warned the lord chief justice that I feared that the case had the capacity to damage the reputation of our legal system. This was after Mr Stadlen had drawn to my attention many, as I thought, highly relevant documents in the material disclosed by the bank which I had not hitherto seen, and after he had ruthlessly exposed just some of the myriad hopeless inconsistencies and implausibilities in the liquidators' case. The lord chief justice and I discussed whether there were any measures which might be taken either by me or by both of us together in order to persuade the liquidators of the folly of their enterprise. I take full responsibility for the conclusion, which was essentially mine anyway, that there was nothing which could usefully be done. The liquidators were

represented by a legal team of the greatest eminence. What was apparent to me as a result of Mr Stadlen's exposition must have been as apparent to them, although unfortunately Lord Neill and Mr Pollock absented themselves from large parts of Mr Stadlen's address so that the immediate impact thereof may have been lost on them. In the event the trial then proceeded for very nearly another year, hence my remark on 2 November 2005.

....

The foregoing are just some of the reasons for my conclusion that the entitlement of the bank to indemnity costs could not be more clearly made out. The bank also prayed in aid as one of many grounds upon which an order for indemnity costs is in this case appropriate 'the offensive treatment of the court, the bank's officials, former officials and witnesses, the bank and the bank's legal representatives and other natural and legal persons involved in some way or other with BCCI SA or its associated companies.' It will be apparent that the bank has no need to rely upon this ground and I do not propose to dwell on it. Mr Pollock was only infrequently rude to me and I ignored it. Not everything said by Mr Pollock is intended to be taken seriously and sometimes his offensive remarks are the product of a well-intentioned but ill-judged attempt to lighten the mood. I propose to say no more about some of the things said in the course of the trial about the bank, its officials and its legal advisers with the exception however of Mr Stadlen. Mr Pollock's sustained rudeness to his opponent was of an altogether different order. It was behaviour not in the usual tradition of the Bar and it was inappropriate and distracting. I should have done more to attempt to control it, although I doubt if I should have been any more successful than evidently were Mr Pollock's colleagues whom on at any rate one occasion I invited to attempt to exercise some restraining influence. Whether this is a ground upon which an award of indemnity costs should be considered I do not need to decide.



## The Hon Justice Biscoe

Peter Meldrum Biscoe QC was sworn in as a judge of the Land and Environment Court of New South Wales on Monday, 13 March 2006.

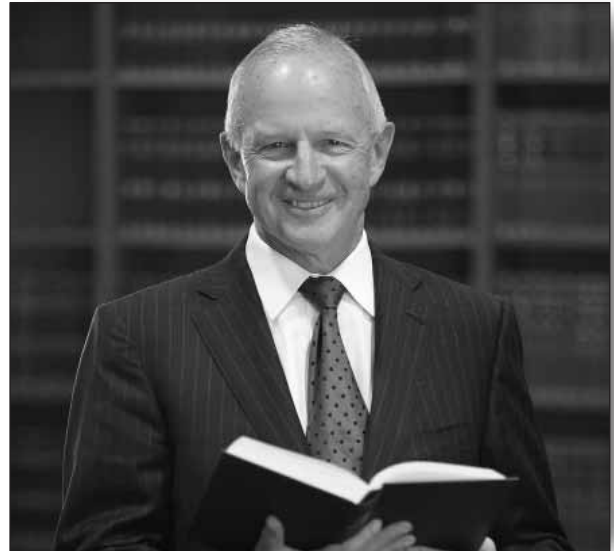
The Hon R J Debus MP, Attorney General, spoke on behalf of the Bar, noting from the outset that '[a]t the present rate of Land and Environment Court swearings-in we should have a completely new Bench by October. The court is presently undergoing more change than the Victorian branch of the Labor Party'. On a more serious note, the attorney expressed confidence that the professional and personal qualities that Justice Biscoe was known for at the Bar – extensive legal knowledge, calm temperament, an inquiring mind and a strong work ethic – would ensure that he would serve the people of New South Wales as well as a judge of the Land and Environment Court.

Justice Biscoe grew up in Tasmania, represented that state in water polo and won several state swimming titles. He also represented the University of Tasmania in rugby union, in debating and mooting, in which latter pursuit he won the trophy for the best individual speaker at the 1966 intervarsity competition beating Justice Roger Giles of the Court of Appeal and Chief Judge Blanch of the District Court. He studied under the late Professors Nygh and Higgins and Dean Atkinson at the University of Tasmania. After completing his law degree, his Honour won a scholarship to Tulane University in New Orleans where he studied civil law and completed a masters degree. He then spent a number of years working in London as a commercial solicitor and in New York in an international bank. At this time his Honour also published a book on the *Law and Practice of Credit Factoring*. His Honour was admitted to the Bar in 1974 and took silk in 1991.

In his remarks, the attorney observed that Justice Biscoe had brought:

energy, determination and fondness for a good argument to your work in your thirty years as a barrister, acting in a wide range of cases and earning a reputation as a great all rounder. Those who know you professionally admire your inventive mind and your great determination. That said there may have been times when your juniors have had cause to rue your steely determination to master the material in a case. On one occasion at least you invited an unsuspecting junior to come in when he had a moment and the junior duly did so, expecting a brief chat only to be released very late that night with strict instructions to be back by seven in the morning. Other juniors could only pat him on the back, advise him to telephone his best regards to his children and whisper that he'd been 'Biscoed'.

Your proficiency at administrative law and your expertise in commercial practice are well known and you bring a great breadth of experience to your new post. As a barrister you prepared extensively for cases which you could master in a short time even if it was a brief that one of your colleagues had had to drop. You are known as a great trial advocate, unflappable in court, with a dignity matched by few. Last year you published a book on Mareva orders and Anton Piller orders which you called 'the law's two nuclear weapons'. You



have brought your extensive knowledge of these topics to bear when you assisted a committee of Australian and New Zealand judges investigating the harmonisation of court rules, practice notes and forms of order in the Mareva and Anton Piller areas and you have also shared your extensive knowledge of this topic with other practitioners through presentations and lectures.'

Speaking in reply, Justice Biscoe made a number of observations about the Land and Environment Court of New South Wales:

Established a little over a quarter of a century ago, it has come to be viewed nationally and internationally as a model which other jurisdictions have adopted or have considered adopting for a specialist court or division of its type. I join the court as it faces and deals with the challenges of the twenty-first century. One of the challenges is to develop the jurisprudence concerning the concept of ecologically sustainable development. Since the early stirring of the germ of this idea some forty years ago, it has become entrenched in the law. Its elements are now to be found in the object sections and sometimes in other sections of numerous Australian environmental statutes. A body of case law has begun to emerge in this and other countries. The content and application of the emerging principles will be important to present and to future generations.'

His Honour spoke with great fondness of his 30 years at the Bar and of his colleagues in chambers:

Those who went from my floor to the Bench in my time were among the leading Australian barristers of their generation and I was fortunate to have worked with virtually all of them. They included the likes of justices Sheller, Giles, Lindgren, Hulme and Conti, the last of whom who could charm opponents into a settlement. Another who influenced me was the 'Dancing Man', Frank McAlary QC, who enriched the Bar for over fifty years between the time of his famous VE Day news clip appearance and his recent retirement. In 1984 he was responsible for renaming the building where the Land and Environment Court is now located as Windeyer Chambers.

There was a group who joined my floor at around the same time as myself: my friends Poulos, Maconachie, Hoeben, MacFarlan, Sullivan, Collins, Gray, Holmes and the late Paul Donohoe. We have spent innumerable hours in and out of each other's chambers developing professionally and in other convivial ways. The late Justice Dennis Needham of the Equity Division and Theo Simos QC, later a judge of the Equity Division, who unfortunately is too unwell to be here today, took a particular interest in me as a young equity junior. They were exemplars. Both possessed the grand judicial qualities of great learning, sound judgment and invariable courtesy and patience. Justice Needham would get the best out of an advocate by raising an eyebrow but never his voice.'

His Honour also acknowledged the influence of a former chief judge of the Equity Division, the Hon Malcolm McLelland QC, describing him as having had 'an enduring influence on my generation because of the elegance, wisdom and conciseness of

his judgments and the atmosphere of calm he generated in his court, an atmosphere which I believe to be in the best interests of the participating public as well as practitioners.' He also paid tribute to Justice Andrew Rogers as one who 'had a significant influence on the administration of justice by pioneering in the 1980s in the cauldron of the Commercial List of the Supreme Court, where I practised, a standard of efficient case management that has been widely influential.'

