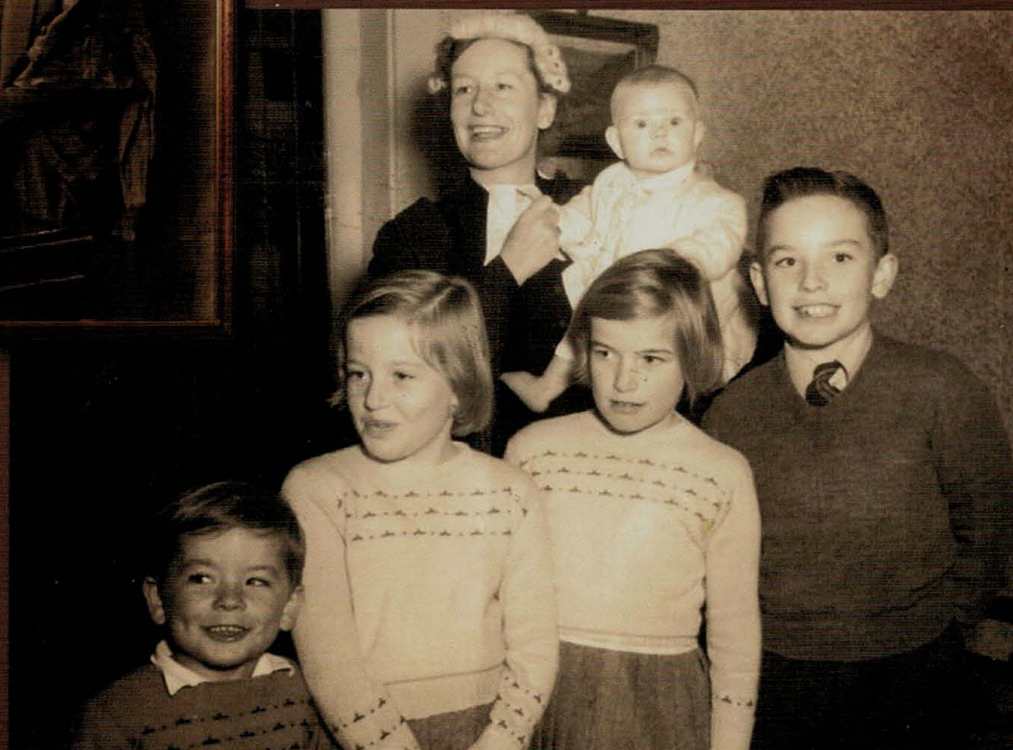


The first women to clear the bar in NSW



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Eleven Wentworth
11/180 Phillip Street
Sydney 2000
DX 377 Sydney

Cover (clockwise): Ada Evans (courtesy Sydney University Archives), Jenny Blackman AO, Beatrice Bateman and the first five of her seven children, holding baby Gregory. Front row, L to R: Thomas, Beatrice, Rosalind and Edmund. Photo: courtesy of Beatrice Gray (courtesy of Beatrice Gray), Sybil Morrison (courtesy Sydney University Archives).

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Laywers and public life

My editor's note in the last issue of *Bar News* commenced by quoting some observations of the late Jeff Shaw on the skills and techniques barristers could bring to politics. In this issue, we are pleased to publish the inaugural Sir Garfield Barwick address delivered earlier this year by Senator George Brandis SC, the current shadow attorney general. This is a most interesting address indeed and focuses on Sir Garfield Barwick's career in federal politics but is much more than a biographical account of that. The theme of the address is captured in the title 'The lawyer's duty to public life'.

Contributions by lawyers to public life can, of course, and do extend far beyond parliamentary membership. Many members of the bar are involved, often at a senior level, in cultural, charitable and educational endeavours on top of their principal occupation. One of the great virtues and privileges of the bar is the liberty and flexibility that permits such participation.

This issue

Much has been written over the past decade about Bills of Rights. Much of that writing is repetitive and familiar. Against that trend is the original and illuminating essay published in this issue by Brian Rayment, QC on the topic of 'Entrenching rights in the US and Canada' which is, as one might expect, a serious and incisive piece of scholarship.

Tony Cunneen continues to make a significant contribution to the legal history of the profession with his article on the *Women's Legal Status Act* of 1918 which gave women the legal right to become lawyers and to be elected to the New South Wales Legislative Assembly. His article is complemented by an important oral history project currently being undertaken and which is described by Jenny Chambers in her article 'The First Women to Clear the Bar in New South Wales'. Despite the passage of the *Women's Legal Status Act* of 1918, only 26 women had been admitted to practice at the New South Wales Bar between 1924 and 1975. The numbers have changed radically since then with approximately the same number of women being admitted to the bar in 2010 alone, representing approximately 40 per cent of all new barristers.

The current issue of *Bar News* features a number of important matters relating to practice. Topics covered include reflections on the 'hot tubbing' of experts by Justice Rares, a description of an important new initiative in relation to the proof

of foreign law in disputes involving New South Wales and New York law, a description of the pro bono referral program directed at offering assistance to complainants in sexual assault proceedings and, finally, a comprehensive article by Hugh Stowe on security for costs which will become the first port of call for junior barristers seeking or resisting orders for security for costs.

25th anniversary

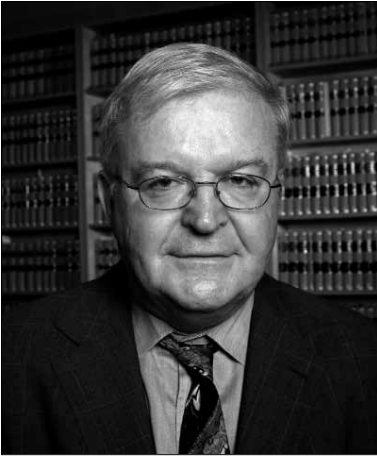
Assuming that the constituency might permit a modicum of self-indulgence and self-congratulation, *Bar News* celebrates its 25th birthday in this issue with a little retrospective compiled by Kate Williams and Ingmar Taylor. All past issues of *Bar News* are now available on the Bar Association website. For those who compare the earlier issues to more recent publications, it will be evident that *Bar News* has grown from an excellent but relatively brief bulletin into a regular and diverse journal which seeks to speak to the entire Bar, endeavouring to focus on all segments of the bar and to touch all practice areas. *Bar News* strives to be a forum in which senior and junior members alike feel free to contribute to a discussion of a diverse range of legally related topics. This issue illustrates that goal.

I am pleased to report that Bar Council has recently endorsed *Bar News* moving to three issues per year. Thus, from next year, *Bar News* will be published in April, August and December. Contributions are always welcome.

Andrew Bell SC
Editor

An interesting year

By Tom Bathurst QC



This edition of *Bar News* is, of course, the final one for the year. It gives me the opportunity of thanking all those people who have made my term as president over the current year not only interesting but also enjoyable and stimulating. In particular, I would like to extend my warmest thanks to the senior vice president, Bernie Coles, the members of the Bar Executive, Philip Selth, the executive director, and all members of the Bar Council. All council members contributed actively this year to the affairs of the Bar Association and although there were some strong differences of views on certain matters, those differences were discussed and resolved in a cordial and collegiate fashion. It was a truly outstanding board of directors.

As you may be aware, the Bar Association's premises are now in a state of shambles. There is significant renovation work currently being undertaken which we hope will result in better facilities for members and provide the staff of the association with working

conditions which, whilst not necessarily the most congenial, will at least be a significant improvement to the conditions which they had to previously work under. The association has sufficient reserves to cover the costs of this redevelopment and it will not need to be funded by any fee increase or levy from members.

As you may be aware, the Bar Association's premises are now in a state of shambles.

The most contentious issue during this year has been the proposed reform of the legal profession. At the outset, as I think I indicated to you in an earlier column, there was a real concern that control over admission to and administration of the profession would be taken almost entirely outside the hands of lawyers. Fortunately, this has not occurred and the model presently under consideration takes into account to a significant extent the need to preserve the independence of the profession. Further, and importantly from the bar's point of view, it has recognised the importance of the bar as a stand alone branch of the profession. The Australian Bar Association has a right to nominate one person to the new national board and the right to be consulted in relation to the appointment of the chair of that board. The other reforms proposed are such that do not threaten the independence of the profession or at least as things presently stand, impose additional costs on the

profession which would need to be accommodated in practising certificate fees.

Philip Selth has worked tirelessly to protect and advance the bar's interest in the reform process. The outcome which has been achieved is in no small manner is due to his work and he deserves our sincerest thanks.

One matter which I regard of particular importance to the bar is its involvement in matters of public interest and controversy, particularly so far as they relate to the rule of law. This will become even more important because of the forthcoming state election. The work of the Human Rights Committee and the Equal Opportunity Committee has enabled us to take soundly reasoned public positions on: matters of controversy in relation to issues of human rights, both in this country and overseas, particularly in the Pacific area; questions of discrimination both at the bar and generally; and, of course, the perennial issue of the treatment of refugees. The Common Law Committee has worked valiantly to try to ensure that common law rights are not further eroded, that legislation dealing with those rights, particularly in the personal injuries and industrial accidents field, operates in a comprehensible and fair manner and to ensure that



Artist's impression of the refurbished common room and reception.

any costs regime imposed does not operate unfairly to members of the bar. Likewise, the Criminal Law Committee has spent considerable time and energy in considering various proposals relating to the reform of the criminal law with a particular view to ensuring that the rights of an accused person continue to be protected.

At the collegiate level the Practice Development Committee is actively involved in seeking solutions to work related problems at the bar including ways in which barristers can advance their practice and the possibility of user-friendly hours for those barristers, both male and female, who have young children. The Health, Sport & Recreation Committee has contributed to the collegiate activities of the bar in the various functions they have put on throughout the year.

The Benevolent Fund and the Bar Association's director, care and assistance, Penny Johnston, have continued to provide crucial support to barristers experiencing health, financial or other personal

difficulties on a confidential basis. On behalf of the bar I extend my thanks to Penny for the help and guidance she provides to members and member's families in times of hardship.

