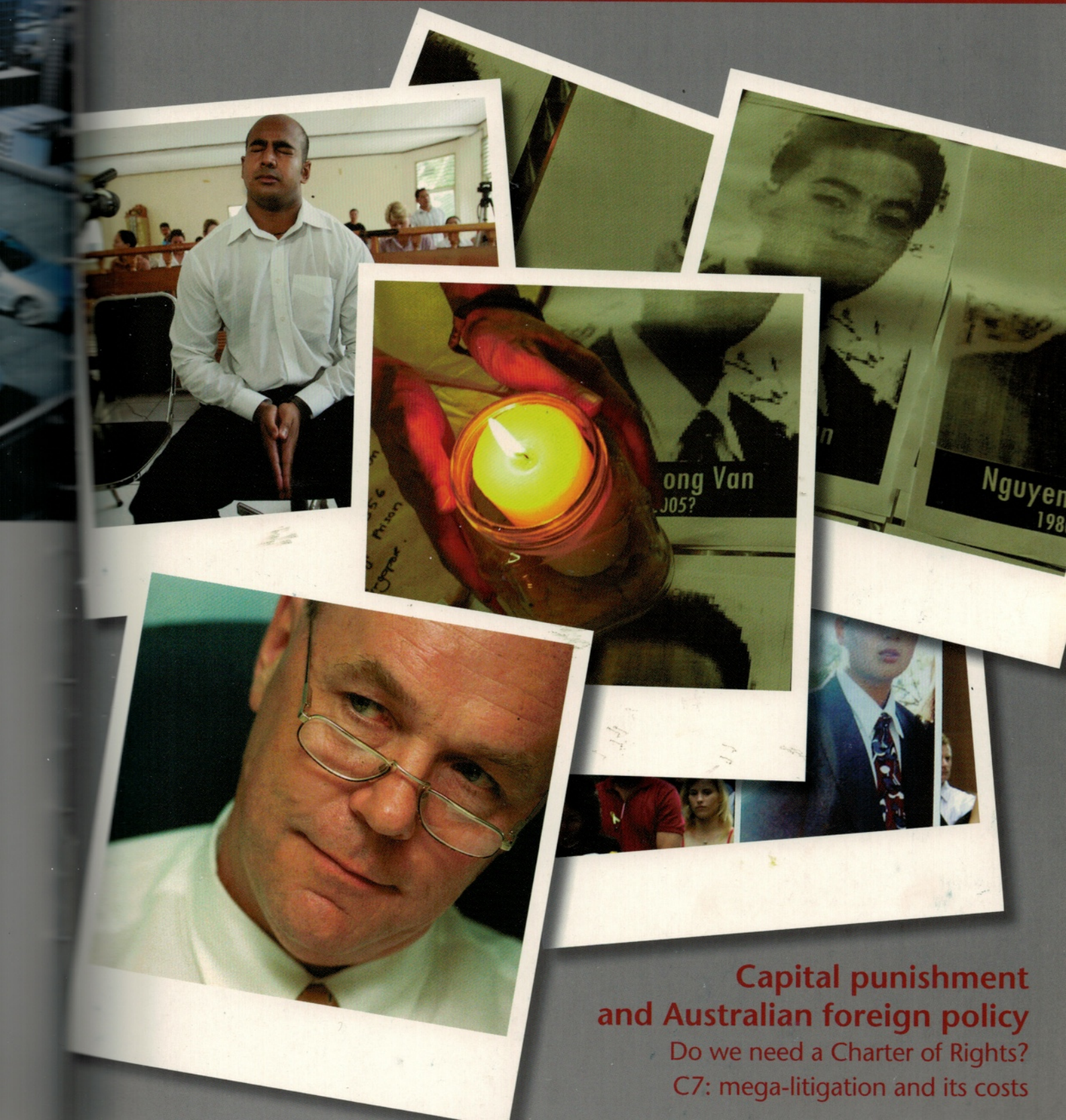


THE JOURNAL OF THE NSW BAR ASSOCIATION | SUMMER 2007/2008

barnews



**Capital punishment
and Australian foreign policy**

Do we need a Charter of Rights?

C7: mega-litigation and its costs

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Competition for business

Competition between courts was characteristic of early English legal history. It continued right up until the *Judicature Act* of 1873. The common injunction, associated with the *Earl of Oxford's case* (1615), saw the courts of Chancery restraining parties from pursuing and or enforcing legal remedies granted by the king's courts. This was the forerunner of the modern anti-suit injunction which is now a well-established remedy in transnational suits. In recent times, there has been something of a resurgence in competition between courts both within Australia and between courts internationally. *Plus ça change, plus c'est la même chose*.

Within Australia, the Federal Court's Victorian Registry much-heralded 'rocket docket' may reasonably be seen as a 'play' to attract commercial litigation to Victoria and away from New South Wales. The New South Wales Registry of the Federal Court's streamlining of procedures in admiralty cases may similarly be viewed as an attempt to make that court (and that particular registry) a desirable place for filing of such suits in preference to the Admiralty Division of the Supreme Court of New South Wales with which the Federal Court shares admiralty jurisdiction. So also, Victoria's current proposals to facilitate class actions complete with US style procedures, following upon recommendations to the Victorian Government by none other than Peter Cashman, are arguably calculated to make that jurisdiction the preferred Australian venue for the commencement of class actions, a phenomenon which will only be fuelled by the recent general

endorsement by the High Court of litigation funding: see *Fostif v Campbell's Cash and Carry*.

At an international level, the Law Society of England and Wales, with the evident encouragement of the English judiciary, has recently issued a glossy booklet apparently distributed to in-house counsel of all Fortune 500 companies singing the praises of litigation in the English courts or private dispute resolution by arbitration in London, under the supervision of the High Court of Justice. In the context of the promotion of the English courts, one recalls Lord Denning's famous response to charges of forum shopping. 'You may call this forum shopping, if you please, but if the forum is England, it is a good place to shop both for the quality of its goods and the speed of its service': *The Atlantic Star* [1973] 2 Lloyd's Rep.394.

With the world's economy becoming ever more global, competition between national courts, and between judicial determination and private arbitration, is likely to increase. One implication at least for commercial barristers is that there is likely to be more scope but also great competition for international practice in the years ahead. When Jonathon Sumption QC addressed the New South Wales Bar in 2006, he noted that the clerk of his set of chambers in London made two trips each year to Hong Kong and Singapore to promote the merits of the barristers in those chambers. Presumably, other London chambers do the same thing. English chambers have also led the way with the development of informative websites and associated marketing material. One of the challenges for the Australian Bar is to seek to ensure that Australian barristers are at least 'in the race' for international work. There is an important issue as to whether or not this can be achieved at an institutional level or whether it requires initiatives to be taken by individual chambers or even by individual barristers (as some have already done, through admission in the United Kingdom, Hong Kong and New Zealand, for example). This is a matter deserving of the attention of the recently elected Bar Council.

Judicial appointments

On 22 October 2007, the New South Wales Attorney General's Department issued an advertisement headed 'Positions Vacant: New South Wales District Court'. The advertisement stated that inquiries could be made to:

The Hon Justice R O Blanch AM, chief judge, District Court of NSW, (02) 9377 5821, or Mr Laurie Glanfield, director general, Attorney General's Department of NSW, (02) 9228 7313.

Expressions of interest, accompanied by a detailed curriculum vitae and the names of at least two referees, should be e-mailed to appointments@agd.nsw.gov.au by 9 November 2007. Expressions of interest may also be posted to the statutory appointments officer, Attorney General's Department of NSW, GPO Box 6, Sydney NSW 2001.

This may well be the first time a judicial appointment has been advertised in New South Wales. It has provoked debate amongst the profession and is certainly a harbinger of things to come. There is no reason to suppose that similar advertisements will not be placed for vacancies in the Supreme Court or for the positions of president of the Court of Appeal (to be filled early next year) and chief justice. Advertising judicial positions may encourage highly competent practitioners who may not otherwise have been identified (for whatever reason) as potentially interested in judicial office to indicate his or her interest. This must be a good thing. Further, it may be thought to add a level of transparency to the process. But that is where transparency ends. The recent advertisement only serves to highlight the general mystery surrounding judicial appointments, including at federal level. Questions which arise from the recent advertisement include: 'How are the "applications" to be processed?'; 'By whom?'; 'According to what criteria?'; 'Do such applications, having been called for, generate correlative administrative law rights of review for unsuccessful applicants?'; and 'What of potential candidates who do not wish to make formal application?'. Readers are invited

The recent advertisement only serves to highlight the general mystery surrounding judicial appointments, including at federal level.

to contribute their views on what is a most important topic in the next issue of *Bar News*.

This issue

At an early stage of the recent federal election campaign, the shadow foreign minister, Mr Robert McLelland, was upbraided for remarks he made about the death penalty. That brief political storm gave rise to an excellent interview on the ABC's *Lateline* of Lex Lasry QC (subsequently appointed to the Supreme Court of Victoria). Lasry QC had been the principal legal representative for Van Nguyen who was executed in Singapore in 2006, and has also had a high profile

involvement in various Indonesian death penalty cases. With the ABC's permission, Tony Jones' interview of Justice Lasry is reproduced in this issue. Accompanying the Lasry interview is an article by Dr Michael Fullilove of the Lowy Institute entitled 'Capital Punishment and Australian Foreign Policy' which contains an excellent and highly informative analysis of the topic.

Another barrister who, like Lex Lasry, stood up firmly and courageously for the rights of his client in the face of considerable pressure from the Australian Government is Stephen Keim SC of the Queensland Bar. Keim SC spoke to Richard Beasley about his experience in the *Haneef* case and

his long-term commitment to civil liberties.

Also featured in this issue is the first of what it is hoped will be a series of articles by David Ash focussing on the careers of High Court judges emanating from the New South Wales Bar. Naturally, Edmund Barton is the first and quite possibly the most interesting cab off the rank. There is much more, besides, in this bumper Christmas edition! Many thanks to Chris Winslow of the Bar Association and the extremely energetic and dedicated 2007 committee of *Bar News* for their assistance in this past year. Good reading and merry Christmas.

Andrew Bell SC



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Future directions

By Anna Katzmann SC



It is a great honour to be elected to the position of president of the NSW Bar. As *The Daily Telegraph* recognised in an editorial last year, the common depiction of lawyers as 'rapacious, self-interested and parasitical' is a stereotype far removed from the reality. 'In truth', as the editorial noted, 'the majority of the profession's members are people of decency and integrity, people genuinely interested in real justice'.¹

That editorial appeared on the day of the launch of the Fair Go for Injured People campaign spearheaded by the former president, Michael Slattery QC. It was a real privilege to serve in a Bar Council led by Michael. His enthusiasm was infectious, his drive and optimism remarkable, his leadership outstanding. He will certainly be a hard act to follow.

Securing our freedom

Michael was first elected president in November 2005. That was at the time of the debate about the Commonwealth's Anti-Terrorism Bill (No 2) which set up a regime of control and preventative detention orders. 15 December this year marks the second anniversary of the introduction of that legislation which was enacted in much the same form,² not only in the Commonwealth, but also in all states and territories. Now that the dust has settled, it is time to revisit the question whether these laws are unnecessary and/or go too far. Control orders have an alarming impact on human rights. They may limit or prevent a citizen's freedom of movement and freedom to communicate for no offence. They facilitate indefinite detention of the kind practised by the

military junta in Burma and to which Aung San Sui Kyi has been subjected for years. Preventative detention by definition involves detaining a person who has not committed an offence, a concept, until relatively recently, no modern democracy would countenance. Under the Australian regime, neither the fact, nor the period of detention may be disclosed and communications between the detainee and his or her lawyer are monitored by the Federal Police. Judges are given administrative roles but there is no right to be heard before a preventative detention order is made. Nor is there a facility for unlimited merits review. The AAT has jurisdiction to review certain but not all orders and then, only after the orders have expired.

Many of the provisions of this legislation offend numerous articles of the International Covenant on Civil and Political Rights which Australia ratified. Of course, as the High Court has pointed out more than once, the ratification by the executive branch of government of an international treaty has no direct effect on domestic law unless and until specific legislation is enacted implementing the treaty obligation.³ Only in the ACT are the powers, there called 'extraordinary temporary powers', tempered by human rights safeguards. The ACT Act emphasises that counter-terrorism measures should be consistent with international human rights obligations. It also excludes children under 18 from the preventative detention provisions. In NSW there are no such protections. Of course, the ACT has a Human Rights Act. NSW does not.

If the purpose of the so-called war against terror is to protect our democratic institutions and our way of life, then we are in grave danger of throwing out

the baby with the bathwater. Specific legislation that recognises the rights we grew up thinking were universal may go some way to restoring the right balance between securing our freedom and having something worth securing. This is an issue where the Bar can provide real community leadership. Moreover, I believe it is our responsibility to do so. As Steven Rares SC (now Rares J) wrote in an article in the *Australian Bar Review*, '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'.⁴ It is true that minds may legitimately differ about the best way to protect human rights. However, I believe that it is high time that legislatures throughout Australia gave express recognition to them and that governments are held to account if they violate them.

The last Bar Council supported the previous state attorney general's call for community consultation over a charter of rights and was disposed to support the introduction of a statutory charter in NSW. However, it resolved to consult the membership before going any further. I urge all who have not yet done so, to read the Options Paper produced by the Human Rights Committee. It is available on the Bar's website. So, too, is an excellent paper by the Hon Michael McHugh AC QC on the general question of whether Australia needs a Bill of Rights.

The Law Council and the Australian Bar Association play an important role in raising public consciousness about these issues on a national level. The NSW Bar will continue to work with both organisations on national questions and, where appropriate, to coordinate our approach on issues of common concern.

Preventative detention by definition involves detaining a person who has not committed an offence, a concept, until relatively recently, no modern democracy would countenance.

Health issues

Depression is reportedly high in the legal profession. In *Bar Brief* I wrote about the issue of safeguarding the welfare of our members and the need to divert practitioners from the disciplinary process where their problems were essentially health related. During this year I propose to devote considerable time and energy to advancing the matters I raised in that article. The association is in discussions at the moment with the aim of employing a welfare officer who will provide confidential assistance to members. Mental health problems are under-reported throughout the community. We do neither ourselves nor our colleagues any favours by ignoring them. Early detection is as important here as in other areas of medicine. What is more, we work in a service profession. Unless we pay proper attention to our own wellbeing, we cannot think we are in a position to help others. Early intervention may spare us or our colleagues from disciplinary action or worse.

Fair go for injured people

Although the Fair Go for Injured People campaign was directed at the politicians in the lead-up to the March state election, the failure of the major political parties to embrace its aims is a matter of some concern. The campaign called for consistency in the legislation, something the chief justice had publicly pleaded for. It was a plea for fairness and justice. Its requests were modest. They were affordable. They were made at a time when, and against the background that, the insurers were enjoying record profits. Still, they fell on deaf ears. It puzzles me that a state Labor government, in



particular, would be so resistant to changes designed to restore fairness and balance in the provision of compensation for injured people, some of the most vulnerable members of our community. I hope that in future the government can be persuaded to make, at least, some amendments which will remove some of the more iniquitous and, perhaps, unintended consequences of the legislation that was introduced under the leadership of the former premier, Bob Carr. Seriously injured people, who were said to be the beneficiaries of some of the Carr-led changes, have in fact suffered. For instance, workers who sue at common law for industrial injuries lose their right to recover from their employer the cost of their medical treatment or care. If a third party is at fault and they choose to sue it, rather than their employer, they often lose a considerable part of their damages. If the employer and the third party are both sued, and the worker succeeds against both, the costs regulations ensure that in many cases the worker will recover no costs of the action against the employer. In the motor accident area, many people with serious back or neck injuries, often involving major surgery, recover no damages for their pain and suffering because they fail to meet the 'greater than 10 per cent threshold' imposed by the

Motor Accident Compensation Act.

Michael was optimistic that the Fair Go campaign would achieve some measure of success. I may not share his optimism but I live in hope that the government can be moved to act on some of the harsher aspects of the legislation, even if it cannot see the wisdom of more radical changes.

Equality of representation

For years now women have been elected to Bar Council in numbers that are out of all proportion to the gender distribution of the membership. This year, of the 21 members of the newly elected Bar Council, 10 (including four of the nine silks) are women. Yet, women still constitute less than 17 per cent of the Bar as a whole and only five per cent of the senior Bar and this despite the fact that, for decades, more women than men have been graduating from, and excelling at, law schools across the country.

Self-employment should, in theory at least, make it easier for women to practise at the Bar. However, that is plainly not the perception. Why are we still seeing significantly fewer women than men coming to the Bar? Are women receiving less rewarding work? Is it simply explained by the fact that in most households women continue to bear the major responsibility for child-rearing and housework? Are the relentless pressures of the Bar incompatible with family life? Clearly not, for many men with families thrive at the Bar and a number of very successful women are also mothers. Are there other factors at play?

In previous years the association introduced a number of schemes to try to improve the position of women. There was the programme introduced in 1991 for visits to chambers by final-year female law students, the mentoring programme for female barristers in their second year, the child

It puzzles me that a state Labor government, in particular, would be so resistant to changes designed to restore fairness and balance in the provision of compensation for injured people, some of the most vulnerable members of our community

care scheme and the adoption in October 2003 of the Equitable Briefing Policy. In addition, the Women Barristers Forum has taken its own initiatives especially in promoting networking amongst women. Perhaps there have been some dividends from the various initiatives. The figures are improving – albeit slowly. In 1996 women comprised only 11.3 per cent of barristers and now we represent more than 17 per cent. But I am impatient. The increases are too slow. Although the last readers' intake included close to 44 per cent women, the current Bar practice course has seen the proportion drop significantly to 31.5 per cent. It seems that our initiatives have been insufficient to change the general complexion of the Bar. It is incumbent on all of us to determine why more women do not see the Bar as an attractive career move

In 1996 women comprised only 11.3 per cent of barristers and now we represent more than 17 per cent. But I am impatient. The increases are too slow.

and to do more to encourage those who do take the plunge to stay in the pool.

I expect the next 12 months will be challenging. I look forward to the challenge and I am very grateful for the many offers of support and encouragement I have received.

Endnotes

1. *Daily Telegraph*, 19 September 2006.

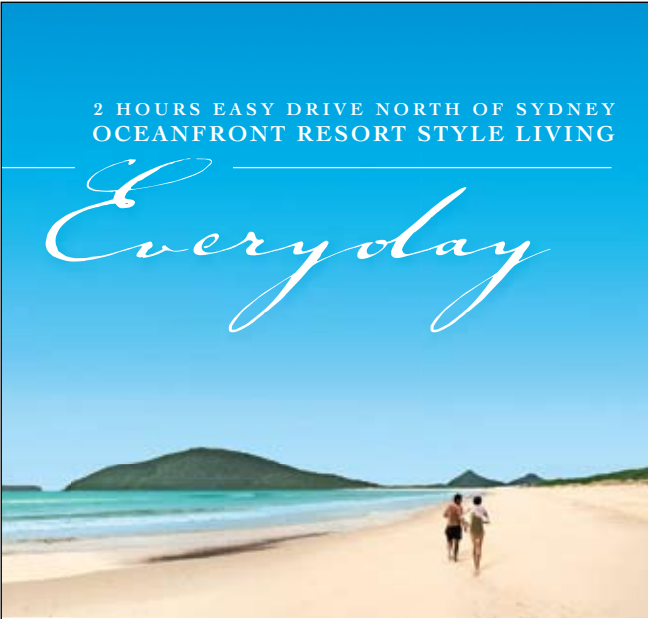



2. With important differences in the ACT. See *Terrorism (Extraordinary Temporary Powers) Act 2006*.

3. See, e.g. *Dietrich v The Queen* (1992) 177 CLR 292, at 305; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 480-482; *Minister for Immigration & Multicultural Affairs* (2003) 214 CLR 1 at [99].

4. 'The independent Bar and human rights' (2005) 26 ABR 11.

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**'Mediation and the Bar' –
Winter 2007**

Dear Sir

At his presentation to the Chartered Institute of Arbitrators in London on 11 June 2007 entitled 'Mediation and its Future Prospects', Sir Brian Neill QC, a former lord justice of appeal, predicted: 'Mediation will be the first and preferred option for settling disputes by 2020'.

As a barrister and parent who serves on a school board, it recently occurred to me that mediation might be a useful way to resolve disputes between students in schools, such as those arising from allegations of bullying. As my first effort involved a matter which had been reported to the Police, two officers sat through the mediation who, approving of the outcome reached to the satisfaction of both students, took no further action. A second matter, arising from a long-running dispute between two teenage girls, seemed to have achieved little until I was advised that the girls, later on the day of the mediation, without any prompting from anyone, wrote letters of apology to each other!

A not uncommon situation in schools these days is that, after a period of bullying, the victim assaults the bully. Normally, the victim ends up in the headmaster's office and may be suspended or even expelled. In that situation the bullying may not be dealt with and the power of the bully may



be increased. When such an incident is the subject of mediation and the participants thereby have an opportunity to raise the topics to be discussed, the bully raises the assault and the victim raises the bullying with the consequence that both matters can be ventilated.

If students learn how to resolve disputes by discussing them calmly, initially with the assistance of a mediator and subsequently without the need for such a person, then that will be a part of their education which is useful not just at school but at home and in the workplace as well.

I do not suggest that I have found some lucrative new field for the Bar. I may have contributed to the fulfilment of the

prediction quoted above. I write in order that other members of the Bar, particularly those who serve on schools board, might consider this option.

Having completed the Practitioner's Certificate in Mediation course run by the Institute of Arbitrators and Mediators Australia (IAMA), I can recommend it to intending mediators and to those expecting to represent clients at mediations. I venture to suggest that the *IAMA Course Handbook* is a useful resource for those who do not have either the time or the inclination to complete that five-day course.

Graham Ellis SC

4th Floor St James' Hall Chambers



International Arbitration

A two week residential course leading to a Diploma of International Arbitration will be held in Kuala Lumpur from Monday, 2 June 2008 to Friday, 13 June 2008 under the auspices of the University of New South Wales and the Chartered Institute of Arbitrators (Australia and Malaysia branches). The cost inclusive of accommodation and some meals is A\$7,500. Further details from Chris Lemerrier: phone 9385 3227 or c.lemerrier@unsw.edu.au.

Throwing Stones

On 6 October 2006, Justice Keith Mason AC delivered a paper entitled 'Throwing Stones: A Cost/Benefit Analysis of Judges Being Offensive to Each Other'. He began it by observing that 'We can give offence without intending it. But judges, of all people, ought to know the meaning of their words. Sometimes the sting is intended, especially in a reserved judgment. Sometimes it is personal.' His Honour's paper explored the motivation of studied harshness, when it is legitimate, and its impact upon the effective working of the judiciary. A full copy of the paper may be found on the Supreme Court's web site. It makes for most interesting reading. It has attracted the following comment from retired Justice John Nader RFD QC.

Dear Sir,

One of the matters raised in the paper of the Hon Justice Keith Mason, 'Throwing Stones', published 6 October 2007 by the NSW Supreme Court, raises a question that has concerned me for some years. It was the subject of an address which I gave at an annual dinner of the Newcastle Section of the New South Wales Bar Association a few years ago.

Justice Mason's paper is complex and deals in depth with many matters. This letter deals with only one minor part of his paper, but one which, as I have said, I have for a long time been concerned.

To the best of my recollection, in most of my years in legal practice, it was customary if not invariable for the Court of Criminal Appeal (CCA), the appellate court with which I am most familiar, not to name a judge against whom an appeal was brought, especially when the appeal was allowed. The common practice was to refer to the judge merely as 'the trial judge'. I refer only to published reasons and not to exchanges between Bench and Bar in the course of the appeal hearing. It seems to me that not to name the judge was reasonable and appropriate. In certain circumstances, it was also good manners.

The reasons given by the CCA have value particularly because of the guidance they give to trial judges for the future and so that parties may know why they failed or succeeded. They also declare law that may bind members of the community. These provide the chief forensic value of publishing reasons. Otherwise, an appeal might as well be allowed or dismissed without the publication of reasons.

I refer to these stated purposes of the publication of reasons as the forensic value of the CCA's reasons.

The CCA should generally exclude from reasons facts which are irrelevant to a decision. The identity of the trial judge has no rational connection with the correctness of his/her rulings of law or directions. The naming of a judge in published reasons by the CCA generally serves no legitimate forensic purpose. The court should always direct its criticisms *ad rem*, not *ad hominem*. Can the fact that Judge Bungle decided the case ever be a ground of appeal, or can it strengthen a legitimate ground of appeal? There are jokes to the effect that it can. Is it possible that the fact that Justice Genius decided a case render correct an incorrect direction to a jury?

A negative argument in support of my contention is that one effect of naming a judge is that his/her reputation as a judge may be to some extent eroded. Of course the people involved directly or indirectly in the case will know the name of the judge. That cannot be avoided, nor should it be. But, when reasons of the CCA naming a judge are published, technically at large, in certain circumstances the judge's reputation may be unnecessarily tarnished for no forensic gain. After all, the CCA is wrong from time to time as the High Court has demonstrated. I acknowledge that one reason why the High Court is always right is that there is no appeal from it. But, the damaged reputation of a judge castigated by the CCA will not be repaired by a later decision of the High Court favourable to him or her. There is no news long after

the event in the fact that a judge was right all along.

Justice Mason noted that some courts (e.g. Victoria) have a policy of not identifying the judge appealed from, at least in certain situations. He went on to say that this risks the appearance of judges protecting each other. I most respectfully disagree. My comment is that, if the court's task is to declare principles and rules to be followed by judges and to let the parties and the community know why they failed or succeeded, it is not failing in that purpose not to name judges. If the media and others wish to know the identity of the judge for their sometimes not commendable reasons they can readily find out.

Justice Mason also said that not identifying the judge in appellate reasons was impracticable in that the profession will always know the identity of the judge appealed from. I think that 'always' is far too strong a word in this context: some will know but many will not. Most members of the profession specialising in criminal practice will not know the identity of the judge referred to in CCA reasons, indeed, may not have heard of him/her. Trial judges of the criminal courts are so numerous, as are criminal trials, and criminal practitioners, that very few of the profession, even those who regularly practise in the criminal courts, would often know which judge is being referred to in the reasons of the CCA in any particular case.

If the media and others wish to know the identity of the judge for their sometimes not commendable reasons they can readily find out.

... one effect of naming a judge is that his/her reputation as a judge may be to some extent eroded.

Justice Mason said that naming of the judge appealed against is also warranted because other judges on the court below are entitled to be excluded from the criticism: I presume by inference. However, if the practice of not naming judges appealed from were universal, any speculation about who was and who was not the erroneous judge would be idle. In any event, why should a judge be judicially excluded from criticism if it is true that 'the profession will always know the identity of the judge appealed from'?

There is a third reason, again on the negative side, why I would prefer to see judges not named in the circumstances to which I have referred, and particularly, not belittled as happened some years ago in New South Wales. Such belittling might cause a judge, generally well thought of, to resign his judicial office. Such severe criticism should be transmitted in other ways. Perhaps by 'counselling' by the judge's head of jurisdiction.

I am aware that this letter touches only a narrow strip of Justice Mason's paper. I express to Justice Mason my gratitude for his most timely paper. I hope that there will be ongoing debate on the questions raised. My disagreement with Justice Mason, really confined to the Court of Criminal Appeal, is, of course, expressed with genuine respect.

John Nader RFD QC

Observations on a fused profession

Dear Sir,

I refer to David Sulan's observations on a fused profession and his experience with the Advocacy Unit at Herbert Smith (Winter, 2007). I agree with his conclusion that such a move is unlikely to prove successful in NSW, at least in the immediate future. However, there are a number of other factors at play in London which are unlikely to affect the Sydney legal scene, one of which was the incursion by American legal firms and their clients into the London market. Put simply, they could not see why they should have to refer to another lawyer, outside the law firm itself.

When I started my professional life at Atkin Chambers in Gray's Inn, London, the appearance of solicitors before any bench, save the Magistrate's Court (Local Court), was definitely frowned upon and often refused. When I emigrated from London and came to the Bar in Sydney I was pleasantly surprised that solicitors were happily appearing before nearly every court in which I appeared. I could see the utility and good sense in that. Over time I became used to it, approved of it and saw it as a good stomping ground for prospective barristers to 'cut their teeth', so to speak.

However, when I returned to the Bar of England & Wales for some 18 months from mid 2005 (Hailsham Chambers, Inner Temple), the juggernaut of change had only really just picked up momentum in London. Nevertheless, my experience was quite different from my early years. There are now solicitor advocates who by special dispensation have rights of audience before the highest courts. It's true that many do most of their advocacy in international

commercial arbitrations but they have not, as yet, usurped the role of advocates at the independent private Bar. Although, in the 18 months I was there, I met Murray Rosen QC at a number of social functions at which he and Herbert Smith were 'promoting' the Advocacy Unit, I did not once come across a single solicitor advocate in the High Court.

One of the unfortunate side effects of the solicitor advocate regime is that authorities dealing with anti-competitive practices, consumers, public servants and politicians do not seem to accept the compelling reasons for the retention of an independent private Bar. Calls for multi-disciplinary organisations dealing with all aspects of the legal process have got louder and more persistent. The work of the Bar Council of England & Wales, in keeping the push for barristers to incorporate into multi-disciplinary organisations at bay, has been no less laborious than the efforts of the ill-fated Sisyphus. One example is the turmoil surrounding the question of whether there should be any silks and the protocol for the appointment of silk, which remains in a 'temporary state' at present.

The New South Wales Bar Association fought hard in the early-mid 1990s to ensure that the Bar did not suffer the fate that many silks at the Bar in London will candidly say may not be that far for them. Let's hope and strive to ensure that the strength of the independent private Bar does not diminish and one way to do that is to ensure the quality, integrity and commitment of those coming to the Bar.

Rashda Rana

11 St James' Hall Chambers

...there are a number of other factors at play in London which are unlikely to affect the Sydney legal scene, one of which was the incursion by American legal firms and their clients into the London market.



Women at the Bar

By Professor Ross Buckley
Faculty of Law, University of New South Wales

In Michael Slattery's president's column (*Bar News*, Winter 2007) he noted that 17 per cent of the New South Wales Bar are women, up from 13 per cent in 2000, and took some comfort from this increase.

In the photo of the readers of 01/2007 in the same issue, almost half of the new readers (19 of 44) were women.

Yet of the 29 counsel engaged in the recent high-profile C7 litigation in Sydney, only two were female. (*Seven Network Limited v News Limited* [2007] FCA 1062 (27 July 2007)). Both were on the team for Channel Seven.

If the gender of barristers on C7 had reflected the representation in the profession, there would have been five female counsel involved, not two.

I mentioned this to a female barrister on Phillip Street the other day, and was met with the rejoinder, 'But where are the excellent female commercial juniors?'

Why is this usually the response, even from women? Why is the test for women and men so often different? Why do women need to be excellent to warrant a guernsey in such litigation, when male juniors often just need to be competent, working on the same floor as one of the senior counsel, and available? And how are women to gain the experience to be excellent if they are not routinely involved in the most complex matters?

Involvement in complex trials led by eminent senior counsel is some of the best training possible for younger barristers. Large teams of barristers need counsel of a range of experience levels. A conscious effort on the part of senior counsel and law firms would result in the involvement of more female counsel.

For many years now women have accounted for more than one-half of our graduates from law schools. At UNSW Law School, where I teach, females have accounted for on average 56.3 per cent of our students for the past five years and have tended to do slightly better than the male students over that period. For some time now two of the four principal law schools in Sydney have had female deans.

Yet the Australian Women Lawyers Gender Appearance Survey of Australian courts for periods in late 2004 and 2005 revealed the following:¹

- ◆ In the Federal Court only 5.8 per cent of appearances by senior counsel were by women, and, of greater concern, the average length of hearing for male senior counsel was 119.7 hours, compared to merely 2.7 hours for female senior counsel.
- ◆ In the Federal Court the average length of hearing for male counsel appearing as junior to senior counsel was 223.6, whereas for female junior counsel in the same role it was only 1.4 hours.
- ◆ Similarly, only 9.9 per cent of appearances before the New South Wales Court of Appeal were by women, but 27.8 per cent of appearances before a master were by women. (Data wasn't collected for hearing length in the NSW Supreme Court).

In short, the data collected in the survey confirmed the anecdotal evidence that, except before the Family Court, women do not appear



Photo: Newspix

as advocates in the superior courts in numbers that reflect their presence in the profession.

This conclusion is reinforced by figures cited by Kirby J in delivering the Dame Ann Ebsworth Memorial Lecture in London in February 2006: of the 161 counsel who appeared before the High Court in 2004 in appeal hearings, seven were women, less than five per cent. On special leave applications, the figure was a little better, but still lamentable: eight per cent of counsel were female.

As Kirby J said:

One hundred years after the first women was admitted to legal practice in Australia it is difficult to understand why there is still such a gap between the numbers of men and women appearing as advocates before the highest court. The reasons would seem to lie deep in legal cultural and professional attitudes and practice.

Michael McHugh, at the High Court Dinner in Perth, 24 October 2004, put it more bluntly: 'discrimination against female lawyers has been rife throughout the 43 years I have been a member of the legal profession.'

McHugh J proceeded to ask and answer the question why women have so few speaking parts before the High Court:

The inescapable conclusion is that it is the product of the discriminatory, systemic and structural practices in the legal profession that have been well-documented in recent years and which prevent female advocates from getting the same opportunities as male advocates.

In other words, the Bar is a blokey place that prefers blokes. No doubt its members rarely notice this. To any outsider looking in, such as myself, it is obvious. As a male law professor recently put to me, 'I went to the recent Bench and Bar Dinner – it was appalling, the testosterone and BS was so thick it was difficult to breathe'. I appreciate to many eminent counsel this will sound like nonsense – but then fish rarely notice the water in which they swim, especially when the temperature is comfortable.

It is now more than three years since the Bar Council adopted the Law Council of Australia's Model Equal Opportunity Briefing Policy for Female Barristers and Advocates. This policy calls for those briefing

counsel to genuinely consider engaging female counsel and to periodically report on the nature and rate of engagement of female counsel.

My searches of large law firms' web sites uncovered no such periodic reports. Three years is more than long enough for law firms to have started to regularly report on their engagement of female counsel and one would expect that the first to do so may well enjoy an edge in seeking to hire female associates. At the least they would mark themselves out as progressive and concerned.

Having children does typically disrupt women's careers more than men's. There is a strong case for affirmative action for female barristers' to compensate for the disruptions of child bearing and rearing. But here I am not discussing affirmative action, merely equal treatment. Why is it still so clearly absent in our profession?

Why are we, a profession committed to the administration of justice, not ashamed of the deep hypocrisy of denying equal treatment to so many of our own members?

Until female advocates gain a fair share of experience in complex litigation and appeals before the higher courts, they will be under-represented among the ranks of senior counsel because they will not have received the training that best prepares people for to assume the role of senior counsel. They will therefore also be under-represented in judicial appointments and our judiciary will remain unrepresentative of the people it judges.

As a profession, if we are serious about providing reasonable opportunities for female advocates, with the goal, in time, of having a representative judiciary, a number of steps need to be taken:

- ◆ The Australian Bar Association, or some other national organisation, needs to commission a comprehensive survey of the appearances of female advocates in all our courts – the type and duration of cases they appear in, and in which courts. The survey considered earlier was, on its own admission, very limited and partial. The starting point must be to know nationally the type of experience female advocates are gaining in the courts.
- ◆ Each state and federal department that regularly engages lawyers needs to decide whether it is going to have an equal opportunity or affirmative briefing policy and implement it.
- ◆ Each law firm needs to decide whether it is going to have an equal opportunity or affirmative briefing policy, and implement it.
- ◆ Having implemented these policies, these government departments and law firms need to report annually on the outcomes of their chosen briefing policies, ie. the proportion of female barristers briefed, and the types, and durations, of matters in which they were briefed.

Perhaps it is even time, when judges look out upon a sea of counsel as in the C7 litigation, for mention to be made if the composition of counsel is unrepresentative of the profession?

Endnote

1. See: *Gender Appearance Survey Results and Explanatory Memorandum*, August 2006 at www.womenslawyers.org.au

Bar Practice Course 02/07



Back row to front:

Donald Mitchell, Warwick Hunt, Troy Anderson, Brian Kelly, Darien Nagle, Bill Ilkovski, Paul Cooper, Sharyn Hall, Nick Bender, Stephen Walsh, Yaseen Shariff, Charles Cassimatis, Bryan Robinson, Tony Di Francesco, David Blackah, Joe Hallion, Richard Kouchoo, Ian Stanley, Andrew Chee, Derek Lee, Melissa Humphreys, Pauline David, Arthur Korakis, Nic Ghabar, Dean-Lloyd Del Monte, Lucinda Wilson, Jason Spinak, Karen Conte-Mills, Michelle Campbell, Yvette Cachia, Despina Laftsidis, Charles Colquhoun, Joshua Knackstredt, Lester Fernandez, Michelle Daniels, Michelle Castle, Janet McDonald

Absent: Sarah Huggett



Underlying legal issues in the NT intervention

By Larissa Y. Behrendt

It was the 'national emergency' that was sitting neglected for over thirty years. In the wake of decades of reports, each with in-depth analysis of the issues and complex blueprints on how to address the immediate and the underlying issues, the Australian Government announced that it was finally going to prioritise the endemic violence in some Aboriginal communities and stated that it was relying on the recently commissioned report by Pat Anderson and Rex Wild, *Little Children are Sacred*.

When originally announced, the federal intervention, unveiled by Aboriginal Affairs Minister Mal Brough on 21 June 2007 included the following measures:

- ◆ widespread alcohol restrictions;
- ◆ quarantining welfare payments and linking them to school attendance;
- ◆ compulsory health checks to identify health problems and signs of abuse;
- ◆ forced acquisition of townships through compulsory leases with just compensation;
- ◆ increased policing;
- ◆ introduction of market based rents and normal tenancy arrangements;
- ◆ banning of pornography and auditing publicly funded computers;
- ◆ scrapping the permit system; and
- ◆ appointing managers to all prescribed communities.

While there has been unanimous concern about the levels of violence and sexual abuse of women and children by Indigenous communities and their leaders, there have been deep divisions about the best way to address the issue. The approach taken in the intervention has highlighted these divisions. It is universally accepted that Aboriginal communities in the Northern Territory have needed the additional resources that have accompanied the intervention, other aspects have been more contentious: Why were welfare payments being tied to school attendance when there are not enough teachers and classrooms in the Northern Territory to cater for all of the Indigenous students? Why was prohibition of alcohol being forced on Aboriginal communities when it has never worked as an intervention strategy except where there is full community support of it? Why were issues related to Indigenous control of their land being tied to the issue of child sexual abuse? Why was the permit system being repealed when even the Northern Territory Police Association warned that this would make it harder to stop drug runners, grog suppliers and paedophiles from entering Aboriginal communities?

The Northern Territory intervention legislation

The supporting legislation for the intervention was introduced into the Australian Parliament on 7 August 2007. It comprised of five major pieces of legislation, including the *Northern Territory National Emergency Response Act 2007* (Cth) and the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*.



Rex Wild QC and Patricia Anderson, authors of *The Little Children are Sacred*, the report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse 2007. Pic. Eve Peter / NewsPix

With the Australian Labor Party agreeing to support the legislation, some of the more contentious aspects of the plan did not get the robust debate that they deserved. In particular, there were two legal issues in that legislative package that deserved much greater scrutiny: the subversion of the *Racial Discrimination Act 1975* (Cth) and the subversion of the principle to provide 'just terms compensation' for the compulsory acquisition of land.

The *Northern Territory National Emergency Response Act 2007* (Cth), amongst other things, provides for the creation of five-year leases by the Commonwealth over specified Aboriginal land and prescribes that native title rights and interests are not protected effectively extinguishing those rights during the term of the compulsorily acquired leases. The owner of the land cannot vary the terms or terminate a compulsorily acquired lease. This deprives Aboriginal people of an avenue to terminate the lease if the Commonwealth is in breach of the terms though the Commonwealth has the discretion to terminate the lease. The town camps under either the *Special Purpose Leases Act* (NT) or the *Crown Lands Act 1992* (NT) have a reduced notice period for lease resumption (from six months to two months), a less favourable provision than other special purpose leases and the safeguards under the *Land Acquisition Act 1989* (Cth) are excluded from the operation of the Act.

The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) empowers the Commonwealth and Queensland (in relation to the Cape York region) to have the power to regulate in whole or part expenditure of income received through social security payments for identified groups of people including, persons who are physically present overnight in a 'relevant Northern Territory area' as described in the *Northern Territory National Emergency Response Act 2007* (Cth) as well as the areas of Finke and Kalkarindji. A majority of the 'persons' in this category will inevitably be Aboriginal because the communities included as relevant Northern Territory areas are Aboriginal communities and townships.

Welfare payments that fall under this provision are wide-ranging

and include social security benefits, social security pensions, Abstudy payments, service pensions and income support supplements. The Commonwealth must deduct between 50 and 100 per cent of a person's welfare payments and place it into an Income Management Special Account in the person's name. The Act requires the secretary to take appropriate action to meet a 'priority need' of the person, their partner, their children or any other dependents. 'Priority needs' are defined as various essential items such as food, clothing and health needs, household utilities, child care and education, rent, funerals and automobile costs. These amendments to the *Social Security Act 1991* (Cth) prevent Aboriginal people from having unfettered access to their social security and other Commonwealth payments and benefits in the same way that other Australians can.