After acknowledging his love and support of members of his family, his Honour concluded:

The oath of judicial office taken this morning 'to do right to all manner of people according to law without fear or favour, affection or ill will' has been sworn by judges for almost seven centuries. It gives me as a new judge a powerful focus as well as a sense of humility about the tasks that lie ahead.

## In memory of the late Justice Peter Hely

An appeal to raise funds

At the instigation of an eminent group of close friends of the late Justice Peter Hely, there has been launched an appeal to raise funds to honour his memory.

In early May 2006, their Honours Justices Heydon, Jacobson and Allsop, together with T F Bathurst QC, J N West QC and Messrs Besson and Sinclair issued the following statement:

The professional skills of the late Justice Peter Hely attracted much admiration and his personal qualities much affection. Those skills and qualities will long live in the memories of those who experienced them at firsthand. They include the lay clients whose affairs he brought into order and whose interests he advanced; the many solicitors who relied on his lucid and shrewd advice; the barristers who, whether they led him, or were led by him, or opposed him, never failed to appreciate his talents as an advocate; the judges who appreciated the flawless economy of his work as an advocate and, later, when he joined the Federal Court of Australia, as a judge; the friends, within and beyond the above categories, who appreciated his wit, cheerfulness and companionship.

We have thought it desirable, however, to seek to ensure a more permanent memorial to Peter Hely. Peter Hely was one of the finest products of the University of Sydney Law School. It is therefore fitting that the Dean has agreed to the University of Sydney receiving contributions with a view to the furthering of any of the following purposes:

- ◆ a Justice P G Hely Visiting Distinguished Scholar Scheme, to support visits to Australia of overseas experts in commercial law and equity;
- ◆ a Justice P G Hely Scholarship to be held either by undergraduates who would not otherwise be able to attend the University of Sydney Law School for financial reasons, or graduates of that law school seeking to engage in postgraduate studies at an overseas university and requiring financial assistance;



The late Justice Peter Hely.

- ◆ prizes or scholarships in commercial law and equity.

Questions as to the precise manner in which the university would apply the funds raised, which of these purposes would be carried out, and the frequency with which payments in furtherance of these purposes would be made, would be questions for the university. The answers would depend in part on the amounts raised.

Any members of the Bar wishing to honour the late judge's memory in this way may do so by completing a form which may be downloaded at [www.nswbar.asn.au/circulars/giftform.pdf](http://www.nswbar.asn.au/circulars/giftform.pdf)

## Anthony Parker (1948-2006)

By Mark Austin



On Tuesday, 30 May 2006 Anthony Ian Parker passed away after a lengthy struggle with cancer. He was a lawyer who dedicated his working life to quality and at times courageous representation of the outcasts in Australian society. He will be sorely missed by his friends and colleagues in the Public Defenders Office and at the wider New South Wales Bar. He is survived by his daughters Catherine, Susan and Frances, their mother Lenore and his partner Anne Healey. His story is pivotal in the development of representation for Aboriginal people in New South Wales particularly in areas west of the Great Dividing Range.

Tony Parker graduated in law from Sydney University in 1969 and after a period as an articled clerk in Sydney was admitted as a solicitor on 31 July 1970. From 1971 to 1974 he was employed in private practice in Cowra with a firm that had its head office in Sydney. During this period he became acutely aware of the unfavourable treatment Aboriginal people faced in their dealings with a legal system, particularly in western New South Wales. In 1975 he began employment with the Aboriginal Legal Service (NSW) Ltd working in the Grafton office. During this period he developed his skills as a fine advocate and was willing to

confront abuses of police power by challenging evidence in the courts. At the time this was a courageous position for any member of the legal profession. Magistrates and judges frequently made it clear to practitioners that challenging the honesty of evidence given by police officers was frowned upon by the bench and no way to advance a legal career.

In 1978 Tony was approached to assist in the formation of the Western Aboriginal Legal Service and in April 1978 he became the new service's founding principal solicitor. He travelled constantly from one court sittings to another in western New South Wales appearing in multiple hearing matters on any given day as well as representing the bulk of defendants in the local court lists. He would travel to courts as far-flung as Wentworth on the Victorian border and Broken Hill in the northwest. The legal service was based in Dubbo as it still is today but much of its work was undertaken in the river towns of Brewarrina, Bourke and Wilcannia. Relations between the police and the Aboriginal communities of western New South Wales were particularly difficult in this period. Many Aboriginal people had become committed to self-determination and this inflamed a conflict with the large local police forces that had traditionally seen their role as controlling the lives of Aboriginal people. Much of this struggle was played out in the courts. Tony Parker played what can only be described as a heroic role in his tireless representation of his Aboriginal clients under unbelievably difficult conditions.

Tony put in place systems within the office which promoted high-quality representation of Aboriginal clients. He always believed that his clients had a right to expect the best from their legal representatives. To this end Tony became, in his own laconic way, a great

teacher to a generation of mostly young, recently-graduated lawyers. A proponent of social justice and Aboriginal self-determination Tony instilled a sense of commitment and purpose in those who were lucky enough to work with him. At one stage, with the other solicitors employed by the Western Aboriginal Legal Service, he worked for months without pay to ensure the survival of the legal service. They were simply unwilling to allow a crisis in funding to leave Aboriginal people once again dealing with a criminal justice system without legal representation.

From June 1980 until July 1981 Tony was employed in private practice in Cooma. After this break he returned to the position of principal solicitor with the Western Aboriginal Legal Service Ltd until December 1988 making him the longest serving principal solicitor in the history of the organisation. From 1989 until 1993 he was employed as a solicitor and barrister in Adelaide with a private firm. During this period he continued to represent Aboriginal people working with former Aboriginal Legal Rights Movement solicitors within the firm and appearing in trial matters for Aboriginal clients in the city as well as in country regions. He also became involved in a number of significant cases before the Royal Commission into Aboriginal Deaths in Custody.

In 1993 he returned to New South Wales and was employed by the Legal Aid Commission as the solicitor advocate at Parramatta District Court. On 21 February 1994 he was admitted to the New South Wales Bar and on 23 February 1994 he was appointed a public defender. Alongside Martin Sides then senior public defender he was instrumental in reintroducing an arrangement through which Aboriginal legal services in this state were able to gain access to the services of the public defenders office. Since then he has continued to represent Aboriginal clients in the city and particularly at the Tamworth District

*Tony Parker played what can only be described as a heroic role in his tireless representation of his Aboriginal clients.*

*continued on page.... 79*

# Brian Francis Murray QC (1934-2006)

By Phil Doherty SC

Nearly 35 years ago when I first started in the District Court section of the GIO, I had a case where the plaintiff seemed a bit of a shonk. A little guy who had the most infectious laugh I have ever heard worked on the other side of the partition. So I leaned over and asked him 'Who is the best cross-examiner?' He didn't even look up. 'Brian Murray' he said.

So I briefed this Brian Murray and by the time he'd finished cross-examining, the victim took my miserable offer. Shortly after that I had my first meal with Brian Francis Murray.

It was this same ruthless cross-examiner who, some years later, wanted to sell his little Lexus. He happily gave the prospective purchaser a test drive on his own. The proposed purchaser waved to Muz (standing there on the side of the road) as he drove off. Neither car nor purchaser was ever seen again.

You know the chronology. Brian Murray came to the Bar when he was not quite 26 years of age. To put that in context, the Vietnam War was hotting up. 'Tie me Kangaroo Down Sport' had just been displaced from number 1 on the Top 40 by that all time classic, 'Itsy Bitsy Teeny Weeny Yellow Polka Dot Bikini'. Head days.

He worked hard. He wanted to provide for his family in a way his own dad had struggled to do. He became a very good barrister.

He became queen's counsel in 1981. His skills were always in demand. Later he was as an acting Supreme Court justice

and, more recently, an acting District Court judge. Behind the scenes, he sat on umpteen committees. He was head of chambers on 8th Floor Wentworth and 11th Floor Garfield Barwick Chambers.

With all this, you'd expect a touch of arrogance. But not a sniff of it. The hallmarks of his life in the law were compassion, simplicity and friendship. He was universally liked and respected. He was so dedicated to his clients. I saw it scores of times – the rapport with uncomplicated country folk and the genuine empathy he felt for injured people.

Of course there was a right way of going about things. He seemed to preside over a courtroom, even from the Bar table. Never yet have I seen a better first instance persuader in a big case.

When sitting as an acting judge, he ran a quiet, pleasant and respectful court. No anger. No angst. There was always due decorum – even when he was dripping with yellow paint thrown over him by a litigant in person. That chap obviously didn't know what a good draw he had.