Looking to the future there are three matters which I would like to mention. First, the Bar Council in conjunction with the Legal Aid Committee is continuing to negotiate with Legal Aid New South Wales with a view to seeking a fair return for barristers doing legal aid work. Some progress has been made in this area but there is certainly some distance to travel. Second, the Bar Council has resolved to undertake a complete

... probably the most traumatic aspect of the year from the point of view of the president is the senior counsel selection process.

review of its education courses including the Bar Practice Course and the professional development courses. Kevin Lindgren QC has 'volunteered' to undertake this review and is anxiously waiting

submissions on how the system can be improved.

Last but not least probably the most traumatic aspect of the year from the point of view of the president is the senior counsel selection process. I don't want to add in this column to anything that Keith Mason has said but emphasise that those persons who think it can be improved should let the council know as the protocol will again be reviewed in early February. I repeat what I said earlier this year that the fact that a person who has chosen to criticise the system will not be taken into account one way or another in considering his or her subsequent application for silk.

Finally, can I just wish all members and their families all the best for the Christmas season and an enjoyable and safe holiday.

Dear Sir

A relatively recent *Bar News* carried the story of LS Abrahams KC, and AC Gain, junior counsel, killed in the *Kyeema* air crash on 25 October 1938 in the Dandenong Ranges.

Two recent books by Macarthur Job OAM reveal that both barristers were en route to Sydney from Perth, having appeared for the British Medical Association in a royal commission on national health insurance.

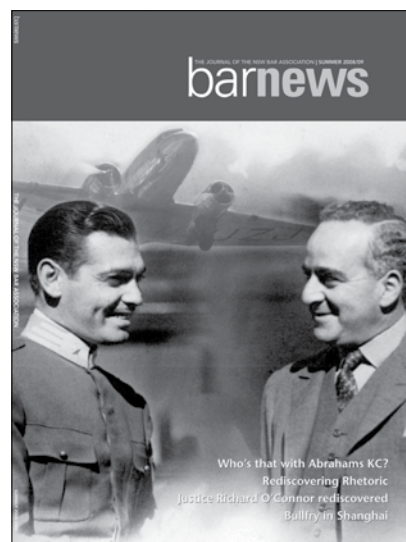
Most of the records of the client for its long case were lost in the crash. Why? Because the two instructing solicitors were traveling on the same doomed flight. The four lawyers were also carrying unrecorded thoughts and opinions on the brief,

these also lost to the client.

There may be a lesson there, with recent problems in air travel safety. In our understandable keenness to get back home, records and lawyers can all be lost.

Of the 18 killed, some (incl. Mr Gain) had survived the horrors of fighting in the First World War.

After much public and political concern was expressed as to the independence of the Commonwealth public service inquiry, the subsequent Air Accidents Investigation Committee was augmented by another prominent lawyer, Colonel Herring KC. The committee was vested with the status of the High Court



(presumably in the absence of the Commonwealth equivalent of our Federal Court).

Christopher Ryan

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Dear Sir

The articles, 'Increase the retirement age for federal judges' and 'A creature of momentary panic' in the Winter edition of *Bar News* prompts me to write to you about one aspect of the current practice relating to acting judges which causes me some concern.

As your readers will know, the current practice is that judges, state or federal, who have reached the relevant retiring age, but who wish to continue on a part-time basis, are generally appointed as acting judges of the Supreme or District Court (the Commonwealth Constitution prevents the appointment of acting judges to federal courts). These appointments are for a term of one year: *Supreme Court Act 1970* s 37, and, if the individual judge is willing, renewed annually until he or she reaches the maximum retiring age for acting judges, currently 77 years: s 37 of the *Supreme Court Act 1970*.

My concern is that this practice breaches a fundamental and well-established constitutional principle dating back to the *Act of Settlement 1701*, in force in this state by virtue of the *Imperial Acts Application Act 1966*, s 6.

The principle established by that Act was that judges were appointed for life (since modified to a set

retiring age) and so had nothing (such as dismissal) to fear and no expectation of further advancement from the government of the day dependent on how they performed their judicial duties or how they decided cases. In my opinion, the present practice of annual renewals breaches this constitutional principle.

In my opinion, judges who have reached the retiring age for permanent judges and who wish to continue should, if the government is willing, be appointed as acting judges once only with a commission lasting until they reach the retiring age for acting judges; and the annual renewals be discontinued.

I am not suggesting that any judges have decided, or are likely to decide, cases favourably to the government of the day in order to advance their prospects of re-appointment, but there could be a perception (particularly to a disappointed litigant) that this had, or could, happen; and it is to avoid the possibility of such a perception (or rather, misconception), that the principle has been established for the last 300 years.

In my opinion, judges who have reached the retiring age for permanent judges and who wish to continue should, if the government is willing, be appointed as acting judges once only with a commission

lasting until they reach the retiring age for acting judges; and the annual renewals be discontinued.

Objection may be made that some such acting judges may reach a stage when their faculties decline and they are no longer as competent as they formerly were, and that the current system

provides a 'safety valve' in this respect. But in my view, a preferable solution for such a situation would be for the relevant chief justice or chief judge to simply not allot the judge in question any further work. Acting judges only get paid for the days on which they actually work.

I actually had something to say on this subject in a judgment I delivered whilst on the bench, namely *Hagan v ICAC* [2002] NSWSC 686 at paras [18] to [24].

The case went to the Court of Appeal: [2003] NSWCA 93, but the matter of acting judges was not considered by that court.

John Dunford QC

Dear Sir

Having returned to the bar after five years as a senior member of the Administrative Appeals Tribunal, I have been struck by many changes that have occurred at the bar during those five years.

I was delighted to become involved in a project of the Women Barristers' Forum about the women who were admitted and practised at the New South Wales Bar before

1976. If the bar has changed in five years, it has changed tremendously since 1975 and, of course, earlier.

There is a wealth of knowledge about the bar known to retired clerks such as Brian Bannon, Bill McMahon, Greg Isaac, and Bill McCarthy, and those present clerks and staff who started working in and around 'The Street' as it was known, 30 or more years ago.

I urge the Bar Association to undertake an oral history project, to capture the story of the bar during the second half of the 20th Century before the opportunity is lost.

Josephine Kelly

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The Clerks' Dinner

On 8 October 2010 The clerks and their guests gathered at Ottoman Cuisine for their annual dinner.



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Kim Sams, Angela Noakes, Andrew Laughlin and Emma Hoolahan



David Chin, Laura O'Laughlin, Mark Cleary



Dominique Hogan-Doran, Jeanette Richards and Christopher Palmer



Nick Tiffen, Dermott Ryan SC and Philippa Ryan



Chief Justice Patrick Keane



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Bar Practice Course 02/10



Back row, left to right: Trent Glover, Jane Maconachie, Todd Pickering, Stephen Thornton, Simon Chapple, Duncan Brakell, Simon Fitzpatrick, Stephen Feredoes. **Middle row, left to right:** Ivan Tam, Sigrid Neumueller, Ivan Leong, Mark Lazarus, Tova Gordon, Monica Neville, Julieanne Levick. **Front row, left to right:** Gary Hill, Katica Longin, Nuala Shaw, Nick Hogan, Rob Yezerksi, Susan Oliver, Richard Chia, Katherine Oldfield.

The silks of 2010



Back row, L to R: Adam Hatcher, Richard Schonell, Richard Cavanagh, Andrew Coleman, Peter Braham, Peter Morris, Murugan Thangaraj, Anthony Black, Geoffrey Kennett. **Front row, L to R:** Hament Dhanji, Phillip Ingram, Patricia McDonald, Gregory Curtin, Sandra Duggan, Stephen Hanley, Gail Furness, Garry McGrath.



Stop pretending

By Duncan Graham



A fresh group of barristers was recently made silk. They are the first appointees since the senior counsel protocol was reviewed by Roger Gyles QC and amended in accordance with his recommendations. Doubtless, the new process of selection is more rigorous and time-consuming. Keith Mason QC, the 'non-practising barrister' observer on the Senior Counsel Selection Committee, said the process was 'exhaustive'. In greeting the new silk, Chief Justice Spigelman described the system as being 'much more rigorous' than the 'considerably less transparent' process of old.

Although revamped and much improved, the system remains fundamentally unfair. The reason for this is simple: while many of the criteria are verifiable, the most critical factor is what colleagues and judges think of an applicant. That can never be anything but a subjective opinion and prone to palpable or subconscious bias. Gyles QC conceded that it was difficult to assess claims of bias on any objective basis. The system will always be

unfair until selection is based exclusively on objective, verifiable criteria. In a branch of a profession which champions the principles of natural justice, it is puzzling why selection of 'outstanding' practitioners rests on the say-so of peers rather than on the satisfaction of objective, provable factors.

Although revamped and much improved, the system remains fundamentally unfair.

The quest for objectivity is worthwhile. Its attainment is not illusory. Gyles QC received submissions on the need for verifiable criteria.¹ His recommendations went some way to that end. For instance, he suggested that the form of application should be reviewed and amended to ensure that the application was made in 'a manner capable of being verified and assessed.' This recommendation was adopted. It enabled the selection committee to check some of an applicant's assertions, but it did not make the selection itself based on

verifiable factors. The real issue is ensuring that the selection is carried out in 'a manner capable of being verified and assessed' and not just the form of application. That issue has not been addressed.

Senior counsel are meant to be those who display an ability to provide exceptional service as advocates and legal advisers in the administration of justice.² The overarching criterion is therefore excellence. The current process apparently selects candidates who are 'in the range'.³ Near enough is not good enough. Excellence should be capable of proof and not something seen in the eye of the beholder.

At present, there is a positive onus on an applicant to demonstrate

that he or she has satisfied to a high degree the essential criteria of learning, skill, integrity and honesty, independence, disinterestedness, diligence and experience.⁴ An applicant must also prove leadership in developing the diverse community of the bar, or in making a significant contribution to Australian society as a barrister.⁵ The only proof applicants can offer is a statement of how long they have been a barrister, what qualifications they hold, and what experience they have had (hearings, important cases). They can also

demonstrate how they have served the Bar Association. That is as far as objective criteria go. Their suitability is then polled, and further culling occurs after members of the selection committee talk to unidentified persons about the applicant. Both the poll and the discussions are purely subjective. Those surveyed may answer 'yes' or 'no' or 'not yet'. It is impossible for any selection committee member to test the objectivity of the opinions they receive from the poll or orally. They have no idea whether a 'yes' or 'no' response is valid or infected by undisclosed bias. They do not know how any of those polled assess the criteria for silk. Trust is not enough.