The subversion of the Racial Discrimination Act

The *Racial Discrimination Act 1975* (Cth) was implemented to incorporate into domestic law Australia's obligations under the International Convention to Eliminate All Forms of Racial Discrimination. Section 9(1) of the Act prohibits 'racial discrimination':

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Part II of the Act prohibits racial discrimination in, amongst other things, rights to equality before the law, access to places and facilities, land, housing and other accommodation and provision of goods and services.

Section 132 of the *Northern Territory National Emergency Response Act 2007* (Cth) provides:

(1) The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the *Racial Discrimination Act 1975*, special measures.

(2) The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the *Racial Discrimination Act 1975*.

Similarly, s4 of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) both excludes the application of Part II of the *Racial Discrimination Act 1975* (Cth) and prescribes activities under the legislation as being 'special measures'.

Prior to the Northern Territory intervention legislation, the *Racial Discrimination Act 1975* had only been repealed on two other occasions: in relation to the *Native Title Act 1993* as part of the Wik amendments in 1998 and in relation to the *Aboriginal and Torres Strait Island Heritage Protection Act 1984* in relation to the Hindmarsh Island bridge area. As a legislative protection against racial discrimination, it can be subject to repeal by the legislature.

The prescription of acts authorised by the legislation as 'special measures' is more contentious. Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination



Indigenous Affairs Minister Mal Brough with a protestor at Mutitjulu in the Northern Territory as he opens a new police station. Pic: Mechelsen Lyndon / Newspix

states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed to be racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Subsection 8(1) of the *Racial Discrimination Act 1975* incorporates the exemption of 'special measures' as understood under international law. These 'special measures' ensure that affirmative action or other types of 'positive discrimination' are not illegal.

The prescription of 'special measures' not only raises the question of whether the Commonwealth is operating outside of the international legal understanding of what is a 'special measure', it also raises the question of the appropriateness of the legislature over-riding the role the judiciary has played in scrutinising and determining whether an activity or condition is a 'special benefit'.

Australian courts have given consideration to what constitutes a 'special measure' and have determined that:

- ◆ it must confer a benefit on some or all members of a class;
- ◆ membership of the class must be based on race, colour, descent or national or ethnic origin;
- ◆ the special measure must be for the sole purpose of securing adequate advancement of the beneficiaries so that they may enjoy and exercise equally with others human rights and freedoms, and
- ◆ the special measure must provide protections to the beneficiaries that are necessary in order for them to enjoy and exercise human rights and freedoms equally with others.

In *Gerhardy v Brown* (1985) 159 CLR 70, Justice Brennan held that 'the



Senior elders attend a town meeting in the Aboriginal community of Mutitjulu, near Uluru, in the Northern Territory. Photo: Jason South / Fairfaxphotos

wishes of the beneficiaries for the measure are of great importance' perhaps essential in determining whether a measure is taken for the purpose of securing advancement (at 126).

Under this well-established legal test, several aspects about the Northern Territory intervention legislation raise questions about whether they would meet the definition of a 'special measure' if the matter had have been left to the court, for example, whether the quarantining of welfare payments in a way that stops Aboriginal people from having unfettered access to their social security payments a measure that confers a benefit.

The subversion of just terms compensation

Several aspects of the Northern Territory intervention legislation provide for the acquisition of property, including the compulsory acquisition of five-year leases and provisions that allow the Commonwealth and the Northern Territory Governments to have continuing ownership of buildings and infrastructure on Aboriginal land that are constructed or upgraded with government funding, which effectively permits Aboriginal communities to be stripped of their assets.

Sections 60 and 134 of the *Northern Territory National Emergency Response Act 2007* (Cth) excludes the operation of ss.50(2) of the *Northern Territory Self-Government Act 1978* (Cth) which provides for 'just terms compensation' from applying to any acquisition of property that occurs as a result of the provisions of the Act. These provisions also prescribe that if certain acts would result in an acquisition of property to which the 'just terms' power (s51(xxxi)) of the Constitution would apply, the Commonwealth is required to pay a 'reasonable amount of compensation'.

In other words, the provisions do not specifically apply s51(xxxi) to the acquisition, the acquisition does not require 'just terms' and if the

acquisition is otherwise than on 'just terms', the Commonwealth is required to pay 'a reasonable amount of compensation'. Section 61 also provides direction as to how a 'reasonable amount of compensation' is to be calculated which includes rent and compensation paid and improvements to the land and infrastructure.

With s50(2) suspended, there is no requirement for 'just terms' compensation arising under the *Northern Territory Self-Government Act 1978* (Cth). However, questions remain about the extent to which s51 (xxxi) applies to the territories. The interpretation of the 'territories power' (s122) in *Teori Tau v Commonwealth* (1969) 119 CLR 564 established a line of authorities that excluded the operation of s51(xxxi) from the Northern Territory. *Newcrest Mining (WA) Limited v Commonwealth* (1997) 190 CLR 513 questioned this with a four to three majority decision that held that the 'just terms' requirement could apply in the Northern Territory. The result is that the application of the Constitutional 'just terms' provision is not definitively determined.

The concern about the provisions is that a distinction seems to be drawn between 'just terms' and 'a reasonable amount of' compensation with the implication that the latter might mean less than the former.

'Just terms' compensation requires an inquiry as to 'whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country': *Grace Bros Pty Ltd v Commonwealth* (1946) CLR 269 (at 290). Justice Brennan in *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 stated:

The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government

presumably in the interests of the community at large are not required to sacrifice their property for less than it is worth. Unless it is shown that what is gained is full compensation for what is lost, the terms cannot be found to be just (at 310-311).

What 'a reasonable amount of compensation' means is less clear. It has already been suggested by the federal minister that compensation might be given in the form of services or infrastructure rather than proper compensation for the Aboriginal landholders. This aspect of the intervention legislation is part of the grounds for a legal challenge lodged against the Northern Territory intervention by the Bawinanga Aboriginal Corporation and Reggie Wurrdjal, a traditional owner in Maningrida.

At what cost?

It is not surprising, given the history of underfunding of essential services and infrastructure in Aboriginal communities around Australia that the aspects of the intervention that have seen additional resources brought into some towns warmly welcomed.

Research undertaken last year by the Centre for Aboriginal Policy Research at the Australian National University showed that, in the Northern Territory, only 47 cents was spent on the education of an Aboriginal child compared to the dollar spent on the education of a non-Aboriginal one. Wadey has welcomed the promise of additional housing that has been offered as part of the intervention. But while the Australian Government has promised \$1.6 billion over four years to support the intervention, the under-funding on Indigenous housing in the Northern Territory alone is estimated to be over \$2 billion. All this indicates that, while aspects of the intervention have been a step forward, there is every indication that they will not be enough to deal with the underlying issues that lead to dysfunction and the unravelling of the social fabric in Aboriginal communities.

Much has been made of these small steps to address chronic problems in the Northern Territory but the way in which the intervention has been approached has raised very real questions about its long-term effectiveness. This is partly because the research that shows what works in Indigenous communities when it comes to improving the socio-economic disparity between black and white Australians emphasises the key need to consult and work with Aboriginal and Torres Strait communities affected by policies and programs. The lack



Minister Mal Brough tables the NT Emergency Response Legislation.
Photo: Gary Ramage / Newspix

of consultation in the way the intervention has been undertaken has been a key concern of those working on the ground because the 'top-down' approach to Indigenous policy has consistently been shown to fail.

However, when questions were asked about this and other aspects of the intervention, the federal government and their supporters, black and white, dismissed any questions about the nature of the intervention by accusing the sceptics of protecting paedophiles and of not wanting to protect children. The unfortunate effect of this stifling of debate around the very contentious mechanisms employed in the intervention meant that some of the key questions that needed to be asked about the necessity of repealing some of the few legal protections our legal system affords the most vulnerable were not asked.

In its report of March 2005, the Committee on the Elimination of Racial Discrimination noted the lack of entrenched provisions to protect from racial discrimination in the Australian legal system and recommended that Australia work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law.¹ The Northern Territory intervention is another example of how fragile that protection is.

Endnotes

1. *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on Australia* CERD/AUS/CO/14, March 2005. Committee to Eliminate Racial Discrimination, Sixty-sixth session, 21 February-11 March 2005. <http://www.humanrights.gov.au/cerd/report.html>.

The concern about the provisions is that a distinction seems to be drawn between 'just terms' and 'a reasonable amount of' compensation with the implication that the latter might mean less than the former.



Do we need a Charter of Rights?

By Dina Yehia

In view of the numerous laws that do, or have the potential, to significantly infringe individual human rights, the question as to whether we need protection in the form of a Bill or Charter, is becoming an increasingly relevant and urgent question.

Canada enacted a Bill of Rights in 1980. New Zealand enacted one in 1990. The United Kingdom enacted a Bill of Rights in 1998.

With the enactment of such legislation these countries have provided several different examples of a mechanism for development and determination of human rights norms.

Closer to home, the ACT enacted the Human Rights Act in 2004 and Victoria enacted the Charter of Human Rights and Responsibilities Act in 2006.

In depositing its instrument of accession on 25 September 1991 to the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), Australia has also provided each citizen with the ability to seek redress for alleged human rights abuses to the Human Rights Committee.

This avenue of redress is, however, only available after all domestic remedies have been exhausted. It is a long and expensive process.¹

Is the common law sufficient protection?

There is a long-standing and strong commitment to the rule of law in Australia. Traditional arguments against a Bill of Rights have been that Australia can rely on our traditional and proud background of respect for civil liberties and the democratic freedoms of the individual citizen.

It has been asserted that the protection of our rights can be left to our parliamentary representatives and that to legislate for a Bill of Rights would distort our system of government by giving unelected judges too much influence.²

One of the difficulties with this argument is that the common law has an absence of written guarantees of freedom. Another difficulty is that in times of perceived crisis, whether it be alleged acts of terrorism or biker activity, politicians cannot be trusted to legislate with proper regard to individual human rights.

Our need for a Bill of Rights is demonstrated by reference to just a handful of examples of human rights problems in this country:

- ◆ detention of asylum seekers, particularly children;
- ◆ indefinite detention of an asylum seeker who cannot be deported (see *Al Kateb*); and
- ◆ over-reaching 'anti-terror' laws.

The International Commission of Jurists (ICJ) in its submission to the 2001 Inquiry into New South Wales Bill of Rights, stated that 'under the common law the liberty of the subject is what is left over when all the prohibitions have limited the area of lawful conduct'.³

In advocating for a Bill of Rights in New South Wales, the previous attorney general, Bob Debus, is reported to have said:

The times we live in are causing us to pass some laws that intrude on traditional freedoms in ways that we have not experienced in recent times. I support our laws on terrorism as they have been



Photo: John Reid / Fairfax photos

drafted – and the community does too – but they potentially restrict freedoms. This [introduction of a Bill of Rights] is a process by which the whole community discusses what it thinks are our basic values and tells the Parliament that it wants them protected.⁴

Addressing the Law and Justice Foundation in October 2005, former chief justice of Australia, Sir Anthony Mason, presented a broad critique of the detention powers in the Australian Government's anti-terrorist legislation arguing that such powers should be subject to judicial review. He is reported to have said that the federal attorney-general is not a 'suitable guardian of individual rights'.

He said that while some suspension of individual rights was necessary to combat terrorism, the question of balance was 'too important a vehicle for superficial party political and federal – state point scoring'.⁵

Retired High Court justice, Michael McHugh, supported the notion of a Bill of Rights when he addressed law students at Sydney University. He pointed to a number of failings by the High Court to prevent human rights being abused. Comparing Australia and UK decisions, he argued:

Thus while the House of Lords could find the executive's indefinite detention of a suspected terrorist was unauthorised, the High Court of Australia was not – in the *Al Kateb* case – equally empowered to find the executive's indefinite detention of an asylum seeker was a similar breach of human rights. This example clearly evidences a need to place greater focus on human rights and freedoms within Australia, and supports the argument for the introduction of a Bill of Rights.⁶

In his judgment in *Al-Kateb v Godwin*, McHugh J rejected the proposition that the Commonwealth Constitution 'should be read consistently with the rules of international law'.⁷ He went on to say that, 'as desirable as a Bill of Rights may be, it is not to be inserted into our Constitution by judicial decisions drawing on international instruments that are not even part of the law of this country'.⁸

In my view we do need a Bill of Rights because there must be a basic law against which legislation threatening civil liberties can be measured.

Statutory v constitutionally entrenched bill of rights

The US model of a Bill of Rights is entrenched in the US Constitution. Judges are the ultimate arbiters in conflicts over human rights. This does not sit well from the perspective of the Westminster parliamentary system of government.

The UK model incorporates the major rights found in the European Convention on Human Rights into domestic law and makes these enforceable rights in the courts. However, as an ordinary piece of legislation, the Act does not entrench those rights. Nor does it provide the courts with the power to declare primary legislation invalid. Instead, higher courts are granted the power to make a 'declaration of incompatibility', the making of which can allow a Minister to seek

The US model of a Bill of Rights is entrenched in the US Constitution. Judges are the ultimate arbiters in conflicts over human rights. This does not sit well from the perspective of the Westminster parliamentary system of government.

parliamentary approval for a remedial order to amend legislation to bring it in line with Convention rights.

The Report of the Standing Committee on Law and Justice of New South Wales Legislative Council (October 2001), recommended against the introduction of a Bill of Rights. The rational underpinning the recommendation was that a Bill of Rights would derogate from parliamentary supremacy and lead to politicisation of the judiciary.

In view of the political resistance to a Bill of Rights in this country, I have decided to focus in this paper on the UK model as I see that it is probably the model, or some adaptation of it, that might attract most support. Before we look at some of the case studies in the UK, it is apt to refer to the Victorian Charter, which is founded on the following principles:

- ◆ human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- ◆ human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- ◆ human rights come with responsibilities and must be exercised in a way that respects the human rights of others; and
- ◆ human rights have special importance for Aboriginal people of Victoria, as descendants of Australia's first people with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

George Williams, in his paper *Victoria's Charter of Human Rights and Responsibilities: Lessons for the National Debate*, pointed to the many benefits of a Bill of Rights.⁹

- ◆ Public servants will take into account the Charter in developing new policies.
- ◆ Government departments and other public authorities will be required to comply with the Charter. If they fail to do so a person who is adversely affected by a government decision will be able to have the decision examined in court.
- ◆ Government departments and other public authorities can undertake audits of their programs and policies to check that they comply with the Charter.
- ◆ When a Bill is introduced into parliament, it will be accompanied by a Statement of Compatibility made by the person introducing the Bill setting out with reasons whether the Bill complies with the Charter. Parliament will be able to pass the Bill whether or not it complies.
- ◆ The Victorian Parliament's Scrutiny of Acts and Regulations Committee will have a special role in examining the Statements of Compatibility. It will advise parliament on the human rights implications of a Bill.
- ◆ Victorian courts and tribunals will be required to interpret all legislation in a way that is consistent with the Charter.
- ◆ Where legislation cannot be interpreted in a way that is consistent with the Charter, the Supreme Court will be able to make Declarations of Inconsistent Interpretation. This will not strike down the law but parliament could decide to amend the law.

The UK *Human Rights Act 1998* is often referred to as a 'dialogue' model in that higher courts are able to make a declaration that legislation is incompatible with European Convention rights. This initiates a dialogue between the judiciary, parliament and the executive.¹⁰

The declaration of incompatibility allows a minister to seek parliamentary approval for a remedial order to amend legislation to make it compatible.

The declaration of incompatibility can be ignored by the executive government. In that case the legislation would remain the same and valid. Such a course might, however, invite political embarrassment.

Another useful aspect of the UK model is that a minister must, before the second reading speech of a Bill either:

- ◆ make a statement of compatibility with European Convention rights; or
- ◆ make a statement to the effect that although he or she is unable to make a statement of compatibility, the government nevertheless wishes the House to proceed with the Bill. The practical effect of this provision is to require government departments and agencies to undertake a formal review in relation to Convention rights when preparing legislation or regulations.

Ministers may introduce legislation incompatible with Convention rights, but the Human Rights Act obliges the minister to explain to

The declaration of incompatibility can be ignored by the executive government. In that case the legislation would remain the same and valid. Such a course might, however, invite political embarrassment.

parliament (and the public) why these rights have been ignored.

UK case studies

The UK *Human Rights Act 1998* incorporates the major rights found in the European Charter of Human Rights (ECHR) into domestic law and makes them enforceable in the courts. As stated above, the courts do not have the power to strike down legislation but to make Declarations of Incompatibility. This is the main innovation as regards the balance struck between parliamentary supremacy and judicial review.

In the UK the Joint Committee on Human Rights was set up to review compliance with the Act. The joint committee has expressed some concerns including that it does not get any advance view of Bills, or of amendments with human rights implications tabled to Bills; has no specific powers to slow down the timing of a passage of a Bill; has only finite resources and must therefore prioritise between Bills; and time constraints limit the use that can be made of external submissions.¹¹

On a positive note, the joint committee commented:

In many cases we have been successful in causing government to bring forward specific amendments to legislation, to accept amendments moved by others, to take into account of human rights considerations. We have also succeeded on occasions in getting government to agree to change guidance or codes of practice, or to change draft legislation before introducing it as a bill, rather than amending primary legislation itself.¹²

In his briefing paper, Gareth Griffith reviewed some cases brought in the UK.¹³

In *R v Secretary for the Home Department, ex parte Daly*¹⁴ the applicant (a prisoner) challenged the policy that prison officers could examine prisoners' legally privileged correspondence in their absence. The House of Lords held that the policy infringed both the prisoner's common law rights to legal professional privilege and the protection afforded to private correspondence under Article 8(1) of the ECHR. It was found that the policy interfered with the prisoner's exercise of his rights under Article 8(1) to an extent much greater than necessity required. The policy was declared unlawful and void.

In *Bellinger v Bellinger*¹⁵ a post-operative male to female transsexual appealed to the House of Lords against a decision that she was not validly married to her husband, by virtue of the fact that at law she

was a man. One claim submitted by the petitioner was that, so far as it made no provision for the recognition of gender reassignment, s11(c) of the *Matrimonial Causes Act 1973* (UK) was incompatible with Article 8 (right to respect for private and family life) and Article 12 (right to marry) of the ECHR. The House of Lords upheld the appeal, making a Declaration of Incompatibility under s4 of the Human Rights Act.

That incompatibility was subsequently removed by the *Gender Recognition Act 2004*.

In *R v A (No 2)*¹⁶ at issue was section 41 of the *Youth Justice and Criminal Evidence Act 1999* (UK) which made it very difficult to cross-examine a sexual assault complainant about her prior sexual conduct with the accused. The question was whether this provision was compatible with Article 6 (right to a fair trial) of the ECHR. It was held that the blanket exclusion of evidence of prior sexual conduct in section 41 was disproportionate. By application of s3 of the Human Rights Act it was decided that s41 should not apply when the evidence was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6.

In *Ghaidan v Godin-Mendoza*¹⁷ the House of Lords confirmed that the surviving member of a long-term homosexual couple was a statutory tenant under the *Rent Act 1977*. Under that Act such a tenancy (a protected tenancy) was only granted to persons living with the original tenant 'as his or her wife or husband'. On its ordinary meaning this was found to treat survivors of homosexual partnerships less favourably than survivors of heterosexual partnerships without any rational or fair ground for the distinction. As such the relevant provision of the Act infringed Article 8 (right to respect for private and family life) and Article 14 (right against discrimination). By virtue of s3 of the *Human Rights Act 1998* the court held that the legislation should be given a Convention-compliant meaning, which in this case, made it possible for the provision in question to be read as extending to same-sex partners.

On 12 April 2006 a single judge of the High Court ruled that a control order made under new anti-terror laws was incompatible with the Human Rights Act, as it denied the suspect's right to a fair hearing under Article 6 of the ECHR. Under the anti-terrorist laws, control



orders issued by the home secretary to limit the freedom of suspected terrorists can be imposed without judicial hearing. They can be imposed for up to 12 months and can be renewed indefinitely at the request of the home secretary. In the case at issue, the suspect, referred to as 'S', became the first British citizen to be placed under virtual house arrest when his control order was imposed by the Home Office on 5 September 2005. He was suspected of wanting to travel to Iraq to fight against British and American soldiers.

In the High Court, Justice Sullivan said it would be an 'understatement' to say the orders deny those affected the right to a fair hearing. He stated that:

The thin veneer of legality...cannot disguise the reality that controlees' rights under the Convention are being determined not by an independent court...but by executive decision-making untrammelled by any prospect of effective judicial supervision.¹⁸

The ACT experience

The ACT Human Rights Act came into force on 1 July 2004. Gabrielle McKinnon (ANU) reviewed the cases where the Act had been considered during its first two years of operation. She found that generally speaking the cases involved a fairly superficial consideration of the Human Rights Act. However, there were some cases where the Act had received detailed analysis.¹⁹

One of the cases reviewed was the case of *Perovic v CW*, No. CH 05/1046 (1 June 2006). This is an unreported decision of the Children's Court. The case involved the criminal prosecution of a young person for a sexual offence. There had been a considerable delay between the complaint and the charge, and a total of 16 months before the matter was brought to hearing.

The child's representative made an application to stay the proceedings because of the quality of the investigation and the way in which it prejudiced the child's ability to defend the charges. It was also argued that there had been a breach of section 20(3) of the Human Rights Act which states that 'A child must be brought to trial as quickly as possible'.

Magistrate Some considered that the wording of s20(3) clearly indicated 'that the time must begin to run as soon as the young person becomes aware that he is the subject of a police investigation'.

In the circumstances of this case the Magistrate found that the child

was not brought to trial as quickly as possible and that this amounted to a clear breach of the Human Rights Act. His Honour accepted that the Act does not provide specific remedies for breach. Nevertheless he noted:

It is, in my view, consistent with the principles of the Human Rights Act, to consider that a breach of that Act, when the breach occurs in relation to criminal charges, may give rise to a situation in which an injustice would occur if the breach was, in effect, accepted and not withstanding that breach, charges were heard and determined by the court....every court has either inherent or implied power to prevent its own processes being used to bring about injustice.²⁰

Magistrate Some ordered a permanent stay.

Conclusion

There is a long and strong commitment in this country to the rule of law. However, the common law has always treated liberty as a 'defeasible' right, whereby every citizen has a right to do what he or she likes, unless restrained by the common law or statute.²¹ Where, however, there is a perceived crisis, either in relation to a potential terrorist threat or a breakdown in law and order, politicians usually do not hesitate in introducing laws where the human rights of individuals are subordinate.

We now live under a regime where control orders can be imposed upon a person suspected of being involved in terrorist activity although there is insufficient evidence to charge let alone obtain a conviction.

The 'anti-terror' laws have created a regime where a non-suspect Australian citizen can be detained at the behest of ASIO for one week. Furthermore, a court can impose a five-year term of imprisonment if a person speaks about or reports on the detention of a person by ASIO.

The state can attempt to justify considerable infringements of human rights by relying upon issues of national security. In this climate we must look towards ways in which the rights traditionally afforded to individuals are protected. History has too often demonstrated the oppressive consequences on individuals where we fail to protect such rights.


Endnotes

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4. J. Pearlman, *Sydney Morning Herald*, 20 March 2006.
5. M Pelly, 'Monitoring of Terrorism Laws Urged', *Sydney Morning Herald*, 8 October 2005.
6. 'Bill of Rights no longer academic', Michael McHugh, *Lawyers Weekly*, 13 February 2006 at <http://www.lawyersweekly.com.au/articles/6C/0C03816C.asp?Type=53&Category=853>
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8. (2004) 208 ALR at 144.
9. G Williams, 'Victoria's Charter of Human Rights and Responsibilities:

Where...there is a perceived crisis, either in relation to a potential terrorist threat or a breakdown in law and order, politicians usually do not hesitate in introducing laws where the human rights of individuals are subordinate.

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11. G Griffith, *A NSW Charter of Rights? The Continuing Debate*, NSW Parliamentary Library Research Service, Briefing Paper No 5/06.
12. *ibid.*, p43.
13. *ibid.*, pp53-57.
14. [2001] 3 All ER 433.
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16. [2002] 1 AC 45.
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19. G McKinnon, *Regulatory Institutions Network*, paper presented at the Australian Bills of Rights Conference, Australian National University, 21 June 2006.
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C7 – Mega litigation and its costs

By Carol Webster

It would have been hard to miss the recent controversy about the cost of big litigation. The long awaited judgment in the C7 litigation attracted significant publicity.

Sackville J delivered judgment on 27 July 2007: *Seven Network Ltd v News Ltd* [2007] FCA 1062 ('the principal judgment'). The judgment was extensive – Sackville J wrote some 1120 pages of published reasons, in 11 chapters; the summary prepared to accompany the reasons for judgment itself ran to several pages.

The case was an example of what Sackville J described as 'mega-litigation': civil litigation involving multiple and separately represented parties that consumed many months of court time and generated vast quantities of documentation in paper or electronic form. His Honour noted the burden imposed by such mega-litigation on not only the parties, but also the court system and hence the community¹.

This is neither the time or place for a review of the judgment. Rather, this note highlights some of the things said about litigation of this size.

Sackville J recorded some of the statistics in the summary:²

- ◆ the trial lasted for 120 hearing days;
- ◆ an electronic database containing 85,653 documents (589,392 pages) was produced from discovery and production of documents. 12,849 'documents' were admitted into evidence (115,586 pages);
- ◆ extensive written submissions were filed: 1,556 pages by Seven, in chief, and a further 812 pages in reply (excluding confidential portions and an extensive electronic attachment with about 8,900 pages of spreadsheets); 2,594 pages by the respondents, supplemented by further outlines, notes and summaries;
- ◆ pleadings totalled 1,028 pages;
- ◆ statements of lay witnesses (admitted into evidence) ran to 1,613 pages. Expert reports admitted into evidence totalled 2,041 pages of text plus what Sackville J described as 'many hundred pages of appendices, calculations and the like'; and
- ◆ the transcript was 9,530 pages in length.

His Honour said at paragraph 7 of the summary 'I have not been idle these nine months'.

One of the matters which attracted publicity regarding the Principal Judgment, and then in relation to the subsequent costs hearing, was his Honour's estimate that the parties had spent in the order of \$200 million on legal costs in connection with the proceedings.³

Sackville J referred to the initial claim suggested by Seven when the case was opened, of more than \$1.1 billion in damages, reduced to between \$194.8 and \$212.3 million by the time of final submissions, subject to grossing up for income tax and pre-judgment interest. His Honour commented:⁴

the maximum amount at stake in this litigation has not been very much more than the total legal costs incurred to date.

It is difficult to understand how the costs incurred by the parties can be said to be proportionate to what is truly at stake, measured in

One of the matters which attracted publicity regarding the Principal Judgment, and then in relation to the subsequent costs hearing, was his Honour's estimate that the parties had spent in the order of \$200 million on legal costs in connection with the proceedings.

financial terms. In my view, the expenditure of \$200 million (and counting) on a single piece of litigation is not only extraordinarily wasteful, but borders on scandalous.

Sackville J concluded the summary with 'A Cautionary Tale'⁵ referring to the *Duke* litigation⁶ which his Honour described as the longest civil trial in recent Australian history, running for 471 days, from 15 June 1994 to 29 September 1997.

His Honour noted⁷ that the *Duke* litigation did not finally conclude until 19 November 2004, when a second application for special leave to appeal was refused: ten and a half years after the commencement of the trial, and over twelve years since the commencement of the proceedings; nearly seven years after the trial judge's judgment.

Sackville J suggested that the parties to the C7 proceedings could still bring what he described as 'these protracted and excessively expensive proceedings' to a conclusion by negotiated resolution.⁸ His Honour concluded, in paragraph 61 of the summary, 'The alternative to a negotiated resolution may be a reprise of the *Duke* litigation. I do not recommend this course'.

The reference to proportionality recalls the express objects of case management specified in s57 of the *Civil Procedure Act 2005*:

- (a) the just determination of the proceedings,
- (b) the efficient disposal of the business of the court,
- (c) the efficient use of available judicial and administrative resources,
- (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

In addition, the Civil Procedure Act s56(1) states the overriding purpose of the Act and Rules: 'to facilitate the just, quick and cheap resolution of the real issues in the proceedings.'

A few months before Sackville J's delivery of the principal judgment in the C7 litigation, the full court of the Federal Court had expressed its concern about what it saw as the extravagant conduct of particular piece of litigation:

23 We do not wish to part from this case without observing that the appeal books occupied something like 5,000 pages in ten volumes. Very little of that material was referred to during the course of submissions or oral argument. Indeed, a number of the

volumes were not opened at all during the hearing. Much of this material was completely unnecessary having regard to the trial judge's findings of fact and the nature of the arguments raised on the appeal.

24 Moreover, although no doubt the issues were important to the parties, the conduct of this litigation has been extravagant. It concerned a claim for \$200,000 that occupied 10 days of hearing before the trial judge and two days on appeal. This expenditure of time and resources, not only of the parties, but also of the court bears no apparent relationship to the value of the interests at stake. The fact that the court has been shown only one attempt to compromise the proceedings on which to base a claim for indemnity costs, or to resist any such claim, is indicative of a lack of any appropriate commercial approach to resolution attempts by the parties with their professional advisers. The court is not able to come to any conclusion as to whether any fault lies on any one of the parties to the proceedings. However, given that [the parties] were parties with some sophistication, it is indeed unfortunate that they were unable to resolve matters or to find a more economical way of litigating what in truth was a very small claim.⁹

Sackville J considered costs questions further, in a costs judgment delivered on 26 September 2007: [2007] FCA 1489, regarding a claim for indemnity costs based on a joint offer of compromise (made in August 2005). Unsurprisingly, the hearing attracted further publicity, with a number of media articles about the costs incurred by a number of the respondents.

In the costs judgment, his Honour set out the total costs incurred by the various respondents, as recorded in their written submissions, totalling \$94,561,429.¹⁰ (A number of the respondents resolved their claims for costs against Seven.)

The story does not end here however, even in relation to costs. The application for costs on an indemnity basis was dismissed, but the court is still to hear applications for a gross sum order for costs, as an alternative to taxed costs.

A gross costs order, or lump sum costs order, was made in one of the other recent pieces of large litigation, although the proceedings did not proceed to a concluded hearing and judgment: *Idoport Pty Ltd v National Australia Bank Ltd* [2007] NSWSC 23¹¹. On 6 February 2007, Einstein J made a gross sum costs award against the Idoport parties for \$50 million.

Statistics can be recounted here as well: Einstein J recorded that 868 pages of affidavit and 33,572 pages of exhibits (in 110 folders) were relied on in support of the application. The judgment records ten hearing days in November and December 2006 on the application.

Einstein J accepted that the case for a gross sum costs order in that case was compelling,¹² bearing in mind the expense and time that would be involved in an orthodox assessment of costs. Costs consultants gave evidence for both parties. Neither of them had ever prepared a bill of costs in the order of \$60-70 million.

One of the issues raised was that the NAB parties had adopted a 'Rolls-Royce' approach: Einstein J considered this, but said '...at the least and viewing the matter from *their clients perspective*, that approach was called for in this litigation'.¹³

It remains to be seen how the gross costs applications will proceed in the C7 litigation.

Endnotes

1. Paragraph 2 of the summary.
2. Paragraphs 4 to 6 of the summary.
3. Paragraph 8 of the summary.
4. Paragraphs 9 and 10 of the summary.
5. from paragraph 58 of the summary.
6. *Duke Group Ltd (in liq) v Pilmer* (1998) 27 ACSR 1.
7. Paragraph 59 of the Summary.
8. Paragraph 60 of the Summary.
9. *King v Yurisich (No 2)* [2007] FCAFC 51 at [23]-[24], Sundberg, Weinberg and Rares JJ.
10. [2007] FCA 1489 at [11] and [12]
11. Also see *Idoport Pty Limited & Anor v National Australia Bank Limited & 8 Ors* [52] [2002] NSWSC 18 and *Idoport Pty Limited & Anor v National Australia Bank Limited and 8 Ors* [51] [2001] NSWSC 1081, *Idoport Pty Ltd v National Australia Bank Ltd & Ors* [2002] NSWCA 271; *Idoport Pty Limited v National Australia Bank Limited & Anor* [2005] NSWSC 752; *Idoport v National Australia Bank Limited & Anor* [2006] NSWCA 202.
12. [2007] NSWSC 23 at [118].
13. [2007] NSWSC 23 at [122], emphasis in original.

Gleeson CJ on the cost of justice: an excerpt from 'Some Legal Scenery', delivered at the Judicial Conference of Australia, Sydney, 5 October 2007.

The mega-trial is not a complete novelty. When I came to the Bar in 1963, the case of *American Flange v Rheem* was just getting started. As I recall, it was as at least as long as the C7 case, although there were only two parties. What is new and more alarming is the length of the ordinary case. For well-resourced litigants, the time of judges is cheap. The government pays for judges; and it pays them much less than many litigants pay their lawyers. It is understandable that some parties and their lawyers adopt a habit of thought which discounts the economic value of judicial services and court time. Judges should be conscious of this, and should be ready to assert their authority where that is necessary to secure reasonable expedition.

...

The facility with which lawyers can produce documentary material, including evidence and arguments in written or electronic form, increases the cost of litigation, and places an additional burden on judges. Judges often find themselves, at the end of a case and with little oral argument, presented with a volume of documentary material on the assumption that they will use it in the preparation of a reserved judgment. Conducting a completely oral procedure is now a luxury that most courts cannot afford, but there is a need to make allowance for the pressure on judges that can come from increasing reliance on written material. There is also, on occasion, a question whether such material has been properly tested and evaluated.

Recent developments

Utmost good faith in insurance contracts: CGU Insurance Ltd v AMP Financial Planning Pty Ltd [2007] HCA 36 (237 ALR 420) 81 ALJR 1551

Amongst the issues examined by the High Court in the final stage of this 'complex litigation' (as it was described in the joint judgment of Gleeson CJ and Crennan J) is the scope of section 13 of the *Insurance Contracts Act 1984* (Cth) ('the ICA') and the obligations that this section imposes upon an insurer in relation to the handling of claims by an insured. Section 13 of the ICA provides that:

A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

The proceedings concerned a claim by the respondent (AMP) for an indemnity under professional risk insurance policies of which the appellant (CGU) was the insurer, in respect of amounts which AMP had paid in settlement of claims that had been made against it. AMP had been under pressure from ASIC to settle these claims promptly and adequately. To this end, AMP put a protocol in place for the handling of the claims. At first instance, it was found that AMP had adopted this procedure and settled these claims for its own sound commercial reasons (including both a need to protect its relations with ASIC, its licence and goodwill its as well as a desire to avoid being placed in a position where CGU might exercise its contractual right to take over and defend any of the investors' claims in the name of AMP).

AMP initially notified CGU of the possible claims against it and thereby of its possible claim for indemnity under its professional risk policy. In due course, AMP also provided CGU with a copy of its protocol for the handling of claims and material in relation to its claim under the policies. CGU agreed in principle to the protocol but reserved its position under the policies. It repeatedly instructed AMP to act as a prudent uninsured. CGU did not at any time expressly authorise or approve any of the settlements concluded by AMP. In due course, CGU denied that it was liable under the policies to indemnify AMP in respect of both the claims against it and the settlement of those claims.

AMP commenced proceedings against CGU in the Federal Court of Australia, seeking to recover the amounts that it had paid in settlement of the various claims that had been made against it (less the policy excess for each claim). In addition to its claim for an indemnity in respect of these amounts under its policies with CGU, AMP also claimed that CGU was in breach of the duty that it owed to AMP as its insured under section 13 of the ICA and that the amounts that AMP had paid in settlement of the claims against it were recoverable as damages for that breach. (Although AMP also advanced its claim on other bases and a number of other issues arise out of these proceedings, it is only proposed to deal with AMP's section 13 claim in this case note).

At first instance Heerey J dismissed AMP's claim, including its section 13 claim. In doing so, his Honour held that an allegation of breach of the duty of utmost good faith provided for by section 13 of the ICA requires proof of some want of honesty (citing *CIC Insurance Ltd v Barwon Region Water Authority* [1999] 1 VR 683 at 689 in support of

that proposition). However his Honour also found that there was no evidence of such dishonesty on CGU's part.

AMP appealed to the full court of the Federal Court. Moore and Emmett JJ allowed the appeal and set aside the orders made by Heerey J below. In their stead, they directed that the proceedings be remitted to the trial judge so that further consideration (in accordance with their Honour's reasons) could be given to the four questions posed at [144] of the judgment of Emmett J. In the course of their judgments, the majority of the full Federal Court rejected Heerey J's narrow construction of both section 13 and what was required in order to prove a breach of the duty imposed by that section. Justice Gyles dissented in the outcome and, whilst not agreeing with the reasons given in the judgment below, nevertheless found that Heerey J had come to the right conclusion and that the appeal should therefore be dismissed. But in doing so, his Honour did not discuss or express any opinion on the issue of section 13 (other than to conclude that AMP's appeal on that point had been 'misplaced').

CGU appealed to the High Court, who (Kirby J dissenting) overturned the decision and orders of the majority of the full Federal Court and reinstated the orders of Heerey J in effect dismissing AMP's claim. But in doing so, all of the members of the High Court endorsed the wider view of the requirement of good faith adopted by the majority of the full Federal Court in preference to Heerey J's view that absence of good faith was limited to want of honesty.

A number of comments may be drawn from the judgments of both the full Federal Court and High Court in these proceedings, so far as section 13 and the extent of the duty that it imposes are concerned.

First, it is clear from the terms of the section that the duty of utmost good faith that section 13 provides for is a duty that is owed by both the insured and the insurer and that it is a reciprocal and mutual duty. The latter aspect was of particular significance to the conclusion of Callinan and Heydon JJ who held that, even if there had been an absence of good faith on the part of CGU, there was not such a degree of reciprocal good faith on the part of AMP as would entitle it to relief against CGU.

Secondly, contrary to the view expressed by Heerey J at first instance, both the majority of the full Federal Court and all of the members of the High Court agreed that a breach of duty by an insurer did not require proof of a want of honesty (or proof of dishonesty) on the part of the insurer. Whilst a want of honesty (if proved) will constitute a failure to act with utmost good faith, it is not a necessary requirement.

According to Emmett J the notion of acting in good faith entails acting with both honesty and propriety. A lack of propriety alone may amount to a breach of the duty. Lack of propriety does not necessarily entail a lack of honesty. The duty of utmost good faith encompasses notions of fairness, reasonableness and community standards of decency and fair dealing. Capricious or unreasonable conduct may also amount to a breach of the duty.

In the High Court, Gleeson CJ and Crennan J accepted that utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the legitimate interests of an insured, as well as to the insurers' own interests. This

is in the same way that the insured's obligation of utmost good faith requires the insured to pay regard to the legitimate interests of the insurer. Callinan and Heydon JJ also agreed that a lack of utmost good faith was not to be equated with dishonesty only. In their joint judgment they indicated that an absence of good faith may have elements in common with an absence of clean hands (although conceded that the analogy should not be taken too far). Their Honours also stated that utmost good faith will usually require something more than passivity; it will usually require affirmative or positive action on the part of the person owing the duty.

Kirby J agreed that a want of honesty was not a necessary requirement of the duty of utmost good faith and that the criteria of dishonesty, caprice and unreasonableness more accurately expressed the ambit of what constitutes a breach of the duty imposed by section 13. Kirby J also emphasised that this duty was 'an affirmative' one and like Emmett J below agreed that the emphasis must be placed on the word 'utmost'.

Thirdly, it is clear from the judgments both of the majority of the Full Federal Court and of the High Court that the duty imposed upon an insurer by section 13 extends to the manner in which the insurer handles claims made by its insureds, including the time taken to consider and respond to such claims.

For example, in the full Federal Court, Emmett J stated that a failure to make a prompt admission of liability to meet a sound claim for indemnity and to promptly pay the claim may amount to a failure to act with the utmost good faith on the part of an insurer. The position would of course be different where the insurer is awaiting details that are necessary for the making of a decision whether to accept liability or to determine the quantum of its liability. But a failure by an insurer to make and communicate within a reasonable time a decision of acceptance or rejection of a claim for indemnity, by reason of negligence or unjustified and unwarrantable suspicion as to the *bona fides* of the claim by the insured, may constitute a failure on the part of the insurer to act towards the insured with the utmost good faith in dealing with the claim and thereby in breach of its duty under section 13. There may also be a breach where the insurer fails to proceed reasonably promptly to deal with a claim, where all the relevant material is to hand, sufficient to enable a decision on the claim to be made and communicated to the insured.

In the High Court, Gleeson CJ and Crennan J acknowledged that the insurer's obligation to act with utmost good faith 'may well affect the conduct of an insurer in making a timely response to a claim for indemnity'. The discussion at paragraphs [258] to [261] of the joint judgment of Callinan and Heydon JJ also proceeded on the premise that the duty imposed upon an insurer by section 13 extended to the manner in which it handle its insured's claims and that an insurer's conduct in handling such claims may amount to a breach of that duty. In this context, their Honours noted (at [259]) that temporising by an insurer can be just as damaging to an insured as outright rejection of a claim.