He brought out the best in counsel because he genuinely wanted to hear their submissions. At one stage, there were nearly 70 District and Supreme court venues in New South Wales. Brian Murray would have been to nearly every one of them. Peter Brennan will tell you that the people of Grafton thought he was a local.

He even developed an international practice doing cases in England, Ireland

and the United States. He certainly had a love of travelling to new places and meeting new people.

A couple of years ago Patrick Joseph Heath and I were returning from a case in India when we were forced to stop in Singapore. I sent Muz an SMS message: 'We are in the Long Bar at Raffles Hotel in Singapore, where Rudyard Kipling wrote Kim. Have you ever been here?'

His reply: 'Is Fred still the barman there?'

He didn't just preside over a court room. He presided over meals. That psalm about the Lord being my shepherd tells of setting a table in sight of your foes. Well, they'll be in for a long one because Muzza won't be coming to eat, he'll be coming to dine.

It's hard to believe you're lying there Muzza. But you are. Your wonderful life has come to an end. We're so glad that you'll be judged as you judged.

From all your friends who are here and those who are not here, from all those who have loved you over the years and from the thousands of people who benefitted from your knowledge, determination and compassion – thank you for your life.

Without exception, you were regarded as a gentleman in the law. I'm sure you chose to die on St Paddy's Day so that we will forever raise a pint to your memory and say: 'To Muzza – what a great man'.

Go on now Muz, the Lord is setting a table for you.

*continued from page.... 78*

Court. Tony has an understanding of the situation faced by Aboriginal people within the criminal justice system, which lawyers from more traditional legal backgrounds could never achieve.

His work as a public defender was as significant as his earlier work with the Western Aboriginal Legal Service. For

over a decade he provided high-quality representation as a barrister working for those charged with serious criminal offences. It is timely to reflect upon this work and the context in which it was carried out. At a time when the motives of criminal defence lawyers were under constant attack mostly from ill informed commentators all those who sought to

pursue personal ambition Anthony Parker worked tirelessly to provide the highest quality legal representation to the indigent.

At the memorial service at St James Church he was described in these terms which remained fitting 'Anthony Parker was a champion. We will not see his like again'.



## Robert Anthony Campbell (1951-2006)

By Izaz Khan

**Robert Anthony Campbell of the Thirteenth Floor Selborne Chambers died suddenly from a heart attack on the night of 26 May 2006 at his home.**

Robert was 55 years old and had been at the Bar and in the chambers on the thirteenth floor since 1982. Although he specialised in defamation law, he was also an equity commercial barrister. Over the last few years, he had also acted as an arbitrator in the District Court resolving mainly personal injury cases.

I knew Robert well. He was a great guy with an easy manner and an ability to get along with everyone around him. I remember that not long after he came on the floor, he made a big splash with his presence when he bought an expensive, large antique desk set, which, to the rest of us new barristers seemed to

cost a fortune. A bit later on he hung expensive, large paintings on one of the walls of his chambers.

Robert was a very good lawyer who was equally at ease with the most complex of legal issues to the most mundane and annoying little problems of procedure.

He was very well-travelled. He used to enthral me with his many detailed descriptions and stories about various places he had been to both in Europe and in Africa.

I have met very few people who are as well read as Robert, both in law and in general. Whenever I wanted to discuss law or history, I would have a chat with him. There were not many areas of the law in which Robert could not hold his own in a discussion. But for me, it was his knowledge of history, especially ancient history, that fascinated me the most. Robert could go into detailed descriptions of topics relating to any one of the ancient civilizations with ease.

Robert's reading was not restricted to history. He was also a keen reader of

fiction and specialised in the works of prize winners. He liked to read the current and past works of authors who had won the Pulitzer, Booker or Miles Franklin prizes. He must have spent hours making a list of such books and gave me a copy for reference.

Robert was an accomplished aesthete of classical music and movies. He had a huge collection of CDs and DVDs on a tall stand in his chambers.

For many years, one thing I had in common with Robert was solving the Sydney Morning Herald Quick Crossword each weekday morning. He usually solved them all except perhaps the few which related to technological matters and took great pride in beating the man who set the puzzle.

Robert was a good friend and an excellent sounding board for me on questions of law and history. His death was a shock to all who knew him and we shall miss him very much.

## Rodney Brian McCloghry (1951-2006)

By Arthur Moses

Rod McCloghry was a hard working member of the Bar whose busy 1990s common law practice had slowed in recent times due to legislative changes. Sadly, he passed away on 5 March 2006. Rod was known for his larrikin style both in and out of the courtroom. He will be greatly missed by his loving family, friends and colleagues. He leaves behind his loving wife Susan, children Ben, Mathew and Kim and step children Hayden and Liam.

Rod came to the Bar in late 1989 following successful practice as a solicitor. He was educated at Marist Brothers, Parramatta (an old school of a few members of his former chambers) and completed a degree in arts/law at the University of Sydney between 1969 and 1974.

Rod was admitted as a solicitor in 1975 and worked in private practice in that time in various capacities, including as a

sole practitioner until coming to the Bar in late 1989. Rod was also appointed a District Court arbitrator.

Rod's death was sudden and unexpected. He will be missed greatly by his friends and colleagues at Frederick Jordon Chambers.

# The Hon John Stanley Lockhart AO QC (1935-2006)

On 10 February 2006, a memorial service was held at St James' Church, King Street, to celebrate the life of the late Honourable John Stanley Lockhart AO QC, one of the NSW Bar's most outstanding members.

Numerous tributes were paid including by the Hon John Howard, Prime Minister and by the Hon. Philip Ruddock, Commonwealth Attorney General, who had regularly briefed Mr Lockhart, as he then was, more than 30 years earlier. The attorney observed that, on the Federal Court, Justice Lockhart 'served with distinction and confirmed his reputation as one of Australia's outstanding jurists', adding a 'lustre to the Federal Court, the Copyright Tribunal, and the Trade Practices Tribunal and the Australian Competition Tribunal of which he was president.' The attorney continued:

His skills and capabilities meant that in retirement he was frequently asked to serve by governments in a range of capacities. He served the World Trade Organization, the Asian Development Bank and as chair of the independent review of *The Prohibition of Human Cloning Act 2002 and the Research Involving Human Embryos Act 2000*. Personally I was delighted that he was willing to accept the position of deputy chairman of the International Legal Services Advisory Council in 2004. He contributed strongly to the work of the council in a number of areas, helping to advance the liberalisation of legal services, internationally. Indeed, were it not for his passing, I was planning to ask him to make his expertise available in other areas within my portfolio.

Dr John Vallance, headmaster of John Lockhart's *alma mater*, Sydney Grammar School – of which he also served as a trustee for many years – described the late judge as 'an elegant, civilized and courteous man possessed of ... a certain aristocracy of mind' and as a man filled with what Aristotle called 'practical wisdom'.

Mr David Spencer, Deputy Secretary of the Department of Foreign Affairs & Trade, and former ambassador of Australia to the World Trade Organisation and chair of the WTO Dispute Settlement Body, referred to Justice Lockhart's work as a member of the appellate body of the WTO, the highest institution responsible for settling international trade disputes between members of the WTO. He described Justice Lockhart as having made a 'lasting contribution' to that institution and as someone who commanded the respect and admiration of both his fellow members and those who argued cases before the Appellate Body. He noted that such was the faith in Justice Lockhart's ability that, when given the choice, he was selected more often than any other Appellate Body member to serve as an arbitrator in WTO disputes.

A moving address was also delivered by James Lockhart who focussed on the personal side of his father's life in an address which captured the judge's essential humanity.

A wonderful tribute was also paid to the late judge by the Hon TEF Hughes AO QC who had been his Honour's pupil master in 1960. Hughes QC's eulogy is reproduced in full.



PRIME MINISTER  
CANBERRA

## THE HON JOHN LOCKHART AO, QC

John Lockhart was one of the most skilled and respected jurists of his generation.

There are many who can attest more eloquently than I can to his great legal attributes.

My belief, and I am sure inadequate comments, relate to what I might call the international and public policy phase of his accomplished and meritorious life.

Some years ago I lunched with John and he indicated his desire to serve his country beyond a massive contribution as a member of the Federal Court.

Thus began a very special and productive phase of his life.

Prior to his retirement from the bench in June 1999, Justice Lockhart took leave of the Court to join the World Bank as its Judicial Consultant, based in the United States. The experience from this sabbatical, particularly during visits to a number of developing countries, would inevitably shape the course of John Lockhart's post-judicial career.