Put simply, an applicant may satisfy objective criteria and yet the application may be rejected on the basis that an unidentified third person has told a member of the Senior Counsel Selection Committee that the applicant is not skilful, diligent, independent, disinterested or honest enough. I am not sure how some of these intangible factors can be assessed fairly. I do not know how someone can tell a barrister is not independent or disinterested when many only accept briefs for insurers or on a speculative basis (and, hence, must always have a conflict of interest with a client). Criticisms levelled at a barrister may be very serious. In an adversarial system, there must always be a risk of personality clashes, animosity, professional jealousy, etc. There may be a dislike of the applicant's personality, or a desire to protect one's own practice. Of course,

there may be many valid reasons why a third person may have a negative opinion about an applicant (e.g. lack of trustworthiness). But it is impossible for a committee member to ascertain where the truth lies, particularly if the survey shows polarisation of views. There is a real risk of unwitting discrimination against applicants with mental illness (an unknown explanation for personality clashes beyond the 'bad hair day' referred

To think that those consulted will provide uniformly fair and appropriate appraisals of applicants is to live in a world where a frog could turn into a prince if kissed.

to by Mason QC) or based on an applicant's sexuality. The Senior Counsel Selection Committee may have no knowledge of a particular applicant and thus must rely on the views of third persons. No professional organisation would tolerate a system which permits an unidentified third person to criticise, defame or misrepresent the qualities of an applicant and for this to pass as a proper basis for identifying excellence. It is no more than a glorified job application where referees are rung up for their feedback on a particular applicant.

To think that those consulted will provide uniformly fair and appropriate appraisals of applicants is to live in a world where a frog could turn into a prince if kissed. It is time to stop pretending that this consultation process is anything other than subjective and often

unfair, particularly when there is no right of review or a right to receive reasons or to know what has been said and by whom. In addition, stop pretending this is a system that recognises real expertise. The vast majority (or even all of those) consulted approach their task intending to be fair. But it is basic to the human condition that subjective factors may influence the advice given to the committee. The cases on bias teach us this much at least.

Having identified the problem, it is difficult to gain any momentum for change within the Bar. Most criticisms of the system are from rejects⁶ and dismissed by many as 'sour grapes'. Those already senior counsel are unlikely to be interested in change. Others are fearful of criticising the process on the basis that it will cruel prospects in the future. This is hardly a satisfactory environment in which to have proper debate on the system. The apathy of which Gyles QC referred to in his report is also understandable. I doubt it reflects satisfaction with the system, other than from those who have already passed through it.

If there is to be debate about the system, then the first question is to ascertain whether silk are relevant to contemporary practice.



For the appointment of silk to be relevant, the position must satisfy some valid public interest or need. Barristers provide professional legal services and assist in the proper administration of justice. Consumers of barristers' services are solicitors and, either directly or indirectly, members of the public. This means that it is necessary to view the system from the perspective of the consumer of legal services rather than internally from peer perspective within the bar.

The letters 'SC' tell a consumer nothing about the qualifications, training or experience of the particular barrister.

How do clients or solicitors view the position of senior counsel? In simple terms, senior counsel are held out to, and perceived by, consumers as experienced experts in particular fields of practice or as experienced and more skilled general advocates. They are held out to consumers to be the best in their fields. The question is whether the present system is the best way

of acknowledging expertise and excellence and of communicating that fact to consumers. I do not think it is. The reason is that members of the public, and probably the majority of solicitors, have no idea how senior counsel are selected. They cannot identify (particularly after the event) whether valid, relevant criteria have been satisfied so as to ensure the best counsel are selected. The letters 'SC' tell a consumer nothing about the qualifications, training or experience of the particular barrister.

Gyles QC vaguely referred to the public's need for silk in his report when he said:

The basic principle enunciated in the protocol is peer group identification of those with individual merit and integrity for the benefit of the public in choosing counsel – principally solicitors and their clients. That justification for the system has not been widely questioned.

The purpose is therefore to help consumers in 'choosing counsel'. It is unclear what this means. Is the public served by silk selected by peers through the present system? There can be little doubt that there is a need for consumers to access acknowledged experts in particular fields of practice. Consumers also are likely to have a need to access the very best and the most experienced advocates in a particular field or generally. The fact that senior counsel are able to charge higher fees and lead other counsel is proof that some type of specialist system is not only tolerated, but desired, by consumers.

If there is a need for a system giving acknowledgement to expertise and experience, then it must be a system that can be trusted by consumers of barristers' services to result in the appointment of the right people. This can only exist if the selection of barristers with additional expertise and experience is based upon objective, tangible and verifiable factors.

What are verifiable, objective factors? This needs to be reviewed and debated. They could include the following:

- number of years of practice (say, a minimum of 15 years);
- number of years of practice in a particular area of law (say, a minimum of five to 10 years);
- a log demonstrating a prescribed minimum number of first instance trials as junior counsel and as sole counsel in various jurisdictions;

Keith Mason QC's 'insider' comments about the lack of trial experience ignores the changing landscape of commercial and common law litigation.

- a log demonstrating a prescribed minimum number of contested interlocutory arguments;
- a log demonstrating a prescribed minimum number of appeals as junior counsel and as sole counsel;
- evidence of number of briefs per annum (taking into account the applicant's area);
- qualifications – including qualifications additional to a law degree in specialist areas;
- no history of professional complaints; and
- no convictions.

The current requirement for a log of the previous 12 months' work is a step in the right direction, but is far too short. Keith Mason QC's 'insider' comments about the lack of trial experience ignores the changing landscape of commercial and common law litigation. The majority of cases settle at mediation. Many barristers ran a significant number of cases earlier in their practices before alternative dispute resolution became mandatory. To suggest such an applicant lacks trial experience based on the last 12 months is not only unreal, but unfair. There is also a tension between the ethical obligation of barristers to try and resolve matters and the demand for trial experience. To obtain greater exposure to the judiciary, barristers would need to run cases

that could be settled, contrary to the barristers' rules. Anyone with passing knowledge of contemporary practice must know that, for many, it largely involves advice work, mediations and arbitrations.

At present, a barrister is only able to hold himself or herself out as a specialist if he or she has both relevant expertise *and* experience or is a specialist under a scheme conducted by the Bar Association.⁷ No specialist scheme exists other than that for the appointment of silk. It is not enough to hold yourself out as a specialist to say you have been practising in an area for a certain number of years unless you also have relevant expertise. What expertise is required? There is no guidance. Does it mean a law degree or does it mean a law degree and, for example, a Master in Taxation to be a specialist taxation barrister, or a law degree and a medical degree to be a specialist in medical negligence? It is unclear and unsatisfactory. Are silk the only barristers allowed legally to hold themselves out as specialists? If they are, then the system is flawed in relation to the recognition of specialist practitioners.

Gyles QC's terms of reference did not include whether the system of silk selection should be abolished or whether some other type of system should be introduced in its place or in combination with it. That inquiry should occur. At the very least,

there should be a further review of the process to ensure decisions are made in 'a manner capable of being verified and assessed'.

Endnotes

1. Such as from this writer.
2. Paragraph 5 of the Senior Counsel Protocol.
3. Gyles QC report.
4. Paragraph 6 of the Protocol.
5. Paragraph 7 of the Protocol.
6. Like me.
7. Section 86 *Legal Profession Act 2004*.

Editor's note

The article 'Stop pretending' was prepared for publication during the 'caretaker period' immediately before the new Bar Council was elected.

In these circumstances the outgoing president of the time, Tom Bathurst QC, did not believe it appropriate to make a detailed comment on matters raised in the article. However, Bathurst did say that whilst there are inevitably difficulties in relying on subjective appraisal of applicants for appointment as senior counsel, the alternative suggested by Mr Graham would seem to substitute a mechanical procedure that may raise more problems than it might solve.

Mr Graham's comments, along with the comments of any other person who believes the silk process could be approved, will be considered by the new Bar Council as part of the annual review of the protocol, which will take place early in 2011. Members are encouraged to express their views to the Bar Council.

Variations to registrable charges

Public Trustee of Queensland v Fortress Credit Corporation (Aus) 11 Pty Ltd [2010] HCA 29

In this decision, the High Court has provided guidance as to the operation of section 266 of the *Corporations Act 2001* (Cth) (Act) concerning variation in the terms of a registrable charge. In particular, the High Court has clarified that in determining whether there has been a variation to the terms of a registrable charge under section 266(3), there must be a variation to the actual wording and effect of the instruments effecting the charge, not merely an increase in the liabilities secured by the charge by virtue of an instrument executed after the entry into the charge.

In a joint judgment, French CJ, Gummow, Hayne, Kiefel and Bell JJ upheld the decision of the Court of Appeal of the Supreme Court of Queensland in which Holmes JA (Muir JA agreeing) and White JA set aside the declaratory order made by the trial judge (McMurdo J) that a fixed and floating charge over the assets of the second respondent (Octaviar) in favour of the first respondent (Fortress Credit) was void to the extent that it secured a particular liability not expressed to be secured by the charge at the time of its creation, but which was subsequently the subject of a deed which had the effect of including it within the liabilities secured by the charge.

The facts

An understanding of the history of the charge is critical to an appreciation of the court's reasoning and decision. Under the charge granted by instrument in June 2007 (charge), Octaviar charged to Fortress Credit all of the 'Secured Property, (all of its present and future property) as security for payment of the 'Secured Money' (all moneys that became payable by Octaviar to Fortress Credit 'under or in relation to a 'Transaction Document'). On the same date as the entry into the charge, a facility agreement was entered into between Fortress Credit as lender, Octaviar Castle (an Octaviar subsidiary) as borrower, and Octaviar and Octaviar Administration (another Octaviar subsidiary) as guarantors. 'Transaction Document' was defined in the facility agreement to mean each document which Fortress Credit and Octaviar Castle or Octaviar agreed in writing to be a transaction document for the

purposes of the facility agreement. The charge was registered under the Act a few days later.