Kirby J observed that the duty imposed by section 13 governed the conduct of insurers. It was more important than a term implied in the

insurance contract giving rise to remedies for a breach, although by its express provisions it was also that. According to Kirby J:

the duty imposes obligations of a stringent kind in respect of the conduct of insurer and insured with each other, wherever that conduct has legal consequences.

His Honour acknowledged that the duty imposed on an insurer by section 13 extended to its handling of claims, including an obligation to make timely decisions as to whether or not a claim would be accepted. In doing so, Kirby J quoted with approval (at [135]) the dicta of Ambrose J in *Gutteridge* which his Honour noted that the majority of the Full Federal Court had 'correctly endorsed'. At [139] his Honour also stated:

In particular, the broad view which the full court [of the Federal Court] majority took concerning the operation of s13 of the Act is one that this court should endorse. It sets the correct, desirable and lawful standard for the efficient, reasonably prompt, candid and business-like processing of claims for insurance indemnity in this country.

As to what this might entail of an insurer, his Honour concluded that this case stood for the principle that an insurer should not act in the manner in which his Honour had thought CGU had acted here (the details of which are set out in paragraph [179] of his Honour's reasons for judgment). Whilst the remaining members of the High Court may not have shared his Honour's conclusion that CGU were guilty of the conduct there described, this paragraph nevertheless provides a useful catalogue of the type of conduct by an insurer that Kirby J has in mind as amounting to breach of section 13.

Fourthly, in their joint judgment Gleeson CJ and Crennan J concluded that the ICA did not empower a court to make a finding of liability against an insurer as a punitive sanction for not acting in good faith. This is especially where, as on the facts found here, the insurer was not liable under the terms of the insurance policies to indemnify AMP for the amounts that it had paid in settlement of the investor claims. As their Honours stated (at [16]):

If there is found to be a breach of the requirements of s13 of the Act, there remains the question how that is to form part of some principled process of reasoning leading to a conclusion that the insurer is liable to indemnify the insured under the contract of insurance into which the parties have entered. ... Between a premise that CGU's delay constituted a failure to act with the utmost good faith, and a conclusion that CGU is liable to indemnify AMP in respect of the settlement amounts, there must be at least one other premise. What it might be has never been clearly articulated.

This raises the potentially important question as to the appropriate remedy for an insurer's alleged breach of the duty imposed upon it by section 13 in relation to the handling of claims (especially where the complaint is one of the insurer's prevarication or delay in determining whether to accept or reject the insured's claim) and more particularly whether the breach of the duty can give rise to a liability on the part of the insurer to indemnify its insured in respect of payment of a claim made against the insured in circumstances where such an indemnity is not otherwise available to the insured under the terms of the policy.

On the facts here Gleeson CJ and Crennan J found that it could not. In the full Federal Court Gyles J made an observation to similar effect (at [162]).

Finally, there were two respects in which it had been asserted in these proceedings that CGU had been in breach of the duty imposed on it by section 13 of the ICA. The first was based on CGU's failure to provide an indemnity in respect of each claim made on AMP within the time period after the provision of information in respect of each of claim contemplated by the protocol (established by AMP for the handling of the claims). This was the argument advanced at first instance and dealt with by Heerey J. It is also in relation to a breach of this nature that both the comments that a failure to handle claims in a timely fashion may amount to a breach of the section 13 duty and the difficulty in granting an indemnity for such claims as relief for the breach alleged (identified in the joint judgment of Gleeson CJ and Crennan J) are apposite.

The second respect in which it had been asserted that there had been a breach of duty by CGU was identified by Emmett J in the context of the appeal to the full Federal Court. It was a failure to act with the utmost good faith in relation to the policies in the manner in

which CGI conducted itself in its defence of the proceedings instituted against it by AMP for the recovery of AMP's claimed indemnity under the policies. In particular, it was by taking a stance in the proceedings that AMP was required to establish by admissible evidence that it was legally liable to any investor whose demand had been settled in order to recover an indemnity under the policies for that liability and any amounts paid in settlement of it. It was for the purposes of reconsidering inter alia this argument (which was also bound up with AMP's claim based on estoppel) that the majority of the full Federal Court directed that the proceedings be remitted. It was to this argument that the first three of the four questions that the majority of the full court directed the trial judge to reconsider were directed. However, the majority of the High Court held (Kirby J dissenting) that it was not appropriate for the proceedings to be remitted for the further consideration of any of these issues. Accordingly, the effect of the decision of the majority of the High Court was that to the extent that AMP may have been able to advance a claim that CGU had been in breach of its section 13 duty on this second basis, in the end that claim also failed.

By Greg Nell SC

No tortious duty of good faith: CGU Workers Compensation (NSW) Limited v Garcia [2007] NSWCA 193

This recent judgment of the New South Wales Court of Appeal deals with whether there is a tortious duty to act in good faith at common law and more particularly whether such a duty is owed by an insurer of a workers compensation policy in respect of the handling of claims under that policy or whether such a duty is to be implied into the statutory workers compensation policy, as an implied term of that policy. In addition, this judgment also provides guidance as to the approach that a court should take when issues arise as to the existence or scope of a novel tort as well as to the circumstances in which a term imposing a duty of good faith may be implied into a contract.

The underlying claim

The appeal arose out of proceedings in the District Court of New South Wales in which the respondent (Mr Garcia) had claimed damages from his employer's workers compensation insurer for its alleged breach of a duty to act in good faith in dealing with a claim for workers compensation that the respondent had made on the insurer in respect of injuries that the respondent was said to have sustained in August 1999 in the course of his employment.

Initially, the respondent's claim was accepted by the insurer, who made weekly compensation payments to the respondent whilst he was unable to work. But in January 2000, the insurer terminated these weekly payments, based on medical evidence said to indicate that the respondent's then symptoms were due to a degenerative condition and any aggravation of that condition caused by the events of August 1999 had by that time ceased. The respondent brought proceedings against the insurer in the Compensation Court claiming (inter alia) reinstatement of his weekly compensation payments. Those

proceedings were fixed for hearing in April 2001. However, on the day of the hearing, the insurer indicated that the respondent's claim for compensation had been re-accepted.

The respondent claimed to have suffered both economic and non-economic loss (extending beyond the amounts recoverable in the Compensation Court proceedings) as a consequence of the insurer's decision to terminate his weekly compensation payments and commenced proceedings against the insurer in the District Court for the recovery of damages in respect of that loss.

The respondent's claim in those proceedings was put in two ways. The first was that the insurer was in breach of an implied term of the statutory workers compensation policy that it would 'deal fairly and in good faith with' the worker. Secondly, the insurer was also alleged to have been in breach of a tortious duty of good faith that it owed the worker, being a 'duty to act in good faith towards the plaintiff [worker] in relation to any claims made under the [Workers Compensation] Act by the plaintiff'.

The judgment in the District Court

The proceedings in the District Court were heard by Goldring DCJ who upheld the respondent's claim on the second of the above two bases and awarded the respondent damages of \$ 451,317.50 (including \$ 50,000 exemplary damages).

In doing so, his Honour acknowledged that this tortious duty of good faith which he found the insurer to be in breach of was a novel one under Australian law and one that did not arise under principles of negligence. In particular, it was not just a duty of care within the framework of the existing law of negligence or an action for a breach of a specific statutory duty. Rather, it was said to be a completely new tort. However, both this decision and this new tort were confined to

the situation as between an insurer and a worker and in relation to the statutory policy provided for by the workers compensation legislation, even though the duty of good faith comprised in this tort was said to exist independently of the workers compensation scheme.

His Honour's conclusion that the insurer owed the respondent a duty of good faith rested effectively on the decision and reasoning in *Gibson v Parkes District Hospital* (1991) 26 NSWLR 9 ('*Gibson*'), in which Badgery-Parker J had held that a workers compensation insurer and an employer owed a duty to act in good faith in the processing of a workers compensation claim, the breach of which may attract a liability in tort. Goldring DCJ concluded that the reasoning in *Gibson* was both directly on point and compelling. Moreover, his Honour concluded that insofar as later decisions from other jurisdictions expressed reservation about the correctness of the decision in *Gibson*, they were either distinguishable or not to be followed.

The decision in *Gibson* has not met with universal approval elsewhere in Australia. For instance in Victoria, McDonald J came to the opposite conclusion in *Gimson v Victorian Workcover Authority* [1995] 1 VR 209, holding that:

- ◆ there was no basis in law for concluding that circumstances might exist giving rise to a common law duty which was imposed on a person to act in good faith in that person's dealings or relationship with another, the breach of which would give rise to a remedy in damages in tort; and
- ◆ the provisions of the Victorian Accidents Compensation Act did not give rise to such a duty, at least in the circumstances of the case before him. In reaching these conclusions, McDonald J was not persuaded by either the decision or reasoning of the judgment in *Gibson*. Nor was his Honour able to conclude that that judgment was, by analogy, of assistance in determining whether in the circumstances of the case before him it may be soundly and properly argued that, in the absence of any contractual relationship, a duty of good faith may nevertheless be owed at common law by a compensation insurer. Accordingly, McDonald J concluded that the plaintiff's claim that the defendants owed the plaintiff such a duty had no good foundation in law and disclosed no cause of action.

More recently in Queensland, McMurdo J held in *Lomsargis v National Mutual Life Association of Australasia Ltd* [2005] Qd R 295 that an insurer under a contract governed by the *Insurance Contracts Act 1984* (Cth) was not liable in tort to its insured for failing to act towards the insured in good faith. In doing so, his Honour distinguished the decision in *Gibson* (on which the plaintiff in that case had relied), on the grounds that it was concerned with the existence of a duty and remedies for its breach in a particular statutory context (namely workers compensation legislation) rather than in the context of an insurance contract governed by the *Insurance Contracts Act* and therefore did not deal with whether there was a tortious duty of good faith which was owed concurrently with the contractual duty implied in a contract of insurance by section 13 of the *Insurance Contracts Act*, being the issue confronting his Honour.

The appeal

The defendant insurer appealed. The Court of Appeal allowed the appeal and dismissed the respondent's underlying claim. The principal judgment was given by the president of the Court of Appeal, Justice Mason, with whom both Hodgson and Santow JJA agreed. Justice Santow also went on to make some additional observations about the approach that should be taken when an issue arises with respect to the existence or scope of a novel tort, both generally and in the context of the particular proceedings before him.

There is no tortious duty of good faith

In allowing the appeal, Mason P concluded that there was no tortious duty of good faith at common law – in particular such a duty was not owed by an insurer of a workers compensation policy in respect of the handling of claims under that policy – and that Goldring DCJ had erred both in concluding that there was such a duty and in finding that the insurer had been in breach of that duty in the present instance.

Essentially, his Honour reached this conclusion in two ways. The first was following an examination both of the new tort conceptually and of the circumstances in which it was said to arise. The second was having regard to the existing authorities, including the judgment of Badgery-Parker J in *Gibson* upon which Goldring DCJ had relied heavily.

In relation to the first, Mason P agreed with the appellant's submissions that the workers compensation legislation did not require, let alone call forth, the 'novel tort' that Goldring DCJ had found below. In the course of his judgment, Mason P also expressed agreement with remarks made in *OBG Ltd v Allan* [2007] UKHL 21 that it was not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law:

Where substantive and procedural obligations are spelt out in detail with their enforcement remitted (in the main) to a court, then the silence of the legislature as regards a duty of fair dealing that sounds in damages is pregnant with the rejection of any such duty.

Central to this part of his Honour's reasoning were issues concerning coherence (or perhaps more correctly a lack of coherence) between this new tort and the framework within which it must be placed. This need for coherence was also approved by Santow JA and addressed separately in his reasons for judgment. In particular, his Honour stated that whilst the lack of such coherence would preclude the introduction of a novel tort, its presence may not of itself suffice to justify it.

When examined conceptually, Mason P found that for this new tort to have a role to play, it must of necessity find its place within the interstices of the existing statutory workers compensation framework. In particular, it must not contradict the terms or policies of the statutory and contractual frameworks within which it would be placed. Furthermore, it was also wrong in principle to contemplate any role for this new tort unless and until the contractual ordering of the relationship was understood and respected. This is especially where this new tort was being ventured (as it was by the respondent in this case) as a gap filler intended to deliver remedies such as exemplary damages and recompense for delayed payment that both the statute and contract law generally withheld. In the course of his judgment,

Mason P identified three problems that were said to demonstrate powerful arguments why this new tort should not be invoked to trump so-called inadequacies (from the worker's point of view) of the statutory contract, namely that Australian law has thus far not accepted exemplary damages for breach of contract, that the statute and common law already compensated for the impact of delay in meeting a contractual claim and that there is under the common law only a qualified recognition of damages for disappointment, distress and injured feelings caused by non-performance of a contract.

In respect of the coherence as between the new tort and the statutory scheme generally, Mason P identified a number of policy considerations that (in his opinion) negated the need to find a tort of good faith (or even an implied contractual term to that effect). His Honour also identified a number of respects in which the alleged tortious duty was incompatible (both practically and legally) with the legislative regime, which prescribes in detail the substantive and procedural rights and obligations of all the participants and within which framework the parties are permitted to pursue their rights with vigour and self interest. These respects included:

- ◆ that the duty contended for intersected sharply across the statutory mechanisms and the adversary context in which the whole scheme was embedded;
- ◆ that claims for consequential loss that would arise under a duty of good faith lay uneasily with the detailed limits of claims under the workers compensation legislation and its focus on the management of workplace injuries; and
- ◆ that the insurer's duties are already closely monitored through a system of licensing and criminal penalties, with the legislation already imposing various duties on the insurer and creating offences for failing to comply with certain obligations. Mason P concluded that a duty of good faith in the making or maintaining of a claim, the breach of which sounds in damages, lay very uncomfortably within such a framework.

As for the second aspect of this part of his Honour's decision, Mason P found that the authorities did not support the existence of a tortious duty of good faith, especially one which (as his Honour characterised it) cut across the legislative and contractual framework in some respects shattering the coherence of the statutory workers compensation scheme. In this regard, his Honour referred to the recent 'stern warnings' of the High Court (in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 81 ALJR 1107) against intermediate courts of appeal stepping beyond long established authority derived from English precedents or considered dicta of the High Court itself, and concluded that:

... the present case lies well past that point on the plank where even bold judicial spirits might think to stand without firm external support or compelling analogy in the existing case law.

Although in *Gibson* Badgery-Parker J concluded (at p34D) that it was just and reasonable to impose on a workers compensation insurer and an employer a duty to act in good faith in the processing of a workers compensation claim breach of which should attract liability for damages in tort, this conclusion was expressed in the context of

an appeal against the decision of a master of the court permitting the plaintiff in that case (Mrs Gibson) to amend her Statement of Claim to include a claim for breach of this alleged duty of good faith. The *ratio* of the decision in *Gibson* is found at the conclusion of the judgment (at p36A) where his Honour states that in his opinion the defendant had not shown that the plaintiff's case for breach of the alleged duty was so clearly untenable that if the amendment was allowed it was liable to be struck out at that stage of the proceedings. It was on that basis and for that reason that his Honour dismissed the appeal and affirmed the master's order granting the plaintiff leave to amend her Statement of Claim to include a claim for breach of this alleged duty. It was observed by Mason P in the course of his judgment in *Garcia* that a search of the Supreme Court file in *Gibson* disclosed that those proceedings had been resolved by consent some time after the hearing before Badgery-Parker J and before Mrs Gibson's claim for breach of this alleged duty ever went to trial.

In light of the foregoing, Mason P stated that the decision in *Gibson* stood as authority (resting upon the reasoning of a respected judge of the Supreme Court) that the claim in question (that is, a claim for breach of the alleged duty of good faith) was arguable, in the sense that a pleading that avers such a claim ought not be struck out. The decision was not however authority for any broader proposition (nor did it bind the Court of Appeal).

In any event Mason P stated, and in the course of his judgment demonstrated, that there were a number of difficulties with the decision in *Gibson* 'even within the four corners of its own reasoning'. For instance, although Badgery-Parker J had correctly recognised that this putative tort was not a species of negligence, Mason P stated that his Honour had nevertheless placed significant and unexplained reliance upon decisions such as *Anns v Merton London Borough Council* [178] AC 728 and decisions in Australia and England discussing that precedent, which were negligence based. Insofar as Goldring DCJ had adopted similar reasoning, for instance in eliding the circumstances capable of giving rise to a duty of care and those said to generate this new tort, in particular so as to emphasise the vulnerability of the worker's position and the insurer's knowledge of those matters going to that vulnerability, his judgment was also criticised by Mason P. Whilst both Badgery-Parker J and Goldring DCJ had each also had regard to where a duty of good faith had been implied into a particular contract or class of contract, including contracts of insurance, in support of their respective conclusions as to the existence of the alleged tortious duty, Mason P concluded that their reasoning in this regard was unhelpful and to a degree erroneous. Rather, Mason P found that proof of a concurrent contractual duty of good faith suggested the need for real caution before reaching for a tortious backup, *a fortiori* if the resort to tort is part of an attempt to recover exemplary damages (such as those in fact awarded by Goldring DCJ) that would be unavailable in the contractual context.

As Mason P also observed, the case law subsequent to *Gibson*, including the decisions in *Gimson*, and *Lomsargis*, had been hostile to the reception of the new tort. Although Goldring DCJ had sought to draw support from the decision of Wallwork J (with whom Kennedy J agreed) in *Ilievsk-Dieva v SGIO Insurance Ltd* [2000] WASC 161

for his conclusion that as a matter of law, damages were available against a workers compensation insurer for breach of the duty of good faith at common law, Mason P found that this did not appear to be a correct reading of the reasons in that case. Similarly, Mason P stated that Goldring DCJ had also appeared to have misread the decision of McMurdo J in *Lomsargis* and had erred in distinguishing that decision on the basis that the respondent in the present case was not in a contractual relationship with the insurer (cf section 159 of the Workers Compensation Act). Moreover, Mason P observed that the use of the statutory duty of good faith implied by section 13 of the Insurance Contracts Act into contracts of insurance (although not workers compensation policies, by reason of section 9(1)(e) of that Act) as a 'gap filler' made it harder for the common law of Australia to accommodate the wide range of duties argued for by the respondent. In the opinion of Mason P this tended to strengthen the force of the reasoning in *Lomsargis* insofar as it rejected the tortious duty even in relation to a contract that has a statutory implied term.

In the course of his reasons, Mason P also referred to a number of decisions which were inconsistent with the existence of the new tort and which either had not been referred to by Badgery-Parker J or Goldring DCJ or were not referred to in their respective judgments. These included:

- ◆ the decisions of the English Court of Appeal and House of Lords in *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 and *Banque Financiere de la Cite SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249 which McDonald J had drawn upon for support in *Gimson* in concluding that there was no duty. Whilst Mason P conceded that these decisions were far from being directly on point, he nevertheless stated that their reasoning generally undermined the authority of *Gibson*;
- ◆ the 'additional persuasive decision' of the English Court of Appeal in *Bank of Nova Scotia v Hellenic War Risk Association (Bermuda) Ltd* (1990) 1 QB 818 in which a differently constituted Court of Appeal, having confirmed the correctness of their earlier decision in the *Banque Keyser* case and thereby held that a contract of insurance did not contain an implied term requiring the parties to act with the utmost good faith one to the other, the breach of which sounded in damages, also went on to find that there was no corresponding tortious duty that might be invoked to fill in the contractual gap. This decision had not been cited to Badgery-Parker J in *Gibson* nor mentioned by Goldring DCJ in his judgment below; and
- ◆ the earlier unreported judgment of the New South Wales Court of Appeal in *Employers Mutual Indemnity (Workers Compensation) Ltd v A Donald Pty Ltd* (unreported 23 Oct 1997) in which the Court of Appeal had, in the context of a claim by an insurer for payment by an employer of a workers compensation policy premium, 'briefly but firmly rejected' an argument that the insurer owed was a tortious liability to the employer to act in good faith.

Having regard to the present state of the authorities Mason P concluded that there was no universal common law duty of good faith in the performance of a contract of insurance and that for all

the reasons set out in his judgment such a duty did not exist in the circumstances of the present case.

Implied contractual duty of good faith

Because of his conclusion as to the existence and breach of the tortious duty of good faith, Goldring DCJ found that it was unnecessary to decide whether the statutory policy contained an implied term to similar effect and whether the insurer was also in breach of that implied term. Whilst the respondent's argument below in this regard was repeated on appeal, it was rejected by the Court of Appeal, who found that there was no implied contractual term to the effect contended by the respondent, in particular one that would sound in damages for its breach.

Although the respondent had been able to point to decisions recognising that some commercial contracts contain terms implied as a matter of law imposing an obligation of good faith and reasonableness in the performance of contractual obligations, Mason P stated that the cases do not establish that such an implied term is to be included into every contract or even into every aspect of a particular contract. Australian law has not yet taken this step as regards an implied term of good faith and fair dealing in performance.

Such a duty may, however, be implied as a matter of law in specific classes of contracts or as a matter of fact to give business efficacy to a particular contract. As to the former, in determining whether the implication is to be drawn from a particular class of contract, Mason P stated that the central criterion was one of 'necessity', a matter to be tested against any applicable statutory policy. However, his Honour did not find that this criterion had been satisfied in the circumstances in which the claim before him arose.

Mason P also found that in the circumstances before him the implication of such a term was not necessary to give efficacy to the statutory policy and its working out would contradict the express terms of that policy and its statutory framework. The reasons that his Honour had earlier given for rejecting the alleged tortious duty were (in his opinion) equally applicable in the context of the alleged implied term and in rejecting the implication of any such term.

For those reasons, the Court of Appeal concluded that there was no relevant contractually implied duty of good faith, of which the insurer could be said to have been in breach and thereby liable in damages to the respondent and that the respondent's claim thereby also failed on that basis.

Whether the insurer had been in breach

Although it was strictly unnecessary to decide the issue, given his conclusion that there was no tortious duty or implied term of which the insurer might be said to have been in breach, Mason P nevertheless went on to state that in his opinion there were sufficient matters of concern in the trial judge's reasoning on breach to set aside his discussion on that topic. In particular, seven reasons were given. In identifying these reasons, Mason P did not go so far as to suggest that there was no evidence that might have grounded a finding of breach of the alleged duty. However, his Honour was not persuaded that there was such a breach for the reasons given by Goldring DCJ below. Although given his conclusion that there was no tortious duty

or implied term, Mason P was not prepared to determine as on a rehearing what conclusion should have in fact been drawn on the question of breach.

Conclusion

In concluding that there was no tortious duty of good faith at common law, the Court of Appeal's judgment has effectively overruled the decision in *Gibson*, insofar as that decision has in the past been invoked as authority for the existence of such a tortious duty at least on the part of a workers compensation insurer, and thereby brought the

position in the New South Wales into line with that under Victorian, Queensland and English law. Although in its judgment the Court of Appeal also provided some guidance as to how a claim that seeks to extend the existence or scope of a tort, including a novel tort, should in the future be dealt with, it also reveals the difficulties that are likely to be encountered in that regard by a claimant seeking to advance such a claim, particularly at first instance and which requires travelling beyond long established authorities.

By Greg Nell SC

Legal professional privilege: *AWB Limited v Cole (No1)* (2006) 152 FCR 382

This decision arose out of the Australian Government's Inquiry into Certain Australian Companies in relation to the United Nations Oil for Food Programme (Oil for Food Inquiry), conducted by former Supreme Court judge, Terence Cole, from late 2005 through until November 2006.

The case involved a claim by AWB Limited (*AWB*) for legal professional privilege in relation to a document, a draft statement of contrition, which had been produced to the Inquiry by one of AWB's employees (in response to a notice to produce) and subsequently tendered during the examination of the then Managing Director of AWB, Mr Lindberg, in the course of the Inquiry's public hearings. The document was said by AWB to have had been mistakenly produced to the Inquiry and that there had been no intention to waive the privilege which AWB claimed attached to it. After the document had been tendered, AWB applied to the Commissioner for its return and removal from the exhibits before the Inquiry. The Commissioner (assuming in favour of AWB that the document had been produced inadvertently and any privilege that might have attached to it had not thereby been waived), ruled that the document did not attract legal professional privilege, giving detailed reasons in support of that ruling.

AWB applied to the Federal Court of Australia for a declaration that the draft statement of contrition was privileged and for a review of the commissioner's ruling to the contrary. That application was opposed by the Commonwealth, Commissioner Cole having filed a submitting appearance and advised the court that he would take no part in the proceedings and would abide the court's determination of AWB's claim. In support of its application, AWB claimed that the draft statement was protected by both 'advice privilege' and 'litigation privilege'. The issues raised by the former were whether the draft statement was brought into existence for the dominant purpose of obtaining legal advice or whether it recorded legal advice provided by AWB's lawyers for the benefit of AWB? The issues raised by the second basis of AWB's claim were whether the document had been brought into existence for the dominant purpose of being used in connection with litigation that was reasonably in prospect and what amounted to 'litigation' for the purposes of that privilege? The onus was of course upon AWB to establish the privilege claimed.

The proceedings were heard by Justice Young who held that, having

regard to its contents and the circumstances in which it had come into being, the draft statement of contrition did not fall within any of the established categories of legal professional privilege and was therefore not properly the subject of a claim for privilege.

In his detailed reasons for judgment, Justice Young has provided both a comprehensive discussion as to what qualifies as 'advice privilege' and a useful summary of the principles that are to be applied in determining whether or not a document is properly the subject of that privilege. In the course of that discussion, his Honour has also collated many of the recent authorities, both Australian and English, on the content of advice privilege and what is required to be proved in order successfully to establish a claim for that privilege. Space does not permit an examination of his Honour's discussion of either these principles or authorities to be included in this case note. Suffice it to say that his judgment (especially paragraphs [60] – [63] and [85] – [110]) as well as his Honour's later judgment in *AWB Limited v Cole (No. 5)* (2006) 155 FCR 30 are a useful resource for those seeking to assert or challenge a claim for legal professional privilege, particularly advice privilege.

In rejecting AWB's claim that the draft statement was protected by litigation privilege, Justice Young held that the rationale for litigation privilege did not support its extension to a commission of inquiry and that the privilege therefore did not extend to documents brought into existence for the dominant purpose of being used in connection with such an Inquiry. That is of course not to say that legal advice privilege may not attach to work undertaken in connection with an Inquiry, provided that the dominant purpose is satisfied. Justice Young also rejected, on the facts before him, AWB's claim that the draft statement of contrition had been brought into existence for the dominant purpose of being used in connection with any litigation which might follow on from the inquiry or the commissioner's final report. In those circumstances, his Honour did not decide whether potential future litigation of that kind fell within the scope of the litigation privilege.

Leaving aside the substantive questions raised by AWB's application, Justice Young also held that :

- ◆ the *Royal Commissions Act 1902* (Cth) did not abrogate legal professional privilege and that the provisions of that Act should be read down so as not to require production of documents that were properly the subject of a claim for legal professional privilege; and

- ◆ under the Royal Commissions Act a commissioner has no power either to determine whether a claim for privilege should be upheld or to inspect a document that may be required to be produced under a notice issued by the commission or inquiry and that is the subject of a claim for privilege. In particular, his Honour rejected the submission (advanced by the Commonwealth) that a royal commissioner had an implied authority under the Act to require production of a document that is claimed to be the subject of legal professional privilege for the limited purpose of inspecting it in order to determine whether the claim for privilege is made out.

In relation to this second matter, his Honour acknowledged that a commissioner has an administrative power or capacity, for the purposes of determining his (or her) own actions and procedures to 'decide', in the sense of forming an opinion, whether a particular document was required to be produced under a notice to produce because it was not legally privileged. In this sense, a commissioner has the power to accept or reject a claim for privilege when made. But any ruling made or opinion expressed by a commissioner in that regard had no binding force or effect in law. His Honour had no doubt that it was obviously administratively convenient and practical that the Royal Commissions Act be construed as giving a commissioner the implied authority to make such a non-binding decision. But his Honour concluded that it was open to the party claiming privilege to agitate that issue directly in declaratory proceedings in the Federal Court without embarking upon a review of the commissioner's decision or ruling.

In response to this part of his Honour's decision, the Australian Government almost immediately passed the *Royal Commissions Amendment Act 2006* (Cth), to amend the Royal Commissions Act *inter alia* to henceforth confer upon a commissioner under the Act both power to determine a claim for legal professional privilege in certain circumstances, including in relation to documents required to be produced by a commission or inquiry under a notice to produce, and power (in certain circumstances) to inspect for the purpose of such a determination the documents in respect of which privilege is claimed and to compel the production of those documents for the purposes of that inspection. However, these amendments did not go so far as to confer the power to determine questions of privilege exclusively on the commissioner and a party asserting a claim for privilege in respect of any documents required to be produced to a commission or inquiry (or resisting the production of documents to the commission or inquiry on the grounds that they are privileged) may still approach the Federal Court to determine that claim and issue. Accordingly, this part of Justice Young's judgment must now be read subject to this amending legislation.

In relation to his Honour's conclusion that the Royal Commissions Act did not abrogate legal professional privilege, in his final report Commissioner Cole recommended that consideration be given to amending the Royal Commissions Act to permit the governor-general in council by Letters Patent to determine that in relation to the whole or particular aspect of matters the subject of inquiry, legal professional privilege should not apply. On 3 May 2007, the Australian Government responded to this recommendation, in particular noting that on 30 November 2006 it had announced an inquiry by the Australian

Law Reform Commission (ALRC) into legal professional privilege as it relates to the activities of Commonwealth investigatory agencies. In April 2007, the ALRC issued (as part of its inquiry) an Issues Paper entitled *Client Legal Privilege and Federal Investigatory Bodies*. In July 2007, a submission was made by the Law Council of Australia to the ALRC in response to this Issues Paper, in which the Law Council stressed the importance of client legal privilege to the legal system and stated that it did not support sweeping changes to the current rules for corporations, royal commissions or in any other investigatory or regulatory context. The Law Council also recommended the development of guidelines and 'best practice' procedures to enable the efficient and effective resolution of client legal privilege claims raised in the context of investigations by Commonwealth agencies.

On 26 September 2007 the ALRC released a Discussion Paper entitled *Client Legal Privilege and Federal Investigatory Bodies* (DP 73), containing 42 proposals aimed at addressing disputes over client legal privilege in federal investigations. Included amongst these was proposal 6-1 recommending that:

Federal client legal privilege legislation should provide that, in special circumstances, the Australian Parliament may legislate to abrogate client legal privilege in relation to a particular royal commission of inquiry or investigation undertaken by a federal investigative body.

The factors to be considered in determining whether such legislation should be enacted are:

- ◆ the subject of the royal commission of inquiry or investigation, including whether the inquiry or investigation concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community or is a covert investigation;
- ◆ whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and especially
- ◆ the likelihood and degree to which the privileged information will benefit the royal commission or investigation, particularly where the legal advice itself is central to the issues being considered by the commission or federal body.

The ALRC's final report is due to be completed by December 2007 and the ALRC is currently seeking feedback to its Discussion Paper. Submissions close on 1 November 2007.

By Greg Nell SC

(Note: although the author was one of the counsel assisting in the Oil for Food Inquiry, he did not participate in the hearing of these proceedings)

**Control orders: Thomas v Mowbray [2007] HCA 33
(2 August 2007) 237 ALR 194 ; 81 ALJR 1414**

Introduction

In this decision the High Court upheld the constitutional validity of the control order provisions in Division 104 of the Criminal Code (Cth) by a majority, comprising four separate judgments, of five to two.

However, the controversial nature of this legislation, which was evident in public debate at the time of its introduction, is reflected in the extraordinary dissenting judgment of Kirby J, who predicted that Australians in the future 'will look back with regret and embarrassment at the majority decision' for its departure from the 'foresight, prudence and wisdom' evident in the decision of an earlier High Court majority led by Dixon J in the equally challenging *Communist Party Case* (1950) 83 CLR 1.¹

On 27 August 2006 Mowbray FM made an interim control order under Division 104 against Joseph Terrence Thomas on the grounds that: making the order would substantially assist in preventing a terrorist act; Thomas had received training from a listed terrorist organisation; and each of the obligations, prohibitions and restrictions to be imposed on Thomas by the order was reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

Thomas challenged the validity of Division 104 of the Code by commencing proceedings in the High Court to quash the interim control order on the grounds that Division 104: confers non-judicial power on a federal court contrary to Chapter III of the *Commonwealth Constitution*; insofar as it confers judicial power on a federal court, authorises the exercise of that power in a manner contrary to Chapter III of the Constitution; and is not supported by one or more express or implied heads of legislative power under the Constitution.

Legislative power

Gleeson CJ agreed with Gummow and Crennan JJ that Division 104 is supported by the defence power (s 51(vi)) and the external affairs power (s 51(xxvii)). Gleeson CJ held that the necessary criterion for the issue of a control order – protecting the public from a terrorist act – was sufficient to invoke the legislative support of the defence power, supplemented where necessary by the external affairs power.²

The definition of 'terrorist act' includes an action that: causes death, serious physical harm or serious damage to property; endangers life; creates a serious risk to public health or safety; or seriously interferes with vital public infrastructure.

Noting that modern terrorist organisations operate outside the control of states and across international boundaries, Gleeson CJ held that the defence power 'is not limited to defence against aggression from a foreign nation; ... external threats; ... waging war in a conventional sense of combat between forces of nations; and ... protection of bodies politic as distinct from the public, or sections of the public.'³

Gummow and Crennan JJ interpreted the defence power broadly as applying to both internal and external threats. English law preceding the Constitution extended defence of the realm to the 'levying of war' against the sovereign from within the realm and made that treasonous.⁴ The matters proscribed by the content of the definition

of 'terrorist act' fall 'within a central conception of the defence power'.⁵ Gummow and Crennan JJ distinguished Division 104 from the *Communist Party Dissolution Act 1950* (Cth) because the latter was:⁶

as Dixon J put it, 'not addressed to suppressing violence or disorder' and did not 'take the course of forbidding descriptions of conduct' with 'objective standards or tests of liability upon the subject...'

In separate judgments, Callinan J and Heydon J held that the defence power was not confined to external threats.⁷ Both held that Division 104 was supported entirely by the defence power.⁸

Although finding Division 104 invalid on other grounds, Hayne J agreed with the majority that the defence power is not confined to protection of the Commonwealth from external enemies and supported the provisions of Division 104 as 'laws with respect to the naval and military defence of the Commonwealth. They are laws with respect to naval and military defence because, in their particular operation in this case, they provide measures directed to preventing the application of force to persons or property in Australia that is sought to be applied for the purpose of changing the federal polity's foreign policies.'⁹

Kirby J accepted that the defence power could be enlivened by internal as well as external threats but confined the power to threats directed at the bodies politic. Because the threats Division 104 is directed towards are to people and property within the bodies politic Kirby J held that the provisions were not supported by the defence power¹⁰, the operation of which should be contained. State police power, supported where necessary by a valid reference of such powers to the Commonwealth should federal direction be required, should be sufficient to deal with the threats referred to in Division 104.¹¹ Kirby J also held that Division 104 was not supported by the external affairs power.¹²

Separation of powers

Gleeson CJ rejected the argument that by conferring power to determine what legal rights and obligations should be created rather than a power to resolve disputes about existing rights and obligations Division 104 confers non-judicial power on a federal court. Gleeson CJ also rejected the argument that the power under Division 104 was invalid because it could deprive a person of liberty on the basis of apprehended rather than past conduct.

Opposed to these arguments were bail and apprehended violence orders – 'two familiar examples of the judicial exercise of power to create new rights and obligations which may restrict a person's liberty'. An earlier example cited by Gleeson CJ was the 'ancient power of justices and judges to bind persons over to keep the peace' which Blackstone described as an example of 'preventive justice'.¹³

Gleeson CJ also rejected the argument that the wording of the power to make control orders under the Code was antithetical to judicial decision-making. Division 104 requires the relevant court to be satisfied on the balance of probabilities that the control order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act. This language was not too vague for use in judicial decision-making.¹⁴

Gummow and Crennan JJ reached the same conclusion, noting the use in Division 104 of the concept 'reasonable' – 'the great workhorse of the common law' – and the origins of the term 'reasonably appropriate and adapted' in the well-known decision of the United States Supreme Court in *McCulloch v Maryland*.¹⁵

Gleeson CJ rejected the argument that Division 104, if it did confer judicial power, required it to be exercised in a manner inconsistent with Chapter III. Although interim orders may be made *ex parte*, the procedure requires a confirmation hearing to follow, governed by the rules of evidence, with the burden of proof on the balance of probabilities being on the applicant, the provision of documents, cross-examination, argument and rights of appeal.¹⁶ Gummow and Crennan JJ reached the same conclusion.

Callinan J also rejected the plaintiff's arguments on the Chapter III issues and upheld the validity of Division 104. Heydon J agreed with Gleeson CJ, Gummow and Crennan JJ and Callinan J on the Chapter III issues.

Kirby J criticised Division 104 as an example of 'legal exceptionalism' and accepted the argument that the criteria for the exercise of the power conferred by Division 104 imposed on federal courts power which was not judicial, stating that:

the stated criteria attempt to confer on federal judges powers and discretions that, in their nebulous generality, are unchecked and unguided. In matters affecting individual liberty, this is to condone a form of judicial tyranny alien to federal judicial office in this country. It is therefore invalid.¹⁷

Hayne J ruled the legislation invalid for the same reason, expressed as follows:

To require a Ch III court to decide whether to impose upon a person obligations, prohibitions or restrictions of the kind specified in s104.5(3), by reference only to the relationship between those orders and the protection of the public from a terrorist act, would

require the court to apply its own idiosyncratic notion as to what is just. That is not to require the exercise of the judicial power of the Commonwealth.¹⁸

The likelihood of Kirby J's estimation that had the Communist Party Dissolution Bill been challenged today its constitutional validity would have been upheld by the High Court cannot be tested.¹⁹ Only time will tell whether Justice Kirby's prediction about future regard for the majority's decision in this case becomes true.

By Chris O'Donnell

Endnotes

1. [2007] HCA 33, para. [387].
2. Para. [9].
3. Para. [7].
4. Para. [140].
5. Para. [146].
6. Para. [147], citing Dixon J in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 192.
7. Callinan J at para [583]; Heydon J at para. [611].
8. Callinan J at para [585]; Heydon J at para. [649].
9. Hayne J at para. [444].
10. Kirby J at paras. [251] – [255].
11. Kirby J at para. [267].
12. Kirby J at para. [294].
13. Gleeson CJ at para. [16].
14. Gleeson CJ at para. [27].
15. Gummow and Crennan JJ at paras. [94 – 103].
16. Gleeson CJ at para. [30].
17. Kirby J at para. [322].
18. Hayne J at para. [516].
19. Kirby J at para. [386].

Key changes to the Evidence Act

Background

The *Evidence Amendment Bill 2007* (the Bill) was passed by both houses of the NSW Parliament on 24 October 2007. The Bill will commence upon proclamation, which is 'most likely' to be at least six months after assent, to give time for consultation with the legal profession in relation to the changes.¹

The Bill will make miscellaneous amendments to the *Evidence Act 1995* (NSW) (and some related acts such as the *Civil Procedure Act 2005* (NSW) and the *Criminal Procedure Act 1986* (NSW)). The amendments arise out of the collaborative report on the review of operation of the Uniform Evidence Acts of 2005 by the Australian, New South Wales and Victorian law reform commissions. The report found that the Evidence Acts were generally working well with no major structural or policy problems, although 63 recommendations for reform were made. The amendments are uniform (with some very

minor amendments) and are based on a Uniform Evidence Bill endorsed by the Standing Committee of Attorneys General on 26 July 2007. The amendments are said to 'fine tune' the law and promote harmonisation.

The amendments constitute the first thorough overhaul of the Evidence Act since it came into force in 1995 and will affect those who practise in both the criminal and civil areas.

This article is a summary of key changes and readers are referred to the text of the Bill for details of all of the changes to be made by the Bill.

Summary of key changes

Competence and Compellability

Section 13 of the Evidence Act will be repealed and replaced by a new section 13. All witnesses will be required to satisfy a new test of general competence in section 13(1).

The new test focuses on the ability of a person to comprehend and communicate. Under the new test, a person is not competent to give sworn or unsworn evidence about a fact if the person lacks the capacity to understand a question about the fact, or to give an answer to that question that can be understood, and that incapacity cannot be overcome. A person not competent to give evidence of one fact, may still be competent to give evidence about other facts (section 13(2)).

New section 13(3) provides that a person is not competent to give sworn evidence if he or she does not have the capacity to understand that he or she is under an obligation to give truthful evidence (restating the current section 13(1)). A person not competent to give sworn evidence, may be competent to give unsworn evidence if the requirements of section 13(5) are met. The existing presumption is continued, namely that a person is presumed to be competent to give evidence unless it is proven that he or she is incompetent.

A new section 13(8) will be added which provides that when a court is determining whether a person is competent to give evidence, the court may inform itself as it thinks fit, including by obtaining information from an expert.

The NSW Bar Association in its submissions commenting on an earlier issues paper opposed this change. It was noted that the common law requirements for competence were considerably more stringent and the association believed that a further weakening of the test was undesirable. The minimum standard for giving unsworn evidence is that the person understands the difference between the truth and a lie and indicates that he or she will not tell lies.