He accepted an appointment as Executive Director for Australia at The Asian Development Bank later in 1999. He took particular interest in improving the legal and institutional frameworks in developing member nations following the crisis in Asian financial markets two years earlier. This work would be essential to the restructuring of those nations' corporate and banking sectors. In an article for the NSW Bar Association in 2000, John Lockhart remarked that while he missed the exacting and definitive work of the Bench, his work for the Bank was particularly interesting and enjoyable.

A member of the Appellate Body of the World Trade Organisation since 2001, he made a significant contribution, participating in 30 appeals as well as a number of arbitration proceedings. He was appointed Deputy Chairman of the International Legal Services Advisory Council in 2004.

I am particularly grateful for John's recent work as the Chairman of the independent review of the *Prohibition of Human Cloning Act 2002* and the *Research Involving Human Embryos Act 2002*. His report was presented to the government for its consideration only a few weeks before his death.

The diversity of his post-judicial work evidenced of his great abilities.

John Lockhart brought passion as well as exactitude to the responsibilities he discharged internationally and for the government.

He was an immensely charming and gracious person, always courteous and possessed of a deep affection for the welfare of our country and its people.

I join his many friends in honouring a remarkable life well and fully lived.

(John Howard)

## Tribute by Hughes QC

We are present in very large numbers in this beautiful Parish Church of Bench and Bar, one of our traditional places of communal worship, to celebrate the life and mourn the unexpected and untimely departure from our midst of a distinguished son of Australia. Also to express by our presence our sympathy for Juliet, his beloved wife of eight years, and the members of his united and devoted family.

Because there is so much in his life to celebrate, the primary emphasis of our thoughts should be not so much on sorrow but on what God gave us in the person of John Lockhart and his many attributes.

It is a truism that death comes in an almost infinite variety of guises and at variable speed. It came upon him quite suddenly when he was at the height of his intellectual powers, having just undertaken and completed, at the request of the Australian government, a landmark inquiry and report into the sensitive topic of the uses to be made of human stem cell research. Happily he was spared long suffering and was totally lucid to the end. We celebrate a life of awe-inspiring versatility in the deployment of many talents.

He commenced his training in the law under the tutelage of two distinguished solicitors, first, the late E.J. Culey ('Ted Culey') and then Sir Norman Cowper. They taught him well, building upon the promising foundation of his innate ability, so that when, on admission to the Bar in 1960, at the age of 24, he became my pupil, there was little for me to teach him. He had an instinctive and sure grasp of what was required of him as counsel and of what he had to do in order to comply with those requirements. His progress at the Bar was as certain as it was well deserved. He took silk in 1973 at the early age of 37. In that rank he conducted a busy and successful practice until his appointment to the Federal Court in 1978. There he sat with distinction for twenty judicially productive years, until he retired in 1999 at the age of 64. He spent his sabbatical leave of 12 months prior to retirement as a Judicial Consultant to the World Bank, based in Washington.

His qualities as a judge – additional to those inherent in his capable and well-furnished mind – were patience, courtesy, balance, tolerance and a lively understanding of the pressures of litigation upon parties and their lawyers. Whenever possible, he practised restraint in expression when passing judgment upon the testimony of a witness whom he did not accept. He abstained from denouncement unless he saw it as unavoidably necessary. He was one of the really significant intermediate appellate judges of his generation. He was able to handle with conspicuous ability all first instance and appellate work allotted to him. His judgments will live; they will be read by successive generations of lawyers because of the depth of their wisdom and the elegance of their expression. They have left a permanent imprint on important areas of our jurisprudence, particularly trade practices, intellectual property and administrative law. The broad sweep of

his learning is illustrated by one of his early judgments, in 1979, in *Trade Practices Commission v Sterling*, where he compiled, in a masterly fashion, a comprehensive and definitive list of the kinds of document to which the protection of legal professional privilege may apply.

As president of the Australian Competition Tribunal from 1982 to 1999, he stood in an influential position at the cross-roads of law, commerce and economics. During his term of office he was responsible for the introduction of what came to be known as the 'hot tub' method of dealing with the testimony of economists. They were all thrown into a witness box together. This procedure had been pioneered by the late Bruce Gynge, when chairman of the Australian Broadcasting Tribunal, in a different context. When the proceedings in which Mr Gynge's tribunal had adopted that procedure came to the attention of the High Court, Sir Anthony Mason inquired somewhat sceptically, whether the witnesses had been accommodated in a 'family size' witness-box. At all events, the 'hot tub' technique has gained currency with the passage of time and is a tribute to John Lockhart's capacity for useful innovation.

Congruently with his sense of civic responsibility and doubtless to the satisfaction of his distinguished father-in-law, Sir Victor Windeyer, to whose daughter Margaret he was happily married for 35 years, until her untimely death in 1995, John Lockhart took pride in his service, in the CMF, in which, in 1959, he attained the rank of captain.

He resigned from the Bench not to engage in the leisurely pursuits of retirement but to embark upon another challenging career as a member of the Board of Governors and executive director of the Asian Development Bank, in which positions he rendered outstanding public service between 1999 and 2002. Then he took office as a member of the Appellate Body of the World Trade Organisation, Geneva. In that part-time position he exercised a powerful jurisdiction over national governments in matters of trade. His appointment signified the high opinion of him held by the Australian Government, leaving him time, however, to engage his skills as an arbitrator and mediator, in which roles he was much in demand.

He was honoured by appointment as an officer of the Order of Australia in 1994 for his contributions to the law, arts and education. His contributions to education included occupying the office of a Trustee of his alma mater, Sydney Grammar School; and later from 2004 as deputy chairman of the International Legal Services Advisory Council. I would hope that consideration be given to his posthumous promotion to the rank of Companion of the Order of Australia, for which his recent report on stem cell research, his work in the World Trade Organisation and previously in the Asian Development Bank provide powerful reasons. He undertook all these great and successful endeavours after his appointment as an officer of the order in 1994.

No summary of John Lockhart's life story would be complete without reference to his enduring love of art. He was not just a collector of paintings judged by him to be worthy of collection; he gave tangible support to Australian artists trying to emerge from the ruck of obscurity. While holding office as minister for the arts, Bob Ellicott appointed him to the Art Exhibitions Australia Board, a body designed to promote the display in Australia of significant foreign works of art.

I have picked some highlights of a stellar career dedicated, since 1978, almost exclusively to public service. He was in truth an all-rounder whose character was the amalgam of a profusion of remarkable qualities – all of them good: social grace without pretension, cheerful good humour, a capacity to exert authority without pomposity, to name just a few. Speaking for myself, I say that I never spent time in his company without feeling better for it.

John and I once, and quite recently, discussed religion. He expressed himself paradoxically. He said: 'I think I'm an agnostic Anglican'. He was explaining that he had doubts about faith, thereby declaring himself a member of a club with many members, including St Augustine, who, even after his conversion, prayed to God to help his unbelief. Even saints – and many of them – have been plagued with such doubts about their faith. But, if any person was ready to meet his Maker because of an exemplary life, that person was John Lockhart. We can say 'May he rest in peace' with confidence that he has already attained that state. His favourite musical work was 'St Matthew's Passion'. Of him let us say, in the words attributed to Christ in the gospel of that apostle: 'Well done thou good and faithful servant. Enter thou into the joy of Our Lord.'

## BOOK REVIEWS

### Passing The Torch

By Peter Gray SC (editor) | Aisling Society, 2005

*Passing the Torch*, an idiosyncratic selection of 50 years of talks to the Aisling (Irish for a vision or dream) Society of Sydney is not manifestly of general interest to lawyers. However, this 'book of talks', edited by Peter Gray SC, provides further evidence of the attraction of the practice of the law to the 'romantic character of the Celt'.

The 'love of language, the lawyer's tools of trade, and the fascination of concepts and ideals are qualities to be found in the Irish temperament', Sir Gerard Brennan told the Aisling Society in a 1989 talk highlighting common bonds of law between Australia and Ireland – especially involving people: chief justice of the High Court Sir Frank Gavan Duffy, NSW chief justices Sir James Martin and Sir Frederick Darley, and barristers Roger Therry and John Hubert Plunkett, NSW attorney general from 1836 to 1856, who prosecuted to conviction the perpetrators of the Myall Creek massacre of 28 Aboriginal men, women and children.

As a 1992 speaker to the society related, after the jury in a trial before Chief Justice Dowling, had found 11 men not guilty of murder in relation to one Myall Creek death, Plunkett had seven of them rearrested as they left the court and arraigned to appear in relation to the deaths of two children. Before a different judge, they were found guilty and hanged. 'From then on, Plunkett was

hated by the majority of the squatter class and other white settlers', received numerous death threats and 'was subjected to a vicious campaign of slander and vilification'.