Octaviar then entered into a guarantee under which it guaranteed the indebtedness of Young Village Estates Pty Ltd (YVE) to Fortress Credit (YVE Guarantee). On 22 January 2008, Fortress Credit, Octaviar and Octaviar Castle entered into a deed under which the parties agreed that 'the YVE Guarantee is a Transaction Document for the purposes of the Facility Agreement' (deed), thereby purporting to bring the liability of Octaviar to Fortress Credit in relation to YVE under the purview of the charge.

After Octaviar and an associated entity entered into deeds of company arrangement, the Public Trustee of Queensland as trustee for certain noteholders applied to the Supreme Court for orders under s 445D terminating each deed on the footing that they had been premised upon the validity of the charge in all respects, but that the charge did not validly secure the YVE Guarantee.

The High Court proceedings

Two questions arose for the court's consideration. First, whether the deed was a 'variation in the terms' of the charge to which s 268(2) of the Act applied, and secondly, whether the deed created a new charge to which the registration provisions of ss 262 and 263 applied. The High Court answered both questions in the negative.

The Public Trustee argued in the High Court that the deed varied the terms of the charge by adding a new liability to the class of liabilities already secured by the charge, thereby altering the terms of the charge by adding to the meaning of 'Transaction Document'.

The court rejected this argument. The court held (at [22]) that the phrase 'agree in writing' in the definition of 'Transaction Document' is ambulatory, meaning both 'have already agreed' and 'hereafter agree'. Although as a result of the deed, the YVE guarantee was now, but had not before been, a transaction document, that did not alter the meaning of 'Transaction Document' in the facility agreement or 'secured money' in the charge.

The court agreed with both Holmes JA and Muir JA that before section 268(2) can be applied, there must be shown to be a term of the charge that has been varied, and that s 268(2) is directed to variations in the terms of the charge, and not changes imposed pursuant to those terms upon the burden of liability under the charge. In this case, there was no variation to the terms of the charge by the entry into the deed, whether by wording or effect.

This decision brings clarity to the interpretation of Ch 2K of the Act as to the circumstances in which a variation in the terms of a registrable charge will be effected.

The court held (at [24]) that it was misconceived to focus upon the effect of the deed, as opposed to the question of whether the execution of the deed varied the terms of the charge, because s 268(2) does not apply to any increase in the debt or liabilities secured. Where a term of a charge is variable or ambulatory, there is no variation in the terms each time the operation of that term is as a matter of fact, altered or modified. For this reason, there was no variation in the terms of the charge, and no new charge was created.

The court rejected the Public Trustee's submission that such a result is contrary to the scope and purpose of the registration system established by Ch 2K, and emphasised that the provisions in that chapter do not purport to create a 'perfect and complete' register of all of the details of a registrable charge. Rather, the court recognised that the nature of liabilities which may be secured is an uncertainty incapable of being made

certain at the time of registration, and noted that it was unsurprising that the monetary obligations underlying the charge and the property comprising the security might change from time to time (at [29] – [30]).

Further, the court noted (at [31]) that all that was required under s 263(1)(a)(iv) when a new charge is created is a 'short description' of the liability, which was satisfied by the inclusion of the definitions of secured money and facility agreement and the charge itself. The court noted that the definition of secured money flagged a need to look elsewhere to determine the exact nature of the liabilities secured, and in those circumstances there was nothing objectionable to the policy of Ch 2K that notice of the deed was not required to be lodged.

Conclusion

This decision brings clarity to the interpretation of Ch 2K of the Act as to the circumstances in which a variation in the terms of a registrable charge will be effected. One issue left unresolved by the High Court's decision is whether the phrase 'terms of the charge' in s 268(2) encompasses all of the terms of an instrument or only those 'relevant to its character as a charge'. Holmes JA in the Court of Appeal had noted that 'terms of the charge' arguably included the terms of the facility agreement (at [48]). The High Court found that this question was unnecessary for the Court of Appeal to decide, and noted that the High Court's reasons should not be taken to endorse the proposition that they were (at [28]). The question is therefore open for the time being.

By Victoria Brigden

Mistake and qualified privilege

Atkas v Westpac Banking Corporation [2010] HCA 25

It has long been established that the wrongful dishonouring of a cheque may found a defamation action. In *Atkas v Westpac Banking Corporation* the High Court considered the availability of the defence of qualified privilege when the defendant bank mistakenly dishonoured cheques issued by the plaintiff to his clients.

The facts

Mr Atkas was the sole shareholder of a company, Homeside Lending Pty Ltd, that carried on a real estate franchise business at Auburn. The business managed rental properties for its clients and maintained trust accounts with Westpac on behalf of those clients. Following a dispute, the franchisor obtained a garnishee order against Homeside's accounts with Westpac. By virtue of section 36(2) of the *Property, Stock and Business Agents Act 1941* (NSW) the garnishee order did not operate against the trust accounts maintained by Homeside. Owing to an internal error, the bank changed the designation of the trust accounts to prevent customer-initiated debits, including cheques.

Homeside drew 30 cheques in favour of its rental clients from one of its trust accounts. Mr Atkas was one of the signatories on the cheques. Westpac dishonoured each of the cheques on presentation. Each of the cheques were returned with the explanation 'Refer to Drawer.' That expression is commonly understood to denote that there are insufficient funds in the account to meet the cheque. This was not the case in respect of the trust account on which the cheques were drawn.

As a result of the reasons given for the dishonour by Westpac, Mr Atkas encountered hostility from the Turkish community in which he moved and elsewhere. At a trial before Fullerton J the jury found that the communications by Westpac carried the imputations that Homewise had passed valueless trust account cheques and that Mr Atkas had caused this to happen. Fullerton J found that Westpac's defamatory communications were protected by the defence of common law qualified privilege.¹ An appeal against the verdict in favour of Westpac was dismissed by the Court of Appeal.



Issues

Westpac argued that the advice given to Homeside's customers was published on an occasion of qualified privilege in that it had a duty, by virtue of its obligations under section 67(1) of the *Cheques Act 1986* (Cth) to communicate the status of its cheques to its customers and collecting banks and the interest the recipients of the communications had in receiving the information.

The issue in the appeal turned on whether the bank's mistake as to the operation of the garnishee order on Homeside's trust accounts gave rise to a privileged occasion.

The High Court accepted, following Parke B in *Toogood v Spyring*, that the defence of qualified privilege is not to be narrowly confined.² The defence depends on the existence of an occasion on which the maker of a defamatory communication has a duty or interest in publishing it in the conduct of its affairs and the recipient has a corresponding interest in receiving it, that the communication fairly relates to the occasion, and that the communication was not actuated by malice. It was common ground that the circumstances in which the cheques were dishonoured were caused by an honest mistake on the part of Westpac as to its entitlement to refuse payment of the cheques, such that there was no room for a finding that the defence was defeated by malice.³

The issue in the appeal turned on whether the bank's mistake as to the operation of the garnishee order on Homeside's trust accounts gave rise to a privileged occasion.

The majority judgment

In a joint majority judgment, French CJ, Gummow and Hayne JJ held that Westpac's mistake did not generate a privileged occasion. The majority rejected, and Westpac in argument accepted, that because it had no entitlement to dishonour the cheques drawn on the trust account, it had no duty to communicate the dishonour to the payees of the cheques.⁴ The majority also rejected the alternative argument that there was a general reciprocity of interest between the bank and the payees such that the erroneous communication of the dishonour was protected by the privilege.

The majority accepted that there was a community of interest between each of Westpac, the payees and Homeside in the cheque being paid if there were funds to meet it.⁵ The majority held that, consistently with the rationale for the defence, the interest in freedom of communication of dishonour by a drawee bank will outweigh the need for accuracy in such communications only where the cheque is to be dishonoured by the bank.⁶ The majority had regard to the decision of Hilbery J on similar facts in *Davidson v Barclay's Bank Ltd*⁷ that:

you cannot, by making a mistake, create the occasion for making the communication, and what the bank seek[s] to do here is to create an occasion of qualified privilege by making a mistake which called for a communication on their part.

For the majority, the fact of the mistake was less significant than the fact that, in the absence of a justifiable reason for the bank's decision to dishonour a cheque, there can be no reciprocity of interest in communication of the dishonour. The payee can have no interest in the receipt of a defamatory communication of the reasons for dishonour, as a payee's interest is limited to knowing whether the cheque will be paid or not. There is no interest in knowing 'the fate' of the cheque if it is capable of being paid.⁸

The dissenting judgments

Heydon and Kiefel JJ approved the findings of the primary judge and the Court of Appeal that the privileged occasion arose from the relationship between Westpac, the payees and the collecting banks, so that there was a general commonality of interest in communication of the bank's decision as to payment of the cheques.⁹

Heydon J considered that the majority's identification of the 'occasion' was too narrow. In other circumstances, such as reports of misconduct or criminal charges, the defamatory imputation will be published on an occasion that would not exist but for the mistake of the maker as to the relevant misconduct or criminality.¹⁰ Kiefel J considered that there was no satisfactory reason why a communication, which, in the absence of mistake, would attract the privilege, should not be privileged where founded on a mistake.¹¹

For Heydon J, the privileged occasion arose on drawing of the cheques, because from that point Westpac was to communicate something to the payees, either that it was willing or unwilling to pay.¹² The minority agreed that Westpac had an interest and duty in communicating not just the refusal to pay, but the reason for it, both because from the bank's (mistaken) perspective, it was bound to comply with the garnishee order, and because the payees needed to know the position in respect of the cheques so that they could take steps to secure payment. The payees had a corresponding interest in knowing the position.¹³ This position promoted the rationale for the existence of the privilege, in that it was for the 'common convenience and welfare of society'¹⁴ that communications be made that enabled payments to be made where they should.¹⁵

Conclusion

The differences between the majority and minority rest on the tension between the circumstances giving rise to an occasion of privilege and the circumstances that made the bank's statement untrue, and therefore defamatory. In the present case, the bank's mistake affected the identification of both issues. Resolution of this issue required a clear identification of the relationship between a drawee bank and the payee

of a cheque and what communications are necessary in the course of that relationship. Both the majority and minority decisions rested to a large degree on an investigation of how the operation of the privilege might affect the orderly conduct of the banking system. For the majority, deprivation of the privilege achieves the object of encouraging responsibility by banks in their decisions about payment of cheques.¹⁶ For the minority, the maintenance of the privilege in these circumstances would promote free communication of decisions about cheques and ultimately promotes the efficient payment of cheques.¹⁷

The decision also contains one of the most wonderful footnotes in recent High Court jurisprudence, which is worth setting out in full. While discussing *Davidson v Barclay's Bank Ltd*, Heydon J said:

Whatever its legal merits, this decision, printed as it is on wartime paper, yellowed now by the humidity of seventy sultry Sydney summers, at least illustrates the untruth, in common law systems, of the maxim 'inter arma silent leges'. There is much to admire in a legal system which, in the terrible year of 1940, ensured that one of its most senior judges devoted his energies to determining whether the dishonouring of a cheque for £2 15s 8d drawn by a credit bookmaker to settle a successful long odds bet on a horse race was actionable defamation, and deciding that the defendant should pay damages of £250 – another successful long odds bet, this time in the greater lottery of defamation litigation. Thus were traditional and

fundamental cultural values, which had played so large a part in the rough island story, vindicated. Had Churchill, whose name is inextricably linked with 1940, been aware of the decision, he might have made the remark he made in another context: 'It makes you feel proud to be British'.