In a change that is likely to impact on the scope of the compellability exception, the Bill proposes a change in the definitions used from 'defacto spouse' to 'defacto partner' to cater for same sex couples. As a result of these changes, a 'defacto partner' will be able to object to giving evidence against their partner under section 18 of the Evidence Act.

Narrative form evidence

Previously evidence was able to be given in narrative form where a party calling the witness applied for a direction to call such evidence and the court gave the direction (section 29 of the Evidence Act). Narrative form refers to the situation where a witness stands in the witness box and speaks without being questioned, as opposed to the conventional model where the witness gives evidence in answer to questions put to the witness.

The Bill will amend section 29 to relax the requirement that leave be sought before a witness can give evidence in narrative form by providing that the court of its own motion can direct a witness to give evidence in narrative form, as well as when requested to do so by the party calling the witness.

The NSW Bar Association in its submissions opposed the relaxation proposed, submitting that there was an increased risk that a witness may give irrelevant or prejudicial evidence in this form.

The Report identified the basis for this amendment as being that it would be particularly helpful for vulnerable witnesses, such as children

and the intellectually disabled. There is, however, scope for attempts to use this section in a more wide ranging manner, for example to try to overcome difficulties or objections as to form with the evidence proposed to be led.

Improper questions in cross-examination of witnesses

Amendments to be made to section 41 of the Evidence Act provide that the court must disallow improper questions which are, amongst other things, misleading, unduly annoying, harassing, intimidating, offensive, oppressive, repetitive, or based on stereotype, as opposed to previously being permitted to disallow such questions (the new section will replicate section 275A of the *Criminal Procedure Act 1986* (NSW) which presently applies to criminal proceedings in New South Wales in any event, not section 41 of the present Evidence Act).

Leading questions

Section 37 will be amended to permit leading questions to be put to a witness in examination in chief if no objection is taken and each party is represented by an Australian legal practitioner or legal counsel (which includes a party represented by a prosecutor).

The Hearsay Rule

Section 59 of the Evidence Act will be amended to provide that the test as to what a person intended to assert by a representation is based on what a person in the position of the maker of the representation can reasonably be supposed to have intended, having regard to the circumstances in which the representation was made (this is to overcome the position taken by the court in *R v Hannes* (2000) 158 FLR 359).

Section 60 of the Evidence Act will also be amended to clarify that the changes to section 59 in relation to 'intention' will also apply to section 60.

The new section 60(2) of the Evidence Act will confirm that section 60 permits evidence admitted for a non-hearsay purpose to be used to prove the facts asserted in the representation, whether or not the person had first-hand knowledge based on something they said, heard or otherwise perceived (this amendment is in response to the High Court's decision in *Lee v The Queen* (1998) 195 CLR 594).

Section 60(3) will ensure that evidence of an admission in criminal proceedings that is not first hand, will be excluded from the scope of section 60.

The NSW Bar Association in its submissions opposed the change to section 60 of the Evidence Act, taking the view that section 60 should remain restricted to first hand hearsay, as the proposed amendment would reverse the High Court's decision in *Lee v The Queen*. The policy consideration behind the hearsay rule was that, the further the evidence gets from direct testimony of eye witnesses, the greater the likelihood of it being unreliable and the more difficult to test by cross-examination.

Changes will also be made to s64 (the exception to the hearsay rule if the maker is available in civil proceedings), to s65 (the exception to the hearsay rule if the maker is not available in criminal proceedings) and to section 66 (the exception to the hearsay rule if the maker is available in criminal proceedings).

Section 72 (exception to the hearsay rule for contemporaneous statements about a person's health etc) is to be moved to Division 2 of Part 3.2 and re-enacted as section 66A to make it clear that the exception only applies to first-hand hearsay.

Changes to the Opinion Evidence rule

Two reforms are implemented: the first to enable a court to use expert opinion to inform itself about the competence of a witness (by the insertion of the new s13(8) – addressed above), and the second to provide expressly by the insertion of a new s79(2) that an expert for the purposes of s79 of the Evidence Act includes persons with specialised knowledge of child development and behaviour and/or development and behaviour of children who are victims of sexual offences.

The NSW Bar Association in its submissions was concerned that it was undesirable that this field of knowledge was singled out for specific legislative acknowledgment as an admissible field. The field of knowledge that was 'crying out' to be singled out was the field of expert evidence about the dangers of mistaken identification.

It was also concerned that this proposed amendment (to the extent that it may allow an expert to give evidence that there may be reasons why a complainant delayed making a complaint or gave inconsistent accounts) comes close to permitting a witness to express an opinion on the fact that the complainant is telling the truth and may usurp the function of the jury.

Admissions in criminal proceedings

A new s60(3) will be inserted to make it clear that s60 (exception to the hearsay rule for evidence that is admitted for a non-hearsay purpose) does not apply to evidence of an admission in a criminal proceeding. This gives effect to the recommendation in the Report that admissions in criminal proceedings that are not first-hand are excluded from the ambit of sections 60 and 82 of the Evidence Act.

Section 85 of the Evidence Act will be amended by the insertion of a new s85(1) which broadens the scope of the section so that admissions made 'to or in the presence of, an investigating official who at the time was performing functions in connection with the investigation of the commission, or possible commission, of an offence' are covered (cf. the narrow view of the previous section taken by the High Court in *Kelly v The Queen* (2004) 218 CLR 216).

Tendency and coincidence evidence

The tendency rule in s97 will be amended to remove double negatives and make the section easier to understand. But otherwise, no substantive changes are being made.

The amendments to s98 of the Evidence Act will reduce the threshold for admitting coincidence evidence so that what is required is a consideration of any similarities in events and/or circumstances, rather than the existing threshold requiring that there are similarities in events and/or circumstances.

Credibility of witnesses

New sections 101A and 102 will be inserted into the Evidence Act.

The current credibility rule in section 102 of the Evidence Act provides that evidence that is relevant only to a witnesses' credibility is not

admissible. This section was interpreted literally by the High Court in (2001) 207 CLR 96 as meaning that evidence relevant in a proceeding in some other way other than to the witness' credibility was not caught by the section (even though it is inadmissible for that other purpose).

The new sections were inserted as a response to the decision in *Adam*. They provide that evidence going to credibility that is relevant for another purpose but which is inadmissible for that purpose, will not be admissible for credibility purposes.

Privilege against self incrimination

Section 128 will be replaced and the new s128(1) will expand the grounds of objection to cover not only particular evidence, but evidence on a particular matter. A certificate can be relied upon despite any challenge, quashing or calling into question a ground of the decision to give or the validity of the certificate, although a certificate in relation to a proceeding does not apply to a retrial for the same offence (cf. the position under the old section taken in *Cornwell v The Queen* [2007] HCA 12).

A new s128A will be inserted and will provide that privilege against self incrimination applies to complying with disclosure orders, such as a search order (*Anton Piller*), freezing order (*Mareva*) or other order under Part 25 of the *Uniform Civil Procedure Rules 2005* in civil proceedings, although the privilege cannot be claimed over information in a document that was in existence before the order was made and is an annexure or exhibit to a 'privilege' affidavit (the affidavit containing so much of the information required to be disclosed to which objection is taken which is provided in a sealed envelope to the court)(s128A(9)). A new section 131A will be inserted to extend the privilege against self incrimination to a 'disclosure' requirement, such as in answer to a subpoena, pre-trial discovery, non-party discovery or notice to produce.

Advance rulings on evidentiary issues

A new s192A will be inserted to make it clear that the court has the power to make an advance ruling or finding before the evidence is adduced in respect to the admissibility or use of evidence proposed to be adduced, the operation of the Evidence Act or another law in relation to evidence proposed to be adduced or leave or the giving of leave or a direction in respect of the Evidence Act under s192, where it is appropriate to do so.

There is potential for an application for an advance ruling to be used tactically to identify in advance whether a key piece of evidence will be admitted in the present form at the hearing or whether further efforts will be required to obtain the evidence in admissible form.

Warnings and directions to the jury

Section 165 is amended and new sections 165A and 165B will be inserted which deal with warnings in relation to children's evidence and delays in prosecution. These changes clarify that a trial judge is not to give a warning about the reliability of the evidence of a child solely on account of the age of the child. The courts are to treat child witnesses the same as adult witnesses when determining whether a warning is appropriate and are prohibited from suggesting that children as a class are unreliable witnesses or their evidence is

inherently less credible. They clarify the scope of information to be given to the jury about the forensic disadvantage a defendant may have suffered because of the consequences of delay, and when such information should be given (only if a party applies for it and there is an identifiable risk of prejudice to the accused).

The Bar Association in its submissions took the position that it was preferable to leave to the courts the development of appropriate directions in sexual assault cases where there was a long delay in complaint.

Evidence of traditional law and custom excepted from the hearsay rule

New sections 72 and 78A will be inserted to create exceptions to the hearsay and opinion evidence rules for evidence of a representation about the existence, non-existence or content of the traditional laws and customs of an Aboriginal or Torres Strait Islander group. A definition of 'traditional laws and customs' will be inserted into the Dictionary. Reliability of the evidence is now the key issue.

Proof of voluminous or complex documents and changes in relation to electronic communications

Voluminous documents or complex documents are presently admissible in the form of a summary pursuant to section 50 of the Evidence Act provided that an application had been made for this leave prior to the hearing. The Bill amends this section so that there is no longer any requirement that the leave be obtained prior to the hearing.

A new definition of 'electronic communications' has been inserted into the Dictionary (with the same meaning as it has in the *Electronic Transactions Act 2000* (NSW)). A new section 71 is inserted into the Evidence Act by the Bill which broadens the technologies which fall within the exception to the hearsay rule presently contained in section 71.

Amendments relating to lawyers and their clients and client legal privilege

Previously, a 'lawyer' was defined in the Dictionary as a barrister or solicitor. A new definition of 'lawyer' will be inserted into s117(1) of the Evidence Act with various definitions of categories of lawyers which is said to be consistent with the definition used in national uniform legislation. The definition of 'client' has also been expanded to include, for example, someone who employs a lawyer.

By reason of changes to the definition of 'lawyer' used in s117(1),

client legal privilege will extend to advice provided by an 'Australian lawyer' which will be defined as per this term in the *Legal Profession Act 2004* (NSW) and includes a lawyer admitted to practice but who does not necessarily have a practising certificate, and will extend to employees and agents of a 'lawyer'.

The privilege conferred by s118 of the Evidence Act (legal advice privilege) will be extended to confidential documents prepared by a 'client, lawyer or other person' i.e. someone other than a lawyer (for e.g. an accountant or consultant) for the dominant purpose of the lawyer providing legal advice to the client. The effect of this change is to continue the trend of moving away from a distinction between litigation privilege and legal advice privilege. In respect of documents prepared by a third party, as a result of the proposed amendments it will no longer be necessary to bring the documents within the exception in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217 in order for legal advice privilege to be claimed.

An important change has been made to the waiver of privilege provisions in s122 of the Evidence Act. Now loss of legal privilege will occur where a client or party has acted in a way that is inconsistent with the maintenance of the privilege, whereas the previous test required the substance of the evidence to have been knowingly and voluntarily disclosed to another person. This new section moves the statutory test under the Evidence Act closer to the common law test for loss of privilege set out in *Mann v Carnell* (1999) 201 CLR 1.

Conclusion

For any who are still coming to terms with the uniform Evidence Acts, the new changes may cause further confusion. For others, the changes will clarify and change the law in a number of important respects. The full impact of the changes will not be known until the new provisions have been tested in practice. The precise terms of any savings of transitional provisions will be contained in the regulations which are not yet available.

It is interesting to note that in the Second Reading Speech for the Bill, the NSW Parliamentary Secretary said that the Commonwealth Government had taken the position that it will not implement a number of the changes in the Uniform Evidence Bill and so the Commonwealth and State acts on evidence will further diverge, assuming there is no change of position by reason of, for example, a change of Commonwealth government. The major areas of difference have been identified as being that the Commonwealth will not change the definition of "defacto spouse" to "defacto partner" and will not make the changes to the hearsay rule to make evidence of Aboriginal and Torres Strait Island traditional law and custom an exception to the hearsay rule. This will be of relevance where cases are conducted in the Federal Court. There is also no present indication as to when the Commonwealth Evidence Act will be amended in line with the recommendations accepted by the Standing Committee of Attorneys General.

By Julie Soars

Endnotes

a. Legislative Review Committee, Legislative Review Digest No. 4 of 2004, 23 October 2007 p34

Sentencing in Commonwealth drug cases

Two recent decisions of the New South Wales Court of Criminal Appeal have provided guidance for the appropriate range of sentences in large Commonwealth drug importations.

Regina v To Si Thanh [2007] NSWCCA 200 was a Crown appeal against the sentence imposed in the District Court after the respondent was convicted of involvement in a large methylamphetamine importation. The trial judge found that *To* had a managerial role in the importation and should be sentenced as the Australian principal. The offender was originally sentenced to imprisonment for 17 years with a non-parole period of 10½ years. This was increased on appeal to 25 years imprisonment with a non-parole period of 15 years.

The case is instructive because of the detailed examination of sentencing history and considerations in this type of offence.

Hulme J analysed many earlier decisions from paragraph 17 onwards. Hall J who disagreed a little with the majority regarding the ultimate non-parole period to be fixed, also considered many earlier decisions in particular in the part of his judgment headed 'Sentence Patterns' beginning at paragraph 112. The court was of the view that a head sentence of 25 years imprisonment was appropriate given that there were no particular discounts for a guilty plea or for other matters apart from some general subjective factors.

R v Lee [2007] NSWCCA 234 contains an even more detailed, Australia-wide schedule of comparative cases following the court's request to the Commonwealth director of public prosecutions for a summary of sentences imposed in drug importation cases by courts in New South Wales and the other states.

A handy table containing this information is set out in paragraph 36 of the judgment of McClellan CJ at CL following his Honour's consideration of the relevant principles involved which commences at paragraph 23.

Lee was convicted at trial in the District Court of involvement in an importation of over 76kgs pure of heroin. The sentence imposed by the trial judge was complicated a little because of time spent by the offender in prison in Hong Kong awaiting extradition to Australia. Effectively he was imprisoned for 18 years with a non-parole period of 11 years.

The Court of Criminal Appeal, after considering the sentencing patterns and other matters, found that the sentence imposed was quite inadequate for a person who played a senior role in a very large drug importation. On appeal Lee was sentenced to a non-parole period of 18 years and 11 months with an additional term of eight years and six months.

As with *To*, the ultimate sentence imposed by the Court of Criminal Appeal followed a successful Crown appeal. But for that fact, the Court was of the view that a non-parole period significantly in excess of 20 years was appropriate. The objective criminality and amount of drugs involved warranted a heavy sentence, toward the top of the range but not life imprisonment (following *R v Stanbouli*: (2003) 141 A Crim R 531).

By Keith Chapple SC



Capital punishment and Australian foreign policy

By Michael Fullilove*

What is the problem?

Australia is an abolitionist country. Both the Australian Government and the Opposition are opposed to capital punishment. Australia engages in modest advocacy against the death penalty but most of Canberra's efforts are directed toward cases involving Australian citizens. These are likely to continue to occur: our closest Asian neighbours retain the death penalty, and Australian nationals will probably continue to commit criminal acts carrying this penalty. Situations involving Australians often do violence to bilateral relations. For example, the looming execution of Van Tuong Nguyen last year led to calls from Australian commentators for trade and business sanctions against Singapore, and charges of hypocrisy being levelled against Australia in the regional press.

The problem, then, is twofold: Australian diplomacy is making little progress toward universal abolition, a bipartisan national policy; and our bilateral relationships are being damaged because of our perceived hypocrisy on the issue.

Capital punishment in Asia and the world

The death penalty is an ugly feature of the world in which we live. Seventy-one countries and territories retain and use the death penalty. Accurate numbers are impossible to obtain because many countries refuse to produce official statistics on death sentences and executions. However, Amnesty International estimates that at least 2,148 people were executed in 2005 and 5,186 people were sentenced to death. The global death row accommodates at least 20,000 individuals. These are minimum figures: the actual totals are probably much higher.¹

The Asian region, in which Australia does much of its commercial and diplomatic business, is world's best practice when it comes to executing people. Fifteen Asian states retain the death penalty for ordinary crimes: Bangladesh, China, India, Indonesia, Japan, North Korea, South Korea, Laos, Malaysia, Mongolia, Pakistan, Singapore, Taiwan, Thailand and Vietnam.² China and Singapore in particular have distinguished themselves. Public reports indicate that at least 1,770 people were executed in China last year, which represents more than 80 per cent of known executions worldwide. (Again, the true number is likely to be much higher than this.) In the period 1999–2003, Singapore boasted by far the highest per capita execution rate in the world: 6.9 executions per one million people. Since 2000, methods of execution in Asia have included hanging (Japan and Singapore), shooting by firing squad or with a single bullet to the back of the head (China, Taiwan and Vietnam), and lethal injection (China and Thailand).³

However, the news is not all bad for those who oppose capital



A woman places a yellow flower near a large photo of Australian drug trafficker Nguyen Tuong Van during a vigil in Sydney, 02 December 2005. Photo: Greg Wood / NewsPix

punishment; indeed, progress is being made. Since 1990, over forty countries have abolished the death penalty for all crimes. In our own region, five Asian states have abolished the death penalty since 1989: Cambodia (1989), Nepal (1997), Timor-Leste (1999), Bhutan (2004), and the Philippines, where President Gloria Macapagal-Arroyo signed a bill outlawing the death penalty on 24 June 2006. In addition, Brunei Darussalam, Maldives, Myanmar and Sri Lanka are regarded as abolitionist in practice, even if not at law.⁴

Why is the death penalty an issue for Australia?

The persistence of capital punishment in our region and around the world is an issue for Australia, and not only when the condemned person is an Australian national.⁵ In the case of Australians, of course, the case is black and white. All governments have a consular responsibility to assist their nationals when they are in difficulties abroad, especially when their lives are at risk. Shortly after the execution of Nguyen Tuong Van last December, Foreign Minister Alexander Downer stated the position plainly: 'We will always make representations on behalf of Australian citizens who are given the death penalty. We will always seek clemency on their behalf.'⁶

Van Nguyen was the first Australian to be executed in Singapore since its independence and the first to be executed overseas since 1993. However he is unlikely to be the last. Currently, at least four Australian nationals are at serious risk of execution:⁷

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- ◆ Andrew Chan and Myuran Sukumaran of the Bali Nine, sentenced to death in February for attempted heroin smuggling, are appealing their convictions. Recent comments by Indonesian President Susilo Bambang Yudhoyono indicated that clemency is unlikely to be awarded to convicted drug traffickers.
- ◆ Trinh Huu, sentenced to death last December in Vietnam for drug trafficking, had his appeal rejected in April. He has applied for clemency.
- ◆ An unnamed Australian in Lebanon is facing murder charges which could lead to a sentence of death. The case has not yet gone to trial.

Furthermore, other Australians are likely to join them on death row. Many of our closest neighbours, including our key source and transit countries, retain the death penalty for drug trafficking and other serious offences. Given the frailties of human nature, Australian nationals are likely to commit these crimes – in particular the carriage of commercial quantities of illegal drugs – and to be called to account for them.

Quite apart from Australia's specific responsibility in the case of Australians facing the death penalty, however, we should also be active on the question of universal abolition, for reasons of both values and interests.

State-sanctioned killing clearly engages Australian values. Opponents of capital punishment make a variety of persuasive arguments: that it offends human dignity; that it brutalises the societies which employ it; that innocent people will be executed because of the inability of legal systems (especially, but certainly not only, in the developing world) to eliminate error and prejudice; that it causes unacceptable suffering to the condemned and their innocent loved ones; that it does not deter the commission of crime. One of the most compelling historical critiques of capital punishment was George Orwell's account of a hanging in colonial Burma. Walking behind the condemned man on the way to the gallows, Orwell noticed him step slightly aside to avoid a puddle on the path:

It is curious, but till that moment I had never realized what it means to destroy a healthy, conscious man. When I saw the prisoner step aside to avoid the puddle, I saw the mystery, the unspeakable wrongness, of cutting a life short when it is in full tide. This man was not dying, he was alive just as we were alive. All the organs of his body were working – bowels digesting food, skin renewing itself, nails growing, tissues forming – all toiling away in solemn foolery. His nails would still be growing when he stood on the drop, when he was falling through the air with a second to live. His eyes saw the yellow gravel and the grey walls, and his brain still remembered, foresaw, reasoned – reasoned even about puddles. He and we were a party of men walking together, seeing, hearing, feeling, understanding the same world; and in two minutes, with a sudden snap, one of us would be gone – one mind less, one world less.⁸

Australian public opinion is divided on the merits of capital punishment. Poll results vary depending on the question asked and the salience of the issue at the time of polling. For example, in November 2005,

Roy Morgan found that only 27 per cent of respondents believed the penalty for murder should be death – the lowest figure ever recorded and half of what it was a decade ago. On the other hand Morgan recorded that 47 per cent of Australians believed that Van Nguyen's death penalty should be carried out. In August 2003, Newspoll found that a majority of respondents supported the reintroduction of capital punishment for terror attacks committed in Australia.⁹

Ultimately, it is not necessary to litigate the pros and cons of the issue. We do not start with a blank sheet. The Australian Government is opposed to capital punishment. The last Australian executed in this country was Ronald Ryan in 1967. The death penalty has been abolished by the Commonwealth of Australia and all its States and Territories. Canberra has acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), which prohibits the execution of any person within the jurisdictions of the states party to it.¹⁰ Official documents set out Australia's opposition to the death penalty on the universal ground that it is 'an inhumane form of punishment which violates the most fundamental human right – the right to life.' We consistently sign up to UN resolutions calling upon all states to abolish it. Furthermore, at the political level an effective consensus exists that capital punishment is bad and Australia should work against it. Prime Minister John Howard has said 'I don't believe in capital punishment' and Foreign Minister Alexander Downer has confirmed 'the Australian Government has a longstanding policy of opposition to the death penalty.' The alternative prime minister Kevin Rudd, has stated that Labor is opposed to the death penalty worldwide. The other political parties concur.¹¹

Unless and until our elected representatives decide otherwise, the settled policy of the Australian Government is to oppose capital punishment. Successive governments have indicated that the death penalty offends Australian values – and as Prime Minister Howard has rightly said (albeit in another context): 'in the end a nation's foreign policy must be values-based.'¹²

Maintaining our opposition to the death penalty in relation to foreigners as well as Australians conforms with our values. It also serves our national interests.¹³ Four Australians currently sit on death row and in all likelihood, others will join them there. The best position from which to petition foreign governments on behalf of our nationals is that of consistent and strong opposition to the death penalty regardless of the nationality of the condemned. Such a stance would enable the government to deal with the issue positively and continually, rather than negatively and sporadically. It would increase the momentum toward universal prohibition and bulletproof us against claims of hypocrisy.

If, on the other hand, we create a perception that we are concerned only or principally with capital punishment when it involves Australians, then we open ourselves to accusations of special pleading. Indeed, these accusations are already being made. In the lead-up to Van Nguyen's execution, for instance, the Singaporean and Malaysian press contained statements to the effect that, as a commentator for The Straits Times put it, 'Australians... practise double standards.' 'Singaporeans live under the very same laws that convicted Nguyen', stated another columnist. 'Are the Australian government and people

suggesting that because he carried an Australian passport, he is therefore above our laws?¹⁴ Anecdotal evidence confirms that this perception exists in a number of southeast Asian countries. The best way to disarm these kinds of critics is to act consistently.

It is understandable and appropriate that Australia places a particular priority on the welfare of its own citizens. It would be naïve to imagine that any national government would ever be indifferent to the kind of passport held by an individual facing execution – nor should it be. However, vigorous opposition to capital punishment in general is likely to bolster a government's credibility in opposing certain specific executions.

Australians on death row

If it accords with Australian values and serves Australian interests to lobby for our nationals on death row and pursue universal abolition – and furthermore it is our stated policy to do so – then how well are we performing? The answer is: fairly well on the consular side, and fairly modestly on the universal side.



Accused drug smuggler Myuran Sukumaran at the Denpasar Courthouse for trial. The prosecution has asked for the death sentence for his role as ring leader. Photo: Rante Ardiles / Newspix

In relation to Australian nationals, the Department of Foreign Affairs and Trade (DFAT) always seeks clemency for Australians sentenced to death. It takes a pragmatic approach to each case, using the arguments it judges are most likely to find success. In some cases, for example, the emphasis is put on an individual's personal circumstances; in others, on the strength of the bilateral relationship. Generally DFAT prefers high-level political representations to interventions in local judicial processes, unless there is strong evidence that due process has not been followed. Representations are made by senior officials, the Foreign Minister, and on occasion, the highest officeholders in the land. In the case of Van Nguyen, for example, several dozen written and personal representations were made to the president, prime minister and other senior ministers of Singapore by the Australian governor-general, prime minister, foreign minister, trade minister, attorney-general, justice minister and parliamentary secretary for

There was criticism of the government's handling of Van Nguyen's case, but it is hard to imagine what more Canberra could have done that would have altered Singapore's implacable, clinical determination to put him to death.

foreign affairs, as well as our high commissioner in Singapore and other officials.¹⁵

It is not easy to judge the effectiveness of diplomacy that is often quiet. Certainly it is vigorous, as one would expect, and as the political imperative requires. There was criticism of the government's handling of Van Nguyen's case, but it is hard to imagine what more Canberra could have done that would have altered Singapore's implacable, clinical determination to put him to death. Furthermore, our consular efforts have their successes as well as failures: earlier this year, for example, the president of Vietnam commuted the death sentences of Australian citizen Mai Cong Thanh and Australian permanent resident Nguyen Van Chinh after a full-court diplomatic press by Canberra, including personal lobbying by Mr Howard.¹⁶

As Van Nguyen's execution loomed last year, a number of politicians suggested that Canberra should up the ante by interrupting bilateral trade or limiting the Australian activities of Singaporean businesses. Liberal backbencher Bruce Baird MP, for example, argued the government should take Singapore's behaviour into account when considering whether Singapore Airlines should be given access to the Sydney-Los Angeles air route; Greens Senator Kerry Nettle raised the possibility of trade sanctions and even military sanctions.¹⁷ These kinds of prescriptions are flawed. They would fail the effectiveness test, as they would be highly unlikely to save any Australian lives. Sovereign governments tend not to take well to bullying, especially by a middle-sized power. They would damage other Australian interests and make us a less effective international player. Finally, their limitation to cases involving Australian citizens would undermine the moral strength of our abolitionist position.

Universal abolition

In relation to Australians on death row, then, the government is reasonably effective. In relation to universal abolition, however, we do less than we should.

Certainly, we oppose the death penalty at the multilateral and bilateral levels. We join other abolitionist states in co-sponsoring an annual UN resolution calling upon all states to abolish or limit the death penalty.¹⁸ At the request of the European Union, which takes the lead on these

We need to get our death penalty rhetoric right. We also need to create some diplomatic reality behind it. The Government should signal that universal abolition is an Australian diplomatic priority and devise a strategy to advance the issue.

resolutions, Australia has lobbied Pacific Island countries to join the ranks of the co-sponsors.

From time to time Australia also makes bilateral representations on behalf of non-Australians on death row, usually on the basis of information provided by Amnesty International. Sometimes those representations are made within the context of the ongoing human rights dialogues Australia maintains with China, Vietnam and Iran. Current and former Australian diplomats involved with the making of such representations differ on their value. Speaking off the record, one said that representations are 'very formulaic... the point is to make no waves but to be able to tell the non-governmental organisations (NGOs) we've done it.' Another observed that the making of representations gives the Foreign Minister a story to tell the human rights NGOs at his biannual meeting with them. A third official, by contrast, was more positive, saying the effect of representations is in the nature of 'water dripping on stone.' He argued that 'a structured diplomatic exchange' can initiate a useful discussion, although it depends on whether the official 'reads it off a sheet or delivers it with conviction'.

In sum, the Australian Government serves in the ranks of the anti-death penalty forces. However the issue is not accorded a high diplomatic priority. Few observers would identify Canberra as a leader in the international abolition movement.

What should be done?

Australia should take universal abolition more seriously and accelerate its efforts on this bipartisan policy issue. There are two steps Australia should take.

1. Be consistent in our public comments

In the advocacy of human rights, consistency is a virtue. The Australian international relations scholar R J Vincent observed that 'finding its place in the empire of circumstance is more damaging to human rights policy than it might be to other items of foreign policy, because... it is on the substance and appearance of even-handedness that a successful human rights policy depends.' Of course, true consistency is only possible for angels, not governments. No Australian government will ever be as exercised by the execution

of someone from Mumbai as it is by the execution of someone from Melbourne. Different circumstances require different approaches.¹⁹ That said, a general consistency of direction is essential.

However it is difficult to discern such consistency in the recent comments of Australian politicians about the death penalty; instead, we have seen blatant and apparently deliberate departures from Australia's official position. For example, in February 2003 Mr Howard said that if the perpetrators of the 2002 Bali bombing, which killed 202 people including 88 Australians, were sentenced to death there 'won't be any protest from Australia'. The following month the Prime Minister told America's Fox 9 News Channel that he would welcome the execution of Osama Bin Laden.²⁰ In August 2003, the then Labor frontbencher Mark Latham rejoiced in the sentencing of Bali bomber Amrozi to death by firing squad: 'I think it's a day where all political parties should be celebrating, thankful for the fact that one of the bastards has been got and he's going to face the full weight of the law in the jurisdiction where this act of evil was committed.'²¹

The capture of Saddam Hussein in December 2003 produced a rare example of unanimity between Mr Latham, the newly elected Opposition Leader, and his opponent Mr Howard, who both declared they would not object to his execution.²²

This kind of inconsistency erodes the abolitionist underpinnings of our stance. It makes us look hypocritical when we ask for our own people to be spared. As a commentator remarked in *The Straits Times* in December 2005:

those who are most critical of the Singapore authorities in the Nguyen case are silent when it comes to Amrozi, who is on death row in Indonesia for his role in the Bali bombing which killed many Australians... Is this a case of double standards – death for Amrozi because he killed Australians, leniency for Nguyen because he is Australian? Why is the death penalty 'barbaric' in one case, but not the other?²³

Opposing capital punishment in all cases, including the hardest cases, buttresses our position in relation to Australians on death row. Our political leaders should ensure that Australia's principled opposition to the death penalty is reflected in their public comments. They should resist the temptation to play to the gallery, even in relation to individuals who have caused great suffering to Australians and in relation to important friends and allies such as Indonesia and the United States.

2. Initiate a regional coalition against the death penalty

We need to get our death penalty rhetoric right. We also need to create some diplomatic reality behind it. The Government should signal that universal abolition is an Australian diplomatic priority and devise a strategy to advance the issue.

One approach would be to work more closely with the Europeans, who form the most strictly abolitionist international bloc. Some Australian officials criticise the Europeans' approach as 'press release diplomacy', but it is impossible to deny the impact that their sustained advocacy has had on the issue generally or in particular cases such as the Philippines and Turkey, which limited its application of the death penalty in order to boost its case for entry to the European Union.

However a better approach would be for Australia to start its work in Asia, the region where we deploy our greatest diplomatic resources and which also happens to be the location of most of the world's executions. Australia has an activist diplomatic tradition within the region and some experience in building constituencies for particular initiatives, as demonstrated by our work on the Cambodian peace process and the establishment of the Asia-Pacific Economic Cooperation forum (APEC). Australia should initiate a regional coalition of Asian states opposed to the death penalty, in order to build on the momentum created by its abolition in five Asian jurisdictions in the past decade. If we make common cause with Cambodians, Nepalese, East Timorese, Bhutanese, Filipinos and others, we will increase our points of influence and decrease the ability of death penalty proponents to accuse us of neo-colonialism.

The work of the coalition should be guided by the principles of effectiveness and prudence. The issuing of loud condemnations and the indiscriminate raising of trade and military sanctions would leave Australia poor and friendless, and furthermore would be unlikely to save a single life. Instead we should look for creative approaches to nudge regional countries toward abolition.

There are a number of ways to structure the coalition's work, none of it absolutist in tone. Megaphones need not be employed. We may find it politic to focus our resources on *de facto* abolitionist countries such as Sri Lanka, and seek to move them up the spectrum towards formal abolition. A particular opportunity exists in the case of South Korea, which has not executed anyone since 1998 but maintains a death row of sixty-odd individuals. There is a growing movement in South Korea to abolish capital punishment in favour of life imprisonment without parole, which is supported by former President Kim Dae-jung and was kicked along this year by the Justice Ministry's announcement that it will study the case for abolition. A similar debate is stirring in Malaysia, led by the Bar Council and a Cabinet Minister.²⁴ Ultimately this issue will be decided in Seoul and Kuala Lumpur, of course, but a regional grouping may be able to influence the thinking in those and other capitals.

There are other strategies we could employ, all of them more nuanced than simply demanding universal abolition immediately. For example, the coalition could encourage retentionist countries to:

- ◆ Announce a moratorium on executions as part of a move toward complete abolition;
- ◆ Restrict the number and type of offences for which capital punishment is imposed;
- ◆ Abolish mandatory death penalties (such as the one according to which Van Nguyen was executed);
- ◆ Release comprehensive official statistics about their use of the death penalty;
- ◆ Guarantee that death sentences will not be carried out on children, pregnant women, new mothers, or the insane; and that it will only be applied after a fair trial, and when the individual's guilt has been established by clear evidence, leaving no room for alternative explanation;

- ◆ Institute safeguards to protect the rights of those on death row, for example the right to appeal to a court of higher jurisdiction, the right to seek a pardon or commutation, and the right not to be executed pending any such appeal.²⁵

The regional coalition should be inter-governmental in nature, but the government could also consider appointing a high-level advisory body composed of eminent people. An Australian example of this model was the Keating Government's Canberra Commission on the Elimination of Nuclear Weapons, whose membership included Robert McNamara, Michel Rocard, Richard Butler and Robert O'Neill and which produced an impressive report in 1996.²⁶ An example which achieved considerably more success was Canada's International Commission on Intervention and State Sovereignty (ICISS), which was co-chaired by former Foreign Minister Gareth Evans and whose membership included Michael Ignatieff, Fidel Ramos and Ramesh Thakur. The ICISS's highly influential report, *The Responsibility to Protect*, argued for the existence of an emerging norm, after Somalia, Bosnia-Herzegovina, Rwanda and Kosovo, that a collective international responsibility to protect civilians exists in the case of genocide, ethnic cleansing and widespread violations of human rights. That idea has been embraced widely and was adopted by national heads of government at the UN's 2005 World Summit in New York.²⁷ A high-level advisory group of this kind could generate ideas and provide political cover for the regional coalition.

Conclusion

By being inconsistent and declaratory about capital punishment, we look hypocritical and weak. Stepping up our efforts toward universal abolition, by contrast, would not only be the right thing to do but the smart thing. If we put our shoulder to this wheel, we may even be able to move it a little; certainly, wheels rarely move without pushing.

Australia is an effective advocate for our nationals on death row. However, we should accelerate our efforts on comprehensive abolition, in two ways:

- ◆ Australian political leaders should bring some consistency to their rhetoric on the death penalty; and
- ◆ Australia should initiate a regional coalition against capital punishment. In the past decade five Asian states have done away with the death penalty. In partnership with abolitionist Asian states, we should devise creative ways to nudge others toward abolition.

Speaking with one voice on capital punishment and leading from the front would increase our chances of making a difference. It would also disarm those regional critics who charge that Australia cares only about its own. In other words a forward-leaning policy would conform with Australian interests as well as Australian values. It would be the smart thing to do as well as the right thing.

Notes

1. This article uses statistics from Amnesty International (AI), which are generally regarded as being authoritative and up-to-date: see AI, Facts and figures on the death penalty : <http://web.amnesty.org/pages/deathpenalty-facts-eng>; Abolitionist and retentionist countries: <http://web.amnesty.org/pages/deathpenalty-countries-eng>. United Nations (UN) estimates contain marginally different country counts, based on

- a different definition of countries that are de facto abolitionist: see The question of the death penalty. Report of the Secretary-General to the UN Economic and Social Council, E/CN.4/2006/83, 10 February 2006: <http://www.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>.
2. 'Asia' is defined as northeast, south and southeast Asia. AI, Abolitionist and retentionist countries: <http://web.amnesty.org/pages/deathpenalty-countries-eng>.
 3. AI, Facts and figures on the death penalty: <http://web.amnesty.org/pages/deathpenalty-facts-eng>; The question of the death penalty, Seventh quinquennial report of the Secretary-General to the UN Economic and Social Council, 9 March 2005, E/2005/3: <http://www.un.org/docs/ecosoc/documents.asp?id=880>, table 2 and paragraph 48. Earlier this year it was reported that a Chinese legal scholar had estimated, based on information from local officials and judges, that approximately 8,000 people are executed in China each year: see China's world record – 8,000 dead? 1 March 2006: <http://asiadeathpenalty.blogspot.com/2006/03/chinas-world-record-8000-dead.html>.
 4. The question of the death penalty. Report of the Secretary-General to the UN Economic and Social Council, E/CN.4/2006/83, 10 February 2006, <http://www.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>; AI, Abolitionist and retentionist countries: <http://web.amnesty.org/pages/deathpenalty-countries-eng>. AI defines 'abolitionist in practice' as including countries which retain the death penalty but have not executed anyone for a decade and are believed to have a policy or established practice of not carrying out executions. On the Philippines, see David Cagahastian, Bill abolishing death penalty signed – all death sentences now commuted to life, Manila Bulletin, 25 June 2006.
 5. This Policy Brief examines capital punishment in Australian foreign policy. It does not deal with the related issues of international criminal cooperation, for example extradition, mutual legal assistance and police-to-police cooperation.
 6. House of Representatives Hansard, 13 February 2006, p.3: <http://www.aph.gov.au/hansard/rep/daily/dr130206.pdf>. See also What we do: <http://www.dfat.gov.au/dept/whatwedo.html>.
 7. Other Australians are also in danger, although the risk is less immediate than for these four. Dr Aggrey Kiyingi is on trial for murder in Uganda, but it had been thought that if convicted he would be unlikely to receive the death penalty. Recent media coverage, however, appears to indicate that execution is a real possibility. Henry Chhin is serving a 'suspended death sentence' in China, which will probably be reviewed in September 2007 and either commuted or carried out.
 8. George Orwell, 'A hanging', in Shooting an elephant and other essays. London, Secker and Warburg, 1953, pp.13-14. See also Albert Camus, Reflections on the guillotine. Michigan City, Fridtjof-Karla Publications, 1959; Arthur Koestler, Reflections on hanging. London, Victor Gollancz, 1956; Hugo Adam Bedau and Paul G. Cassell, eds,
- Debating the death penalty: should America have capital punishment? The experts on both sides make their best case. New York, Oxford University Press, 2004.
9. Roy Morgan, Australians divided over hanging of Van Nguyen, Finding No. 3947, 1 December 2005: <http://www.roymorgan.com/news/polls/2005/3947/>; Steve Lewis, Terrorists should die: poll – majority in support of Amrozi execution, The Australian, 19 August 2003, p.1. See also Patrick Carlyon, Swinging voters, The Bulletin, 1 March 2006.
 10. Second Optional Protocol to the International Covenant on Civil and Political Rights: http://www.unhchr.ch/html/menu3/b/a_opt2.htm. Australia acceded to the Protocol on 2 October 1990, however it has not yet been incorporated into Australian domestic law by an Act of the Australian Parliament.
 11. Department of Foreign Affairs and Trade, Human Rights Manual. Canberra, Commonwealth of Australia, 2004, p.33: http://www.dfat.gov.au/hr/hr_manual_2004/hr_manual.pdf; John Howard, Interview with Neil Mitchell, Radio 3AW, 2 December 2005: <http://www.pm.gov.au/news/interviews/Interview1709.html>; Alexander Downer, House of Representatives Hansard, 14 February 2006, p.3: <http://www.aph.gov.au/hansard/rep/daily/dr140206.pdf>; Kim Beazley, Interview with Philip Clark, Radio 2GB, 14 February 2006: <http://www.alp.org.au/media/0206/riloo141.php>;
- Kevin Rudd, Doorstop interview, 4 December 2005: <http://www.alp.org.au/media/1205/dsifastra040.php>; see also Nicola Roxon, Call to action on anniversary of Death Penalty Protocol, media statement 1 July 2006: <http://www.alp.org.au/media/0706/msag110.php>.
- Regarding Democrat and Green opposition to capital punishment, see: Government doesn't abhor death penalty, 29 November 2005: http://www.bobbrown.org.au/600_media_sub.php?deptItemID=1833; Senator Natasha Stott-Despoja, Senate Hansard, 28 November 2005, p.59: <http://www.aph.gov.au/hansard/senate/daily/ds281105.pdf>. An official from the Nationals' Federal Secretariat indicated by private communication that the Nationals' policy conforms with the Government's.
12. John Howard, Joint press conference with then British Foreign Secretary Jack Straw, November 2003: <http://www.pm.gov.au/News/interviews/Interview564.html>.
 13. A *Bar News* article is not the appropriate venue for a discussion of the relationship between values, interests and foreign policy. However Owen Harries was surely correct when he argued in his recent elegant survey that the 'characteristic fault of realism is that it believes the application of a morality to foreign policy to be negligible, if not entirely irrelevant.' E.H. Carr argued similarly that 'it is an unreal kind of realism which ignores the element of morality in any world order.' Harries followed Edmund Burke, Hans J. Morgenthau and others in advocating a morality of prudence. Some realist scholars allow that human rights advocacy, for example, has a legitimate place in diplomacy so long as it is not pursued in a categorical or absolute way; sometimes it can even promote other state interests. Jack Donnelly has argued persuasively that realism 'provides no good theoretical ground for excluding human rights before the fact. In certain (contingent) circumstances it may be unwise to pursue human rights, but that must be determined empirically, case by case.' See Owen Harries, Morality and foreign policy. Sydney, CIS Occasional Paper 94, 2005, p.23; E.H. Carr, The twenty years' crisis 1919-1939: an introduction to the study of international relations. London, Macmillan, 1970, p.235; Hans J. Morgenthau, Politics among nations: the struggle for power and peace. , 6th rev ed. New York, McGraw-Hill, 1985, pp.10-11, 14-15, 236-237; Hans J. Morgenthau, Human rights and foreign policy. New York, Council on Religious and International Affairs, 1979, p.6; Jack Donnelly, Universal human rights in theory and practice. Ithaca, Cornell University Press, 1989, p.232.
 14. See e.g. Wilson Loo Kok Wee, Australians shouldn't get special treatment, The Straits Times, 30 November 2005; Pauline Ooi Chen Ni, Does Aussie passport put one above law? The Straits Times, 23 November 2005; A. Soorian, Australia's double standards, New Straits Times, 25 November 2005.