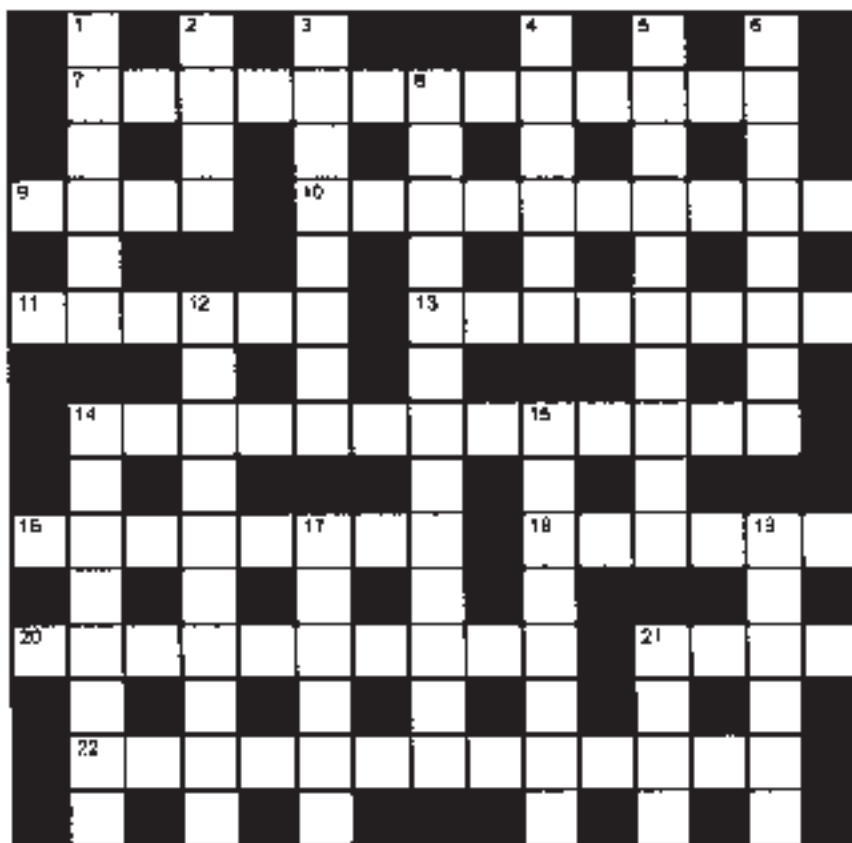
In March 2002, Justice Michael Kirby (family derived 'with perfect neutrality' from both communities of Ireland) at the end of 'a not always lovely week',<sup>1</sup> recalled successful European Court of Human Rights challenges by 'two very difficult Irishmen' to laws against homosexuals: *Dudgeon v United Kingdom* (1981) 4 EHRR 149 and *Norris v Ireland* (1989) 13 EHRR 186.

'We can learn from heroes such as Geoffrey Dudgeon and David Norris', Justice Kirby concluded. 'They refused to accept humiliation, injustice, oppression and inequality. Ultimately by courage, integrity and persistence they secured reform of the law not only for themselves but for all of their fellow citizens and for generations yet to come'.

Reviewed by John Mancy

<sup>1</sup> The events of which are described in *E Campbell and M Groves 'Attacks on judges under parliamentary privilege: a sorry Australian episode' [2002] Public Law 626*.





## Across

- 7 The barratry ebb is turned off, by this creature? (4,9)
- 9 Pointless writs issue back to prison. (4)
- 10 "Earl Ponytail", Tory leader to have York in Yorkshire, or Oxford in Oxfordshire. (6,4)
- 11 7 across had best be out of nappies for these! (6)
- 13 The Hindu leader permitted the revered. (8)
- 14 A passage from a Gospel which opens and closes a passage from anywhere. (9,4)
- 16 Word for word, a doing word at Cockney Tim. (8)
- 18 "Shy back to England, wolf!" (6)
- 20 Old change around way of the Italian plague. (10)
- 21 (1722) 2 P Wms 75; 24 ER 646. (4)
- 22 Dissenting article off "Anon" tricks specialist in legend. (13)

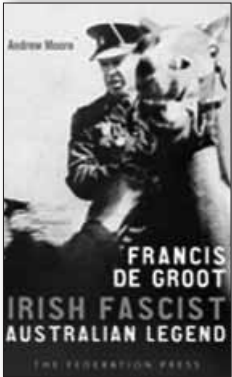
## Down

- 1 The vocative for "the bitter", yet toothless all the same? (6)
- 2 Seat for skiing brat, maybe? (1-3)
- 3 Points on the x-axis as basics chopped up. (8)
- 4 The Italian, after fluff, make for a strong support. (6)
- 5 Stray into shattered stable. (10)
- 6 Kiss behind workmates makes for a sweeter. (4-4)
- 8 Humid dragoons melt rugged ice. (5,8)
- 12 The former sphere of activity for a worker with golden handcuffs! (10)
- 14 Prompting sound filing. (8)
- 15 Atoms without electrons have no nucleus exploded. (8)
- 17 To get fat, lung around all. (6)
- 19 Wobbly yoghurt drops unknown quantity into ditch. (6)
- 21 Keen yet reflective star. (4)

Solution on page 89

# Francis De Groot: Irish Fascist. Australian Legend

By Andrew Moore | The Federation Press, 2005



Portrait of Captain F E De Groot  
by F Werner, National Library of Australia.

According to the 2006 Mahlab *Law Diary*, Seven Wentworth comprises three sites, one being a level in Lord Foster's building on the corner of Phillip and Hunter Streets.

No doubt it will make its own history. For now, it can be noted that the site includes the old Lanark House, where Francis De Groot opened his auction rooms in the 1920s.

And this is one of author Andrew Moore's themes: De Groot's intervention at the opening of the Harbour Bridge in March 1932 was 'a few minutes of politics and bravado, a mere sideshow'. His main contribution was the design, manufacture and marketing of fine furniture. When David Jones opened its Castlereagh, Elizabeth and Market Street stores, all the woodwork was from De Groot, an eight-month job for £80,000.

A few years on, and the world was another place: the Wall Street crash, the leap in unemployment and the polarisation of politics across the globe. In New South Wales, the crisis was given a dramatic dose in the presence of Jack Lang, the man who was splitting Labor a generation before the DLP was conceived.

Was the New Guard, with De Groot and Eric Campbell and the rest of them, anything more than a 'Boys' Own' rabbleroising reaction to Lang? Moore has incurred the wrath of *Herald* columnist Gerard Henderson on this one. Writing on 24 January 2006, Henderson says 'the New Guard was never fascist in any sensible understanding of the term and there was never any serious suggestion of civil war in the early 1930s in any part of Australia'. He goes on to say that: 'There is no evidence de Groot was a fascist and Moore produces none in his taxpayer-funded biography'. (The publication records that it 'has been supported by the Sesquicentenary of Responsible Government in NSW Committee'.)

I, too, have doubts about the tag 'fascist', although for a different reason to Henderson. As Moore notes, 'In terms of contemporary fascist politics, the New Guard differed from Hitler and the German Nazis in that it was not anti-Semitic. Paradoxically, the most effective anti-Semite in New South Wales was the New Guard's most reviled opponent, J T Lang'. To my ear, if the word 'fascist' in the context of 1930s politics didn't then have an anti-Semitic flavour, it does now, and the title is unhelpful. Be that as it may, Moore puts both sides of the case, and readers can make up their own minds.

Unfortunately for posterity, it doesn't seem De Groot's horse ever got a name. De Groot's counsel, Lamb QC, offered to buy it from its owner, who refused. And whatever De Groot's status as a fascist, the horse was later bought by a German wool buyer who was a member of the Nazi party. Meanwhile, De Groot (who was not the owner) gave Lamb a bronze figure of it as a consolation. Lamb used it as a prop in 1937, when cross-examining a witness with regard to injuries caused by a racehorse.

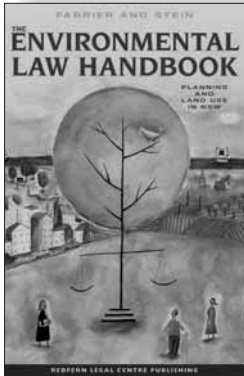
Moore packs a lot of colour and background into this sketch. A telling incident occurred at a scout camp in the Central West of the state in November 1932. There was a re-enactment where one local, a prominent member of the posher Old Guard, played De Groot, and Lang was portrayed by none other than Sir Philip Game, the governor of the day and the man who had sacked Lang in May! Meanwhile, those members of the Bar who feel confident that the North Shore provides fertile ground for patriotism will be bemused to hear and might query the propositions that the Nazi Party's members congregated there and that Turramurra had been known in the Great War as 'Hunamurra'.