By Catherine Gleeson

Endnotes

1. The case was decided under the *Defamation Act 1974* (NSW). Section 11 of that Act preserved the operation of common law defences. The common law defences are similarly preserved by the operation of section 24 of the *Defamation Act 2005* (NSW).
2. (1834) 1 Cr M & R 181 at 193; 149 ER 1044 at 1050 (French CJ, Gummow and Hayne JJ at [15]–[17], Kiefel J at [92]).
3. French CJ, Gummow and Hayne JJ at [19]–[20], Heydon J at [55], Kiefel J at [109]–[110].
4. French CJ, Gummow and Hayne JJ at [25].
5. French CJ, Gummow and Hayne JJ at [27].
6. French CJ, Gummow and Hayne JJ at [32]–[33], referring to *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357 at 363 and *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 412 per Gummow J.
7. [1940] 1 All ER 316 at 322.
8. French CJ, Gummow and Hayne JJ at [41].
9. Heydon J at [64], Kiefel J at [87].
10. Heydon J at [61], citing *Pyke v Hibernian Bank* [1950] IR 195 at 221–222; Kiefel J at [113].
11. Kiefel J at [103], Heydon J at [63].
12. Heydon J at [62], [65].
13. Heydon J at [69]–[70], Kiefel J at [102].
14. As referred to by Parke B in *Toogood v Spyring*.
15. Heydon J at [74].
16. French CJ, Gummow and Hayne JJ at [42].
17. Heydon J at [74].

Verbatim

Sir Anthony Mason, launching *From Moree to Mabo: The Mary Gaudron Story*

'The author mentions an anecdote related to Mary's success in her very early years at the Bar in the *O'Shaughnessy* case. ... Mary lost the case before the trial judge and jury and again in the Court of Appeal (of which I was then a member) but won a unanimous judgment in the High Court. ... Some

time after the case I congratulated Mary on her success in the High Court. Her response – a typical one – was simply to say "I was surprised by your judgment. I thought you were a much better lawyer than that".'

Verbatim

Surfing, waves and roof-racks - Bannon SC's dream re-examination (or 'waxing' lyrical)

Q: What is your interest in the beach?

A: Surfing.

Q: That is surfboard riding?

A: Yes.

Q: Is that something you have done all your life?

A: Yes.

Q: During your time in the union did you do that as much as you do now?

A: No.

Q: In terms of passions or loves how would you describe it in your life?

A: Oh, it is my passion.

Q: Trips. You were asked questions about overseas trips you made. I think you referred to the Maldives twice and once to Hawaii?

A: Yes.

Q: Did you engage in surfing?

A: Yes.

Q: Are they two renowned surfing locations?

A: Yes, they are.

Q: Is it easy for people who have not enjoyed the experience of surfboard riding to understand how much joy it brings, in your experience?

A: I don't think so, no.

Q: Have you found it easy to describe just how much passion and enjoyment it brings to people who don't?

A: No, I have found it hard to describe.

Q: And the area in which you live, is that near some of the finest waves in the world?

A: Yes, it is.



Q: And it was put to you that you don't have a BMW any more and it was suggested to you that this has had a negative impact on your lifestyle. You rejected that. Do you have a car now?

A: Yes.

Q: What sort of car is it?

A: A Holden Commodore.

Q: And how has your life experience or lifestyle diminished by not having a BMW?

A: It has not diminished at all. In fact it is embellished because surfboard racks go on a Commodore much easier than they do on a BMW.

Legal professional privilege over accounting documents

Hogan v Australian Crime Commission [2010] HCA 21



Paul Hogan in the office of his solicitor. Photo: Rene Nowytarger / Newspix

The High Court rejected an argument that the Federal Court should have made orders restricting publication of evidence on the basis that it was of an 'inherently confidential nature', holding that any such order must be necessary to prevent prejudice to the administration of justice.

As a part of its investigation of promoters and participants in tax haven arrangements, 'Operation Wickenby', the Australian Crime Commission (ACC) issued a notice requiring an accounting firm to produce documents relating to the financial affairs of Paul Hogan.

In a Federal Court proceeding Mr Hogan maintained a claim of legal professional privilege over the accounting documents. The ACC submitted that the documents were made in furtherance of a crime or fraud and, as a consequence, no privilege existed.

During the course of the Federal Court proceeding, Emmett J made a number of orders pursuant to section 50 of the *Federal Court of Australia Act 1976* restricting the publication of the identity of Mr Hogan and the contents of affidavits and exhibits in the proceeding. Section 50¹ stated:

The Court may, at any time during or after the hearing of a proceeding in the Court, make such order forbidding or restricting the publication of particular evidence, or the

In a Federal Court proceeding Mr Hogan maintained a claim of legal professional privilege over the accounting documents. The ACC submitted that the documents were made in furtherance of a crime or fraud and, as a consequence, no privilege existed.

name of a party or witness, as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth.

A motion filed by Mr Hogan seeking further and better discovery from the ACC was supported by an affidavit of Mr Hogan's solicitor exhibiting documents which included a schedule of the inferences the ACC sought to draw as to Mr Hogan's involvement in tax haven arrangements and file notes and advices created by Mr Hogan's accountants (relevant documents). It was the relevant documents, which were the subject of the appeal to the High Court.

Upon the application of Mr Hogan, Emmett J made an order under section 50 with respect to the relevant

documents.² Mr Hogan was subsequently successful in his application for further and better discovery and in his assertion of privilege.

Media organisations applied to the court for access to the court's files and the vacation of all section 50 orders made by the court. Emmett J vacated section 50 orders previously made, including with respect to the relevant documents. His Honour held that section 50 only allowed the court to prohibit publication of material otherwise accessible on a court file if its disclosure would prejudice the administration of justice. Mr Hogan had failed to identify any specific prejudice other than the broad assertion that the relevant documents were his 'private and confidential information'.³ By majority, the full court dismissed Mr Hogan's appeal.⁴

Both in the full court and the High Court, Mr Hogan argued that the relevant documents were of an 'inherently confidential nature' and that the Federal Court had failed to recognise that fact. Relevantly, Mr Hogan did not rely on any claim of legal professional privilege in relation to the relevant documents.

In dismissing the appeal, the High Court recited and explicitly approved a passage⁵ from the judgment of Jessup J in the full court (with whom Moore J agreed). His Honour recognised that the court will protect certain personal and public information and that the source of the Federal Court's jurisdiction to protect such information is section 50, in respect of which:

... the question will always be: is an order necessary to prevent prejudice to the administration of justice? Absent an affirmative answer to this question it is, in my view, almost meaningless to propose that documents themselves are, or that the information in them is, inherently confidential to an extent justifying, or assisting in the justification of, the making of an order permanently protecting them from public view.⁶

In construing section 50, the High Court noted that 'necessary' in section 50 'is a strong word' and in order

for a section 50 order to be made it will need to be more than 'convenient, reasonable or sensible, or to serve some notion of the public interest'.⁷

The court concluded by noting that placing material into evidence 'is a matter of forensic decision' and although the price of that decision may include 'embarrassing publicity', 'it is no sufficient answer to brandish the term 'inherently confidential'.' Once evidence is admitted in a proceeding 'the interests of open justice' will be considered alongside the interests of the parties.⁸

Both in the full court and the High Court, Mr Hogan argued that the relevant documents were of an 'inherently confidential nature' and that the Federal Court had failed to recognise that fact.

The judgment is a salutary reminder to litigants and their lawyers that particular care must be taken in the exercise of forensic decisions as to the evidence to be adduced in proceedings. The jurisdiction of the Federal Court to restrict publication of evidence is limited to section 50 and outside of the terms of that section, broad notions of confidentiality will not assist.

By Ben Koch

Endnotes

1. Now s 50(1) following the amendments introduced by the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009*.
2. *P v Australian Crime Commission* [2008] FCA 1336; 250 ALR 66.
3. [2008] FCA 1336 at [61]–[62].
4. *Hogan v Australian Crime Commission* (2009) 177 FCR 205.
5. [2010] HCA 21 at [38]–[39].
6. (2009) 177 FCR 205 at 221.
7. [2010] HCA 21 at [30]–[31].
8. [2010] HCA 21 at [41]–[43].

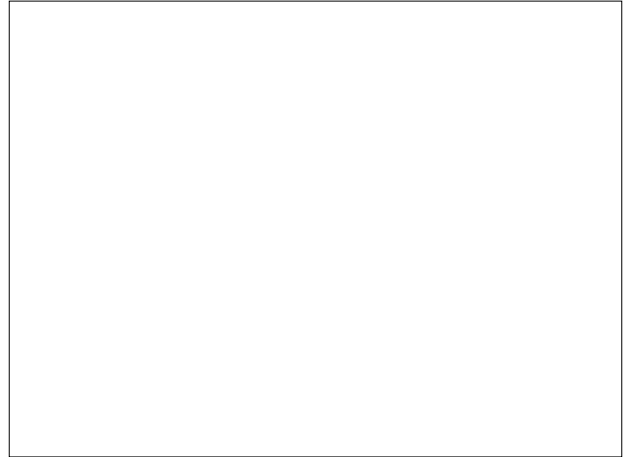
Breaches of directors' duties

CGU Insurance Limited v One.Tel Limited (in Liquidation) & Ors [2010] HCA 26

These proceedings originated from the conduct of the third respondent, John Greaves (Mr Greaves) during his tenure as a non-executive director of the first respondent, One.Tel Limited (in Liquidation) (One.Tel). The circumstances surrounding the failure of One.Tel are well known. In December 2001, the Australian Securities and Investments Commission (ASIC) commenced an action against Mr Greaves, the former chairman and non-executive director of One.Tel, and the executive directors, following the collapse of the telco in May 2001 with a deficiency of assets in the order of \$240 million. ASIC alleged various breaches of directors' duties and sought a range of orders for contraventions of the civil penalty provisions of the *Corporations Act 2001* (Cth).