15. Alexander Downer, List of representations to Singapore Ministers and President, 28 November 2005: http://www.foreignminister.gov.au/releases/2005/nguyen_van_tuong_representation_singapore.html.
16. DFAT provides general consular assistance to Australian citizens and permanent residents equally, with the exception of some financial transactions such as prisoner loans. Australian permanent residents sentenced to death are dealt with in exactly the same way as Australian citizens.
17. 'Michelle Grattan, Airline row linked to Nguyen, The Age, 24 November 2005, p.1; Greens say increase pressure on Singapore, AAP, 27 November 2005.
18. See e.g. Resolution 2005/59 at the Commission on Human Rights: http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-59.doc. Abolitionist resolutions are generally put in similar terms in several UN forums including the Commission on Human Rights (now replaced by the Human Rights Council) and the Economic and Social Council.
19. R.J. Vincent, Human rights and international relations. Cambridge, Cambridge University Press, 1986, p.136. On the importance of judgment in differentiating between cases, see Owen Harries, Morality and foreign policy, p.18.
20. John Howard, Interview on Sunday Sunrise, Channel 7, 16 February 2003: <http://www.pm.gov.au/news/interviews/Interview244.html>; John Howard, Interview on Fox 9 News Channel, 7 March 2003: <http://www.pm.gov.au/news/interviews/Interview261.html>.
21. Mark Latham quoted on Lateline, ABC Television, 9 August 2003: <http://www.abc.net.au/lateline/content/2003/s920638.htm>.
22. Mark Latham and John Howard quoted on The World Today, ABC Radio, 15 December 2003: <http://www.abc.net.au/worldtoday/content/2003/s1010314.htm>. Other examples are cited in Lex Lasry, Australia and the death penalty – Are we really against it? Costello Lecture, Monash University, 29 March 2006.
23. Warren Fernandez, Real villains in Nguyen case, The Straits Times, 3 December 2005. See also Laurel Teo, To hang or not to hang? Activists must be consistent, The Straits Times, 11 November 2005.
24. On South Korea, see e.g. Hearing on death penalty, The Korea Herald, 3 April 2006; Jin Dae-woong, Former President Kim calls for end to death penalty, The Korea Herald, 27 February 2006; Debates rekindled on death penalty, The Korea Times, 23 February 2006. On Malaysia, see e.g. Malaysian law minister supports abolishing death penalty, Dow Jones International News, 21 March 2006.
25. These kinds of limitations are included in the various UN resolutions on capital punishment, e.g. Resolution 2005/59 at the Commission on Human Rights: http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-59.doc.
26. Report of the Canberra Commission on the Elimination of Nuclear Weapons. Canberra, Australian Government, 1996: <http://www.dfat.gov.au/cc/cchome.html>.
27. See 2005 World Summit Outcome, 15 September 2005, paragraphs 138-139: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>.

Lex Lasry on the death penalty

The following is a transcript of a *Lateline* interview with (now Justice) Lex Lasry in October 2007

Tony Jones: Now to our top story and the decision by Labor's foreign affairs spokesman to apologise to Bali bombing survivors for his blunder on capital punishment.

Today the Government intensified its attack as Robert McClelland said he was wrong to suggest the Bali bombers should not get the death penalty for their crimes.

Lex Lasry QC is a prominent lawyer and human rights advocate. He unsuccessfully defended Van Tuong Nguyen who was executed for drug smuggling in Singapore in 2005. He is now representing two members of the so-called Bali nine, in a challenge to the death penalty in the Indonesian Constitutional Court.

Well, Lex Lasry, thanks for joining us.

Lex Lasry, Barrister: It's a pleasure, Tony.

Tony Jones: Who do you think has done the best job over the past few days of expressing a consistent principle of principle on capital punishment, John Howard or Kevin Rudd?

Lex Lasry: I don't think either of those options is open really. I must say from what I read of Robert McClelland's speech, he expressed the views that I agreed with and I think it's shame that it's been politicised in the way that it has since then.

Tony Jones: It also appears that he is backing off the principle that he espoused in the speech. Does that worry you?

Lex Lasry: Yes, it does, because what's important in this is to have a consistent policy on the death penalty so far as Australia is concerned. And the concern is that Australia's international moral authority, if you like, is being compromised because the policy isn't consistent.

Tony Jones: We appear to be having a kind of contest at the moment to determine who is the most uncompromising when it comes to the fate of Bali bombers. Now, Kevin Rudd says they should only leave jail in a wooden box or a pine box. The Prime Minister said today it would be very, very bad if they are not executed.

Lex Lasry: Yes, well, that's completely at odds with Australia's declared position. We don't have the death penalty here in Australia, we haven't had it since the 1970s. We don't execute terrorists. We support, internationally, the abolition of capital punishment.

Now you're either for that or you're not. As I understood the Prime Minister, he is for it and it seems to me that the sort of comments that you've just referred to are comments which are in a sense contrary to his declared position.

Tony Jones: Do you feel or see this debate shifting in Australia under your feet as it were?

Lex Lasry: No, I think the shame, Tony, is that the debate's been politicised. There's a political contest going on and there's an election coming up. And regrettably, the principles which are at stake so far as capital punishment are concerned are being somewhat lost in the kind of rush that you're talking about.

It would be a lot better if there was a bipartisan position which supported Australia's declared position since 1990 when we signed the – and supported and ratified the international covenant on this



– that Australia is simply opposed to the death penalty in all cases and in all countries.

Tony Jones: I was just going to say, these political messages are not going to be lost in Indonesia, are they? And I'm wondering how you think they will be read in Indonesia where you have two clients facing the death penalty.

Lex Lasry: Well, I think Australia's already had its critics over the last few years in South-East Asia for having an inconsistent message on the death penalty.

I have been asked and I have said a number of times that in Van Nguyen case, the Australian Government's support for us was excellent, I have never criticised that. But there is a problem about inconsistency, depending on the particular case.

So far as the Indonesian situation is concerned, we have... certainly our legal team has great faith in the Indonesian courts and the Indonesian Constitutional Court.

There is a judgment in that case imminent and I am sure the judges will do their judge duty as judges when they deliver their decision.

But it does send, I think, a very poor message and my concern is that Australia has the potential to lead a debate – not haranguing countries, not hectoring them – but leading a debate on desirability of reducing and eventually abolishing capital punishment. And the credibility of Australia's position is being lost in this sort of political battleground and I think that is unfortunate. And as you say, it won't be lost in South-East Asia.

Tony Jones: What I was specifically hinting at here is that even courts in Indonesia don't act totally in isolation of debates that are going on in the public arena, do they? So I guess I'm wondering if this particular debate has been unhelpful to your clients.

Lex Lasry: Certainly unhelpful. No question, unhelpful. And it's often the case, I suspect, that this sort of political point scoring is unhelpful. But the case that was conducted in Indonesia was a very detailed,

complex case. The Indonesian constitutional court gave the case a great deal of time and listened carefully to the arguments that were being put into the material and I am sure in the end the court will make its decision on that rather than on some political dispute in Australia.

Tony Jones: Indonesia is a Muslim country, there are very strict drug laws, obviously. I mean, would you agree there'd be plenty of Indonesians who would actually regard heroin smuggling as bad as terrorism?

Lex Lasry: There may well be. But I think Indonesia is also a country that is taking its developing democracy very seriously and wants to establish itself as a serious, important South-East Asian democracy.

And therefore they're interested in the complexity of this argument and I think they will take that seriously, notwithstanding that of course there will be views to the contrary, particularly in a country that size.

Tony Jones: But if you actually had judges who believed that heroin smuggling and terrorism both resulted in the taking of innocent lives, they may equate the two and take John Howard quite simply at his word – that if you should execute terrorists, then you should also treat drug smugglers without mercy.

Lex Lasry: Yes, well there is... Tony, I accept there is that risk but of course beyond that really I can't say because I don't know until we get the result of that case, I don't know what's in the minds of the judges who are hearing the case.

Tony Jones: Are you worried, though, that this debate will play into their decision in any way?

Lex Lasry: I'm confident in their process, Tony. I'm disappointed and I guess I'm worried because there will be other cases like this, presumably in the future.

And I think Australia... it now seems both sides of politics in Australia are missing an opportunity to maintain a principled and consistent message.

That will have its effect and it may have its effect in this case. It may have its effect in other cases. It's very difficult for the Australian Government to plead the case for Australians and select them as being more deserving of clemency than others in the context of a debate about capital punishment.

Tony Jones: By the same token, it is extremely hard political for the Australian Government to do or say anything that appears to make a case for clemency for the Bali bombers? And indeed as we now learned clearly for the Opposition and its strategists and its leader.

Lex Lasry: It may sound simplistic, Tony, but those of us concerned in the debate just want the killing to stop. And the simple response to that proposition is the state killing someone has never solved a problem, has never really resolved the criminality of what's gone before.

And we, I don't believe that executing anyone resolves the problem created by the crime they committed. As I say, I think those of us who support the abolition of the death penalty internationally simply say we want the killing to stop and state sanctioned killing is a particularly

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grotesque way to deal with people.

Tony Jones: The point about this principle is that it's a moral one...

Lex Lasry: Yes, that's right.

Tony Jones: And people appear to be choosing to take different moral positions and what appears to be happening is the moral position in Australia is slipping and sliding, depending on the case.

Lex Lasry: Yes, exactly. And that's the problem. That's the problem, that the principle that is under discussion in a sense is lost in the discussion about the instant case.

Australia's position in 1990, in signing the second optional protocol was clear – it's the Australian position in this country. We are opposed to the death penalty in all circumstances. It's not a complicated concept.

But of course, there's a harder argument to have in the terrorist case than for example in the more sympathetic case and perhaps I put my own client Van Nguyen in the more sympathetic case. But the hard part of the argument is to say, no, we really are against the death penalty for everyone, because we believe in the principle that supports that argument, whatever the case.

I think the consistency of the approach is crucial. Without that consistency, the credibility of the argument diminishes.

Tony Jones: On the moral issue, the Catholic Archbishop of Sydney, Cardinal George Pell, today said this issue probably wouldn't change too many Christian votes, which I found fascinating as a concept.

He says... because he says there's a clear... he believes there's a clear majority approval in Australia for capital punishment in certain circumstances. How would you gauge that message from a leader of a church, which actually holds a principled position against capital punishment?

Lex Lasry: Well, the primary position is that I hope he's wrong about that. I would hope – and I must say my own experience over the last

couple of years is that there's a very, very strong resistance to capital punishment and a strong part of the population that would resist any suggestion that it should be reintroduced here. And a lot of people who in particular cases, notwithstanding the fact that they're offended by the particular conduct, see the antiquity of capital punishment and I think that argument... I think worldwide the argument is growing. I think the level of the use of capital punishment is diminishing and I think that's having its effect on the argument here in Australia.

Tony Jones: Terrorism appears to be the issue which has changed people's ideas so fundamentally.

Lex Lasry: Yes.

Tony Jones: It wouldn't be that hard to shift focus from terrorism to drug smuggling, though, would it as they already have done in South-East Asia?

Lex Lasry: No, that's probably right. And, again, I think when you discuss the individual case and the individual offence, then inevitably you lose sight of the principle.

It depends what principle you're talking about. But if you're talking about the inherent inhumanity of the death penalty, then it really doesn't matter what the offence is.

And my complaint, of course, about politicians and now on both sides it would seem, is that they tend to pick and choose depending on what they perceive to be the public pressure and the discussion. I think there needs to be some clear leadership about it.

Tony Jones: Look, I make that point because it was clear at the time of the arrests of the Bali nine that in order to defend the position of his own policeman, the Federal Police Commissioner Mick Keelty came out and said very clearly that what these people are doing is causing the deaths of innocent people in Australia and then he cited the many thousands who died from drug over doses.

Lex Lasry: Yes, well, he did say that, and our position in this country – and I know to some extent I'm repeating myself – is notwithstanding that consequence we don't execute people here.

We don't execute people for murder. We don't execute people for any offences where death is an outcome of the criminal activity. That's because as a matter of principle we reject the death penalty as consistent with the values by which our community lives. I am simply saying that that position needs to be put consistently outside Australia.

Tony Jones: As a way of getting people to focus on what this actually means when it comes down to someone facing death, you've seen it up close, you didn't see the execution but you were there when it happened and you were there immediately before it happened with Van Nguyen. Can you explain what you went through experiencing that and what his family went through?

Lex Lasry: Well, it's a very difficult process certainly as a lawyer, Tony, something that I've never been through before. And because I think it's that... apart from anything else, apart from the emotion of it, there's something completely bizarre about sitting in a cell with a client and saying goodbye to that person, seeing the person in complete good health, knowing that person is in every respect completely rehabilitated and changed and contrite and knowing that the following morning at 6am that person will be dead.

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And there's a level of emotion and a level of desperation involved in that experience that is very hard to explain. But there is something about... as Sister Helen Prejean made the point in her book about Louisiana, about the very idea that the state would kill a person who at the time of their death is completely defenceless. And, of course, on the following day in some of the religious ceremonies that followed we actually saw the body of our client.

The contrast between what I saw on the day before and what I saw on the following day is something that will obviously live with me for the rest of my life.

Tony Jones: A final question then. Are you getting the same level of support now from the Australian Government to help you with the cases of the Bali nine as you received in the case of Van Nguyen?

Lex Lasry: Oh, yes. The Australian Government have been very supportive in the running of the case. They've been involved, of course, supporting our part in the constitutional case. Everything we've asked for they have provided and I can't complain about the way they've supported the case.

And I understand how they will make representations and what they will do during the future of the case to the extent that that's necessary. So I can't... I don't make any complaint about that.

Tony Jones: Lex Lasry, we thank you very much once again for coming in to talk to us tonight and taking the time, thank you.

Lex Lasry: Thanks, Tony.

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Edmund Barton

By David Ash

In these carbon neutral times, what use a nation-builder who chops down cherry trees or burns cakes? Why not a founding father who is an urbane and unruffled man, for whom the charge of indolence is answered by the zeal of his supporters? And in Edmund Barton, did Australia have such a man, 'Toby' to his friends and 'Tosspot' to the rest?

Regrettably, this note serves neither to rehabilitate Barton if he needs to be, nor to condemn him if he does not. Rather, it deals with a life beyond a leadership of the federal movement, in an attempt to isolate the qualities which made him a successful member of the New South Wales bar and a foundation member of the High Court. It is hoped that the note may be the first of an occasional series on persons who have been members of both.

For those interested in a more detailed picture of the man, there are to date two biographical books, as well as notations in the nation's various dictionaries of biography.¹ There are also the Barton papers, held in the National Library.²

The first book is John Reynolds' 1948 *Edmund Barton*. I have the 1979 republication, with a sympathetic foreword by Sir Garfield Barwick. There is also reproduced R G Menzies' foreword to the first edition. He records a bar dinner given to Sir Adrian Knox in Melbourne where he found himself Mr Junior. That brilliant curiosity Sir Hayden Starke sent for Menzies, looked at him, and said 'We won't want you to make a speech', so allowing Menzies to relax. At the end of the dinner, he received a note from one Starke with typical prolixity, 'Menzies, propose Barton's health!'³

That biography was published by Angus and Robertson. That may have been a change of heart, for there is A G Stephens's tale of Henry Lawson hawking his latest volume of verse around the Athenaeum Club: Barton offered ten pounds, but as he and Lawson left, George Robertson said that he would disregard the order, adding 'Why, Barton's as bad as Lawson in his way.'

An anecdote which is found in the second biography, Geoffrey Bolton's 2000 *Edmund Barton: The One Man For the Job*, published, appropriately, with the support of the National Council for the Centenary of Federation.⁴

Of schools

Barton was Australian-born, the son of Sydney's first stockbroker.⁵ He appears to have been among the first students of the Sydney Grammar School when it opened – some might say reopened – in 1857, and it was here that Barton received the classical grounding which was to be invaluable to him throughout his life.

It was also here that he first made acquaintance with Richard Edward O'Connor, a lifelong friend and colleague. (Although I am not sure, in the absence of primary material, how much it can be supposed that the friendship started here. Barton had been born in January 1849, and O'Connor in August 1851, over two and a half years his junior. Barton went on to university aged 16.)

In these two boys the school commenced its domination of the nation's supreme court. Only from Sir George Rich's retirement in 1950 to Sir Victor Windeyer's appointment in 1958 has the court been without an



Sir Edmund Barton and Alfred Deakin. Photo: National Library of Australia.

alumnus. It would be churlish to suggest that the Court's reputation in the interregnum was a result, and merely dangerous to suggest that it arose from an infusion of vigorous Victorian blood.

It is interesting, then, that Barton chose in his 'first recorded parliamentary utterance of any length'⁶ to dwell on the merits of his other and earlier alma mater, the state school now known as Fort Street High. In the midst of the vicious sectarian battles of the time was the equal certainty that secular rather than denominational schools were 'seed plots of immorality and crime'.⁷ During a speech in support of a bill to ensure that all government supported education became free and secular, Barton said:⁸

I was for two years a pupil at the Model School in Fort-street, which was then conducted upon the Irish national system, and if any special religious instruction was given in connection with that system, I do not recollect it. I was afterwards educated in another equally secular institution (the Sydney University.) I point this out because I object that those who were educated with me under a system which has been stigmatized as producing infidelity, immorality and lawlessness, should have it imputed to them that they are other than what I know them to be, namely, upright and God-fearing citizens. We have been told that every legitimate means is to be used to upset the present system of education. There is no doubt that the meaning of that expression is that when this question comes to be discussed before the country, as I have no doubt it will, every means within the four corners of a statute will be used to upset the system proposed to be established by this Bill, and to re-introduce and perpetuate what I take leave to designate as a retrograde system. In view of the strenuous opposition which has been promised, I am tempted to remind honorable members of a quotation from Jeremy Taylor, who said, 'He that will do all that he can lawfully, would, if he durst, do something which is not lawful.' And if the honorable member for West Sydney takes me to Homer I also give him a line or two which he can apply at this juncture:

Αεήτωε ἁ ὕμνιστος ἀνεστῖος ἔστιν ἐκείνος
Ὅς πολέμου ἐράται ἐπιδημῖον ὑκρυσεντοζ.

There are many honorable members who understand Homer quite as well as I do, but I may freely translate the passage, thus: 'That man is bound by no social, religious, and domestic tie who would court civil war with all its horrors.'

Anyway, the current court has one Fort Street alumnus and one Sydney Grammar alumnus, so it's a case of *Laus deus*.⁹

Of the Bar

Barton's university career was academically distinguished, culminating in an 1868 graduation with first class honours in classics and a special prize of twenty pounds.¹⁰ As Reynolds observes, with no other assets and no wealthy friends, it was natural that a person such as he would gravitate to the law, although it is to the loss of later generations that only the barest details of his 'first steps on the slippery climb up the professional ladder' remain.¹¹

It seems that Barton served time in both branches, first in the office of the solicitor Henry Burton Bradley and later reading with G C Davis. I am not aware of anything Barton later said about either apprenticeship, but Bradley may have been able to give some good tips as to the wonders of the judicial mind: he was the nephew of and had grown up in the home of Sir William Westbrooke Burton, the colony's second puisne judge, and had himself been a sometime chief clerk of and later commissioner of the court.¹²

Barton's first few years were on circuit. It seems that he was a member of Denman Chambers at 182 Phillip Street.¹³ As to the bar of the time, Reynolds says it was 'a jovial, expansive society when its work was finished, finding time in those leisurely days for dinners of many courses and toasts, humorous discourses, writing of satires and practical jokes'.¹⁴ Many years later, in the 1950s, a more sober generation faced an important choice, described by J M Bennett in the following terms:¹⁵

...with no other assets and no wealthy friends, it was natural that a person such as he would gravitate to the law...

... a special general meeting of shareholders was held in December 1956 when it was resolved that a ballot should be held of the names Barton, Counsel's Chambers, Edmund Barton, Lachlan, Macquarie, Westminster and Wentworth.

The choice, of course, was Wentworth, the patriot nonpareil of an earlier generation, and this year marks that distinguished chambers' jubilee.

Of cricket

In Australia, being a cricket tragic is no disqualification for the prime ministership or for high judicial office. But Barton could also play. Frank Iredale described him as very fair with the bat, although a wretched fielder,¹⁶ which perhaps explains his position on reserve powers.

However, it was the far more dangerous activity of umpiring that Barton was to come to the fore and to find the base for his next step forward, to politics. In 1879, Lord Harris brought an England XI on tour of the colonies. Barton was nominated by his colony as umpire in Sydney. The other umpire was the star Australian rules player George Coulthard. As the Wikipedia entry for the latter tells it:¹⁷

As an umpire he was at the centre of an ugly incident that turned into a riot in Sydney in 1879 when he was officiating in a match between Lord Harris's England side and New South Wales at the Association Ground in Sydney. On the second day of the match, he called star NSW batsman Billy Murdoch run out. Independent witnesses said the decision was 'close but fair', and was supported by the other umpire Edmund Barton, later to become Australia's first prime minister. However, NSW captain Dave Gregory demanded his replacement, claiming he was incompetent. The crowd subsequently invaded the pitch and play was suspended for the remainder of the day. When it resumed the following Monday – with the rioters back at work – Coulthard remained as umpire.

Observers of the politics of cricket will be aware of the later controversy about whether Harris as governor of Bombay¹⁸ contributed to or impeded the development of the game in that land. Meanwhile (and whatever Coulthard's relationship with Barton), Barton's own approach earned (important) domestic plaudits:¹⁹

It rained incessantly for the rest of the weekend, so that on Monday the New South Wales team was all out for 49 on a murderously sticky wicket. Lengthy controversy resulted, from which Barton was one of the few to emerge with credit. His mediating style brought him into the public eye, and this soon had its political reward. In August, Windeyer was appointed to the Supreme Court bench and resigned as the university's parliamentary representative. Several candidates were thought likely to come forward but, in the end, Barton was opposed only by Dr Arthur Renwick, an energetic physician with a strong interest in public health.

With his own reputation for indolence still in the future, the young barrister won, the *Sydney Morning Herald* recording the return of Mr Edwin Barton.²⁰

Of the speakership

By January 1883, Barton was in his third parliament.²¹ In one of those peculiar machinations of colonial politics of the time – part Sir Henry Parkes, part another Lands Bill, part the up and coming George Reid – he came up against the incumbent speaker and won the contest 51-47.²² It was a singular advertisement for the independence of the Bar, the defeated incumbent being the prominent solicitor Sir George Wigram Allen.

It may be noted in passing that the first Allen to realise that the firm needed to move beyond the family was Wigram's son Arthur. However, it was not this 'Arthur' who is responsible for the current name 'Allens Arthur Robinson'. Rather, that comes from a coupling over a century later with a Melbourne firm, Arthur Robinson & Co. Barton lingers, somewhat indirectly, as the original Arthur Robinson (b 1872) was none other than his nephew.

Of Wigram Allen one biographer has said ‘As speaker he showed dignity, courtesy and ability, his only fault being that occasionally he was not sufficiently firm with some of the wilder spirits in the house.’²³

Would the same be said of Barton?

In fact, it was not.

Later, in the new parliament of 1887, Reid would state that Barton’s firm methods over the preceding four years would be greatly missed.²⁴ Sir Patrick Jennings, a leader of the opposition while Barton held the chair, would say ‘the feeling and sense of the House at that time was deeply impressed by the qualities which you have always exercised in your career—more particularly by the judicial quality, which, I think, is so abundantly evident as being part of your character that I need not dwell upon them [sic].’²⁵

However, these qualities were not enough to avoid a drubbing at the hands of the mercurial Adolphus George Taylor. Taylor died at Callan Park in 1900 after a tempestuous life: ‘Tall and gangling, he was known variously as ‘Giraffe’, ‘Doll’ Taylor, ‘The Mudgee pet’ and the ‘Mudgee camel’. Rowdy, brilliant, unstable and addicted to the bottle, he sometimes drew attention to real evils.’²⁶

The same biographer says ‘He repeatedly obstructed parliament, caused disorder by his violent language, raised points of order, challenged the speaker... and displayed an embarrassing knowledge of constitutional law.’²⁷ And when Barton was unsuccessful in having the New South Wales judiciary come to the aid of the legislature in a fight with Taylor, he took the matter to the Privy Council.

Taylor, for his part, ‘raised his fare by lecturing on ‘The Iron Hand in Politics’ and selling his stamp collection, took ‘his wife, his mother, a cockatoo, a parrot and a magpie’ to England and successfully conducted his own case’.²⁸

The embarrassment of *Barton v Taylor* is summarised in the headnote in the *Appeal Cases* for 1886:²⁹

[Taylor] having entered the chamber of the New South Wales Assembly, of which he was a member, within a week after it had passed a resolution that he be ‘suspended from the service of the House,’ he was removed therefrom and prevented from re-entering it:

Held, in an action of trespass, that the resolution must not be construed as operating beyond the sitting during which the resolution was passed.

Held, further, that the standing order of the Legislative Assembly adopting so far as is applicable to its proceedings the rules, forms, and usages in force in the British House of Commons, and assented to by the governor, was valid, but must be construed to relate only to such rules, forms, and usages as were in existence at the date of the order.

The powers incident to or inherent in a colonial Legislative Assembly are ‘such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute,’

and do not extend to justify punitive action, or unconditional suspension of a member during the pleasure of the Assembly.

In the recent High Court decision on the so-called ‘interim control orders’, the chief justice refers to the opinion in the course of a discussion of the concept of ‘reasonable necessity’.³⁰

It seems that Taylor could hardly let a day go by. A year later, directly after Barton had accepted the thanks of the leaders of the house (including those of Jennings, above), Taylor challenged the right of the house to conduct business. The house had previously adjourned, and Taylor opined:³¹

No house ever meets unless it is summoned by the queen, by the representative of the queen, or by the predeterminate vote of the house itself... I say that this house cannot meet by the *mero motu* of the speaker or *mero motu* of members of this house. Can a number of members come together and say, ‘We will meet this evening, and that shall constitute a meeting of parliament’? By no means.

Barton quashed the complaint by answering to the effect that Taylor had acknowledged the right of the house to sit by addressing the question to the chair.³² He had entered an unconditional appearance, as it were.

It took another three pages of debate for Taylor to let this go, but it would be unfair to the reader, or to Taylor’s memory, to have the reader suppose that this was the end of Taylor’s contribution to parliament for the day. In the first column of page 21 of the relevant Hansard (just after the end of Taylor’s last challenge) are the words ‘THE PARKES GOVERNMENT.’ On the next line, in a smaller font, along the lines of a second header, are the words ‘SEAT OF PREMIER CHALLENGED.’ With a sentiment that can probably be sourced, one way or another, to Runnymede, Taylor expostulated:³³

What is the position of the Hon. member [that is, Parkes]? I understand from the few words he let drop that he is about to sit here to-night as vice-president of the Executive Council. Whoever heard of such an atrocity in the Lower House? It is good enough to placate members of the Upper House who have retired from legislative life. Whoever heard of the vice-president of the Executive Council coming down here and saying, ‘I am premier, and that is my office’? A premier! Good heavens! A premier of a country has a right to control all the legitimate operations of the administrative part of the government. Where in the Constitution Act is any provision for a vice-president of the Executive Council, except in the Upper House? [and so on, in the same vein]

Taylor was an annoyance, but the sort of annoyance a country bound by the rule of law needs now and again. Whatever, he was the cause of Barton’s first defeat in the Privy Council, and it is to the second that we now turn.

Of the Privy Council

It would be wrong to think that Barton’s attitude to the Privy Council – something that would not be unimportant to the coming nation – was forged solely in the battering he took by virtue of his office. He received a personal battering as well, in his capacity as the administrator of his father’s estate.

Barton was attempting to argue that a deed of conveyance executed by his father to the Bank of New South Wales notwithstanding, the true relationship was merely that of mortgagor and mortgagee. Their lordships³⁴ would have none of it, and did not call upon the bank, a party represented by the distinguished Chancery silk Sir Horace Davey, coincidentally counsel for Barton in the earlier matter. Davey was the bank's counsel of choice: in the first of the reports containing the Barton matters, there are two other appeals involving the bank, both with him as (one of) its counsel.³⁵

Bolton suggests that 'As in A G Taylor's case the highest court in the British Empire was rebuffing a cherished enterprise of Barton's. It was scarcely wonderful that, with all his loyal sentiments towards Britain, Barton in future felt little reverence for the wisdom of the judicial committee of the Privy Council.'³⁶

Of the Bar (again)

Then as now, politics was a financial sacrifice to a barrister of Barton's abilities. While he continued to practise upon taking the speakership, he calculated that the 1,500 earned in the role made up almost two-thirds of his income.³⁷ In the debates of his salary in September 1886, a sympathiser asserted that he could make at the Bar 3,000.³⁸

Barton served as attorney-general, and it was likely this as much as anything else which permitted him to take silk at the age of forty. As to his competence, there seems to be no doubt. Reynolds says that his practice 'seems to have lain principally in common law cases'³⁹, while Bolton observes that 'He specialised mainly in commercial cases, fiding his way deftly around the intricacies of contract law...'⁴⁰

Both biographers note his reputation or ability as an arbitrator,⁴¹ harking back to Jennings' praise of his judicial tempers. Indeed, Barton's principal work at the bar before federation took him over entirely was the McSharry arbitration: he took it on in 1896 and only handed down his award in 1898. The expensive and controversial nature of the arbitration took in the public mind. In the election of that year, Reid was able to say of an opponent merely that he had been counsel in the McSharry arbitration.⁴²

Of dignity

It was not the McSharry arbitration but an earlier case involving another railway contractor that casts an interesting light on Barton's self-perception. Like many, legal or lay, he was quick upon his dignity and upon any sleight on his integrity. It so happened that some time before taking office in Dibbs's ministry, Barton and his friend O'Connor had taken briefs to act in litigation with the railway commissioners. The matter emerged during debate in November and December 1893. There was, was there not, a conflict of interest in the attorney general holding the brief?

Well, from Barton's point of view, there may have been a conflict arising from a stamp duty question, and in any event the retainer was a trivial one. Had he left it there, the matter might have gone away. But Barton was not going to leave the deeper question unanswered:⁴³

Now I come to this point. I may state, as matter of fact, that it is the duty of a barrister, in any case in which it is not a conflict of duty-as, for instance, in any case in which he is not retained on the other side-it is the duty of a barrister-the absolute duty-unless there



is some reason of absolute honor against it, to accept the retainer of any solicitor who comes to him with that retainer. [Mr Edden: When it is against the Crown?] No, not when it is against the Crown. If the hon. member had been here at first he would have understood that I am explaining that the Railway Department as regards the Crown Law Department has ceased to be a department of the Crown.

In other words, the railway commissioners were not the Crown. There was no longer a department, but an independent statutory authority, and the complaint of conflict was groundless. As Bolton says, 'This was too fine-drawn a distinction for most members without legal backgrounds to swallow.'⁴⁴

As a result and within a week, the government fell. Barton and O'Connor took holidays. Literally, with O'Connor on a sea voyage and Barton spending three weeks as Sir John Downer's guest in Adelaide. On 20 January 1894, the *Bulletin* published a cartoon with Barton asleep in an armchair, the caption being 'Mr Barton says that the Australians are apathetic on the subject of federation. Mr Barton himself is a monument of apathy.'⁴⁵

Of the club

Barton's membership of the Athenaeum Club in Sydney was a basis for his reputation as a tosspot. The original Athenaeum Club in Pall Mall was founded in 1823. There must have been a pre-federation flurry, as the extant club in Hobart dates from 1889,⁴⁶ and the Melbourne one from 1868.⁴⁷

The Sydney club appears to have been founded around about 1880, and later had the benefit of premises on a long lease from Lord Rosebery, who had presumably enjoyed the company and not the 'somewhat inadequate rooms' when he visited early in its history.⁴⁸

(Rosebery, it will be recalled, was the man who achieved his three aims, winning the Derby, marrying an heiress, and becoming prime minister.)

The club disbanded a year or two after the First World War, and was probably by then a bit of a shadow of its former self. Ernest Wunderlich – one of the brothers who redroofed suburban Australia – wrote in his memoirs:⁴⁹

About 1902, I became a member of the Athenaeum Club, a rendezvous of Bohemians. To become a member, it was necessary to have a literary, artistic or scientific qualification. There I came into frequent contact with men of the *Bulletin*: J.F. Archibald, Macleod, Edmund, and its pictorial contributors: Phil May, Livingstone Hopkins, Alfred Vincent, Low and Soutar. Sir Toby Barton used to preside at the 'Knights of the Round Table', who were mostly legal luminaries, Reg Broomfield⁵⁰ and other barristers. Wit sparkled while the wine flowed freely.

It may say something for Wunderlich that he put the barristers last and politicians – given that Barton's daytime job by this time was prime minister – not at all, but the likely truth is that Barton's best times with the club had been in the previous century.

I say 'best' without exactly being sure what I mean. Reynolds is circumspect and borders on euphemism, suggesting that the decade before Barton was fully absorbed by the federal movement, he 'probably spent far more time in [the club's] comfortable quarters than he could justify in the light of his position as a professional man with heavy family responsibilities. His young friend Bavin was shocked at his neglect of his profession for the company of his fellow clubmen.'⁵¹

Bolton sets out two stories from A B Piddington, an admirer of Barton and a quixotic figure who (a) would later resign from the High Court before he ever sat; and (b) would resign the presidency of the New South Wales Industrial Commission a few weeks prior to becoming entitled to a pension, viewing Sir Philip Game's dismissal of Premier Lang as unconstitutional.⁵² He also defended Egon Kisch.⁵³ The second of those three cases is notable for the Crown's reference in argument to legislation which Barton three decades before had overseen as minister for external affairs. Kisch, it will be remembered, failed a dictation test in Gaelic. The Crown frankly admitted 'By not defining the expression 'an European language' the Legislature retained the right to apply an arbitrary test. The statutory provision was designed, primarily, for the exclusion from the Commonwealth of Asiatics, the underlying motive being the preservation of a 'white' Australia.'⁵⁴

As to Bavin, he was still to play a role when Piddington the pedestrian was in 1938 injured in Phillip Street near the southern side of Martin Place. That is, outside where the Lindt chocolate shop now is. The jury found for the defendant. In the full court, only Bavin J – no longer young – would have found for Piddington.

In the High Court, Piddington was represented by a descendant of Barton's parliamentary predecessor (Windeyer KC), with the father-in-law of one of Barton's prime ministerial successors as the opposition (Dovey KC). A new trial was granted, although not without dissents from the chief and from Starke J, the latter advising that 'Friendship

and sympathy for an old and distinguished member of the legal profession should not sway the judgment of the court.'⁵⁵

But returning to Piddington's stories, a half century before. The first is when Barton proposed that members should all do their best to help the club 'drink itself out of debt'.^{55a} The second one was while Barton was speaker. He had broken his ankle and was laid up in the club for a fortnight. A Coonamble lawyer was invited to stay with him, but found the going too tough. There was rum-and-milk before breakfast, sherry at 11.00am, beer or stout with lunch, a late afternoon whisky, and a well-wined dinner at 8.00pm. After liqueurs around 10.00pm 'the real and serious business of the day began...'⁵⁶

Bolton is sceptical where Reynolds is ambivalent. He says that a 'convincing explanation for Barton's swings of mood is offered by a medically qualified and experienced grandson, Dr David Barton':⁵⁷

I have come to the conclusion that he suffered a bipolar disorder, the modern term of manic depressive psychosis. This would explain the wild fluctuation in his behaviour and many of the illnesses he suffered. The disorder is familial and it would explain the behaviour of William Barton, also George Burdett Barton, in the extravagances of behaviour they showed... Edmund's flight from one extravagant house to another at times when he could ill afford it, is typical... So is his capacity to work at ferocious pace with little rest in spasms and appear lazy and indolent at other times.

His reputation for eating and drinking too much... suggests that this was a feature of depression... He was never described as an alcoholic – food was the factor and overeating is a compensatory mechanism...

Of the Privy Council (again)

As intimated above, this article is not about Barton's triumphs of federation and of premiership. That said, it would be remiss not to look briefly at an issue which arose in London, when Barton and his fellow statesmen arrived to see one of the greatest statesmen of them all, Joseph Chamberlain, steer the Commonwealth Bill through the House.

The Bill which was introduced differed from the draft of the Convention in a couple of ways. Major things turned on clause 74 (which in an amended form is represented by section 74 of our Constitution and relates to Privy Council appeals).

Clause 74 was omitted from the original Bill, with the last sentence of clause 73 being cut-and-pasted to make up the deficiency. That sentence read – and still reads in its restored resting place – 'Until the parliament otherwise provides, the conditions of and restrictions on appeals to the queen in council from the Supreme courts of the several states shall be applicable to appeals from them to the High Court'.

Chamberlain's corollary – the sting in the head, as it were – was in the words added to covering clause 5, 'Notwithstanding anything in the Constitution set forth in the schedule to this Act, the prerogative of her majesty to grant special leave to appeal to her majesty in council may be exercised with respect to any judgment or order of the High Court of the Commonwealth or of the Supreme Court of any state'.⁵⁸

The fight for the colonials' preferred clause 7A was a hard one. Deakin estimated that the Australian party lobbied 3,000 people of influence.⁵⁹ There was Australian antipathy too: Sir Julian Salomons 'had opposed Federation as faddish and inimical to the best interests of New South Wales'⁶⁰ and was at the time New South Wales's agent-general. At a City Liberal Club dinner, he attacked clause 74 'with an emotion which rendered him almost speechless'.⁶¹ (Followers of bench machinations will recall that Salomons, like Piddington, was appointed but never sat, in this case as chief justice of the colony.)

Barton was equal to the occasion. His biographers note his tremendous industry. In one perhaps ambitious but certainly notorious piece of lobbying, he addressed a dinner of newspaper owners for three-quarters of an hour's worth of close legal reasoning on clause 74.⁶²

Quick and Garrahan summarise the negotiations thus:⁶³

To meet the protests of the Delegates, Mr. Chamberlain afterwards proposed... [then] To meet criticisms from the Delegates and from Australia... Finally, the clause as it now stands was suggested by Mr. Chamberlain... [emphasis added]

Bolton the biographer is less prosaic:⁶⁴

It did not suit [Chamberlain's] book to remain at odds with the potential leaders of a federated Australia, and by conceding a degree of Australian autonomy in the constitutional field Britain retained what really concerned Chamberlain, the right of the Privy Council to intervene in commercial cases. It took a day or two to finalise details, but an interview with Chamberlain on 17 May left Barton, Deakin and Kingston so elated that when they found themselves alone 'they seized each other's hands and danced hand in hand in a ring around the centre of the room to express their jubilation'. It is a pleasing image, although Sir Josiah Symon wrote years later, 'knowing the men, I think their joining hands in a fandango... though a good story, is apocryphal'.

The result was, however, a successful appeal in the matter of appeals, and it may have brought Barton qua litigant as much joy as Barton qua statesman.

Of judging

The Judiciary Bill, the means to put in place the High Court provided for by the Constitution, did not have an easy passage, despite a second reading speech on 18 March 1902 by Deakin as attorney which was rated by one listener as 'the finest speech I have ever heard'.⁶⁵ (Leo Amery, the great British politician – and one of Barton's future son-in-law's colleagues at Oxford – rated Deakin 'the greatest natural orator of my day'.⁶⁶)

By 1903, the Bill had passed and the search was on. Sir Samuel Griffith, then chief justice of Queensland, and O'Connor were seen as givens.⁶⁷ Barton posed the rhetorical question to Governor-General Tennyson: 'Griffith will be the CJ, that is for sure; O'Connor will be one of the judges that is equally sure. The remaining question is, *can* I persuade myself to leave politics and take the second place?'⁶⁸ Among other contenders were Andrew Inglis Clark and the abovementioned Sir Josiah Symon.⁶⁹ Barton did overcome his doubts, and took his place with the others on 7 October 1903.