Reviewed by David Ash

*De Groot's intervention at the opening of the Harbour Bridge in March 1932 was 'a few minutes of politics and bravado, a mere sideshow'.*

# The Environmental Law Handbook (4th ed)

By David Farrier and Paul Stein (Editors) | Redfern Legal Centre Publishing, 2006



Two major legal developments in the last quarter of a century have been the growth of environmental law and the move towards the use of plain English in the law.

Today environmental law probably excites more passion among non-lawyers than any other legal subject except criminal law.

Consequently, there is a particular need for an environmental law book written in plain English which makes the law accessible while not shying away from its complexities. The fourth edition of the *Environmental Law Handbook* meets this need admirably.

This edition is based on contributions by over 20 authors in the legal profession and academia, supported by many others and a team of plain language editors. As a book with many authors, it should do for environmental law what Parkinson's multi-authored *Principles of Equity* (2nd ed) has done for equity.

The editors are well known to New South Wales lawyers. Paul Stein was formerly a judge of the Court of Appeal and a judge of the Land and Environment Court of New South Wales. David Farrier is professor of law at the University of Wollongong. They point out in the preface that environmental law in NSW is unnecessarily complex because of a history of many piecemeal legislative changes, and in that respect differs from most areas of the law where legislatures are relatively inactive. As they say, environmental law is a moving target. This edition captures the version that existed at the time of writing.

*The Environmental Law Handbook*, the first edition of which appeared in 1988, has evolved from its origins in the law relating to planning and land use in NSW, although that remains its primary focus. There is an extensive overview of environmental law in chapters one and two. Chapter three is concerned with land use planning.

*They point out in the preface that environmental law in NSW is unnecessarily complex because of a history of many piecemeal legislative changes, and in that respect differs from most areas of the law where legislatures are relatively inactive.*

It analyses a fundamental concept in environmental management, the control of land through planning instruments. The distinction is noted between environmental planning instruments made under the *Environmental Planning and Assessment Act 1979* (NSW) which are legally binding, and other planning instruments which are not legally binding, including development control plans, which are governed by statutory procedural requirements, and council codes and policies which are not so governed. A reference here to the leading case of *Stockland Development Pty Ltd v Manly Council* (2004) 136 LGERA 254 (McClelland CJ) would have been useful, although it is referred to in chapter five.

There follow 16 chapters dealing with particular areas:

- ◆ public lands;
- ◆ development;
- ◆ environmental assessment in NSW;
- ◆ Commonwealth environmental assessment;
- ◆ local government;
- ◆ pollution control and waste disposal;
- ◆ agriculture;
- ◆ biodiversity conservation;
- ◆ forestry;
- ◆ coastal and riverside land;
- ◆ water supply;
- ◆ catchment management;
- ◆ heritage protection; mining; fisheries; and
- ◆ land rights and native title in NSW.

Witty, pertinent cartoons at the beginning of each chapter provide a welcome departure from the traditional presentation of a legal book.

If only two books were to be acquired to start an environmental law library in NSW, they should be this book and Bates's valuable *Environmental Law in Australia* (2nd ed, 2002).

Reviewed by Justice Peter Biscoe

# The Devil's Advocate: The Unauthorised Biography of John Mortimer

By Graham Lord | Orion Books, 2005

## The Life of H L A Hart

By Nicola Lacey | Oxford University Press, 2005

There are 'unauthorised biographies' and there are unauthorised biographies which began life as authorised biographies.

Graham Lord's book on Sir John Mortimer QC falls into the latter category and the author's choice of title – *The Devil's Advocate* – provides a not too subtle insight into the author's view of his subject. The book begins by describing Sir John Mortimer in old age as 'increasingly resembling one of Britain's fat eighteenth century German kings – with his portly Hanoverian gait, lopsided jaw and derelict teeth'. The barbs continue to fly as the author seeks to expose Mortimer as a philandering, insensitive, hypocritical and self-indulgent character who revelled (or, as the author would prefer to put it, wallowed) in his cult status.

Rarely have I encountered such a sustained character assassination. At times, Lord's attacks on Mortimer seem somewhat churlish. But for all of this, the tale of Mortimer's life and work is riveting. Mortimer's literary (including journalistic) output has been nothing short of prolific over 50 years and his inevitable association with Rumpole rather cloaks this fact. He is the author of some 13 novels written between 1947 and 2004, several works of non-fiction including the acclaimed *Clinging to the Wreckage*, the editor of *The Oxford Book of Villains*, is responsible for some 25 stage plays, some 13 television series, over 40 television plays, 11 film scripts and, in the 1950s and 1960s, numerous radio plays. This prolific output is acknowledged by Lord but does not escape a deal of literary criticism (Lord was, for 23 years, literary editor and weekly book columnist of the *Sunday Express*).

*Rarely have I encountered such a sustained character assassination.*

Lawyers will have particular interest in the detailed accounts of Mortimer's celebrated involvement in the Oz trials (instructed by a young Geoffrey Robertson who became his acolyte and whose wife – Kathy Lette – the biographer appears to despise even more than Mortimer himself). But this is only one of many aspects of the account which traverses Mortimer's professional, personal and literary lives.

One of the most interesting and impressive features of the biography is the way it skilfully weaves the tale of Mortimer's life and work, both legal and literary, into the broader social context of Britain's engagement with the permissive society through the late 1950s to the 1970s. As such, it is a fascinating social history spiced with salacious detail – an excellent read.

At the same time as Mortimer was at his most active in terms of both the law and literature, another former barrister, HLA Hart, was blazing the trail that led to him being universally recognised as the foremost English speaking jurist of the twentieth century. Between 1961 and 1968, Hart published *The Concept of Law* (1961), *Law Liberty and Morality* (1963), *The Morality of the Criminal Law* (1965) and *Punishment and Responsibility* (1968). Earlier, in 1959, he had published with Tony Honore, the acclaimed *Causation in the Law*, a second edition of which was published in 1985. As some of these titles reflect, he was heavily engaged in the important and famous debate with Lord Devlin as to the use and limits of the law to enforce morality.

*The Life of H L A Hart* is a fascinating and accessible account of a great thinker whose clarity of written work masked what his biographer, Professor Nicola Lacey, identifies as a significant lack of confidence, self-doubt and great intellectual and personal angst. Hart was not only a philosopher and jurist of great eminence but had a distinguished early career at the Chancery and Revenue Bars (during which he formed a life long friendship with Lord Wilberforce) followed by a high level wartime involvement with MI5. After he retired from the Oxford Chair of Jurisprudence, he became principal of Brasenose College, Oxford and devoted himself to the study and resuscitation of the work of Jeremy Bentham, as well as engaging in an active dialogue with his successor in the Oxford chair, Ronald Dworkin.

One of many points of interest is Lacey's description of how Hart drew on his experiences at the Bar and vast knowledge of case law to develop the case studies and examples which are explored in *Causation in the Law*, a topic the intractable difficulty of which still bedevils common law courts.

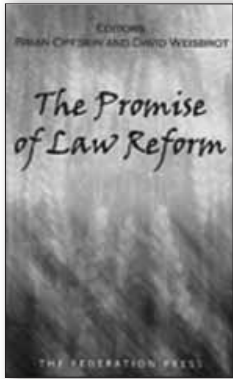
This biography should appeal at many levels. It is much more than an intellectual biography and, as with Lord's biography of Mortimer, provides a lens through which to view a seminal period of the last century, and some of its great intellectual, legal and moral debates.

Reviewed by Andrew Bell



# The Promise of Law Reform

Brian Opeskin & David Weisbrot (eds) | The Federation Press, 2005



Law reform commissions, that is to say, independent advisory bodies of experts engaged in a continuous process of law reform, began in their modern form in the 1960s and 1970s. The New South Wales Commission was established early, in 1967.

This book reproduces 30 diverse and instructive papers given to a symposium to celebrate the 30th anniversary of the Australian Law Reform Commission.

Several contributors to the present book mention a famous passage written by Professor Geoffrey Sawyer in 1970 in which he suggested that 'the whole body of law stood potentially in need of reform' and supported the existence of a permanent body of experts to consider reform continuously. It is possible to believe that some early enthusiasts felt that a LRC could be made responsible for all law reform but of course that could never have been. The job in a modern society is far too big for any single body.