In September 2004 Mr Greaves reached an agreement with ASIC to settle the civil penalty proceedings against him. Under the agreement Mr Greaves admitted to contraventions of the Corporations Law between January 2001 and 30 March 2001 in relation to discharge of his duties as a non-executive director and chairman of One.Tel, accepted a disqualification from managing a corporation for a period of 4 years and agreed to pay compensation of \$20 million to One.Tel and ASIC's costs of \$350,000. Orders to this effect were made on 6 September 2004.

Mr Greaves was insured under a Directors' and Officers Liability Policy (the policy) with CGU Insurance Limited (CGU). Two months after settling the civil penalty proceedings, Mr Greaves entered into a Deed of Arrangement (the deed) pursuant to Part X of the *Bankruptcy Act 1966* (Cth) (the Act), prior to the substantial amendments made to that Part on 1 December 2004 by the *Bankruptcy Legislation Amendment Act 2004* (Cth). The trustee appointed by the deed was David Patrick Wilson (the trustee). Pursuant to clause 2 of the deed, Mr Greaves' rights under the policy were assigned to the trustee.



One Tel directors (L to R) Jodee Rich, Brad Keeling, Rodney Adler and John Greaves at the company's AGM in 2000.
Photo: Mark Williams / Newspix.

Relevantly, clause 9 of the deed provided that immediately after the trustee:

- I. completes or settles any claim for the realisation of assets being rights under the [Policy] including the pursuit to judgment or settlement of any claim under [the Policy]; or
- II. makes a decision not to pursue a claim under the [Policy], the Trustee will issue a certificate to the effect that he has completed the realisation of assets being rights under the [Policy] or to the effect that the Trustee does not intend to pursue a claim against CGU ... under [the Policy].

Clause 10 of the deed provided that:

[Mr Greaves] shall upon execution of the said certificate by the Trustee be absolutely released and discharged from all liability in respect of the compensation and costs order made on 6 September 2004 in the ASIC Proceedings.

Clause 11 of the deed provided that:

Prior to the execution of the certificate referred to in clause 9, neither the Trustee nor any creditor will take any steps to enforce against [Mr Greaves] the compensation order and the costs order made on 6 September 2004 in the ASIC Proceedings other than to seek recovery pursuant to the arrangement constituted by this Deed.

On 18 October 2006, the trustee commenced proceedings in the Commercial List of the Equity

Division of the NSW Supreme Court to pursue Mr Greaves' cause of action on the policy in respect of the \$20 million dollar compensation order (the proceedings). CGU was the first defendant, ASIC the second, One.Tel the third and Mr Greaves the fourth. CGU had previously purported to avoid the policy and in its defence to the trustee's claim raised many allegations against Mr Greaves of fraudulent non-disclosure and fraudulent misrepresentation.

On 30 November 2007 the deed terminated in accordance with its terms. From 8 August 2008 the summons in the proceedings was amended so that the name of the plaintiff was changed from 'David Patrick Watson, as trustee of the Deed of Arrangement in respect of John Huyshe Greaves' to 'David Patrick Watson'. The parties postulated several questions for determination prior to the resolution of the other issues in the case, including whether, following the termination of the deed, the trustee could continue to maintain the proceedings.

At first instance the primary judgment held that, once the deed terminated, the trustee had no power to continue the proceedings and that Mr Greaves had suffered no 'loss' because, even after the deed was terminated, clause 11 continued to operate so as to prevent the trustee and creditors from enforcing against Mr Greaves the compensation and costs orders made in September 2004. The Court of Appeal allowed an appeal and remitted the matter to the Supreme Court for further hearing. CGU then appealed to the High Court.

In a joint judgment the High Court (French CJ, Heydon, Crennan, Kiefel and Bell JJ) held that the deed created a trusteeship with express duties and that the termination of the deed caused the trustee to have duties and powers outside the deed. In particular, the trustee had a duty to vindicate the rights connected with the trust property, which was the chose in action being enforced in the proceedings. The High Court held at [36] of the joint judgment that:

One obligation of a trustee which exists by virtue of the very office is the obligation to get the trust property in, protect it, and vindicate the rights attaching to it. That obligation exists even if no provision of any statute or

trust instrument creates it. It exists unless it is negated by a provision of any statute or trust instrument. Here no provision of the Act nor the Deed negates it. Mr Greaves' equitable assignment of his right to sue CGU under the Policy gave the Trustee the duty to vindicate that right. After the Deed terminated, the Trustee continued to comply with the duty to vindicate that right by prosecuting the Trustee proceedings against CGU in order to crystallise its advantages by reducing them to a judgment in damages. Even assuming in favour of CGU that, after termination of the Deed, the Trustee no longer held the chose in action on the trusts of the Deed, the Trustee did remain a trustee, and did have an obligation to continue the process of complying with the duty to vindicate the rights associated with the trust property.

Accordingly, the trustee was not disentitled from continuing the proceedings.

As to whether Mr Greaves had suffered any 'loss', the High Court agreed with the Court of Appeal that even if clause 11 survived termination of the deed it did not discharge or release Mr Greaves from the judgment debts as that could only occur on the execution of a clause 10 certificate. However, the High Court held that clause 11 could not survive the termination of the deed as such a construction produced an 'absurdity' as it would leave One.Tel stripped of its beneficial interest created by the deed and simultaneously unable to exploit its original right to enforce the \$20 million compensation order, which it had given up in return for gaining the beneficial interest. Further, once the deed was terminated the duty under clause 9 ceased. As a result, that left no room for clause 11 to operate. The High Court held that '[o]nce it became impossible for any cl 9 certificate to be executed, the basis on which cl 11 could operate collapsed'.

The proceedings have now been referred back to the Supreme Court for the resolution of the remaining issues between the parties.

By Ralph Notley

Summary applications in the Federal Court

Spencer v Commonwealth (2010) 269 ALR 233; [2010] HCA 28



Peter Spencer outside the High Court of Australia. Photo: Ray Strange / Newspix

In the recent decision of *Spencer v Commonwealth* (2010) 269 ALR 233; [2010] HCA 28 ('*Spencer*') the High Court examined section 31A of the *Federal Court of Australia Act 1976* (the 'FCA'). Following *Spencer*, former authorities which had set out the basis for determining a summary dismissal application, such as *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 ('*Dey*') and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 ('*General Steel Industries*'), will no longer apply directly to such an application brought in the Federal Court pursuant to section 31A of the FCA.

Facts and Decision

Mr Spencer owned a farm at Shannons Flat in New South Wales. He was restricted from clearing vegetation on his farm by reason of two New South Wales Acts, namely, the *Native Vegetation Conservation Act 1997* (NSW) and the *Native Vegetation Act 2003* (NSW). Mr Spencer alleged that the restrictions effected an acquisition of property from him other than on just terms. The property acquired was said to include certain carbon sequestration rights.

Mr Spencer claimed that the acquisition arose through the implementation of agreements between New South

Wales and the Commonwealth. He alleged that the Commonwealth Acts which authorised the agreements were invalid to the extent that the Acts effected or authorised the acquisition of property from him other than on just terms, within the meaning of section 51(xxxi) of the Constitution. The Commonwealth Acts in question were the *Natural Resources Management (Financial Assistance) Act 1992* (Cth) and the *Natural Heritage Trust of Australia Act 1997* (Cth).

Upon application by the Commonwealth, Emmett J dismissed the proceedings pursuant to section 31A of the FCA on the basis that Mr Spencer had no reasonable prospects of success of obtaining the relief he sought. This was (in part) due to his Honour's conclusion that the Commonwealth Acts were not laws with respect to the acquisition of property pursuant to section 51(xxxi) of the Constitution. Mr Spencer's appeal to the full Federal Court was dismissed.

After the full court dismissed Mr Spencer's appeal, the High Court delivered its reasoning in *ICM Agriculture Pty Limited v Commonwealth* (2009) 240 CLR 140 ('*ICM*'). All of the justices in *Spencer* were of the view that had the courts below been aware of that decision, the proceedings would not have been dismissed. As Heydon J summarised the position (at [61], footnotes

excluded in this and all following extracts):

... on 9 December 2009, *ICM Agriculture Pty Ltd v Commonwealth* was decided. A majority of this court concluded that, notwithstanding *Pye v Renshaw*, the legislative power of the Commonwealth conferred by sections 96 and 51(xxxvi) of the Constitution does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms. Further, three members of the court placed a question mark over the validity of legislation relating to an 'informal arrangement' providing for Commonwealth funding to a State if it acquires property on unjust terms. The applicant has pleaded facts which might attract a conclusion favourable to him if that question is answered against validity. Discovery of documents might assist him to establish those pleaded facts.

All members of the High Court were of the opinion that the appeal should be allowed, the order of Emmett J be set aside and the Commonwealth's application seeking summary dismissal be dismissed.

Section 31A of the FCA

Of more relevance for current purposes is the court's analysis of section 31A of the FCA. That section was introduced into the FCA in 2005. So far as is relevant, section 31A provides as follows:

- (2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
 - (a) the first party is defending the proceeding or that part of the proceeding; and
 - (b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.
- (3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:
 - (a) hopeless; or
 - (b) bound to fail;
 for it to have no reasonable prospect of success.

Three judgments were delivered.