That Barton concurred with Griffith in the 164 cases decided by the full court and reported in the first three volumes of the *Commonwealth Law Reports*, is notorious.⁷⁰ Whether it was because of his alleged indolence is hotly disputed. One commentator says:⁷¹

It would be easy to take the view that he was a tired man scarcely in the condition to show his full powers in conflict with so masterful a personality as Griffith. But this is not borne out by A N Smith, a well-known journalist of the period, who, in his *Thirty Years: The Commonwealth of Australia, 1901-31*, says: 'In the courts, however, it was known that many of the judgments read by the chief justice had been written by Mr Justice Barton'.

Sir Garfield Barwick was not known for his platitudes, and was moved to close his introductory remarks to the second edition of Reynolds' work with the observation 'It has been the practice too long for a superficial view to be taken of Sir Edmund's judicial qualities. As often, volume is mistaken for quality and the lack of it a mark of mediocrity.'⁷² The curious can access online Barton's notebook from October 1903 to April 1904.⁷³

Certainly, as father time marched on, there were other factors which may have contributed to Barton's quietness, for want of a better word. Barton didn't like Isaacs, and the evidence is found in his letters to Griffith during the latter's absence in 1913: Isaacs was scheming for Griffith's job, there was no sincerity 'in the jewelling's attitude', and he was 'always trying to colloque with our colleagues apart from me'.⁷⁴

To our age, such racism (never mind the ageism) is not excused by the times, but what makes it the more disappointing is that Barton was capable of making better potshots at the same colleague, once notebooking an understandable 'Mr Justice Barton concurred *silenter*. Mr Justice Isaacs concurred at great length'.⁷⁵

Barton's notebook is also the source of a dig at the Privy Council. In *Webb v Outtrim*⁷⁶ the council had opined that the doctrine of immunity of instrumentalities did not apply to Australia. This was the work of Lord Halsbury, and Barton wrote to (the by now not quite so young) Bavin, saying 'Old man Halsbury's judgment deserves no better description than that it is fatuous and beneath consideration', adding later 'But the old pig wants to hurt the new federation, and does not much care how he does it'.⁷⁷ The court fixed the problem in *Baxter v Commissioner of Taxation, NSW*.⁷⁸ As the headnote abruptly puts it, 'The rule in *D'Emden v Pedder*, 1 C.L.R. 91, reaffirmed.'

Of sectarian things

Whatever may be inferred from the note about Isaacs, it seems clear enough that Barton exhibited splendid isolationism when it came to matters Christian, in particular the rough sectarianism of the day. While in Italy in 1902, he met with the 92-year-old Pope Leo XIII (not, as Reynolds has it, Pope Pius X⁷⁹), the two talking in Latin.⁸⁰ The pope presented Barton with a medallion.⁸¹ The protestants went hysterical, and the ongoing uproar may have contributed to Barton starting to think about calling politics a day, in early 1903.⁸²

Later, in *Nelan v Downes*,⁸³ Barton was able to unite a healthy disrespect for unsuitable English precedent and for the same sectarianism. The court held that a gift for masses for the repose of a deceased's soul was not a gift for a supersititious use, but charitable, Barton saying

'This is a country without any established church. Within its bounds, all religions are on an equal footing'.⁸⁴ The verdict 'was received appreciatively by the Catholic community'.⁸⁵

Of the end

It was supposed that Barton might succeed Griffith, but he was not in good health. He knew this from, among other people, his physician and grandfather of Kerry Packer, Dr Herbert Henry Bullmore.⁸⁶ He vacillated, and by the time he got around to throwing his hat into the ring, the Little Digger had opted for Knox. It was a disappointment for Barton, but he would act with dignity.

I described at the outset Menzies' recollection of the dinner for Knox, which the former records in his opening to Reynolds' work. I set out now Bolton's description, which captures well this changing of the guard, and allows incidentally a glimpse of Menzies in the vigour of his youth:⁸⁷

Resolutely Barton met Knox on Monday 20 October at the Spencer Street station; Knox said he appreciated nothing in his life more. Barton administered the oath at his swearing in and went with him to a welcoming dinner tendered by the Melbourne Bar Association. By convention the toast of the honoured guest should have been given by the junior member of the Bar, who at that time happened to be Robert Menzies. Unfortunately several senior lawyers, including the chairman of the dinner, Hayden Starke, had taken against Menzies because of what they saw as a self-assurance inexcusable in one who had not seen war service. Instead, the speech welcoming Knox was entrusted to a very senior member, Sir Edward Mitchell. This proved disastrous. Mitchell was tediously longwinded. At length Starke scribbled a message to Menzies on his menu: 'Menzies, propose Barton's health.' The young man rose ably to the occasion, capping his impromptu speech with a quotation from Swinburne:

I come as one whose thoughts half linger,

Half run before;

The youngest to the oldest singer

That England bore.

'The speech,' Menzies liked to remember, '... made me known to the judges; and restored me, permanently, I believe, to Starke's good graces.' Barton congratulated him with his habitual warmth towards promising young people; and so the first of Australia's Liberal prime ministers made contact with the successor who most resembled him.

Early the following year, on 7 January 1920, Barton died.

Of family

I have mentioned in the endnotes that Barton's brother was also a barrister. Barton had a number of children. It is no discourtesy to those who eschewed a legal career if I note briefly for the interest of likely readers, other legal links in the immediate family.

Edmund Alfred Barton was born in 1879 and died in 1949, having served as a District Court and as an acting Supreme Court judge, in New South Wales.⁸⁸ Wilfred Alexander Barton was born in 1880, was

New South Wales's first Rhodes Scholar, and became king's counsel in London.⁸⁹ Finally, Barton's daughter Jean Alice was born in 1882 and married David Maughan, later a leader of the state's Bar.⁹⁰ (Among Maughan's other distinctions, he pipped F E Smith and William Holdsworth at Oxford.⁹¹)

Of a conclusion

Near the end of a lengthy and colourful entry in the *Australian Dictionary of Biography*, Martha Rutledge observes 'For a 'lazy' man, his achievements were great.'⁹¹ What of his advocacy? In 1913, the barrister and politician Bernhard Ringrose Wise⁹² published *The Making of the Australian Commonwealth 1889-1900*. He was part of it all, and he was able to say of the 1898 election campaign:⁹³

Mr Barton was no match for Mr Reid in this style of controversy. His addresses and speeches were logical, but somewhat dull, historico-legal arguments, illumined here and there by a happy phrase... and not in the style which impresses a mob. Except to point contrasts between Mr. Reid's present and past attitudes towards federation, which was legitimate criticism in such a contest, he refrained from personal reference to his opponent.

We are left, then, with a mixed bag as to Barton's effect as a speaker. But it is one of his legacies, that advocacy is more than mere speaking; from his advocacy a new nation was ushered in. It is said that there is a rough and tumble at the Sydney Bar. To the extent that there is, it is apt that the Bar en bloc preferred the name of Wentworth over Barton's. But to the extent that advocacy is not diminished by a more measured and sober approach, it is also apt that chambers since established are named for our nation's first premier.

Endnotes

1. Beginning with Martha Rutledge's entry in the *Australian Dictionary of Biography*. The online reference is www.adb.online.anu.edu.au/biogs/A070202b.htm (31/10/2007). For context, see the entry in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia*, 2001, Oxford University Press.
2. www.nla.gov.au/barton (30/10/2007).
3. John Reynolds, *Edmund Barton*, 2nd ed, 1979, Angus & Robertson, page xii.
4. Geoffrey Bolton, *Edmund Barton – The One Man For the Job*, 2000, Allen & Unwin, page 137.
5. Reynolds, page 2.
6. Reynolds, page 18.
7. Roman Catholic Archbishop of Sydney (1877-1883) Vaughan, quoted in Reynolds, page 17.
8. NSW Parliamentary Debates, 3/12/1879, pages 455-456.
9. Curiously, the motto of the latter and, as we know from Barton, secular, institution. Fort Street's motto is *Faber est suae quisque fortunae*, or Every man is the maker of his own fortune.
10. Reynolds, page 9.
11. Reynolds, page 9.
12. www.adb.online.anu.edu.au/biogs/A030200b.htm (31/10/2007).
13. J M Bennett, *A History of the New South Wales Bar*, 1969, Law Book Co, page 203. I say 'It seems' because the reference is only to 'Barton'; Barton's elder brother was also, among other things, a barrister: cf

- Bennett, page 199; see generally www.adb.online.anu.edu.au/biogs/A030107b.htm (31/10/2007).
14. Reynolds, page 10.
15. Bennett, page 210.
16. Reynolds, page 10.
17. en.wikipedia.org/wiki/George_Coulthard (31/10/2007).
18. Strictly, Governor of the Presidency of Bombay.
19. Bolton, page 23.
20. Bolton, page 24.
21. According to the NSW Parliament's web site (12/09/2007), Barton was member for the University for the ninth parliament (1877-1880); member for Wellington for the tenth (1880-1882); and member for East Sydney (1882-1885).
22. Bolton, page 131.
23. gutenberg.net.au/dictbiog/0-dict-biogA.html#allen1 (23/10/2007).
24. Reynolds, page 29.
25. NSW Parliamentary Debates, 20/01/1887, page 16.
26. www.adb.online.anu.edu.au/biogs/A060261b.htm (23/10/2007).
27. www.adb.online.anu.edu.au/biogs/A060261b.htm (23/10/2007).
28. www.adb.online.anu.edu.au/biogs/A060261b.htm (23/10/2007).
29. *Barton v Armstrong* (1886) 11 App Cas 197.
30. *Thomas v Mowbray* (2007) 237 ALR 194 @ [26].
31. NSW Parliamentary Debates, 20/01/1887, page 17.
32. NSW Parliamentary Debates, 20/01/1887, page 18.
33. NSW Parliamentary Debates, 20/01/1887, page 22.
34. *Barton v Bank of New South Wales* (1890) 15 App Cas 379.
35. *Bank of New South Wales v Campbell* (1886) 11 App Cas 192; *Bank of New South Wales v Taylor* (1886) 11 App Cas 596.
36. Bolton, page 57.
37. Bolton, page 51.
38. NSW Parliamentary Debates, 21/09/1886, page 4978.
39. Reynolds, page 43.
40. Bolton, page 65.
41. Reynolds, page 43 and Bolton, page 65.
42. B R Wise, *The Making of the Australian Commonwealth 1889-1900*, 1913, London, reproduced by Elibron Classics, page 303.
43. NSW Parliamentary Debates, 1/12/1893, page 1574.
44. Bolton, page 118.
45. The cartoon is reprinted in Bolton, page 121.
46. www.athenaeumhobart.com.au/index.htm (23/10/2007).
47. www.athenaeumclub.com.au/about_club.app (23/10/2007).
48. Reynolds, page 52.
49. The extract appears in Reynolds, page 52. As to the fate of Wunderlich tiles, go to www.monier.com.au/SelectTile/default.aspx (23/10/2007).
50. There is a reference to Reginald Broomfield of counsel in an 1897 murder trial: see www.pansw.org.au/PolNews/Jan28-35.pdf (30/10/2007).
51. Reynolds, page 51.
52. See Graham Fricke, *Judges of the High Court*, Hutchinson, 1986, pages 77 to 83.
53. *R v Carter; ex p Kisch* (1934) 52 CLR 221; *R v Wilson; ex p Kisch* (1934) 52 CLR 234; *R v Fletcher; ex p Kisch* (1935) 52 CLR 249.
54. 52 CLR @ 239.
55. *Piddington v Bennett and Wood Ltd* (1940) 63 CLR 533 @ 550.
- 55a. Cyril Pearl has sometime premier Sir John Robertson say, around the same time and as president of the Reform Club, 'We must drink the bloody club out of debt!': *Wild Men of Sydney*, 1970, Universal Books, p15.
56. Both stories are in Bolton, page 58.
57. Bolton, page 59.
58. John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, reprinted 1995, Legal Books, page 242.
59. Bolton, page 210.
60. www.adb.online.anu.edu.au/biogs/A060093b.htm (30 Oct 2007).
61. Bolton, page 210.
62. Reynolds, pages 157 and 158; Bolton, page 210.
63. Quick and Garran, page 750.
64. Bolton, pages 212 and 213.
65. Quoted in Michael Fullilove (ed), *Men and women of Australia! Our greatest modern speeches*, 2005, Vintage, page 86.
66. Fullilove, page 86.
67. Geoffrey Bolton and John Williams, 'Barton, Edmund', in Blackshield, Coper and Williams, page 54.
68. Bolton, page 297.
69. Troy Simpson, 'Appointments that might have been.', in Blackshield, Coper and Williams, page 23; see also Bolton, page 302.
70. See e.g. Fricke, page 27; Bolton and Williams, page 54.
71. gutenberg.net.au/dictbiog/0-dict-biogBa.html#barton1 (30/10/2007); see also Bolton @ page 305, who in turn refers to Reynolds' defence.
72. Reynolds, page ix.
73. nla.gov.au/nla.ms-ms51-11 (30/10/2007).
74. Fricke, page 46.
75. Bolton, page 305.
76. *Webb v Outtrim* (1906) 4 CLR 356.
77. Bolton, page 307.
78. *Baxter v Commissioner of Taxation, NSW* (1907) 4 CLR 1087.
79. Reynolds, page 183.
80. Bolton, pages 270 and 271.
81. Which may be seen @ nla.gov.au/nla.ms-ms51-13-1296 (30/10/2007).
82. Bolton, page 283.
83. *Nelan v Downs* (1917) 23 CLR 547.
84. 23 CLR @ 550.
85. Bolton and Williams, page 56.
86. Bolton, page 329.
87. Bolton, page 334.
88. investigator.records.nsw.gov.au/Entity.aspx?Path=Person\114 (31/10/2007).
89. Reynolds, page 54.
90. Reynolds, page 54.
91. www.adb.online.anu.edu.au/biogs/A100443b.htm (30/10/2007).
92. www.adb.online.anu.edu.au/biogs/A070202b.htm (31/10/2007).
93. www.adb.online.anu.edu.au/biogs/A120614b.htm (31/10/2007).
94. Reproduced by Elibron Classics: books.google.com/books?id=kuoySX0X47EC (31/10/2007).



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Stephen Keim SC

By Richard Beasley

When Anna Cappellano made submissions in mitigation for her client at Brisbane Local Court on 14 July this year, there was one person paying particular attention beyond the magistrate and the defendant. Her father, Stephen Keim SC. As interested as he was to watch his daughter that day, Keim had reasons beyond this to be in the same courtroom. He had the next matter in the list. The continuation of the application by the Australian Federal Police to keep Dr Mohamed Haneef in custody, while neither being questioned nor charged.

If you were a fiction writer determined to create a character with a curriculum vitae for the sole purpose of provoking antipathy in our right-wing cultural warriors, you couldn't do better than plagiarising Keim's.

A former volunteer solicitor at Caxton Legal Centre – the equivalent of Redfern or Kingsford in Sydney – he subsequently became president of its Management Committee. He has been a president of the Queensland Council for Civil Liberties. After the Goss government was elected in 1989, he became chairperson of the Legal Aid Commission. He has been an inquiry commissioner on the Human Rights and Equal Opportunity Commission, and a deputy chairperson of the Land Tribunal. Since coming to the Bar in July 1985, he has regularly acted for Aboriginal people in a variety of cases challenging government decisions, and in native title matters. He has done his share of pro-bono work. Most recently of course, he is best known as legal counsel for Dr Haneef.

As unattractive as the image is, this is a resume that would have Piers Ackerman frothing at the mouth.

While the next generation is already in the legal profession, Keim was the first of his family to study law. He began in 1971. The early days of the Bjelke-Petersen regime and the time of the Springbok riots. Keim admits that, in part at least, his career and political beliefs were influenced by these times, and in particular the Joh-era in Queensland.

Bjelke-Peterson, Keim told me, 'revelled in his conservative reputation'. Beyond this, he had 'no respect, and little understanding' of the institutions of government, all of which were, in Joh's world, tools of the executive. Looking back now, Keim thinks that the era may have 'felt' worse than it was, although he recognises that this is not the case for those who were at the sharp end of the corruption of government in Queensland in the 1970s and 1980s. 'Good people left Queensland because they couldn't bear it anymore.'

Keim reminded me that the low-lights of the Bjelke-Petersen government extended beyond the appointment of the later jailed Terry Lewis as police commissioner, or the un-accounted for cash in the premier's office safe. There was the support for the white supremacist government in South Africa, the organised violence against anti-apartheid protesters, wide spread police corruption, the banning of street marches in the late 1970s, the attempt to have the Racial Discrimination Act declared invalid (*Koowarta v Bjelke Peterson*), and the jailing of sacked electricity workers in the mid-80s not long before the Fitzgerald Inquiry began the unravelling of it all. In the 1970s and the 1980s, Queensland had enough to keep the left and civil libertarians occupied.



So what about Australia and the federal government now, I asked? While there is obviously no analogy between the Howard government and that of Bjelke-Petersen – outside of longevity, perhaps – how does the Anti-Terrorism Act sit with a civil libertarian? What does Keim think of detention without charge, or 'control orders' and their secrecy provisions – breach of which, even by parent to parent, is punishable by jail – that surround them?

'I think – in the context of our recent anti-terrorism laws, and some of the changes to the Migration Act- that Howard could better articulate than Joh what he perceives as the need for the state to enact these laws, even if they take away what many people would consider important protections and individual rights.' That he might speak of it more fluently is not to say however that Keim believes that Prime Minister Howard has been better at meaningfully allowing a proper debate to occur as to whether these additional powers – given to both law enforcement officers and the executive – are worth the risks that come with them.

Keim recognizes that federal politicians are constantly 'pushed and pulled' on security issues. What he objects to though is the politicisation of the arguments for and against the anti-terrorism laws passed by the federal government. 'They've firstly promoted the desire in the community for tougher anti-terrorism laws,' he said. 'They've encouraged people to think we're not safe without them, and then they've said: "we're passing these laws because you desire it". It's almost as if politicians want to increase pressure on themselves to act in a non-rational way.' One of the results of such policy, at least on the Howard government's analysis of the Migration Act in the Haneef case, is that 'any visitor to our country can be kicked out for entirely arbitrary reasons.'

As unattractive as the image is, this is a resume that would have Piers Ackerman frothing at the mouth.

In the course of this discussion I asked Keim what the term 'civil libertarian' meant to him. Two themes emerged. Balance, and conservation. The civil libertarian, so Keim believes, will always conduct a balancing exercise when considering legislation. Are the benefits of anti-terrorism laws worth the risks? Rather than reducing the rights that we have, is it better that they be 'conserved, rather than exercised in the great post 9/11 haste?'

When he said this, I raised with him his interview on the ABC's *Lateline* program with Tony Jones, immediately after the controversy over his release – or 'leak' in the language of Minister Andrews and the attorney-general – of the first police interview with Dr Haneef. Apart from raising his invitation to the attorney-general, the prime minister and the Federal Police – 'they can come and grab me anytime they like' – I reminded him of what he said that night in relation to the debate concerning 'what the government had done' to his client:

As a barrister – because I'm a barrister, I have no opinion with regard to that. But I do have a very, very strong opinion that this debate is something that could affect the lives of our grandchildren and so I felt very passionate this debate be conducted on the evidence and not on some skewed version of the evidence. So, I'm not joining the debate, but I'm trying to make sure that the public have the material by which they can conduct the debate.

What precisely did he mean by this?

'Unless laws are obviously unjust,' Keim believes, 'people – at least most non-lawyers – have an intrinsic respect for the law. It's almost an assumption that because something is the law, it must also be just or fair. If you change the law, you can change people's perception about behaviour.'

Mohamed Haneef, as almost the whole country knows, was arrested on 2 July 2007 at Brisbane Airport. He was later charged under the Criminal Code with intentionally providing resources to a terrorist organisation, being 'reckless' as to whether the organisation was a terrorist organisation. Prior to this, he had been detained without charge for 12 days pursuant to the provisions of the Anti-Terrorism Act.

On 16 July he was granted bail. That afternoon his visa was withdrawn by Minister Andrews. On 27 July, the charges against him were withdrawn. He left the country the next day. His visa has not been restored.

Section 501 of the Migration Act empowers the minister to refuse or cancel a visa. According to Minister Andrews, when the 'character test' in this section talks of someone having, or having had 'an association with someone else, or with a group or organisation, whom the minister reasonably suspects has been or is involved in criminal conduct', the term 'association' carries with it no element of personal fault. This was rejected by Spender J in the Federal Court at first



instance, but is of course on appeal, and perhaps the minister may turn out to be correct.

This won't mean, according to Stephen Keim, that the rule of law is alive and well in this aspect of our security laws. 'It's all on a whim, if they're right,' he told me. 'People think – well, he must be a criminal.'

I reminded Keim at this point of a paper he delivered at the Goodna Neighbourhood Centre on the outskirts of Brisbane way back in 1987 when he was vice-president of the Council of Civil Liberties, that can be found on the Internet. The paper is entitled *Rights, Liberty, Freedom – Civil, Natural, Human, etc.*

After complaining about the paper's title, I reminded him of this:

The council [of Civil Liberties] is of the view that people in Australia generally would benefit from having a Bill of Rights in the Constitution. It would raise an awareness of the importance of protecting basic human rights and would make it more difficult for governments when tempted by some particular political objective to impinge upon matters such as the freedom of assembly or freedom of speech.

Does he still believe, 20 years later, that Australia would benefit from a Bill of Rights?

'Yes.'

We discussed this view in particular against the current anti-terrorism laws. 'There are some basic human values against which, I believe, all of our laws should be judged,' he said. In saying this he made reference to the recent discussions and papers delivered by eminent lawyers such as Lord Bingham and Lord Goldsmith in the UK and Sir Gerard Brennan in Australia,¹ that have centred on the notion of the rule of law meaning more than rule by law. If laws have to be consistent with fundamental human rights, so Keim thinks, then there needs to be a proper debate about whether the anti-terrorism laws 'fail this test'. 'A Bill, or Charter of Rights would state who we are,' Keim says.

Perhaps our migration and anti-terrorism laws do? 'That's part of the debate.'

The civil libertarian, so Keim believes, will always conduct a balancing exercise when considering legislation. Are the benefits of anti-terrorism laws worth the risks?

I discussed with Keim the support that the government and Minister Andrews has had from some sections of the media in relation to the handling of the Haneef matter. How does he respond to the suggestion that people who say that Dr Haneef's 'associations' are not sufficient to 'disqualify him from entry into Australia are either careless of our security or motivated by political antagonism'.²

'He wasn't denied entry,' Keim explained. 'My client was legally living in Australia. He was working in our hospital system. He was making a contribution. The real issue is whether a law that allowed him to be detained for 12 days without charge is the kind of law we want.'

Is it better though, I asked, in terrorism matters, for us to be 'safe rather than sorry'? Or, as Janet Albrechtsen puts it, 'is it better that we detain them and investigate the evidence instead of sifting through the twisted metal of blown up trains and human remains after a terrorist attack if they turn out to be guilty?'³

'The government has a proper and serious role in ensuring public safety,' Keim said. 'It's obviously desirable for the police to have powers to arrest people. It's perfectly reasonable that those people be charged if there is enough evidence to charge them. As I said, the issue really is, should we have laws where people can be detained for long periods of time without being charged, and should people legally here be able to be expelled from our country on an arbitrary basis by a minister?'

During the course of his interviews with the Australian Federal Police, Mohamed Haneef was asked a number of questions which, at least to someone unskilled in criminal or terrorist investigation, appeared quite startling:

'Do you lean one way or the other in terms of being Shiite or Sunni?'

'What sort of Koran were you listening to? Like, I don't understand, is it just verses?'

These are two examples.

'My client was very humanely treated in prison,' is the only comment Keim offers in response to this. 'The Federal police did not try to trick him, and when they asked him important questions, they told him that that was what they were doing. I thought the officers involved were very fair. Whether the AFP or other counter terrorist organisations are properly funded however, is an entirely different issue.'

There hasn't only been criticism though. Keim has received a great deal of support from both colleagues and the community since taking on Dr Haneef's case. He received 300 e-mails in the week following the bail application, and now has more than 500. Only one was hate mail. Thirty-six members of the Queensland Council for Civil Liberties wrote to the attorney general and accused him of 'unfairly' branding Keim's actions in releasing the first interview transcript as unethical. Then the chair of the Criminal Law Section of the Queensland Law Society defended Keim as 'a lawyer of the highest integrity'.

Despite the great attention that the Haneef case was given by the media, Keim is quick to point out that he does not consider it in any way to be the most important decision in relation to human rights in Australia.



Kevin Andrews, minister for immigration and citizenship holds a press conference in Melbourne in relation to information about Mohamed Haneef. Photo: Stuart McEvoy / NewsPix

'What is?'

'Mabo.'

Mabo is of course a four letter word in the minds of Australia's right. Did he think that the High Court's judgment, or some exaggerated reliance on it by something called the 'Aboriginal rights era' had 'in fact hurt the average Aborigine'?⁴

'I'm not competent to comment on that. I do think though that it's probably too early to talk about what the long-term benefits of Mabo will be. I think there will be many benefits, but I think they will be harvested in the long term. In any event, in my view, law based on a fiction like *terra nullius* simply cannot be just.'

Given his double-major in government at university, and his obvious interest in and commitment to civil liberties, I wondered whether Keim had ever considered a role in politics? 'No,' he said. 'Maybe years ago, but not now. It seems to take too heavy a toll on family life. What I've really always wanted,' he told me, 'is a mainstream legal career.'

Mainstream? 'By that I mean, I've acted from time to time for developers in land matters, or for public authorities in administrative law matters, and for the DPP in criminal matters. I haven't wanted to be on the

Should we have laws where people can be detained for long periods of time without being charged, and should people legally here be able to be expelled from our country on an arbitrary basis by a minister?



A prisoner believed to be suspected terrorist Mohamed Haneef being driven out of the Brisbane watchhouse in a police vehicle, 18 July 2007. Photo: Eddie Safarik / Fairfaxphotos

fringes. I think we all need to have a commitment – as lawyers – to ensure those with the fewest resources aren't oppressed, but I suppose, in my career, I've wanted the best of both worlds.'

He must have legal and political heroes though? Who were they?

At first he denied this. In fact he told me his greatest hero was Sam Trimble, an opening batsman for Queensland in the days of the Sheffield Shield who played first-class cricket until he was about 80 without ever being selected for Australia. Upon reflection though Keim said that one of the things he most admired in people was what he describes as 'you can all get stuffed guts' – he nominated Terry O'Gorman (another past-president of the Council of Civil Liberties) and Justice John Jerrard of the Queensland Court of Appeal as people who fell within this category. He also holds in high esteem anyone

who has the ability to 'keep growing and developing into middle and later age'. This is why he admires former chief justices of the High Court Sir Anthony Mason and Sir Gerard Brennan, as well as Sir William Deane.

Slightly more eccentrically, he nominated Stephen Jay Gould (the evolutionary writer) and Richard Feynman (particle physicist) as members of his list. Continuing with the theme, he lastly mentioned Leigh Matthews, the three times premiership coach of the Brisbane Lions. Matthews was a typical AFL player of the 1970s. Prone to one or two outbursts of violence, he was strong enough to push over the entire Wallaby forward pack with one hand, while drinking a schooner and kicking a goal at the same time. Apart from this, I asked, 'Why him?'

'Because my whole family (Keim is married with four adult children) are now Lions fans,' Keim explained. 'And in John Eales recent book on 'Legends' he was the only one who honestly answered 'no' when asked if there was anything he wouldn't do in order to win. Perhaps he drew the line at murder.'

Matthews has mellowed.

I don't think Matthew's philosophy fully reflects the Stephen Keim philosophy. But based on his *Lateline* interview – and more – he appears to have enough of what he describes as 'you can all get stuffed guts' to draw the coach's admiration.

Endnotes

1. *The Role of the Legal Profession in the Rule of Law*, Supreme Court of Queensland, 31 August 2007
2. Imre Salusinszky, *The Australian*, 31 July 2007
3. *The Australian*, 29 July 2007.
4. Janet Albrechtsen, *The Australian*, 18 July 2007. Who the 'average aborigine' is was not defined in the article.



Wentworth Chambers turn 50

By Kylie Day

Some fifty years ago now, Wentworth Chambers was born. The building was officially opened on 20 August 1957, by the Hon JJ Cahill, then premier of New South Wales. The construction of Wentworth Chambers was an undertaking of great resourcefulness and courage, which is largely attributed to the energy and vision of Sir Garfield Barwick QC and Kenneth Manning QC.

On 21 August 2007, Counsel's Chambers Limited hosted a cocktail reception to celebrate the 50th anniversary of the opening of Wentworth Chambers. As the Hon Trevor Morling QC has observed:

There must be very few barristers now in practice who have any knowledge of the huge debt the Bar owes to the original chairman of directors [of Counsel's Chambers Limited], Garfield Barwick QC. A reading of the minutes of board meetings between the date of the first meeting on 17 April 1953 and the opening of Wentworth Chambers four years later reveals the prodigious effort he put into turning his vision for the building into a reality. It was he (assisted principally by Kenneth Manning QC) who explored the possibility of obtaining finance to erect Wentworth Chambers and who negotiated the original building contract.

And it was he who, with a few other silks, personally underwrote the issue of shares to make up for the initial deficiency in applications for shares. He remained chairman of the board whilst he was attorney-general of the Commonwealth and until his appointment as chief justice of Australia.

In his speech at the ceremony to mark the opening of Wentworth Chambers, on 20 August 1957, Sir Garfield Barwick QC said:

This is indeed a proud and memorable day for the Bar of New South Wales, and they are pleased that many have come to rejoice with us ...

By their enterprise and co-operation, a large number of its members have brought this fine building into being, and have thereby given themselves security, convenience and comfort in the practice of their profession.

Accommodation had become impossible in this street, for so long the milieu of the advocate – although we have not overcome the problem completely, we have reduced it.

Satisfying and important as it is to have so much of the Bar housed so close together and as close to the courts, Mr Premier, it is but a part of the result. For in this building the Bar has made a distinct advance in its



corporate life – taken a great step forward towards having an adequate home for itself.

We have not been so fortunate as our English counterparts. We did not inherit the magnificent facilities of the Inns of Court, mellowed by time with a patina of tradition. Such amenities we must contrive for ourselves – must inaugurate and build up our own customs and particular traditions.

Here, in and by this building, we have made a beginning. We hope that succeeding generations of the Bar will enjoy much grander and more adequate appointments, which will have grown out of and because of this day's effort.

As Sir Garfield Barwick QC seems to have intimated, and Trevor Morling QC recently observed:

Fifty years is a long time in the corporate life of any company, especially a company whose sole purpose is to provide chambers for a large group of fiercely independent barristers.

The benefits to the Bar and the wider community as a result of the establishment of Wentworth Chambers (and shortly thereafter, Selborne Chambers) must have been immense, if mostly intangible. Wentworth and Selborne Chambers have been the hub of the Bar, since they were established, and have fostered an autochthonous collegiate professional community. That was part of the initial plan. As Sir Garfield Barwick QC said in his speech at the ceremony to mark the opening:

... in addition to 189 rooms for chambers and accommodation for clerks and secretaries, this building, in the lower ground floor, contains a large area to be devoted exclusively to the communal activities of the Bar. Here a library will be housed, meetings and social gatherings may be held and a restaurant will serve meals both at mid-day and, on special occasions, at evening.

Here, too, we hope to see Her Majesty's judges lunching and dining with us – thus maintaining and furthering the friendly relations of Bench and Bar so indispensable to the smooth administration of justice.

And as the then chief justice, Sir Kenneth Street, wrote in the visitors' book on the occasion of the opening ceremony:

The value of this building will not be limited to the material fabric. I feel that it will promote and develop that corporate professional spirit with which the Bar should be imbued. The intangible, in the end, will be of greater lasting value than the mere bricks and mortar.

However, the success of the project for the construction of the new barristers' chambers had been far from assured. Earlier, when insufficient applications for shares had been received, Sir Garfield

Barwick QC had written a circular to all members of the Bar, saying:

The erection of this building affords the major hope of preventing the dispersal and disintegration of the Bar. If the Bar has no enthusiasm for it it is no purpose or function of ours to press it on an apathetic group. We have done no more than offer our good offices to promote and foster the scheme.

By 1 April 1954, Barwick stated that, unless the response from the Bar improved by the end of the following week, the project would have to cease. Applications had then only been received for 135 shares. The project could not proceed without another 15 shares being taken. At that point, Barwick invited six senior members of the Bar to his chambers to talk about an 'important matter'. They left after agreeing to underwrite a further 16 shares in the project (Barwick and Manning headed the list of underwriters, agreeing to take three further shares each). By May 1954, 17 additional members of the Bar had applied for 15 shares and, shortly thereafter, the generous underwriters were all released from their obligations.

And so it came to pass that, on 20 August 1957, Wentworth Chambers was officially opened by the Hon JJ Cahill, premier of New South Wales. A ceremonial gold key was presented to Counsel's Chambers Limited by the building company, with which to officially open the building. The Honourable Societies of the Inner Temple, the Middle Temple, Gray's Inn and Lincoln's Inn presented to the New South Wales Bar Association replicas of their arms, which were placed in the southern wall at the entrance to Wentworth Chambers (where they remain today). The Right Hon the Lord Morton of Henryton attended specially for the occasion, and formally handed over these carved replicas. Beside the replicas, was a tablet which read as follows (and remains today):

These stones bearing the Arms of the Honourable Societies of Lincolns Inn, the Inner Temple, the Middle Temple, and of Grays Inn are the gift of the four Inns of Court. They are here displayed to mark the continuity in this land of the common law of England and of the traditions of the Bar, its independence and its sense of duty to serve the citizens and to assist in the maintenance of the rule of law.

The then chief justice, Sir Kenneth Street, said of this reference to the 'common law' that:

The 'common law' we there mention is not merely for us a set of particular rules or principles to be found in the decisions of past judges – great and important as the common law is in that sense. For us the common law rather represents an attitude of mind; an insistence on the dignity and worth of the individual; a passion for freedom; and for equal obedience to the law by high and by low, by governments and by citizens alike – a creed ill-suited to totalitarian government.

The wording of the tablet is at once a boast of our worthiness to carry this torch, and a reminder to ourselves of our humble duty to the citizens, to the courts, and to our profession.

A replica of the New South Wales Bar Association's arms, carved in timber, was given by the architects, and was similarly displayed. Benchers of the English Inns of Court also presented several historic stone relics, with which members of the Bar will be familiar from

On 11 September 1957, the Australian Women's Weekly featured an article on the opening of Wentworth Chambers, reporting that there were 'more flowered bonnets than you would see on an off-day at Randwick races'

various spots around the building. These fragments were from the detritus of the bombing of London in 1940.

On 11 September 1957, the Australian Women's Weekly featured an article on the opening of Wentworth Chambers, reporting that there were 'more flowered bonnets than you would see on an off-day at Randwick races', and that the Police Band played fragments of Sympathy and Trial by Jury. Someone had a sense of humour. The Weekly included, and commented on, photographs of sets of individual barristers' chambers in all their sartorial splendour, reporting that:

Many barristers have painted and decorated their new chambers so attractively that it is hard to imagine discussing the law of torts or assault and battery with a queen's counsel in chambers with wall-to-wall carpet and a décor of black orchid.

Well, quite. Although what may have been beyond the imagination of the Weekly's writer, would be nothing short of a taste for understatement, by the lights of one or two future members of the Bar.

The Weekly also quoted the following remarks of the then chief justice, Sir Kenneth Street, at the opening ceremony, on the increasing elegance of barristers' chambers:

I started on the third floor of the old Wentworth Court across the road. We had only bare boards, and very unclean boards at that. One young man was said to be getting above his station when he put down coir matting.

In this building the carpeting is feet thick, there are Regency stripes, and even beautiful typists. I hope it won't come to be known as the Lotus Eaters' Grotto.

It hasn't, so far as I'm aware.

Counsel's Chambers Limited has published a Commemorative Book to mark the 50th anniversary of Wentworth Chambers, although demand for the publication has outstripped the initial print run. Very fortunately, however, the content of the booklet will shortly be available on the website of Counsel's Chambers Limited.

And so to Wentworth Chambers on its first 50 years – many happy returns!



Six great advocates

By Kylie Day

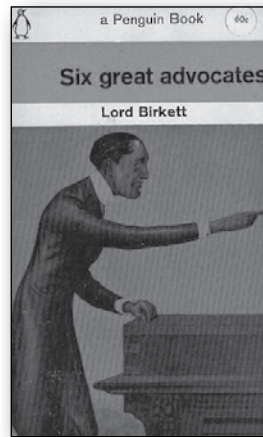
At the swearing in of Fullerton J in the Supreme Court of New South Wales earlier this year, Michael Slattery QC referred to the extravagant compliment paid by Sir Patrick Hastings KC, the great English advocate of the 1920s, to friend and fellow advocate Norman Birkett. Hastings is reported to have said of Birkett:

... if it had ever been my lot to decide to cut up a lady into small pieces and put her in an unwanted suitcase, I should without hesitation have placed my future in Norman Birkett's hands. He would have satisfied the jury (a) that I was not there, (b) that I had not cut up the lady and (c) that if I had she had thoroughly deserved it anyway.

That memorable anecdote sent this young barrister off to find out more about Norman Birkett and his powers of persuasion. H Montgomery Hyde's *Life of Lord Birkett of Ulverston* was patiently awaiting the day of its discovery in a secondhand bookshop in Beechworth, Victoria. In time, that book also revealed his Lordship's authorship of *Six Great Advocates* (Penguin Books Ltd, London, 1961). After some further searching, a near-pristine and never-read copy of *Six Great Advocates* winged its way to me from Dartford, England, thanks to the wonders of the Internet for finding books out of print (www.abebooks.com).

Six Great Advocates is a small gem of a book containing seven broadcast talks given by Lord Birkett on BBC radio, for half an hour on Sunday evenings in April and May 1961. Seven broadcast talks, but six great advocates? Yes, because Lord Birkett wound up the series with a general talk on advocacy, which is also published in the book. The 'six great advocates' subjected to his scrutiny, and sometime personal reminiscence, are Marshall Hall KC, Patrick Hastings KC, Edward Clarke KC, Rufus Isaacs KC, Charles Russell QC, and Thomas Erskine. Together, they cover the period from the late 1700s to about 1950. Like me, you've probably heard learned friends wax lyrical about one or more of this stellar number. If you want to know more about some or all of them, this book may be for you.

He was a master of simple, direct, forcible speech without any embellishments or ornamentation. He also knew the immense value of concise speech linked with brevity; and some of his speeches, without any attempt at literary grace or adornment, were as effective as anything I ever heard from more dramatic or picturesque orators.



In short, the book is a delight. It is a quick afternoon's read, and Lord Birkett's style is engaging and easy. There are a number of things that I particularly like about *Six Great Advocates*. One is Lord Birkett's gift for making these advocates of a bygone era come to life. The reader gets very close to the experience of seeing and hearing them in action in the courtroom, because of Lord Birkett's powers of description and attention to detail. No doubt the reality is heightened because he knew a number of them personally. It helps that he was briefed on the other side in some of the cases from which he plucks moments. Lord Birkett also understood well the difference between the written word, and the moment of the spoken word in the atmosphere of the courtroom. By observation and description, he endeavours to bridge the gap between the two.

A second thing that I particularly like about the book is that Lord Birkett gives the reader a sense not only of the genius, but also the limitations, of his six subjects, with frankness and balance, but absent cruelty or malice. For example, Lord Birkett wrote of Marshall Hall:¹

He was one of the greatest of advocates when he was at his best.

I make this important qualification because it is necessary to make it. It is not enough to say that Marshall Hall was an erratic genius; he was certainly that; but there were times and occasions when genius was simply not there. ... He was the strangest mixture of perfections and imperfections that I ever knew at the Bar. ... In the Russell divorce suit in 1923, Sir Douglas Hogg, the Attorney General, was asked to suggest the name of counsel to conduct the case. Sir Douglas and Sir John Simon had both failed in the previous trial, and were not now available for the rehearing. Sir Douglas said, 'There's only one man at the Bar who might pull it off for you. He might win you a brilliant victory or he might make a terrible mess of it; but I believe that he's the only man who can do it – get Marshall Hall.' And Marshall did pull it off in the most brilliant fashion. But this saying of Sir Douglas Hogg is the wise and experienced comment of a great friend, and expresses very clearly the strange mixture of which the genius of Marshall Hall was compounded.

A third matter of significant interest is how very different the 'six great advocates' appear to have been in style. They were not all dramatic and passionate jury advocates, in the style of Marshall Hall. Far from it. For example, Lord Birkett had this to say about Patrick Hastings KC, whose practice was almost wholly before civil juries in divorce, libel and fraud cases:²

He could be very contemptuous of passionate appeals made to juries by advocates like Marshall Hall. 'Bombast' and 'humbug' were the words he would apply in private and, if necessity warranted, in public too. ... He well knew his limitations, and he knew where his strength lay. He knew that the modes of speech in advocacy are of various kinds, and each one of them can be effective in the hands of the right [advocate]. Hastings had a very powerful kind of his own. He was a master of simple, direct, forcible speech

without any embellishments or ornamentation. He also knew the immense value of concise speech linked with brevity; and some of his speeches, without any attempt at literary grace or adornment, were as effective as anything I ever heard from more dramatic or picturesque orators. ... the great quality of Hastings as an advocate was his power of cross-examination. He was without doubt the greatest cross-examiner I ever heard or saw. ... the cool and calm advocate, disdaining the forensic arts while brilliantly employing them. He captured the jury and the judge by an appeal to the head more than the heart and above all by the manner of presentation.