With the exercise of almost unfettered political power Napoleon could direct the codification of the French civil law. However, in modern societies, as Professor David Weisbrot, President of the Australian Law Reform Commission acknowledges, law reform activity has become steadily more diffuse.

Parliamentary committees, interdepartmental committees, policy divisions of government agencies, specialist councils and commissioners and even the Standing Committee of

Attorneys General have entered the law reform lists.

By way of example the Uniform Rules Committee established under the *Civil Procedure Act 2005* – a taskforce of officials, practitioners and judicial officers chaired by Justice Hamilton – has done admirably well in its project to establish new common rules of court across all jurisdictions in NSW. The NSW Sexual Assault Offences Taskforce – including practitioners, officials and NGOs and chaired by Lloyd Babb, former director of the Criminal Law Review Division of the Attorney General's Department of NSW – has done exemplary work to establish new and principled practices and procedures to improve the treatment of complainants in sexual assault matters as well as significantly reform difficult areas of the law of sexual assault.

There does not appear indeed to be a compelling reason why this sort of extremely important law reform should particularly be carried out exclusively by a LRC. They are matters that can effectively be dealt with by practitioners at the workplace carrying out their normal responsibilities. The future for LRCs for the most part lies elsewhere.

In her contribution to the present book Kate Warner, an academic with much experience in law reform commissions, suggests that their future survival 'is likely to depend on their ability to work on projects beyond matters of the technical law...that involve difficult and controversial issues of social policy, projects that no-one else will pursue'. Weisbrot suggests, consistently, that LRCs have a future role in monitoring, perhaps co-ordinating wider law reform activity, promoting harmonisation and complementarity of law in a federal system and inquiring into complex issues 'at the intersection of law and society'.

I have several more suggestions but these predictions certainly reflect recent experience in the Standing Committee of Attorneys General. They may usefully be read together with the contribution of

Marcia Neave, chairperson of the Victorian LRC before her recent elevation to the Victorian Court of Appeal. She describes the increase in social law reform undertaken in Australia in recent years by LRCs around Australia and also the consultation with the community that has been fundamental to it. Laws about, say, de facto relationships or human genetic information are best drafted with the assistance of specialist research and consultation in the community.

In another paper of particular relevance, Peter Hennessy, Executive Director of the NSWLRC explains the benefit of the independent status that distinguishes LRCs from other agencies with law reform responsibilities. They have been free to develop new methodologies. They may conduct long term projects independent of change of the attorney general or government. Above all, their independence permits them to attract the voluntary service of active judges and other scholars of the highest order who may have difficulties in joining a government committee. In turn, a LRC speaks with the authority of universally accepted integrity. It is that authority which makes their advice in difficult areas of legal and social policy valuable to government and to everybody else, whether it is accepted or not.

Several contributions to the present book point out that the ALRC's seminal report on Aboriginal customary law, exactly the kind of multidisciplinary project that will remain important into the future, was never formally implemented. Nevertheless it has been widely influential, including possibly with the majority of the High Court in *Mabo No 2*. Similarly, although I did not accept the recommendations of Report 111 of the NSWLRC dealing with majority verdicts – after some difficult deliberations I accepted the contrary view also held by the chief magistrate and the chief judge of the District Court – I continue to seek advice from the NSWLRC in the course of drafting the new jury legislation.

It is an uncomfortable truth that the methods that LRCs properly bring to long term inquiries – involving regular meetings of commissioners, painstakingly conducted consultations and prolonged intellectual discourse – often cannot provide information quickly enough to meet the needs of our media-charged, contemporary political environment in an area like criminal law reform.

It is futile to suggest that governments can wait years for reform recommendations about matters that are being subjected to intense and daily media commentary. It is undeniable, on the other hand, that the attorney general could from time to time benefit from advice on such matters from the NSWLRC if it were immediately available.

The NSWLRC is indeed now working to establish the capacity to complement the advice that I receive from time to time from the Attorney General's Department, the DPP, Legal Aid Commission and the Public Defender's Office with immediate comment that reflects the experience and knowledge of the commissioners about criminal legislation. Indeed, I would like to see the NSWLRC more generally extend its ability to provide fast, and of course detached, advice on legal policy issues as they arise without the need for highly formal terms of reference.

Advice given in this form is by its nature contestable, part of a policy dialogue, responsive to events as they arise. Such flexibility may be adapted however, to establish a permanent reference for criminal law policy advice.

The NSW Sentencing Council, for example, was established by the government to advise the attorney general on sentencing related law reform issues, to monitor and report on sentencing trends and practices and to prepare research papers or reports on particular subjects concerning sentencing. Part of the council's charter is to undertake extensive consultation, enabling the wider community to make

a contribution to the development of sentencing law and practice in NSW.

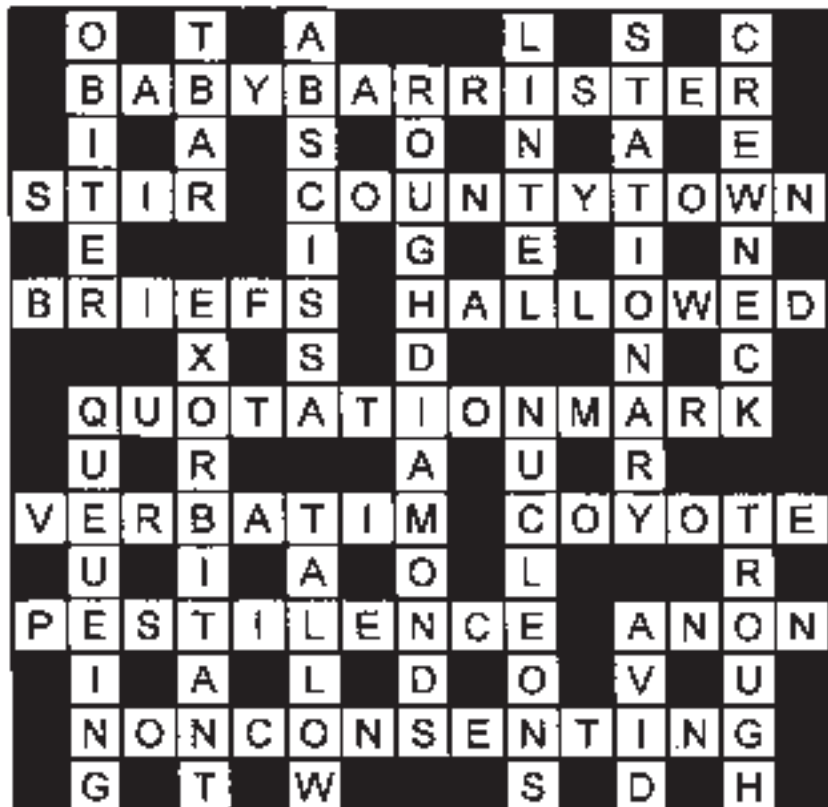
The Sentencing Council operates in a manner not dissimilar from that of LRCs – its emphasis is upon impartial research and broad consultation. Furthermore, like the LRC, the council is chaired by a senior former judicial officer and its members are appointed on the basis of specific experience or expertise in prosecution and defence, in Aboriginal justice matters and in victims of crime issues. The representative membership is similar to the range of experience sought in law reform commissioners appointed to particular references.

The strength of the council, like the LRC, is the authority which comes from an acceptance of its impartiality in controversial circumstances.

Given these synergies in approach and philosophy, a strong case exists for bringing the functions of the Sentencing Council into the LRC structure, while still retaining its specialist nature by doing so by way of an individual, standing reference to the commission.

The contribution of LRCs to legal affairs in this country, as the present book makes clear, has been substantial. Many of the most significant law reforms and legal debates of the last thirty years would have been impossible without their contribution. Government and the community can only benefit into the future from LRCs which undertake new roles within a more flexible framework, which continues to maintain their precious independence.

Reviewed by the Hon Bob Debus  
MP, Attorney General of New South  
Wales.



## Australian Bar XI tour Hong Kong

By Lachlan Gyles

On Wednesday 16 April 2006, the Australian Bar Cricket team gathered at the Cosmopolitan Hotel in Wan Chai, in the shadow of Happy Valley Racecourse.

The team had not played since an English tour in the mid-1980s, so it was with great anticipation that we set off for the first match of the Easter 2006 tour against the strong Kowloon Cricket Club, at their home ground.

The team was made up of players from New South Wales, Queensland and Victoria. It included two survivors from the English tour some twenty years before – Larry King and Thos Hodgson – a noteworthy effort in itself.