(i) Hayne, Crennan, Kiefel and Bell JJ

The majority comprised Hayne, Crennan, Kiefel and Bell JJ. Their honours emphasised two aspects of the legislation. First, importance was given to the word

'reasonable' in the phrase 'no reasonable prospect'. Second, effect needed to be given to what their honours described (at [52]) as the 'negative admonition' in subsection 31A(3), that a proceeding or a defence may have no reasonable prospect even if it is not 'hopeless' or 'bound to fail'. In their honours' view (at [52]):

...the combined effect of subs-sections (2) and (3) is that the enquiry required in this case is whether there is a 'reasonable' prospect of prosecuting the proceeding, not an enquiry directed to whether a certain and concluded determination could be made that the proceeding would necessarily fail.

Accordingly, different considerations apply to subsections 31A(2) and (3) from those which had applied before section 31A was enacted. Indeed, their Honours' expression was that section 31A 'departs radically' (at [53]) from earlier forms of provisions concerning summary applications. In particular, the majority were of the view that the former basis for summary determinations stemming from the oft-cited decisions of *Dey* and *General Steel Industries* did not apply to section 31A. This is because that basis required the formation of 'a certain and concluded determination that a proceeding would necessarily fail' (at [53]).

Thus, their honours said:

The test identified by Dixon J in *Dey* can thus be seen to be a test requiring certain demonstration of the outcome of the litigation, not an assessment of the prospect of its success. (At [54].)

And:

As Barwick CJ also pointed out in *General Steel Industries*, the test to be applied was expressed in many different ways, but in the end amounted to different ways of saying 'that the case of the plaintiff is so *clearly* untenable that it cannot *possibly* succeed' (emphasis added). As that formulation shows, the test to be applied was one of demonstrated certainty of outcome.' (At [55]; emphasis in *Spencer*.)

Accordingly, the majority were of the view that it was 'dangerous' (at [56] and [57]) to seek to understand the statutory expression 'no reasonable prospect of successfully prosecuting the proceeding' by reference to these cases or by reference to the interpretations given to other statutory tests, such as the test in rule

24.2 of the Civil Procedure Rules of England and Wales, in which the relevant test was ‘no real prospect’.

Their honours considered that full weight needed to be given to the expression as a whole. However, ‘judicial creation of a lexicon of words and phrases’ to interpret the phrase was to be avoided (at [58]). Their honours’ final comment was (at [60]):

At this point in the development of the understanding of the expression and its application, it is sufficient, but important, to emphasise that the evident legislative purpose revealed by the text of the provision will be defeated if its application is read as confined to cases of a kind which fell within earlier, different, procedural regimes.

Thus, the majority did not seek to formulate a judicial test for how to approach a summary application pursuant to section 31A of the FCA. Indeed, the only certainty about such an application may be the comment by their Honours (at [60]) that:

Of course, it may readily be accepted that the power to dismiss an action summarily is not to be exercised lightly.

(ii) French CJ and Gummow J

In their joint judgment, French CJ and Gummow J did not adopt the same approach to section 31A as the majority did. The emphasis of their honours’ reasoning was the ‘caution’ with which the power to summarily terminate proceedings must be exercised (at [24]), a matter which the majority touched on only briefly, as referred to above. In this regard, their honours referred to a number of decisions including the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde* (2000) 201 CLR 552 at [57] where their honours had referred to the ‘high degree of certainty about the outcome of the proceeding if it were allowed to go to trial’ that was needed when considering a summary application. The decisions of *Dey* and *General Steel Industries* were referenced in the footnotes in explaining this requirement of certainty.

French CJ and Gummow J then stated (at [24]):

There would seem to be little distinction between those approaches and the requirement of a ‘real’ as distinct from ‘fanciful’ prospect of success contemplated by section 31A. That proposition, however, is not inconsistent with the proposition that the criterion in section 31A may be satisfied upon grounds wider than those contained in pre-existing Rules of Court authorising summary dispositions.

(iii) Heydon J

Heydon J delivered a separate, short judgement in which no opinion was expressed as to section 31A. His Honour was of the view that it was not necessary to consider the correct approach to section 31A in order to determine the result of the appeal. His Honour commented that apart from some limited remarks, no submissions had been advanced by the parties concerning section 31A.

Conclusion

It is clear from the reasoning of Hayne, Crennan, Kiefel and Bell JJ that different considerations affect the application of section 31A of the FCA from the principles derived from decisions such as *Dey* and *General Steel Industries*. *Spencer* applies to summary applications in the Federal Court. Insofar as New South Wales is concerned, Part 13 of the *Uniform Civil Procedure Rules* 2005 is worded differently from section 31A of the FCA and, in particular, does not contain a rule equivalent to sub-section 31A(3). Presumably, decisions such as *Dey* and *General Steel Industries* will continue to apply to summary dismissal applications brought pursuant to Part 13 of the UCPR.

By Daniel Klineberg

Assessment of off-shore claims for refugee status

On 11 November, the High Court handed down its decision in *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth* [2010] HCA 41. An examination of the decision reveals a narrow focus.

Background

The plaintiffs arrived by boat at the Territory of Christmas Island where they were detained. That territory is an 'excised offshore place' for the purposes of the *Migration Act 1958* (Cth) (Act): (s 5). On arrival at an 'excised offshore place' the plaintiffs became 'unlawful noncitizen[s]' and could not make valid applications for a visa (including a 'protection visa') under the Act: (s 46A(1)).

However, the minister may decide that the restriction on applying for a visa does not apply to a person (s 46(2)) and may decide to grant a visa to an unlawful non-citizen in detention (s 195A(2)). Both powers are expressed to be only exercisable by the minister personally (ss 46A(3) & 195A(5)) and the minister does not have a duty to consider exercising either power (ss 46A(7) & 195A(4)).

On 29 July 2008, the minister announced certain changes to the assessment of offshore refugee claims, following which processes for a 'Refugee Status Assessment' (RSA) (by the department) and an 'Independent Merits Review' (IMR) (by a company contracted to the department) were developed. RSAs and IMRs undertaken with respect to the plaintiffs concluded that neither of them were persons to whom Australia had protection obligations.

Reasoning

A seven member court delivered single reasons for judgment.

An unsuccessful challenge to the validity of s 46A was made on the basis that the circumstances concerning whether to consider exercising it were arbitrary and unenforceable such that it was repugnant to s 75(v) of the Constitution. The court held that the provision was not of so little content so as not to be a law (at [56]).

The critical issue was whether the inquiries concerning the status of the plaintiffs as refugees were under and for the purposes of the Act (as the plaintiffs submitted) or in the exercise of non statutory executive power under s 61 of the Constitution (as the defendants submitted). For a number of reasons, the court concluded that the RSAs and IMRs were undertaken

under and for the purposes of the Act. The exercise of power under ss 46A or 195A involves two steps: (1) a decision to *consider* exercising the power; and (2) a decision whether to exercise the power in a particular way. Although not obliged to take either step, the minister had decided to consider exercising the power by reason of the announcement in 2008. The RSAs and IMRs were consequent to that decision and therefore for the purposes of the Act.

Given the statutory foundation for the inquiries, they had to proceed in accordance with law and obligations of procedural fairness were attracted. Such obligations were accepted as applying not only where the exercise of a power affects rights in the strict sense, but also where it affects an interest or privilege. The interests of the plaintiffs were affected as their detention was prolonged while the inquiries took place and in circumstances where they would otherwise have to be removed as soon as practicable (cf. s 198(2)).

Three aspects of the IMRs revealed error across the two matters: (1) the IMRs stated that the review was not bound by Australian law and was non-statutory; (2) one of the IMRs did not refer to one of two claimed bases of persecution; and (3) adverse country information relied upon was not put to the plaintiffs. As such, the reasons involved legal error and procedural fairness was denied.

Because there was no obligation on the minister to exercise any power under ss 46A or 195A, mandamus would not lie and certiorari (in respect of the IMRs) would be futile. Accordingly, relief was limited to a declaration that the recommendation in the IMRs that the plaintiffs were not people owed protection obligations involved an error of law in not treating the provisions of the Act and judicial decisions as binding and failed to observe procedural fairness.

The narrow focus of the decision is revealed in its concentration on the minister's decision to consider exercising ss 46A or 195A. There was no obligation to make that decision. Had it not been made, it is arguable that the consequent obligations would not have arisen.

By Alan Shearer

Conspiracy under the Commonwealth Criminal Code

R v LK & RK (2010) 84 ALJR 395 | *Ansari v R* (2010) 84 ALJR 433

In its recent decisions in *R v LK & RK* (2010) 84 ALJR 395 and *Ansari v R* (2010) 84 ALJR 433, the High Court resolved previous controversy about the elements of the offence of conspiracy under the Commonwealth Criminal Code ('the Code'). The High Court also held that an offence of conspiring to commit a substantive offence which incorporates a fault (mental) element of recklessness is not bad in law. However, in such a case it will be necessary for the prosecution to prove that the alleged conspirator intended that the substantive offence occur. This will entail proving that the alleged conspirator knew or believed in the facts that make the proposed conduct an offence. Proof of recklessness on the part of the alleged conspirator will not suffice.

The controversy about the elements of the offence of conspiracy under the Code arose out of the drafting of section 11.5. Sub-section 11.5(1) of the Code, provides as follows:

(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

A penalty unit is defined in section 4AA of the *Crimes Act 1914* (Cth) as \$110. The Code defines 'offence' as an offence against the laws of the Commonwealth. In other words, s 11.5 of the Code makes it an offence to conspire to commit a non-trivial offence under Commonwealth law.

However, sub-section 11.5(1) of the Code is qualified by sub-section 11.5(2). Sub-section 11.5(2) stipulates the following three conditions before a person can be guilty of conspiracy under section 11.5 of the Code:

- (a) the person must have entered into an agreement with one or more other persons; and
- (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
- (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

This drafting led to competing views on whether the elements of the offence of conspiracy were confined to sub-section 11.5(1) of the Code or included one or more of the conditions in sub-section 11.5(2).

When interpreting these provisions the fundamental approach to discerning the elements of Commonwealth offences set out in Chapter 2 of the Code must be applied. That structure is clear. Offences consist of physical elements and fault elements: s 3.1(1). Before a person can be found guilty of an offence each of the physical elements required to be proved by the law creating the offence must be proved and, for each physical element for which a fault element is required, one of the fault elements for the physical element: s 3.2.