A fourth matter of interest was what Lord Birkett had to say, against the conventional wisdom, on the issue of the age at which it is advisable to come to the Bar:³

To be called to the Bar later than most men is not the great disadvantage it is sometimes said to be. On the contrary, men with a little experience of life, such as Rufus Isaacs at twenty-seven and Douglas Hogg at thirty, have shown conclusively what an advantage a little training of the right kind can be. Although Rufus Isaacs was without public-school or university experience, he knew something of commerce, and with his natural aptitude for figures he made headway at once. Most men spend long years in county courts and magistrates' courts, at Sessions and Assizes in the country, slowly building up their practice; but Rufus Isaacs rarely left London and after the first five years his practice was almost entirely in the High Court.

So at least one of the 'six great advocates' was a latecomer to the Bar according to the conventional wisdom of the day. Lord Birkett's observations may be an encouragement for many of today's newcomers to the Bar.

On advocacy more generally, and with some considerable justification based on his case studies of excellence, Lord Birkett expressed the view that:⁴

There are no fixed and unalterable standards of advocacy. It is impossible to point to a John Simon or a Marshall Hall and to say: There is the pattern. Lord Rosebery once catalogued some of the qualities which made Lord Chatham the greatest orator of his age, and when he had set them all out – the right choice of words, the elegance of the sentences, the poetical imagination, the passion, the mordant wit, the great dramatical skill – he added these impressive words: 'A clever fellow who had mastered all these things would produce but a pale reflection of the original. It is not merely the thing that is said but the man [or woman] who says it that counts, the character which breathes through the sentences.' So it was with Marshall at his best. He could never be imitated.

Lord Birkett considered that, as the status of the advocate had changed (being usurped in public life by the celebrity of the television and film star), and the jury had virtually disappeared from civil cases, so too the style of advocacy had changed.⁵ To attempt jury-style eloquence before a judge alone would be 'slightly ridiculous'.⁶ And advocacy in the Courts of Chancery was perhaps always of a different kind.⁷ It was Birkett's view that an advocate ought to be judged by the standards of the age in which he or she lived and worked, saying:⁸

It is foolish, and a little ungracious, to compare the advocates of one age with those of another, for the great advocate is the product of the age in which he happens to live and work.

That seems to reflect both his wisdom, and his generosity. Nevertheless, there is much to be learned from Lord Birkett's observations of advocates from age to age. And the beauty of this book is that he takes us hand-in-hand to meet them.

Endnotes

1. At 9-10.
2. At 23-25, 36.
3. At 56.
4. At 20-21.
5. At 9, 25.
6. At 25.
7. At 107-108.
8. At 39.

The Women Readers' Room

By Louise Byrne

On 17 August 2007 Frederick Jordan Chambers held a 'wake' to drink to the demise of the Women Readers' Room after 35 years. At the time of its inception, female barristers were experiencing discrimination in their search for professional accommodation. That difficulty having been dramatically reduced, the Women Lawyers Association decided to terminate the lease and celebrate its irrelevance.

One of those who attended the wake, who herself had found it difficult to secure chambers as a young barrister and who was one of those instrumental in the notion of a dedicated women readers' room back in the 1970s, was Mary Gaudron QC.

The approach to Frederick Jordan Chambers by the Women Lawyers' Association began with a simple letter from Miss Jennifer Blackman, barrister and then vice president, who wrote to the secretary, Frederick Jordan Chambers, 233 Macquarie Street, Sydney, as follows:

26th September 1972

Dear Sir,

The Women Lawyers Association is presently considering acquiring a room to be used by newly admitted barristers with a preference for women.

Accordingly, we would be interested to hear of any chambers which your group may have available now or in the near future, the terms of sale and occupation and length of occupation, etc.

We look forward to hearing from you as soon as convenient.

...

Yours sincerely,
Jenny Blackman

Following further exchange of letters between J H Blackman and the good gentlemen of Frederick Jordan Chambers the arrangement was formalised with the grant of a licence by the FJC Co-operative of a small room on the 5th floor of 233 Macquarie Street for a period of four and a half years starting from 15 December 1972.

The initial rental was \$95 per month, clerks fees \$50 per month during the time of occupation and the occupant was to be approved by the members of FJC. The licence provided for a renewal after the initial period on no less favourable terms.

The arrangement continued when FJC moved to its present location at 53 Martin Place in 1993.

However in 1977 the trustees of the room were somewhat optimistic about the long term need for a dedicated women readers' room when they wrote in the following terms to Lionel Robberds QC, secretary:

17th June 1977

Dear Lionel,

Thank you for your letter of 15th June. We do propose to renew the licence held by us for a further three and a half years, taking it to the end of 1980. We feel that it would perhaps be best not to look any further ahead at this stage because by that time there may be no necessity for such a set of chambers which would, no doubt, delight everyone.

.....

Yours sincerely,
Janet Coombs
Jennifer Blackman
Priscilla Flemming

In 1988 the room was moved from the 5th floor to the 1st floor of 233 Macquarie Street and the secretary, David Lloyd (now Justice David Lloyd of the Land and Environment Court), informed the women trustees by letter of the new arrangements adding:

13th June 1988

Dear Janet

.....

The board will formally have to resolve to provide a direct telephone line to the room, but since you are being asked to move from a room in which there is already such a telephone line I do not envisage the board requiring either your association or the new occupant of the room to pay the necessary connection fee.

Yours faithfully
David H Lloyd
Secretary

This reflects the generally benevolent attitude that the board and members of Frederick Jordan Chambers displayed over the 35 years towards the Women Lawyers' Association and the trustees who tirelessly administered the occupation of the room. The records show that on many occasions the board was prepared to waive any shortfall that sometimes arose due to gaps between occupants or other misadventure of particular occupants such that rent could not be met. Unlike today, where to support a female reader or readers on the floor is the done thing and is looked on favourably by leaders of the Bar, until recently Frederick Jordan Chambers was alone in such support.

The women who started their careers at the Bar in the Women Readers' Room at Frederick Jordan Chambers include justices Bell and Fullerton now on the Supreme Court Bench, Judge Ann Ainslie-Wallace of the District Court, justices Robbie Flohm and Jan Stevenson of the Family Court, and Judge Pat O'Shane, magistrate.

In November 1984 a young solicitor by the name of Virginia Bell wrote to Robberds QC, secretary, Frederick Jordan Chambers Co-operative, as follows:

26th November 1984

Dear Mr Robberds,

I am a solicitor currently employed by Redfern Legal Centre Limited. I intend seeking admission to the bar on 20th December next. I hope to commence practice as a barrister in February, 1985.

.....

I have been in practice as a solicitor for seven years. I have had a wide variety of experience in that time, I have handled civil claims, family law, tenancy and criminal matters. I have had extensive advocacy experience in Courts of Petty Sessions. I have also done some appearance work in the District and Supreme Courts; Petty

Sessions appeals, Criminal Injuries compensation applications and bail applications. I have instructed counsel in both criminal and civil matters in all jurisdictions.

.....

Yours sincerely,
Virginia Bell

Justice Virginia Bell, with reference to the 'wake' now writes:

I was truly sorry to miss the wake for the Women Readers' Room.

While I was far from being a pioneering woman barrister, it remained that the thought of making the move from practice as a solicitor to the Bar had a somewhat forbidding aspect to it, in part, because of the sense that it was a male preserve. The existence of the Women Readers' Room was significant in my decision to make the shift. Not only did it offer the prospect of a place to start but also and equally importantly was the impact that it had had over the years on the composition of Frederick Jordan Chambers. This was a set of chambers with more than a token number of women members and that, too, was encouraging.

It is good to see that we have outlived the need for it but the foresight and work of Janet Coombs, Jenny Blackman and Priscilla Flemming in setting up and supporting the Women Readers' Room is something for which I am very grateful. By the time I was the occupant, Gay O'Connor was committee member in chambers with prime responsibility for the room and for making newcomers feel welcome. Other former incumbents who contributed to the collegiate atmosphere included Ann Ainslie-Wallace, Robbie Flohm, Jan Stevenson, Sharron Norton and Liz Fullerton.

Judge Ann Ainslie-Wallace was unable to attend the 'wake' and sent a note of apology commenting:

I hope it is a great party because I know I (and probably a few others) would never have had a chance of getting a room anywhere else in 1978. It also gave me a wonderful introduction to the crazy world of Frederick Jordan Chambers and I think that had I not had a go in the Women Lawyers' Room I would not have had a career at the Bar.



Left to right: Ann Ainslie-Wallace, Graham Barr, Murray Aldridge and Geoff Graham, mid-year.

In similar vein, Justice Elizabeth Fullerton, who was also not able to attend the 'wake' as the night clashed with a Supreme Court conference, wrote: 'I was a very grateful incumbent of the room without a view in 1984.'



Christmas party 1986: Liz Fullerton, Wilma Long and John Nield.

A significant number of women barristers, some of whose names appear above, have worked tirelessly in the routine administration of the room and in providing support for the women readers in their first year at the Bar. However of recent years when the room has been located on the second floor of Frederick Jordan Chambers at 53 Martin Place, it would be remiss not to mention the support provided by the two male barristers, Martin Gorrick and Chris O'Donnell whose rooms are immediately adjacent to the readers' room. The good gentlemen of Frederick Jordan Chambers are a pretty good bunch after all.

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

STATE OF MONTANA,

Plaintiff

vs.

ANDREW SCOTT MCCORMACK,

DEFENDANT.

Mr McCormack, you pled guilty to the charge of Burglary. To aid me in sentencing, I reviewed the pre-sentence investigation report. I read with interest the section containing Defendant's statement. To the question of 'Give your recommendation as to what you think the Court should do in this case,' you said 'Like the Beatles say, "*Let It Be*"'.

While I will not explore the epistemological or ontological overtones of your response, or even the syntactic or symbolic keys of your allusion, I will say *Hey Jude, Do You Want to Know a Secret?* The greatest band in rock history spelled their name B-E-A-T-L-E-S.

I interpret the meaning of your response to suggest that there should be no consequences for your actions and I should just *Let It Be* so that you could live in *Strawberry Fields Forever*. Such reasoning is *Here, There and Everywhere*. It does not require a *Magical Mystery Tour* of interpretation to know The Word means leave it alone. I trust we can all *Come Together* on that meaning.

If I were to overlook your actions and *Let It Be*, I would ignore that *Day in the Life* on April 21, 2006. Evidently, earlier that night you said to yourself *I Feel Fine* while drinking beer. Later, whether you wanted *Money* or were just trying to *Act Naturally*, you became the *Fool on the Hill* on North 27th Street. As *Mr Moonlight* at 1:30 a.m., you did not *Think for Yourself* but just focused on *I, Me, Mine*.

Because you didn't ask for *Help*, *Wait for Something* else, or listen to your conscience saying *Honey Don't*, the victim later that day was *Fixing a Hole* in the glass door you broke. After you stole the 18 pack of Old Milwaukee you decided it was time to *Run for Your Life* and *Carry That Weight*. But when the witness said *Baby It's You*, the police responded *I'll Get You* and you had to admit that *You Really Got a Hold on Me*. You were not able to *Get Back* home because of the Chains they put on you. Although you hoped the police would say *I Don't Want to Spoil the Party* and *We Can Work It Out*, you were in *Misery* when they said you were a *Bad Boy*. When the police took you to jail you experienced *Something New* as they said *Hello Goodbye* and you became a *Nowhere Man*.

Later when you thought about what you did, you may have said *I'll Cry Instead*. Now you're saying *Let It Be* instead or *I'm a Loser*. As a result of your *Hard Day's Night*, you are looking at a *Ticket to Ride* that *Long and Winding Road* to Deer Lodge. Hopefully you can say both now and *When I'm 64* that *I Should Have Known Better*.

DATED this 26th day of February, 2007.

[Gregory R. Todd]

HON. GREGORY R. TODD, DISTRICT COURT JUDGE



I interpret the meaning of your response to suggest that there should be no consequences for your actions and I should just Let It Be so that you could live in Strawberry Fields Forever. Such reasoning is Here, There and Everywhere.

The Formula 1 formula

By Keith Chapple SC

What does a little Formula 1 'industrial espionage' cost these days? If you are McLaren and you try to find out Ferrari's secrets the price is \$US100,000,000. The press tells us that it is the largest fine ever imposed in sporting history – and there is to be no appeal.

Details of what the 2007 Formula 1 world champion, Ferrari's Kimi Raikkonen, calls 'the spy story' appear in the recent 'decision' of the World Motor Sport Council in *Re: Vodafone McLaren Mercedes: (2007) 1 WMSC 1*.

Earlier this year the Ferrari Formula 1 car racing team, or Scuderia Ferrari Marlboro to give it its full title, notified the motor sport's governing body, the Federation Internationale de L'Automobile (the FIA) of its concern that unauthorised use may have been made of some of its confidential information. Apparently proceedings in the High Court of England and Wales between Ferrari and the former chief designer of McLaren, Michael Coughlan, had revealed that a 'dossier' of hundreds of pages of confidential Ferrari data was kept at Coughlan's home.

At first McLaren tried to argue that it was all the fault of a 'rogue employee' namely Coughlan and that McLaren had neither used or benefited from the Ferrari details. The WMSC thought otherwise and charged them with a breach of the International Sporting Code.

In an inspired investigative tactic the WMSC offered the three McLaren Formula 1 drivers the motor racing equivalent of an indemnity for any information they might have. This led to a bundle of e-mails being produced which showed that Ferrari information was circulated by Coughlan within McLaren. The e-mails were particularly specific. They dealt with all the obvious aspects of Formula 1 motor car design and performance. For example in March 2007 one driver e-mailed Coughlan in these terms:

Hi Mike, do you know the Red Car's weight distribution? It would be important for us to know so that we could try it in the simulator

p.s. I will be in the simulator tomorrow.

Flexible wing and aero balance details were circulated and information on tyre gas, braking system and stopping strategy (presumably stepping on the brake pedal) were also passed around. The Italian Police tracked down evidence of communications between Coughlan and a Ferrari employee who seemed to be the source of the information and discovered increasing contacts during the lead up to the Grands Prix in Australia, Malaysia, Bahrain and Spain, the latter being run as recently as May, 2007.

In the end the nature and extent of the contact between Coughlan and the Ferrari employee could not be definitively established but the WMSC was satisfied that a breach of Article 151(c) of the International Sporting Code had occurred, in particular that McLaren had unauthorised possession of documents and confidential information belonging to Ferrari namely details that could be used for designing, engineering, building and running a Formula 1 racing car.

The penalty imposed of \$US100,000,000 was in addition to a rather complicated additional penalty relating to points loss in the 2007 Constructors' Championship. The company was allowed three



Ferrari's Michael Schumacher during practice. 5th March 2005. Picture by Vince Caligiuri / Fairfaxphotos

months to pay. Because of their cooperation, no penalty was imposed on the McLaren drivers and there is talk of nominating them for the Nobel Prize for sport.

Also, the WMSC instructed the FIA technical department to check out McLaren's 2008 plans to make sure no Ferrari details had been incorporated. Rather sportingly the FIA President Max Mosley reminded McLaren of their right to appeal, a right we were told recently they have declined to exercise.

To add insult to injury Ferrari now has the new World Champion, Raikkonen. He said that resolving the business with McLaren would help the Red team 'rebuild' after the retirement of Michael Schumacher last year (who had won the World Championship about 800 times in a row).

The whole case has been a timely reminder to the masses of people who own Formula 1 racing car teams to abide by the rules or suffer the consequences. And what happened to the \$US100,000,000 fine paid over by McLaren to the WMSC, I hear you ask?

I would like to think that it was immediately raced over to Darfur or some other needy place to at least help a few people eat – but I doubt it.

The Hon Justice Susan Kiefel

On 3 September 2007, the Hon Justice Susan Kiefel was sworn in as a justice of the High Court of Australia. On 5 October 2007, there was a special sitting of the High Court of Australia at Sydney to welcome her Honour. Michael Slattery QC spoke on behalf of the New South Wales Bar Association, and Shauna Jarrett spoke on behalf of the Law Society of New South Wales. Her Honour exercised her right of reply.

As might be expected, much was made on both occasions of her Honour's journey to the Court. Like Michael McHugh, her Honour arrived via the road less travelled. Her Honour was born in Cairns, left school in year 10, and spent her early working years other than in legal practice. Also like Michael McHugh, her Honour's formal legal education began via the Barristers' Admission Board. Where Michael McHugh was initially telegram boy and insurance salesman, after her Honour left Sandgate High School in north Brisbane (having enjoyed music, sport and Miss Bailey's English lessons), her Honour worked first for a building society, then for an architect, and later for an exploration company. Her Honour was pleased to learn, on the occasion of her welcome at Sydney, that at least initially upon leaving school she was better paid than Michael McHugh. While comparisons may be odious elsewhere, they are *de rigueur* in the law.

In 1971, her Honour became interested in the law while working as a legal secretary for Fitzgerald, Moynihan and Mack. In 1973, her Honour became a clerk at Cannan & Peterson, solicitors, and in 1975, her Honour completed the three year course offered by the Barristers Admission Board of Queensland. She was called to the Bar, aged 21.

Of her Honour's early years at the Bar, Michael Slattery QC said:

As you started at the Bar you quickly found the briefs which you so well deserved. It is here that the Queensland Bar and the New South Wales Bar show themselves at their best, as very efficiently rewarding prodigious talent such as that of your Honour.

Just as Michael McHugh was encouraged to come from Newcastle to Sydney by Clive Evatt QC, so did Peter Connolly QC, later Mr Justice Connolly of the Queensland Supreme Court, guide your Honour's early years and with a watchful eye help steer the first work opportunities to your Honour, what these days we call mentoring. You soon developed a broad and busy court and advisory practice, particularly in local government, defamation, probate and general commercial work. You quickly became a junior much in demand by McPherson QC, Hampson QC, Callinan QC, Jackson QC, Fitzgerald QC and Pincus QC. You also worked with Pat Keane QC, now Mr Justice Keane of the Queensland Court of Appeal, who once commented of your Honour, "You know that Sue Kiefel is a very helpful junior. She actually identifies the points that are likely to win the case." May I say at times I have found myself dreaming about such juniors.

Of her early years at the Bar, her Honour said:

It is not possible to thank all of those to whom thanks are due by me. ... The senior barristers with whom I more regularly worked, and who were influential in my earlier career, have been identified on a number of occasions. Ian Callinan QC, whose place I now take, was one of them. Peter Connolly QC, gave me an early instruction in terror, so necessary in the development of a novice barrister. In



The Hon Justice Susan Kiefel after being sworn in. Photo: Ray Strange / Newspix

the middle of a trial he informed me that he had decided that we should take the witnesses turn about. The next witness, for me, was an expert in plant genetics.

I could have no excuse for overlooking how much I learned from judges in my early career. Their teaching methods varied, but many were tolerant and instructive. On reflection they taught me much about the conduct necessary of a judge. I am aware that mention was made on the occasions of the swearing-in of Justices Callinan and Heydon of the high standing in which Sir Harry Gibbs was held. I recall him also for his kindness, and for the interest he showed in a young barrister – regularly inquiring about my progress from Gerald Patterson, his good friend and one of my solicitor mentors. ...

Like most young barristers my practice developed largely as a result of the recommendation of others, mostly more senior barristers and solicitors. The outstanding characteristic of the Bar was as a society, in the support and assistance members gave to each other despite the fact that tomorrow they may be adversaries.

On matters of style and substance, barristerial and judicial, Michael Slattery QC said:

If your Honour's style as a barrister could be captured it would probably be in Hemingway's famous description that "Courage is grace under pressure". With the special human insight that more is achieved by charm and determination than by direct attack, your Honour was a devastating and thorough cross-examiner. You have brought the same courtesy to the Bench with powerful results. Your rich and varied judicial work on the Federal Court has been much admired and referred to in this State as it has been elsewhere in the Commonwealth.

Her Honour took time away from practice as a junior barrister to study for the degree of Master of Laws at Cambridge University. That was an exceptional course for someone who did not have an undergraduate law degree. At her swearing-in, Kiefel J said of her time at Cambridge:

I wish again to acknowledge my gratitude to Professor Sir David Williams, who in 1984, as President of Wolfson College, Cambridge, gave someone with a non-traditional legal education the chance to undertake a Masters degree in law. He was influential in having the faculty overlook, for the first time, the absence of a first degree. I shall be forever grateful for my year in Cambridge, which I count amongst my best. It marked a turning point in my understanding and love of the law. I was there introduced to comparative law by Professors Tony Jolowicz and Basil Markesinis, both eminent in this field and gifted teachers. ... My year in Cambridge also introduced me to my husband, Michael Albrecht, an exceptional man. I am privileged to have enjoyed our partnership in life, the 'support account' of which I know I have overdrawn.

Continuing a pattern of youthful achievement, in 1987, two years after returning from Cambridge, her Honour took silk, aged 33. Not long after that, appointments of various kinds began to find her. In 1991, her Honour was appointed a part-time hearing commissioner at the Human Rights and Equal Opportunity Commission. Two years later, her Honour was appointed to the Supreme Court of Queensland. Very shortly after that, in 1994, her Honour was appointed to the Federal Court of Australia, where she served until her appointment to the High Court of Australia. Among numerous other appointments, her Honour has been a part-time commissioner of the Australian Law Reform Commission, and Deputy President (and later, President) of the Federal Police Disciplinary Tribunal. Her Honour's career has involved a series of firsts, including being the first woman to be appointed queen's counsel in Queensland, and the first woman from Queensland to be appointed to the Federal Court of Australia. To that, her Honour can now add her appointment as the third woman to be appointed to the High Court of Australia (and the first woman from Queensland).

At her swearing-in, her Honour said:

I have been surprised about the level of interest in my story, which I do not consider to be so very different from that of many others. The histories of my husband and of my friend, Helen Lynch, are examples. Helen left school at 15 years of age and worked as a clerk in what became the Westpac Bank at Charleville. Last year she retired as a director of its board. In each case we have made our way but we have also been given opportunities. I have been given the rare opportunity to serve on this court and to take part in judicial decision-making at its highest level. I feel deeply honoured to have been appointed to this office and conscious of its responsibilities and burdens. I shall endeavour in every way to fulfil the confidence which has been reposed in me.

I am fortunate to have served on three courts and to have benefited from the fellowship of many judges. I enjoyed my earlier career as a barrister – a very different life from that of a judge. The Queensland Bar, of which I am proud to be a life member, was very kind to me. ...

Since my departure from the Bar, I have been learning the craft of judging. The difference in the roles is not always appreciated. The work of a barrister of course provides training in all aspects of

litigation and the role of the judge in court is well understood by them. It should not however be assumed that the greater part of the work of a judge, the preparation for and writing of judgments, is so well understood.

On the occasion of her swearing-in, her Honour also paid tribute to the work of trial judges, saying:

The importance of a trial judge is sometimes lost sight of. Criticism is easily levelled at a trial judge after the conclusion of a trial, which may have been very complex or badly presented and difficult to manage. On appeal the issues are more clearly defined and the facts ordered. Tribute is not often paid to what can be a most difficult and demanding role, one requiring considerable powers of analysis. Complex or multi-party litigation can require an almost inhuman effort on the part of a trial judge in mastering enormous amounts of information, some of it confused or contradictory. The trial judge must sift, order and appraise the facts whilst at the same time keeping in mind the issues sought to be raised by the parties to which the facts are said to be relevant. It may be that the time has come to reassess whether one person can continue to undertake some of the cases which have been litigated in recent times. I refer not only to complex commercial cases, but to the demands imposed by native title determinations. The point I wish to make is that without skilled trial judges the work of appellate courts would be intolerable.

In her closing comments at her swearing-in, her Honour paid particular tribute to her family, former associates, and colleagues on various courts. Of her move to a different court and a different role as a judge, her Honour said that she looked forward to working with the other judges of the High Court of Australia, for whom she has great admiration – despite their reluctance, on occasions, to agree with her.

As Ms Jarrett observed, after reading much about her Honour, if anything can be ascertained about her Honour's character, it is her ability to pursue her ambitions, and view what lies ahead as a positive opportunity. As her Honour once remarked to a group of students:

You can usually do whatever you determine to do. The constraints or limits placed upon a person's life and career usually come from themselves. I hope you will focus on the possibilities open to you and not dwell on problems that others may tell you about too much.

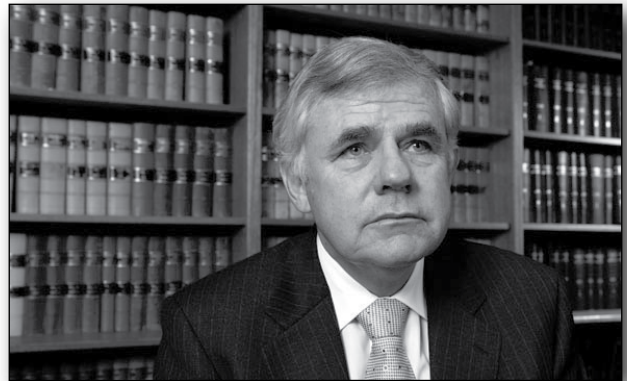
Her Honour has inspired, and will continue to inspire, many people at the Bar and elsewhere, by the facts of her progress and recognition in the law, from an unconventional start, along an uncharted path, and without social or family connections. Her Honour's career and appointment are an encouragement to many things, not least among them being courage, persistence and optimism.

The Hon Justice Geoffrey Flick

Geoffrey Flick SC was sworn in as a judge of the Federal Court of Australia by Chief Justice Black in chambers on 15 October 2007. Prior to his appointment, his Honour was a member of Sixth Floor Selborne Wentworth Chambers.

Justice Flick practiced as a barrister at the New South Wales Bar since 1982, and was appointed senior counsel in 1993. He is the author of several legal publications including *Federal Administrative Law*, *Federal Court Practice*, *High Court Practice*, *Natural Justice* and *Civil Liberties*. Prior to his appointment Justice Flick practiced widely in the Federal Court in many aspects of federal law, particularly in administrative law. As the above works demonstrate, his Honour is a well known author in the area of administrative law and natural justice.

His Honour has a doctorate in law from Cambridge University, having obtained his undergraduate degree at the University of Sydney, where he has also lectured in a number of legal subjects. Justice Flick has been a member of various committees and advisory groups including at the Law Council of Australia and the Australian Law Reform Commission. His Honour is also a former director of research at the Administrative Review Council.



Verbatim

Westfield Management Limited v Perpetual Trustee Company Limited [2007] HCATrans 336 (31 July 2007)

Kirby J: That is the bottom line. You talk to the bottom line. That is the bottom line.

Mr Walker: The bottom line is that this is valuable. There is no question about that. That was one of the reasons why the council was prepared to spare my friend's predecessor in title millions of dollars of expense so that they could carry out a lucrative development to the extent they wanted to carry it out without having to spend millions of dollars on bonus. It was that valuable. In fact, there is evidence of \$3 million worth in terms of the value that was put forward by the grantor to say to the counsel, now, how about my bonus? I have done what you wanted, which is to facilitate, to permit, to ensure, was their word, when in August they described what they had done in February, admissible evidence.

Kirby J: It is sounding awfully commercial.

Mr Walker: Of course it was – everything here – their Honours, there are...

Hayne J: You are not going to tell us that there is some commercial drivers driving both parties, are you, Mr Walker? Heavens above.

Mr Walker: Your Honours, I fear this is all about money...

Kirby J: I feel much happier when we are back in the law of easements.

Mr Walker: Easements are valuable rights which sound in money.

How to take a subtle hint from a judge

In *Global Metal Group Pty Ltd v Chief Executive Officer of Customs* [2007] HCATrans 540, after making orders to remit a matter to the Federal Court, Heydon J asked Svehla if the orders were satisfactory. Svehla raised a single point.

His Honour: Mr Svehla, the choice is between arguing it now, which may have nasty consequences, or referring it to some kindly Federal Court judge.

Mr Svehla: I would prefer to let it be dealt with later, your Honour.

Billy Purves: crown prosecutor

By Mark Tedeschi QC

Billy Purves has recently retired as a barrister and crown prosecutor. At the time of his retirement, Billy was the oldest serving crown prosecutor in New South Wales by a long shot. I hope he will forgive me for disclosing that he is 74.

Billy was born in Glasgow in 1933. His distinctive Scots accent has charmed numerous juries for many years, both as a prosecutor and as a defence counsel. He lived as a boy in the village of Aberlour on the River Spey in the Grampians district. His first adult job was as a journalist with the *Edinburgh Evening News*. He did national service in the British Army for two years. The highlight of his army service was a period of some months which he spent 'guarding the Suez Canal', armed with a First World War rifle and 20 rounds of ammunition.

Between 1958 and 1963 he had an extended 'working holiday' in Australia and New Zealand, being employed as a journalist, a swimming pool attendant, a clerk in a tobacco factory, and a general hand on two cattle stations near Mt Isa. This enabled him, following the peripatetic example of Hemingway, Steinbeck and Orwell, to get the necessary experiences required to write a great novel.

Between 1964 and 1967 he went to New Zealand, working on the 'great novel' and also as a journalist on various newspapers in Hawkes Bay, King Country and Christchurch, before joining the Reuters news agency as a parliamentary reporter in Wellington.

Between 1968 and 1971, he worked for Reuters in Sydney, and then moved to the *Sydney Sun*. He reported on parliament in Canberra and in Macquarie Street, and covered the 1969 federal election. In 1972, he entered the University of New South Wales, studying for a bachelor of arts degree, whilst working part-time at *The Sun* and in the ABC newsrooms, all the while working on the still unfinished novel.

Between 1975 and 1980 he studied law at the University of New South Wales. His fellow students included: Annabelle Bennett, John Bettens, and Stuart Littlemore. His tutors included Terry Buddin and Ian Harrison. All this time, he was working the 11 pm–7am shift as a sub-editor at ABC Radio News. He was also compiling and presenting the Market Report at seven o'clock in the morning on Clive Robertson's programme. The novel remained in the bottom drawer.

In November 1980, he was admitted to the New South Wales Bar. His admission was moved by Jeff Shaw QC with Sir Laurence Street presiding as chief justice.

At the private Bar, Billy read with John Szabo in Garfield Barwick Chambers. In 1982 he appeared in his first major criminal trial without



Photo by Mark Tedeschi QC

a leader. The trial judge was Judge Godfrey-Smith. Brian Sully QC with Peter Deakin were prosecuting in Court No 3 at Darlinghurst. During this trial he paid his first visit to the underground cells underneath the court, which he describes as a life changing event, describing the cells as 'cut from the rock – like caves with iron bars'. His client was acquitted.

In 1984, he appeared for Louis Chin in a drug-importation case (Rodney Purvis QC was prosecuting). His client was convicted. However, in 1985 he appeared without a leader in the Court of Criminal Appeal where Mr Chin successfully appealed against his conviction. The Crown appeal against that decision led to the High Court decision in *R v Chin* (1985) 16 A Crim R 147 which is still an important precedent on the Crown 'splitting its case'.

During the period 1983 to 1988, Billy inadvertently became a specialist in riot cases because of his involvement in the *Milperra Bikie Massacre Case*. He subsequently appeared for accused persons in other similar trials, following riots at Brewarrina, Bourke and Bathurst.

In 1987, he did his longest trial, spending seven months in the District Court at Penrith before Judge Harvey Cooper who was presiding in the case of *R v Anderson, McPhail & others*. The case was prosecuted by the late Ted O'Loughlin QC, Ana Seeto and Len Attard. Billy was instructed by Chrissa Loukas. Other defence counsel included Ian McClintock, Anthony Cook, John Gordon, Jim Barnett, Dino Bertini, Richard Royle and John Peluso. In another trial at the Downing Centre, Billy was appearing for one accused whilst Jock Dailly was appearing for the other. It was one of the very first trials where sound recording was used at the Downing Centre to record the evidence. During the course of the trial, a plaintive message came from the court transcription service asking whether Billy and Jock could please say who was talking each time they spoke. Billy and Jock were quite surprised that the court reporters were not able to distinguish between a rural northeastern Scots accent and a Glaswegian accent.

In 1992, Billy was appointed a crown prosecutor. Reg Blanch QC was then the director of public prosecutions. From 1992 until June

Billy and Jock were quite surprised that the court reporters were not able to distinguish between a rural northeastern Scots accent and a Glaswegian accent.

2007, Billy appeared as crown prosecutor in numerous trials in the District Court throughout the state. He estimates that about 60 per cent of them were either sex-related or drug-related matters (no more riots?).

In February 2002, in a much publicised outburst, an acting District Court judge aborted a trial in which Billy was prosecuting a former police officer on serious drug charges, because he thought that Billy was having difficulty adequately hearing the witnesses. This was despite the fact that Billy was able to read back from his own handwritten notes exactly what the witnesses had said in evidence. This prompted one of the daily newspapers to print a news poster the next day which read 'Judge hands down deaf sentence'. Despite this setback, several months later Billy (without a hearing aid) prosecuted the retrial of the former police officer (in front of another judge). The police officer was convicted after a seven-day trial. In fact, Billy successfully prosecuted for a further five years (still no hearing aid) until June 2007. His last trial, before Judge Norrish QC, was a five-day trial on four counts of fraudulent misappropriation. During sentence proceedings, Judge Norrish, who had known Billy for decades, paid tribute to the many years of outstanding professional service which Billy had given to the community, both as a barrister at the private Bar and as a crown prosecutor.

During this trial he paid his first visit to the underground cells underneath the court, which he describes as a life changing event, describing the cells as 'cut from the rock – like caves with iron bars'. His client was acquitted.

Billy is, in fact, not the oldest barrister ever to serve as a crown prosecutor in New South Wales. That distinction belongs to BFF (Buck) Telfer, who was appointed a crown prosecutor for the Western District on 1 April 1939, and who retired in July 1967 at the age of 78. Buck Telfer was a big man with prominent bushy eyebrows who cut a formidable figure in court. Towards the end of his career, he must have taken great care to conceal his advanced age, because a year before his retirement the then attorney general found out for the first time how old Buck Telfer really was. A short note in the records of the Attorney General's Department discloses that after finding out Buck Telfer's true age, the attorney general interviewed him in the presence of the under secretary and put to him that 'in view of his



Photo by Mark Tedeschi QC

age (77 years) and the policy of the government that officers, as a general rule, should retire at age 70, consideration should be given to his retirement.' After considerable discussion, Telfer agreed to tender his resignation the following year, and the attorney agreed to this. Rumour of this pressure from the attorney general must have spread to private practitioners in the Northern Rivers district where Telfer practised as a crown prosecutor. In June 1967, the secretary of the Clarence River and Coffs Harbour Law Society wrote to the attorney general informing him that the society had heard that Buck Telfer had been required to resign his office as crown prosecutor 'by reason of the view of the present government that he has now reached such an advanced age as renders his further tenure of office undesirable'. The secretary of the society also informed the attorney that 'my society is perturbed that an officer of the crown who has rendered and still renders capable service, who has discharged his office fairly and fearlessly, and who has a contractual right to remain in office should be deprived of such office against his will.' The reply to the society from the attorney was the predictable 'I'm not at liberty to discuss the matter'. Telfer's resignation became effective on 28 July 1967. He had been a crown prosecutor for 28 years, three months and 28 days. To the writer's knowledge, there has never been an older or longer serving NSW crown prosecutor before or since.

Unlike Buck Telfer, Billy Purves retired without any pressure from anyone in order to take up a life of relative leisure with his wife and daughter (another daughter lives in London). Billy has announced that in retirement he will be perfecting his Latin, improving his chess and golf, finishing the crosswords in the paper each day, and possibly even completing the long awaited novel. He will be sadly missed by his many friends and colleagues in the Crown Prosecutors Chambers and at the private Bar, as well as the many judges before whom he practised so ably.

John Coombs QC (1937-2007)



Graham Ellis, who worked on many cases with John, was the last of four speakers at the function held to celebrate John's life after he lost his battle with cancer on 16 July 2007. The following is an edited version of his speech on that occasion.

The funeral notice for this function appeared on the NSW Bar Association's web site above a paragraph headed 'Federal Court seminar on litigation funding'. That served to remind me that Coombsie commonly used his own form of litigation funding: no win – no pay. The fact that he made a good living under that system is testimony to his skills as an advocate.

I first appeared as his junior when the barrister with whom I read, Justice Hulme (as he now is), took silk and passed me a junior brief for the defendant in *Southland Mining v QBE*, a case in which our opponents were AM Gleeson QC and R Giles (as they then were). Not long after, we spent two years working together as Counsel Assisting the Evatt (Agent Orange) Royal Commission.

Apart from courtroom duties, being John's junior included jogging through Lenin

Peace Park in Hanoi, down to Fisherman's Wharf and back up Nob Hill in San Francisco, around Darwin in summer and along the banks of the Yarra in winter not to forget swimming laps in rock pools near Sydney. Despite being 16 years younger, as I was tiring John was changing from freestyle to butterfly. For many years he took pride in swimming, on his birthday, a lap for each year of age. There was also the memorable occasion when his squash partner, Don McCredie, was unavailable. Being unaware that John had two university blues for squash and having no suitable shoes, I offered to play him in bare feet. The final score was 3-2 (meaning he won all three games and I had two blisters).

I recall being invited to the fancy dress birthday party of his daughter Dom to which I wore a Herman Munster mask. For the equity practitioners I would say that the interior surface of the mask, when co-mingled with perspiration, developed adhesive qualities. To those who practise in common law: after dancing with Dom I worked up such a sweat that the mask stuck to my face. To this day I do not know whether John's suggestion that I drive home with the car air-con on high was borne of a genuine belief that would solve the problem or of the fact that, at that time, there was a random breath test facility established close to his home.

One morning, during the life of the Agent Orange Royal Commission, I fielded a call for John from the Headmistress at Abbotsleigh. Peta, another one of the four daughters John loved, was in the office of the Headmistress, accused of forging a note from her father which she had presented when she arrived late for school. When I was told that the note read: 'Because her father is an unpunctual slob, Peta is late for school'. I was able to give two reasons why the note was written by John, not Peta. First, as I had been working back at John's home that night and had stayed over, I had seen John write the note. Secondly, that Peta, a student of Abbotsleigh, would not start a sentence with the word 'Because'.

John also adored his grandchildren. I well remember the time when he rang me up to boast: 'My grandson just beat me at

Coombsie commonly used his own form of litigation funding: no win – no pay. The fact that he made a good living under that system is testimony to his skills as an advocate.

snooker' from which I deduce that either there is a snooker prodigy amongst those grandchildren or that one of them is well on the way to misspending his youth.

Over the years, John and I became involved in each other's cases. We were briefed to appear in the High Court together on three occasions. The first time he turned up with his robes. The second time he turned up without his robes. The third time he didn't turn up – an experience which I feel no junior should ever miss.

Although John appeared in a wide variety of cases, including commercial, industrial and building disputes, I gained the firm impression that he gained the most professional satisfaction in cases where the liberty of the client was at stake and from obtaining just compensation for accident victims. Indeed, I can recall one case where the outcome was a multiple of the insurer's offer inclusive of costs, plus an order for costs.

Perhaps the best example of John's devotion to the rights of accident victims was when he worked for the abolition of TransCover and WorkCover and for the introduction of the Motor Accidents Act. Nor should it be forgotten that John did more than his fair share of pro bono cases. He commonly received 'thank you' letters from his clients, be they plaintiffs in personal injury matters or defendants in criminal cases.

John also resuscitated cases for members of the junior Bar, often after they had commenced. On one occasion he dropped everything and came to PNG to assist me in the conduct of a commission of inquiry. During that visit we had lunch at a restaurant where he ordered a fruit pizza and his advocacy skills were such that he managed to make it sound delicious when he wrote of that meal in his 'culinary column' in the *Bar News*.

Underneath the long succession of cases in which John was briefed lay a number of unshakeable principles. The included, of course, a rigid adherence to ethical

standards and a firm view that barristers should not avoid hard cases which is the practical application of the 'cab rank' rule. Those views reflect the fact that John Coombs QC did not just practise at the Bar: he loved the Bar. It was his intended career from his teenage years. He was not just a master of the law: he was its servant.

In the preface to Bacon's *Maxims of the Law* we read the words:

'I hold every man a debtor to his profession; from the which, as men of course, do seek to receive countenance and profit, so ought they, of duty, to endeavour themselves, by

way of amends, to be a help and ornament thereunto.'

There may have been a time when John Coombs QC was a debtor to his professions but there has been a credit balance in that account for some time.

Some are here today to pay tribute to a skilled colleague; others to farewell a much loved partner, father, grandfather or friend. As one who falls into both those categories, I am glad to have had the opportunity to acknowledge, with admiration, appreciation and affection, someone who was, to me, a brother in the law.

Mark Anthony Macadam QC (1941-2007)



Mark was born in Tumut. His father Archibald, a young Scottish migrant, fought at Gallipoli and the Western Front, was decorated for bravery at Passchendaele in 1917. He moved to Tumut as a soldier settler and married Isobel Halloran, the daughter of a local grazier in 1923.