We allowed the locals first use of the wicket, and after four overs it looked as though it might be a very long tour with the locals reaching 38 without loss. The

opening bowlers then found their line and length and the brakes were put on, particularly when the evergreen King picked up the hard-hitting Kowloon opener (who got 150 a few days later against another touring side) caught smartly by Bilinsky in the gully. That proved to be a crucial moment in the match.

Anderson, coming in from the Star Ferry end, bowled a miserly eight overs, finishing with the fine figures of 3/31, while his partner, King, finished with 1/43. Crawford then bowled a fiery eight overs, taking 2/44 and with some support from Gyles, Bilinsky and Roberts at the other end, Kowloon finished with 9/206 from their allotted 35 overs. They would have been reasonably confident of victory.

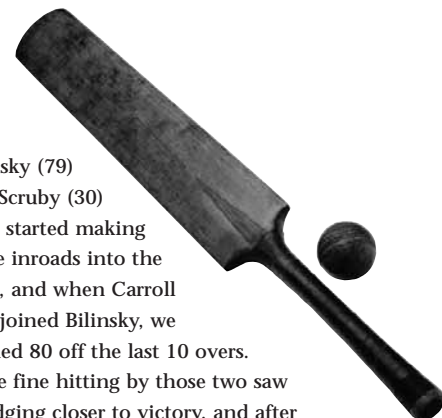
The required run rate was, therefore, about six per over. After 14 overs, with the score at 1/43, the match appeared to be slipping away, particularly with Afzaal, the Hong Kong (and former Pakistan) opening bowler proving to be very difficult to handle.

Bilinsky (79) and Scruby (30) then started making some inroads into the total, and when Carroll (37) joined Bilinsky, we needed 80 off the last 10 overs. Some fine hitting by those two saw us edging closer to victory, and after they were dismissed, Roberts (16 n/o) and Gyles (9 n/o) navigated us home with six balls to spare.

A great match, followed by a dinner put on by the Kowloon CC, and then a visit later that evening to Happy Valley races. It was a wonderful start to the tour.

Thursday was the rest day, and the team was entertained on a junk on Hong Kong Harbour by Greg Egan, buoyed by the fighting victory the day before.

The following day we headed up to HKCC for what turned out to be an easier assignment against Craigengower CC. We batted first, and after the loss of a couple of early wickets the Queensland combination of Crawford (76) and



Nick Bilinsky heading back to the pavilion after a fine 81 against HKCC.



The team before the 1st match against KCC. (back row) Roberts, Scruby, Lithgow, Crawford, Carroll, Bilinsky (seated) Hodgson, Anderson, Gyles(c), Egan, King.



The team chasing 236 in the final match at the magnificent HKCC, overlooking the city and harbour.

Anderson (34) consolidated well before some hard hitting at the end by Carroll (28 n/o) and Greenwood (29 n/o) saw the tourists to 7/224 off 35 overs.

Craigengower were never really in the hunt after losing some early wickets, but managed to get to 9/160 with Lithgow (1/21) and Hodgson (1/16) the pick of the bowlers. Another excellent post match function followed the game.

We therefore headed into the final match against the strong HKCC side searching for the Holy Grail – an undefeated tour.

We decided to send the locals in, a decision which looked to be a good one when we had them 4/20 after seven overs, after a great start by opening bowlers Crawford and Anderson.

Eames, a Hong Kong representative, and the opposing captain Winstanley then set about a rescue mission which saw HKCC to 7/236 off 45 overs, with Eames making his century off the final ball of the innings. Pick of the bowlers were Crawford (3/46) and Anderson (3/44).

Egan and Scruby then strode to the wicket with a target of 237 in their sights. After the loss of Egan, Bilinsky (81) joined Scruby (29) and the two

repeated their fine partnership against Kowloon, and with some hard hitting again from Carroll (41) after Scruby went, it looked as though we might be home. However, as had happened against Kowloon, Carroll and Bilinsky then went in quick succession, bringing Roberts (50 n/o) and Gyles (19 n/o) to the wicket with 65 still to get, and the game up for grabs.

Thankfully, after a few anxious moments when the opening bowlers returned in the fading light, we were able to get the runs in the second last over with a four hit back over the bowlers head by

Roberts, and the celebration, and talk of the modern day 'Invincibles', went on well into the Hong Kong night.

All in all it was a great tour both on and off the field, leaving many happy memories and lasting friendships between the players and their families – and a great opportunity for interaction between barristers across the state boundaries.

It was certainly a privilege to play both at KCC and HKCC, and to be treated with such hospitality by them, and it is hoped that it will not be another twenty years before the team sets sail again.



Richard Scruby taking on the new ball in the 1st match at KCC.



## Hickson Road Bistro

A matinee of the Sydney Theatre Company's brilliant production of Alan Bennett's play, *The History Boys*, saw the party of the second part and I lunching at the Bistro which is run to suit theatre patrons. For a 1.00pm matinee it opens at 11.30, for 2.00pm at 12.30, 6.00pm at 4.30 and so on. Entry is through the theatre foyer.

The presentation is nice with white paper over white linen table cloth, white linen napkins, elegant glasses and a view of the busy kitchen if you are facing that way. Bread rolls and water arrive promptly, drinks a little slow but the menu comes with the water. The menu is 'Modern Australian', whatever that means. It is extensive and interesting but I will describe only what we had, two entrees and two salads.

The trio of duck was a mixed salad with duck liver pate (superb), duck carpaccio (interesting) and duck terrine style sausage (very satisfying). We both loved it. We also shared a warm salad of thinly sliced pork belly, garnished with baby octopus in a light lime mayonnaise, which was light enough but full of flavour. The menu said 'with seafood garnish' so maybe you get what's good on the day. The tiny baby octopus certainly was.

The salads were nicely dressed with a little Balsamic vinegar and olive oil. One was wild rocket with shaved parmesan, the other mixed tomatoes (yellow, red and green), olives, celery and a soupcon of fennel. Plenty of salad.

We had a beer each, followed by a glass of Montrose sauvignon blanc and a Yarra Valley (Yering) pinot. It was an excellent pre-theatre lunch: light, bright and fun. Book well ahead on theatre days and nights.

**Hickson Road Bistro**  
20 Hickson Road  
Walsh Bay  
Ph: (02) 9250 1990  
All major cards accepted

## Omega

A gathering of four skin cancer victims lunched. The basement restaurant is brightly and tastefully presented. The nicely spaced tables set with white linen cloths and napkins. Crunchy bread rolls came quickly with Coopers beer and zatziki dip, a spicy brown dip and olive oil. All excellent. We decided on one main each with skordalia and a house special Greeek salad as sides.

The professor had twice cooked spicy duck with a cheese tart and quince poached in red wine which he pronounced excellent. Very senior counsel and his favourite junior both had the rabbit pie with a mousse of celeriac skordalia and black olive sauce. The pie was a brilliant presentation: elegantly decorated golden puff pastry on top with short pastry below and a pool of black olive sauce around. I found the filling disappointing because it was too dry for my taste – rabbit can be like that. None the less I was glad I tried it. The fourth main was Kingfish Herasand, perfectly grilled, served with spinach and a crab and mushroom ragout. The chooser loved it.

All in all, a very good lunchtime experience, but pricey. Mains were a high \$30 each. Pinot gris for starters, Yering pinot noir to



go on. The worry was that on a Friday there was only one other table, six ladies doing lunch. Can it survive? Paul Merroney's 163 next door was packed.

**Omega**  
161 King Street  
Ph: (02) 9223 0242

## Home cooking

Now cassoulet has a mystique about it which is, I believe, misplaced. Elizabeth David says, 'a hearty seasonal dish'. I have come to think that, like its cousin, Basque stew, it is just a good household manager's way of dealing with quality leftovers (who would cook a goose and then put it into a pot with beans without having some hot first time around?)

As I dealt with leftover turkey and ham after Christmas, I devised an easy way to get the quantities just right. I took three (240g) tins of white cannellini beans and tipped the contents into a colander to drain. I filled one tin with leftover turkey, one with leftover ham and one with chorizo sausage and black pudding, all chopped into stew-sized chunks and put aside. Next I filled one tin with chopped onion and garlic, one with chopped carrot and one with chopped celery. I fried the vegetables lightly in a large heavy bottomed Dutch oven with a good fitting lid, added the meat and beans then barely covered with stock made from the turkey carcass, a veal breast and vegetables in need of a cook up for the dog! (Half red wine and half stock is OK too.) After tucking in a bay leaf or two, some thyme and oregano I cooked it for about 15-20 minutes with the lid on until the vegetables were done. Then I left it off an hour before reheating to eat. A crusty sourdough and a full flavoured red is all you need to go with it.

Bon appetit!  
John Coombs QC