Mark inherited leadership, eloquence, a stage presence and a fine singing voice from Arch, along with a highly developed sense of fair play. Arch was in many respects a model for Mark throughout his life, including, unfortunately a predisposition to depression later in life.

His mother Isobel was a strong personality with a great sense of humour, manifest in her ability to make do with limited resources

and laugh about it. Mark's brother, Robert, recalls her amused pride in overalls she made from sugar bags, decking them out during World War 2.

Arch and Isobel walked off their farm, broke, in 1929 and moved into town where they somehow managed to raise their eight children on Arch's salary as a council clerk, including providing them with a boarding school education. The four boys all went to St. Patrick's College in Goulburn where Mark's unique leadership capacity emerged. Despite an aversion to playing sport and a moderate scholastic record he was, in 1958, appointed School Captain as well as Adjutant of the 250 strong Army Cadet Corps, and maintained his popularity with the boys and Brothers.

After leaving school, Mark revelled in his freedom as a telegram boy in Tumut in 1959, but came under increasing pressure from the higher aspirations for him of Arch and Isobel. The first step was a less than successful stint as an administrative assistant on the Snowy Scheme, followed by a somewhat desperate declaration of a vocation to the priesthood that led to a thirteen (13) day sojourn at St Columba's Seminary at Springwood. Mark's lifelong nickname among his boyhood friends of 'The Archbishop' stems from this interlude.

Isobel's maiden sisters in Leura intervened and introduced Mark to Jack Bolton, a barrister and family friend who launched a stellar career by getting Mark a job in the Clerk of Petty Sessions Office, which he began on 14 March, 1960.

Mark gained valuable practical experience at the Childrens', Coroners', Manly and North Sydney courts. He was also on the court relieving staff for a period. Mark qualified by studying through the Barrister's Admission Board and was called to the bar in 1972 while then working at the Office of the Clerk of the Peace, the precursor to the DPP.

Mark and Margaret (nee Underhill) Macadam began a 40 year marriage in 1967. They lived in Beacon Hill and Roseville before moving, in 1981, to Lismore where Mark became the first resident crown prosecutor with establishment of the Office of the Director of Public Prosecutions, Lismore Regional Office.

Mark and Margaret had three children. Andrew was born in 1970, Mathew in 1971 and Kate in 1980. Mark and Margaret were deeply affected by Andrew's death in a tragic accident in 1990.

In recognition of Mark's skill as an advocate, and no doubt his inherited stage presence, he was one of the first appointments as

a crown prosecutor from the ranks of the Office of the Clerk of the Peace. His undoubted success in that position is in no small way contributed to the continuation of such appointments. Mark took silk in 1987 and was appointed a deputy senior crown prosecutor in 1990.

On 23 November, 2001 the Crown Prosecutors Chambers at Lismore was named the 'Mark Macadam Chambers' and were officially opened by the director of public prosecutions, Nicholas Cowdery QC.

By the time of Mark's retirement in 2002, he was then the longest serving crown prosecutor in NSW. His professional life (and a great deal of his personal life) was dedicated to travelling the state giving service to the courts and people of New South Wales. He prosecuted countless serious criminal trials and in excess of one hundred and fifty (150) murder trials.

From modest beginnings Mark rose to conspicuousness, prosecuting many of the state's infamous murderers. The list includes; Maiden and Petty, Bassett and Steele (the siege at the 'Hanging Rock' Homestead at Cangai), Katherine Knight (who was responsible for one of the states most gruesome murders) and Hyland, Parry, Yates and others (a home invasion and murder by a bikie gang on the Central Coast). Mark also appeared to oppose the application by Leonard Keith Lawson for a determination of a specified term in lieu of his life sentence. Lawson was serving sentences for the kidnap and sexual assault of five professional models and later holding hostage a number of schoolgirls (one of which he murdered) at Moss Vale. Lawsons application was refused.

Unfortunately Mark did not long enjoy his retirement, he suffered a severe stroke

that left him frustrated and to an extent immobilised. He later required surgery, however, suffered further strokes and passed away at Lismore Base Hospital on 24 August, 2007.

Mark was filled with goodwill towards others and was blessed with both a sharp intellect and sense of humour. He was always available as a mentor to others coming up through the ranks. The essence of Mark was in the high expectations he set of himself and others that all things be done to the appropriate and proper standard. He maintained a dignity and integrity to be envied. His perception of fairness and justice was a model for all.

Mark Macadam was a devoted husband and father and a good friend to many. I regard myself privileged to be amongst that number.

By Colin McPherson

David Officer QC (1946 – 2007)



David Officer was the son of Forbes Officer QC and Suzanne.

Forbes Officer QC was a hard working leader of the New South Wales Bar. He raised his son in Turramurra. He educated him at Knox Grammar School, Sydney University and St Andrew's College. He set his son a fine example and gave him as good a start as any. One thing is certain, David made the very most of this opportunity.

He commenced his work in the law at Sly

and Russell. He then worked in London for some little time.

He came to the Bar in 1972 and read with RV Gyles (as he then was) and took a room on Tenth Floor Selborne Chambers (then not combined with Wentworth). He practised from that floor until October 2006 when his final illness dictated he cease.

He had a practice of great breadth and depth. He was equally at home in the High Court as he was before magistrates, and he did not disdain the Local Court.

He did common law cases. He had a significant practice in the Land and Environment Court. He did many Family Provision Act cases. He was the protective commissioner's senior counsel of choice. The work of helping unfortunate people in the care of that office was a source of great satisfaction to him.

In recent times he did cases and gave much advice on the Gaming Machines Act and the liquor licensing legislation.

He appeared for the Forestry Commission in the Terania Creek Enquiry which went

for years. He appeared in the Seaview Inquiry into the fatal crash of an aircraft on the way to Lord Howe Island. The Hyland Estate litigation lasted for ten years. David appeared for the testator's illegitimate son on legal aid. He appeared in the *Wentworth v Rogers* litigation.

He was a member of the Legal Services Division of the Administrative Decisions Tribunal. No member of the profession could have had a fairer judge than him. He also determined the correctness of the local government behaviour of elected councillors.

He had a powerful intellect which he used to its optimum. He was, disconcertingly to some people, forthright in his honesty. He was an economical advocate. No judge was troubled by repetition from him. No 'loose' witness or submission missed his withering attack. He had great judgement, yet, like his father he did not wish for judicial appointment.

He not only did his job with consummate skill but in the process earned the enduring

respect of the tribunals before whom he appeared, his juniors, his instructing solicitors and, most significantly, his clients.

He was a barrister's barrister in that he was conventional and he was conservative in the best sense of that word. He was discreet to the point of apparent disappearance. He

had no thought for the catchy headline or self-promotion.

Like all men of his goodness, his ultimate thoughts were for his family.

He married Gina in 1968 and had three sons, Simon, Mark and Timothy. In 1987 he married Di. Her children, Simon and Louise,

became part of the extended Officer family. His grandsons were his pride and joy.

We are all poorer for the loss of a man who so badly wanted to continue doing what he did so well.

By Stephen Austin SC

Justice Terry Connolly (1958-2007)



On the 25th September 2007 my dear friend Terry 'Tezza' Connolly died from sudden cardiac arrest while cycling on Red Hill in Canberra. Next Valentine's Day would have been his 50th birthday. 'Tezza' was Mr Justice Terry Connolly of the Supreme Court of the ACT.

Although we had little recent contact, Terry was a faithful friend. He was a man of great integrity, reliable, highly intelligent and generous. Our friendship commenced 30 years ago at the University of Adelaide Law School.

Terry grew up in Adelaide. His father, Pat, who passed away in 1990, was a bricklayer and ebullient grass-roots Labor Party campaigner. Terry matriculated at Woodville High School, he obtained a very high score in the competitive state exams and decided to pursue a career in the law. At Law School Terry achieved early prominence winning best orator in the Jessup International Law Moot held in Washington DC. He was

president of the Australia and New Zealand Law Students Association. In 1979 Terry also became national president of Young Labor. Two years later he graduated with honours in Law and Arts. In 1982 he was admitted as a barrister and solicitor of the Supreme Court of South Australia. He achieved further academic cachet obtaining a masters degree in public law from the Australian National University.

His first job was associate to Mr Justice John Gallop, a first class criminal trial judge and cricket aficionado. His honour was then a judge of the Supreme Court of the Northern Territory. Terry eventually moved on to work in the Commonwealth Attorney-General's Department in Canberra. It was in Canberra that he met and subsequently married Helen Watchirs. She is now Dr Watchirs, the highly regarded Human Rights and Discrimination Commissioner for the ACT. Helen and Terry became parents of two delightful daughters, Lara and Maddy.

Terry embraced ACT politics becoming Attorney -General. He also held portfolios of health, community services, housing and urban services. He was admired and respected by his political opponents. He had that special quality of being able to negotiate diametrically opposed views of

political life. In 1995 he introduced a Human Rights Bill in the Australian Capital Territory Assembly which was eventually instrumental to the enactment of the ACT Human Rights Act in 2004.

At the age of 38 he was appointed master of the Supreme Court of the ACT and then, at 45, a justice of the court. There were some devoid of perspicacity who thought his appointment to the Supreme Court unorthodox as Terry had never been in private practise. However, his formidable intellect enabled him to grow rapidly in the job and become a pre-eminent judicial officer much admired by his brother judges and the ACT Bar. He was never tardy with judicial pronouncements mindful always that justice delayed for litigants in hot contest before him was justice denied.

Terry loved good food, wine, stimulating social intercourse and the role of paterfamilias. Episodically we spent many armchair hours solving the world's problems, assisted by more than enough bottles of claret. Terry also loved animals, especially cats. I fondly recall an amusing occasion concerning an automatic cat feeder he purchased in a pet shop. This device was called 'Step and Dine'. Essentially a large plastic cylindrical dry food reservoir, it worked by the cat sitting on a

He was never tardy with judicial pronouncements mindful always that justice delayed for litigants in hot contest before him was justice denied.

platform thus activating a food dispenser. Terry was flummoxed by the quantity of food disappearing. He soon realised that leaving the feeder outside was attracting every edacious neighbourhood cat to its platform which became a sort of cat trampoline food dispenser! Of course Terry's easy generosity compelled him to leave the silly feeder where it was.

The weekend before his death my wife and I were visiting Floriade, Canberra's annual flower festival. We had discussed calling

on Terry and Helen but did not have their unlisted phone number, also they had moved from Narrabundah to Red Hill. To our eternal regret we left it. Two days later he was gone.

Terry was granted the state funeral he deserved. Almost a thousand people, many from afar, attended and heard valedictory speeches. Helen, supported by two brave daughters, gave a heartfelt eulogy commemorating the love of her life. ACT chief minister John Stanhope and the chief

justice, Terry Higgins, spoke passionately about their friend. During the speeches many fought against emotional disintegration. A cortege of family, friends, bewigged and robed lawyers, federal officers and a scotch pipe band accompanied 'Tezza' to his place of eternal rest.

He is survived by his 87 year old mother Dorothy, his wife Dr Helen Watchirs and daughters Lara 15 and Maddy 14.

'Tezza' Requiescat in pace.

By G D Wendler

Rodney Parker QC (1936-2007)



Rodney Parker was born in 1936, the son of Captain Roger Parker of the Royal Australian Navy. He followed two traditions of the navy – one was his loyalty to his friends and to his profession. The second tradition was one of integrity. He was admitted to the Bar in 1965 and took silk in 1979. He had a brilliant career in commercial law. In one leading case he was my junior all the way to the High Court. His advice was reliable, his court advocacy was brilliant.

His third characteristic was his enthusiasm and this was a feature of

his career. This made him enjoy many aspects of his life even when disabled.

He had the very good fortune to have a very happy marriage to Merrilee and he took pride in the achievements of his sons Will and Douglas. He delighted in his grandchildren.

He had courage, courage to live with dignity during years of life as a very disabled man, a prisoner in a wheel chair. In some ways his final wheel chair imprisonment was worse than that of a quadriplegic. He could not sit in a chair or a car. His right hand was weak and barely effective to write his name.

His first stroke was November 1999 and by 2001 he was almost completely immobilised. Yet, he still managed to do useful things, such as teach arbitration to those attending courses conducted by the Australian branch of the Chartered Institute of Arbitrators, as recently as March 2007.

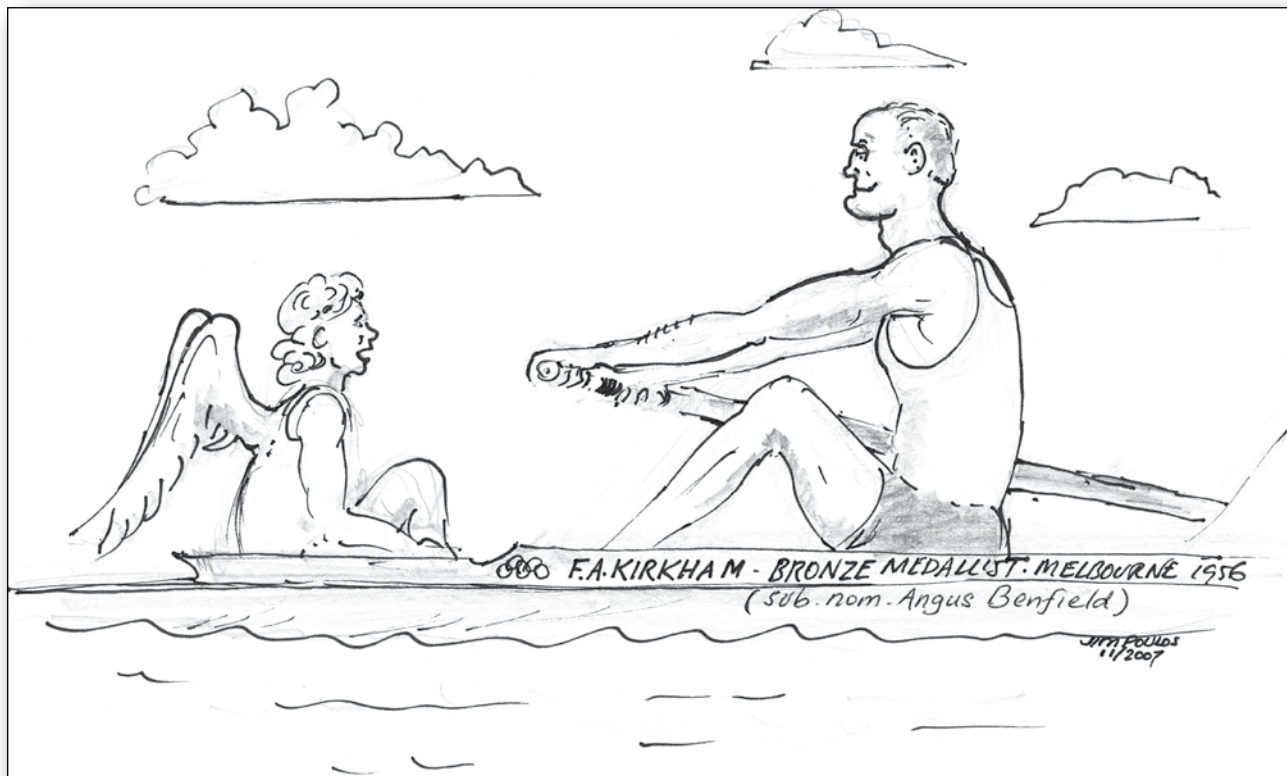
He was always cheerful every time we were together. He had a wonderfully warm personality. He was the president of the 12th Floor Selborne

His advice was reliable, his court advocacy was brilliant.

Chambers from 1988 to 1994. He was also a great Nelson navy historian. He was the last authority in handling wooden ships of the line. He remained cheerful and enthusiastic for the law. He died peacefully in the presence of Merrilee and his younger sister Rosemary.

By Chester Porter QC

His Honour Judge Kirkham (1937 – 2007)



'It doesn't matter what you did in another life, Fred. Up here, I judge what the rating will be.'

I became a friend of Fred soon after he was admitted to the Bar on 6 December 1974, after he left the New South Wales Police Force, as it was then called, where most recently he worked in the drug squad. Many others in the profession and beyond were, or became and remained, his friends. Those friendships remained throughout his life, before and after he came to the Bar, during his time on the Bench, and in retirement.

Those of us who knew him soon realised that three things above all were important to him: his family, his friends and his work. He took pride and joy in the achievements of his children, and that pride and joy he shared with his friends. The encouragement he gave to Jan in pursuing legal studies gave him much delight and that delight he also shared with his friends. The devotion he gave to her in the course of her long illness inspired admiration and esteem in those who knew of it.

His practice at the Bar was predominantly in the field of personal injury and he acquired an extensive medical knowledge. In his years at the Bar, court listing systems were far from perfect, and it was common to spend much time waiting for cases to be called on. Fred would occupy the time and engage his colleagues with tales of past experiences in the police force, or as a member of the international community of those who had been Olympic rowers. Fred was a wonderful cartoonist and frequently would sketch colleagues and witnesses. He and James Poulos, also a cartoonist, in more ways than one, would sketch one another, and their works were displayed for the amusement, but not always the edification, of the inhabitants of the robing room or, indeed, one another. The disparity in their size led Poulos to call Fred 'Your Immense'.

After only 14 years at the Bar, on 9 September 1988, Fred was appointed to the District Court. He devoted himself to judicial life

with the same vigour and understanding which marked his life at the Bar. His work on the Bench confirmed his belief that human beings have a value independent of any temporal process. He had confidence in the greatness of the human spirit, and saw in each person the reflection of God's image. He treated everyone without distinction, and without regard to status or influence.

To the miscreant, he gave courtesy and scrupulous impartiality.

On one occasion, he recognised a prisoner in the dock as a man he had arrested and charged when in the police force. He said to the prosecutor: 'Mr Crown, I believe I should not preside over this trial. I had dealings with the accused in earlier years.' Those in the court who were unaware of Fred's former occupation were puzzled that a judge of the District Court would have had dealings with a man charged with a serious crime. They were flabbergasted when the accused man, after a long stare through squinted eyes at

the man on the Bench, said, if I may first use a euphemism, 'Blow me down, if it isn't me old mate Freddy Kirkham.'

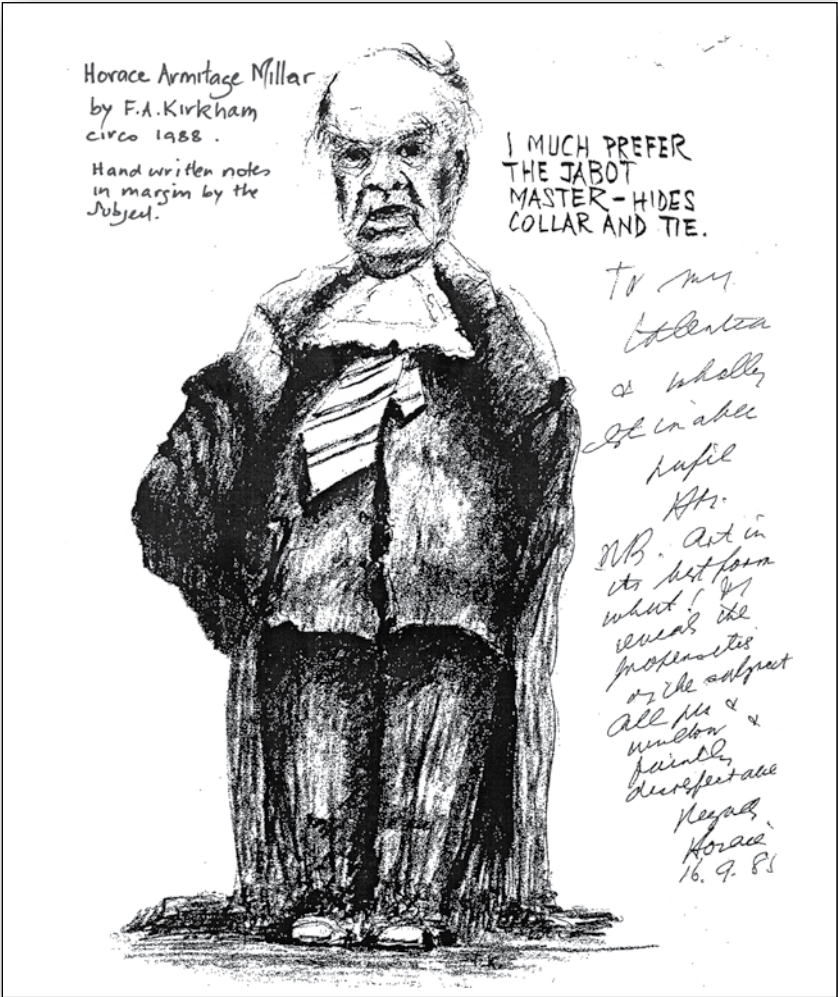
Fred was a wonderful cartoonist and frequently would sketch colleagues and witnesses.

Many will know Fred was a member of the 1956 Australian Olympic rowing team. He also carried the Olympic torch through the Rocks before the Sydney Olympics.

The community of former Olympic rowers is a close-knit one and friendships made between members of competing national teams last a lifetime. Fred maintained contact with many of those against whom he had competed. One of them invited Fred and Jan to the wedding of his daughter. When the invitation was accepted, a further invitation arrived asking Fred to perform the marriage ceremony. On responding that he lacked authority to join people in wedlock, his American friend, himself a lawyer, informed him that the laws applicable to the relevant part of the United States permitted any judge of a court of record to solemnize a marriage.

And so Fred, with approval from New South Wales and United States authorities, performed the marriage on the East Lawn of the White House wearing the robes of a judge of the District Court of New South Wales, as he was requested to do. He and Jan then attended the reception in the family's home, recognised by those who saw the film *Gone with the Wind* as 'Tara', once inhabited by Rhett Butler and Scarlett O'Hara, but then showing no signs of having been destroyed by fire during the American Civil War.

Fred enjoyed travelling, and took an interest in rural Australia. In circuit work, he found the opportunity to meet people associated with country townships and the land. He had an understanding of the travails of the litigants who came before him.



He had a liking for congenial company and pleasant discourse. His knowledge and experience covered many fields.

Fred's life was one in which good humour and wit were frequent. In all his relationships, he breathed kindness and gentleness.

Each of us needs friends with whom we can share a problem or a thought, and in Fred's friendship there was understanding, perception and affection. Friendship pure and unalloyed was Fred's special gift. In this friendship he gave freely of himself; he gave respect encouragement and support. His friendship was unselfish and generous, and those of us who were his friends benefited from it.

To Fred the invisible things – tolerance,

patience and kindness – were more important than the visible.

The words of the Irish poet John O'Donohue, aptly describe Fred's life:

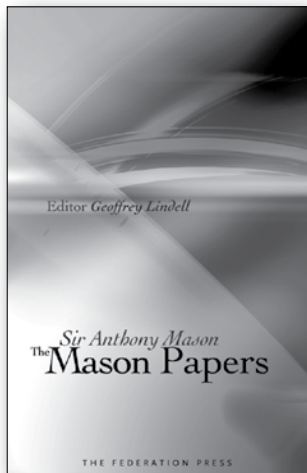
Compassionate of heart
Gentle in word
Gracious in awareness
Courageous in thought
Generous in love

Fred's life has endowed us with much we could imitate. It was a life marked by love of family, loyalty to friends and trust in God. With his family we mourn his passing, but we value the blessings we received from his life.

By Justice John O'Meally

The Mason Papers

Geoffrey Lindell (ed) | Federation Press, 2007



Many members of the Bar will have on their bookshelves a copy of *Jesting Pilate*, a compilation of papers and addresses of Sir Owen Dixon, collected by Judge Woinarski in 1965 (and reprinted in 1996). The publisher's Foreword to that work observed that there was:

so much of value in his extra-curial addresses not only intrinsically but for the purpose of historical record and research that it was felt a volume of selected addresses would appeal to a large reading public overseas as well as in the Commonwealth, and not be confined to professional lawyers. Otherwise much of the author's experience in the law as well as in administrative and international affairs would become if not lost with the passing of the years at least difficult to discover. His continuity of thought upon matters of legal and public concern possesses in itself an inestimable worth.

With the excellent example of *Jesting Pilate* in mind, and for the same reasons stated in the Foreword to *Jesting Pilate*, Professor Geoffrey Lindell, the noted constitutional scholar, has collected a large number of Sir Anthony Mason's extra-judicial writings, spanning a period well in excess of 30 years. The selection process must not have been easy as Sir Anthony was (and remains) prolific in his output. A number of papers published were delivered after Sir Anthony's retirement as chief justice in 1995 and may be thought to reflect the liberation from the strictures on public comment on particular

issues which necessarily attach to that office.

The time of Sir Anthony's chief justiceship (1987-1995) was one of great stability in terms of the composition of the High Court (only Sir Ronald Wilson retired in that period, replaced by Justice McHugh in 1989) and what became known as the 'Mason Court' developed a distinct identity and international reputation. It was certainly regarded by senior legal scholars in the United Kingdom at the time as the outstanding and most influential appellate court in the common law world. That eight year period saw a large number of landmark decisions of the High Court including: *Cole v Whitfield* (1988) 165 CLR 360, *Street v Queensland Bar Association* (1989) 162 CLR 461, *Mabo v Queensland* [No. 2] (1992) 175 CLR 1, *Jago v District Court* (1989) 168 CLR 21, *R v Dietrich* (1992) 177 CLR 292; *Minister for Immigration v Teoh* (1995) 183 CLR 273, *Walton's Stores v Maher* (1988) 164 CLR 387, *Commonwealth v Verwayen* (1990) 170 CLR 394, *Coco v The Queen* (1994) 179 CLR 427, the path-breaking restitution decisions, *Pavey Matthews v Paul* (1987) 162 CLR 221, *ANZ v Westpac Banking Corporation* (1988) 164 CLR 662 and *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, and, perhaps most notably, the brace of free speech cases – *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106, *Nationwide News Ltd v Wills* (1992) 177 CLR 1, *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104.

In a recent address in Adelaide, Justice Kirby expressly pondered whether many or indeed any of the landmark Mason Court decisions would have been reached by the current High Court (or, perhaps more accurately, the current High Court other than Justice Kirby). That is an intriguing question. Whatever the answer, and whatever views people may have as to the proper boundaries of judicial law making, there is no doubt that the years of what has become known as the Mason Court were highly significant in the history of the High Court of Australia, and the country more generally. Professor Lindell's contribution now preserves in one place a well chosen repository of the extra-judicial writings and reflections of the

leader of that court.

The publication is timely given recent and periodic attempts by some journalists to demonize the work of the High Court under Sir Anthony Mason's leadership with superficial and often simplistic claims of judicial activism. It will serve as a permanent reminder of the vitality of Sir Anthony's intellect, the breadth of his knowledge, the depth of his insight and the crystal clarity of his expression.

The book's contents, contained in some 27 chapters, include papers on constitutional law, administrative law, contract, equity and international law. Also included are papers on ancillary topics such as:

- ◆ the use and abuse of precedent;
- ◆ the role of the modern judge;
- ◆ the function and importance of legal research; and
- ◆ the role of counsel and appellate advocacy.

There are also papers delivered on topics of great public significance including in respect of 'Democracy and the Law', 'The Decline of Sovereignty', 'Legislative and Judicial Law-making', an Australian Bill of Rights and models for a republic. There is also an interesting historical reflection on Alfred Deakin entitled 'Deakin's Vision, Australia's Progress'. A number of these papers have not previously been published.

Also reproduced are the observations made by Sir Anthony on the occasions of his swearing in as a justice of the High Court in 1972, and as chief justice in 1987, as well as the transcript of his 1995 *Four Corners* interview with Liz Jackson on the eve of his retirement as chief justice, which was the first ever television interview by a High Court judge. This wide-ranging interview aired in a context of controversy in respect of the court's judgments as to implied constitutional rights, a controversy that was fanned by interventions at the time by Sir Anthony's two predecessors, Sir Harry Gibbs and Sir Garfield Barwick, through the auspices of the Samuel Griffith Society. Also on display in this interview is Sir Anthony's well known wit. Asked what he would like to see as his legacy, he replied 'I never

encourage the process of self-assessment – except, of course, in relation to taxation returns’.

An extremely useful feature of the work is Professor Lindell’s editorial notes which follow each chapter. Many of these notes draw attention to subsequent decisions both of the High Court and House of Lords or other developments which touch on or affect observations made by Sir Anthony in his addresses. They also include cross-

references to other writings. There is also a comprehensive Table of Cases and Statutes, a detailed and useful index and a detailed biographical entry in respect of Sir Anthony’s career. In that context, he has been since 1997, and remains, an active member of the Hong Kong Court of Final Appeal on which he sits for two to three months a year. (Sir Gerard Brennan and Justice McHugh are also non-permanent members of that court.)

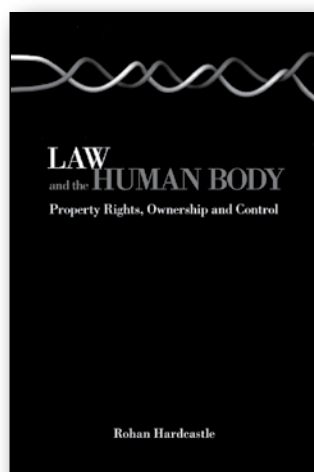
This publication, for which Federation

Press and Professor Lindell are to be congratulated, is a more than worthy sequel to *Jesting Pilate*. It should find a place on the bookshelves of not only every barrister but also of those with any interest in the role and rule of law in this country and some of the great philosophical debates as to this nation’s constitutional make-up at the close of the 20th century.

Reviewed by Andrew Bell SC

Law and the Human Body

By Rohan Hardcastle | Hart Publishing, 2007



The author opens with the question: ‘Do you own your body?’ Although the question sounds simple enough, a clear answer is surprisingly elusive. It has been settled in Australia since 1908 that, in some circumstances (the application of work or skill), ‘a human body, or a portion of a human body, is capable in law of becoming the subject of property’ (*Doodeward v Spence* (1908) 6 CLR 406 at 414). However the status of living bodies — and in particular the status of biological material removed from a living body, such as tissue, cells, fluids or genetic material — is by no means as clear.

In this work adapted from his doctoral dissertation, Dr Hardcastle navigates a broad variety of material from around the common

law world and formulates a principled structure for dealing with this area. He identifies a mix of difficult legal issues that are affected by inconsistent common law principles, a myriad of different statutes, competing commercial interests and significant moral and policy concerns.

The book is divided into two halves. The first half analyses how English, Australian and American jurisdictions currently deal with legal questions concerning biological materials separated from dead bodies and from living persons. The second half deals with future development of the law, and attempts to lay down a coherent framework to assist in resolution of the issues likely to arise.

Chapter 2 is concerned with the legal protection of dead bodies. It starts with the general English principle (of dubious ancestry) that there is no property in a dead body and then traces the exceptions to that principle that have developed. It examines the issue of who might have any property rights that are found to exist in bodies or body parts and how such rights are to be protected (usually in an action for conversion), and draws upon competing strands of American authorities that are in a better developed state than English or Australian ones. The author also examines the various other rights relating to dead bodies, including those that stray close to being proprietary, such as the right to possession for burial.

Chapter 3 deals with the legal rights of a living person in respect of biological material removed from their body, an issue that is likely to be of importance in future but that has so far been dealt with only in American authorities, notably *Moore v Regents of the University of California*, 793 P 2d 479 (Cal SC 1990) and *Washington University v Catalona* 490 F 3d 667 (8th Cir 2007). The author analyses these authorities and argues that the courts have focussed mainly on the posterior question of the competing policy considerations of individuals being permitted to sell separated biological materials without properly dealing with the anterior legal question of how the law of property actually applies to those materials. The author then considers the various authorities in which the possible status of biological materials as property has incidentally arisen as an issue in the course of actions other than proprietary claims made by their source, such as actions under consumer protection or sale of goods legislation, actions for larceny and disputes relating to embryos or gametes in the context of IVF procedures. Finally, he considers non-proprietary interests relating to the information comprised in biological material, such as DNA, retinal prints or fingerprints.

Chapter 4 deals with the *Human Tissue Act 2004* (UK). Although not of direct day-to-day relevance to an Australian audience, the Act is still significant as the most recent and most comprehensive attempt by a common law

jurisdiction to address the legal regulation of biological materials. The Act contains the first statutory codification of the 'work or skill exception' first recognised in *Doodeward* and the author provides a detailed analysis of it. The analysis is useful because the UK Act will likely influence future statutory developments and perhaps also assist in the development of the common law.

Chapter 5 commences the analysis of legal theory underlying the area and the potential future development of the law. The author conducts a comprehensive analysis of the 'work or skill exception' and rejects the exception as a principle capable of general application for the recognition of property rights. This conclusion is significant because commentators have often simply accepted the legal basis for and general application of the exception. Instead, the author argues that another basis is needed to govern the creation of property rights in detached biological material. The two main candidates—that detachment of material from a person's body is alone sufficient to create property rights in the detached material; or that such detachment must be

accompanied by an intention to use the detached material as property before any property rights are created—are developed and analysed in further detail in Chapter 6.

The author also places the legal framework in a practical context and considers the application of property rights to the operation of biobanks and to questions of ownership of cell lines cultured from an original human source. The latter area is of increasing significance in practice, particularly in regard to stem cells, and is consequently likely to be a source of future litigation. Usefully, the commentary is accompanied by an understanding of the underlying scientific aspects of the process involved. For example, the author points out the often-overlooked fact that, after amplification of a DNA sample, only a tiny fraction of the resulting sample consists of molecules present in the original source (typically 1/10,000th to 1/50,000th), with the vast majority consisting of material added during the amplification process. Questions of ownership based upon the original source of the material are thus complicated by the rules relating to admixture of materials and

particularly specification and accession. Such insights are important, as when applying the law to science, any failure to have regard to the true underlying scientific reality is likely to lead legal analysis astray.

Chapter 7 considers various non-proprietary rights that an individual has or may have in respect of detached biological material, including duties of confidence applying to information encoded in such material, rights in tort (battery, negligence, intentional infliction of emotional distress) and possibly rights based upon an individual's privacy. The book concludes, however, that a property-based approach provides the more satisfying legal framework.

Law and the Human Body is a welcome addition to the literature of law and medicine. It summarises the existing state of the law comprehensively and provides informed insights into the way the law can legitimately employ property rights to govern an increasingly complicated area. The author is to be commended for a well-written, accessible book that is useful to both the legal and medical communities.

Reviewed by Ben Kremer

Professional Liability in Australia (2nd ed)

Walmsley, Abadee & Zipser | Law Book Company, 2007

A second edition of a text as useful as the first edition of *Professional Liability in Australia* has proved to be, is, in itself, something to be welcomed. This edition is even more welcome given the extensive impact on the law of professional liability of a host of statutory developments affecting such liability in the period since the first edition went to press in 2002. The authors draw attention to and make extensive reference to these statutory reforms which include the enactment of proportionate liability regimes, the operation of professional standards legislation and the statutory enactment of the *Bolam* test for professional liability. The authors observe in the Preface to this edition that practitioners in this area 'will increasingly need to develop an appreciation of general principles of

statutory interpretation on advising clients and prosecuting or defending claims'. They are quite right.

The authors also, as would be expected, take on board recent common law developments including the High Court's decisions in *Woolcock Street Investments Pty Limited v CDG Pty Limited* (2004) 216 CLR 515; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 and *Harrington v Stephens* (2006) 226 CLR 52.

The book follows the same broad structure as the first edition but with a significantly expanded first section on general principles (running to some 228 pages) and then separate sections dealing with doctors, solicitors, barristers, accountants and auditors, building professionals, valuers

and financial services professionals. This last chapter picks up the language of the *Financial Services Reform Act 2001* (Cth) and treats securities advisers and dealers, finance brokers and insurance agents and brokers, including the not uncomplicated licensing and regulatory provisions relating thereto.

This text is a 'must have' for any practitioner dealing with professional liability questions. Such practitioners owe a debt of gratitude to Judge Walmsley SC and Messrs Abadee and Zipser for this new edition which is of high quality and great practical utility. That it has been written by practitioners adds significantly to its appeal.

Reviewed by Andrew Bell SC

William Bede Dalley: Silver-Tongued Pride of Old Sydney

Robert Lehane | Ginninderra Press, 2007



The defendant in the dock grinned broadly during defence counsel's address to the jury which went on to acquit on a charge for robbery under arms. An encounter after court between the advocate and the acquitted defendant allowed the former to ask the latter why he was grinning during the address. The client replied 'Well, sir, it's this way. Until I heard that speech of yours, I didn't believe I was innocent'.

The eloquent and persuasive advocate was William Bede Dalley.

Dalley was born in 1831 in Sydney of emancipated parents. In 1897, nine years after his death, 10,000 people attended the unveiling of his statue by the governor of New South Wales. The governor of Victoria also attended. The statue stands in Hyde Park, not far from the Supreme Court. What sort of advocate attracts this display of public approbation?

The story of Dalley's life and his prominent role in the shift of the colony of New South Wales to responsible government is vividly told by the historian Robert Lehane in his biography *William Bede Dalley: Silver-tongued Pride of Old Sydney*.

Dalley was admitted to the Bar on Saturday 5 July 1856. It was reported that Dalley spent

the first £20 he earned as a barrister giving a dinner that cost £25. Where was BarCare to counsel against such fiscally imprudent self-indulgence? No matter. He survived and flourished although never seemed to lose his fondness for good food and wine. Chapter 20 of the book is entitled 'The Dining Out Administration' [of Premier Stuart] in which Dalley served as attorney general. A young A B Piddington (the famous High Court judge who never was) recorded for posterity the details of a banquet at the Sydney Town Hall to mark the 70th birthday of the legendary Professor Badham of Sydney University. Piddington noted that 'there were twenty two courses and, with Dalley in the confidence of the caterers, the wines came on in orthodox order and profusion'.

Dalley served as solicitor general and also as attorney general (on several occasions). It was as attorney general that Dalley saw through the passage of the great reforms to, and consolidation of, the criminal law of the colony in 1883, the process having been begun through the famous work of Sir Alfred Stephen in 1870.

Dalley was a liberal and man of principle, who made major contributions to the legal, political and literary life of New South Wales. Lehane tracks not only his career as an advocate, rising to the rank of queen's counsel, but also his several forays into public office where his high-minded oratory appeared to win him great support and esteem bordering on reverence throughout the colony. Lehane also details his commitment to, and advocacy of, religious tolerance in the colony. He was a devout and prominent Catholic with a stained-glass window installed in his memory in the western transept of St Mary's Cathedral in 1892 following his death. Subscribers included the prominent Protestants, and some of his leading peers in public life, Lord Carrington, Sir John Robertson and Sir Frederick Darley. In the same vein as his push for religious tolerance was his commitment to establishing full and proper respect for the large numbers of Chinese who had migrated to New South Wales.

Lehane's book is much more than the account of a fascinating and full public life. It brings to life the colony of New South Wales

in the 30 years after the grant of responsible government. It provides an insight into the controversies of the day, some but not all of which are not so very different 150 years later. Lehane draws heavily on the colonial newspapers and political pamphlets from an age with neither radio, television nor the internet and when the art of oratory and the public meeting necessarily assumed a prominence which is now, sadly, greatly diminished. Many verbatim accounts of Dalley's speeches provide testament to his eloquence. Anyone interested in biography and the legal and political history of this state will enjoy becoming acquainted with the life of William Bede Dalley, silver-tongued pride of old Sydney.

Copies are available through Ginninderra Press, www.ginninderrapress.com.au, PO Box 6753 Charnwood ACT 2615. Recommended retail price \$35.

Reviewed by Andrew Bell SC

Ken Hall Classic 2006

By Tony Bannon

It's been said that it is easier for a camel to enter the US Masters at Augusta than to get an invitation to play in the Ken Hall Classic. Does this make it golf's most prestigious event? Quite possibly. That doyen of clerks and favourite son of the fighting Tenth, Ken Hall (and early mentor to one Bruce Crampton at Royal Beverly Hills Golf Club!), would deserve no less. Selection criteria are shrouded in deep mystery, although golfing talent would not appear to figure prominently. Indeed, camels would more than hold their own. Equally intriguing is the paucity of publicity which the event has attracted. In fact, the only previous Bar News article on the event coincided with the victory several years ago of Wheelahan QC and partner. The tiny font in which the partner's name was printed in Wheelahan's article was just discernible as Mason P.

Readers may thus be surprised to be told that the 19th Ken Hall Classic was held on a glorious 21 December 2006 day at Monash Golf Club. Deserved winners of the 2006 Classic were Bergin J and Peter Wood. No surprises there with Paddy who, as the individual trophy winner in 2005, had form on the board. Wood had none, being the winner of the 2005 Bradman trophy (for the uninitiated that's dead last). The miracle of Monash? Maybe but in a tight finish, the eventual champions held their nerve, eclipsing on a countback the runners up, Bannon and Sullivan SCC (an electric combination), who folded like a cheap suit on the 18th (or as Sullivan would have it, Bannon did and Sullivan had had enough of carrying the team single-handedly for 17 holes). Completing their haul Paddy secured back to back individual trophies and Wood the long drive award. Honourable mentions also go to winner of the nearest the pin Peter Hastings, winner of the Bradman Greg McNally (a former winner!) and winner of the Panache Award Richard Cheney for a putting performance so atrocious as to coax an audible sigh from his long suffering partner, one Keith Mason.

Watching this space for future reports may not be rewarding.



Peter Wood and Justice Bergin