In *R v LK & RK* [2010] HCA17 the majority, comprising Gummow, Hayne, Crennan, Kiefel and Bell JJ, succinctly summarised the relevant provisions of the Code defining the nature of physical and fault elements in the following passages:

[126] A physical element of an offence may be conduct, a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs [Code s 4(1)]. A fault element for a particular physical element of an offence may be intention, knowledge, recklessness or negligence [Code s 5.1(1)]. Each is defined in Div 5 of Pt 2.2. However, the law creating an offence may specify a fault element for a physical element other than one of those that is defined in Div 5 [Code s 5.1(2)].

[127] Under the common law, identification of the particular mental state that the prosecution is required to prove in order to establish mens rea (the fault element of the offence) may be the subject of controversy. The scheme of Pt 2.2 is intended to avoid uncertainty in this respect. Under the Code, default fault elements attach to physical elements of an offence where the law creating the offence does not specify a fault element for a physical element [Code s 5.6] (subject to express provision that there is no fault element for the physical element [Code s 3.1(2)]). Intention is the default fault element for a physical element of conduct [Code s 5.6(1)] and recklessness is the default fault element for a physical element consisting of a circumstance or a result [Code s 5.6(2)].

In *Ansari v R* the same majority also noted (at [59]) the important provision in sub-section 5.4(4) of the Code, which states, in effect, that proof of intention with

respect to a fact, circumstance or state of affairs, will also constitute proof of recklessness or negligence with respect to that fact, circumstance or state of affairs.

In *R v LK & RK* the trial judge on a demurrer application was held by the High Court to have correctly held that the offence in the indictment of conspiring to deal with proceeds of crime where those who were to deal with the money were reckless to the fact it was proceeds of crime was an offence known to law. The High Court also held that the trial judge correctly directed the jury to acquit the respondents at the close of the Crown case because all the Crown had succeeded in doing was proving that the respondents were themselves reckless as to the money being proceeds of crime. Therefore the Crown had not proved the charge in the indictment which required proof on the part of the alleged conspirators that that knew or believed that the moneys would be proceeds of crime, even though the substantive offence under s 400.3(2) of the Code only required a substantive offender to be reckless as to this. The reasons for this finding were articulated by the majority in *R v LK & RK* (at [117]) as follows:

The offence of conspiracy under the Code is confined to agreements that *an* offence be committed. A person who conspires with another to commit an offence is guilty of conspiring to commit *that* offence. It was incumbent on the prosecution to prove that LK and RK intentionally entered an agreement to commit the offence that it averred was the subject of the conspiracy. This required proof that each meant to enter into an agreement to commit that offence [Code s 5.2(1)]. As a matter of ordinary English it may be thought that a person does not agree to commit an offence without knowledge of, or belief in, the existence of the facts that make the conduct that is the subject of the agreement an offence (as distinct from having knowledge of, or belief in, the legal characterisation of the conduct). This is consistent with authority with respect to liability for the offence of conspiracy under the common law. Subject to one reservation, it is how the fault element of the offence created in s 11.5(1) operates. The reservation concerns the application of s 11.5(2)(b). As these reasons will show, this provision informs the meaning of ‘conspires’ in sub-s (1) by making clear that at least one other party to the agreement must have intended that an offence be committed pursuant to the agreement. It also speaks to proof of the accused’s intention. The reservation arises because s 11.5(2)(b) is subject to s 11.5(7A), which applies

any special liability provisions of the substantive offence to the offence of conspiring to commit that offence. A special liability provision includes a provision that absolute liability applies to one or more (but not all) of the physical elements of an offence¹. Proof of the intention to commit an offence does not require proof of knowledge of, or belief in, a matter that is the subject of a special liability provision.

The difficulty with the Crown case in *R v LK & RK* was that it only alleged at its highest an intentional agreement to deal with money that may or may not be proceeds of crime. It was not, therefore, capable of proving that LK or RK entered an agreement knowing or believing that the money would be proceeds of crime.

In defining the elements of conspiracy under the Code in *R v LK & RK* the majority held (at [141]) that the Court of Criminal Appeal correctly held that the law creating the offence of conspiracy under the Code was sub-section 11.5(1). The majority held that references to ‘agreement’ in paragraphs (a) and (b) of sub-section 11.5(2) are references to the agreement referred to in sub-section 11.5(1) and are epexegetical of (that is, clarify) sub-section 11.5(1).

The majority set out the elements of conspiracy under sub-section 11.5(1) of the Code, and the other conditions of proof in sub-section 11.5(2), as follows (at [141]):

The offence has a single physical element of conduct: conspiring with another person to commit a non-trivial offence. The (default) fault element for this physical element of conduct is intention [Code, s 5.6(1)]. At the trial of a person charged with conspiracy it is incumbent on the prosecution to prove that he or she meant to conspire with another person to commit the non-trivial offence particularised as being the object of the conspiracy. In charging a jury as to the meaning of ‘conspiring’ with another person, it is necessary to direct that the prosecution must establish that the accused entered into an agreement with one or more other persons and that he or she and at least one other party to the agreement intended that the offence particularised as the object of the conspiracy be committed pursuant to the agreement. Proof of the commission of an overt act by a party to the agreement conditions guilt and is placed on the prosecution to the criminal standard. The Code does not evince an intention in the latter respect to depart from fundamental principle with respect to proof of criminal liability [*R v Mullen* (1938) 59 CLR 124; [1938] HCA 12].

French CJ set out those elements as follows (at [1]):

The offence of conspiracy created by the *Criminal Code* (Cth) ('the Code') is committed where there is an agreement between the offender and one or more other persons, coupled with an intention, on the part of the offender and at least one of the other persons, that an offence will be committed pursuant to the agreement [Code, s 11.5(2)(a) and (b)]. Proof of commission of an overt act by the offender or another party to the agreement pursuant to the agreement is necessary [Code, s 11.5(2)(c)].

French CJ amplified this analysis (at [75]):

The charge of conspiracy to commit an offence, which is created by s 11.5(1) of the Code, requires proof of an agreement between the person charged and one or more other persons. Moreover, the person charged and at least one other person must have intended that the offence the subject of the conspiracy would be committed pursuant to the agreement. Intention to commit an offence can be taken to encompass all the elements of the offence (subject to the operation of s 11.5(7A) in relation to special liability provisions in the substantive offence). That intention extends to both physical and fault elements of the substantive offence.

The majority noted (at [117]) that the operation of sub-section 11.5(7A) of the Code means that: 'Proof of the intention to commit an offence does not require proof of knowledge of, or belief in, a matter

that is the subject of a special liability provision'. This means, for example, that it is not necessary to prove that an accused charged with conspiring to import a commercial quantity of a border controlled drug under s 307.1 of the Code knew or believed that the quantity to be imported was a commercial quantity.

Therefore, in order to prove the offence of conspiracy under s 11.5(1) of the Code the Crown must prove beyond reasonable doubt that:

- (a) The accused intentionally entered into an agreement with one of more persons to commit a non-trivial offence under Australian law;
- (b) When he/she entered into that agreement he/she intended that the non-trivial offence would be committed pursuant to the agreement;
- (c) At least one other party to the agreement intended that the non-trivial offence would be committed pursuant to the agreement; and
- (d) At least one party to the agreement carried out an overt act in furtherance of the agreement.

The essential element of the offence of conspiracy under sub-section 11.5(1) of the Code is set out in sub-paragraph (a) of the preceding paragraph. The other matters referred to in sub-paragraphs (b) – (c),

Verbatim

Meagher on Leane (from RP Meagher's introductory remarks at the inaugural John Leane Memorial Lecture, September 2002)

'He had a grand, but concealed and impish, sense of humour. I cannot remember any Voltairean epigrams or Wildean paradoxes bursting from his lips, but I distinctly do remember him often exploding with laughter. He was intrigued by the wording of an easement in South Australia which was expressed to last for 'a term of perpetuity less one day'; he was delighted when I showed him a will in which a testatrix left her residuary estate 'to all the people in Australia, or failing that to their children.' In the first

edition of Meagher, Gummow Leane it was said of s.98 of the amended Common Law Procedure Act that 'Myers J had no hand in begetting it', and John became convulsed with laughter when Glass JA observed that the sentence betrayed an elementary ignorance of biology. He was rarely cross, and when he was it was in the gentlest possible manner. He said of Sir Gerard Brennan's judgment in *Corin v Patton* that it was 'mischievous'. Nobody else would have stopped there.'

whilst not elements as such, are preconditions to proof of guilt for conspiracy and must be proved beyond reasonable doubt by the Crown before a person can be found guilty of conspiracy.

In *Ansari v R* the High Court held that an offence of conspiring to commit a substantive offence which incorporates a fault (mental) element of recklessness is not bad in law. The majority (at [37]) approved of the Court of Criminal Appeal majority's (Howie J with Hislop concurring) finding that there was nothing in the Code to suggest that a person could not conspire to commit an offence of recklessness and no occasion to impose such a restriction. Two reasons for this referred to by the Court of Criminal Appeal and approved by the High Court majority were as follows:

First, the conspirators' agreement may provide for a third person to carry out the conduct that constitutes the offence. In such a case, provided that the accused conspirators know all of the facts that make the conduct criminal, it would not matter that the third person was acting recklessly. Second, s 5.4(4) provides that recklessness, where specified as a fault element for an offence, may be satisfied by proof of intention or knowledge.

However, in such a case it will be necessary for the prosecution to prove that the alleged conspirator intended that the substantive offence occur. This will entail proving that the alleged conspirator knew or believed in the facts that make the proposed conduct an offence. Proof of recklessness on the part of the alleged conspirator will not suffice.

By Chris O'Donnell

Endnotes

1. The Dictionary to the Code provides that a 'special liability provision' is a provision that absolute liability applies to one or more (but not all) of the physical elements of an offence or that in a prosecution for an offence it is not necessary to prove that the defendant knew a particular thing or that the defendant knew or believed a particular thing.

Verbatim

Bergin CJ in Equity on Mediation (extracts from her Honour's Opening Remarks at the Bar Association's 2010 ADR Workshop)

'Mediation has impacted on the nature of practice at the Bar. More time is now spent in chambers advising how best to settle the dispute than how best to fight it in Court. Advocates have had to adjust to the change in the way the system operates so that they now advocate strategies for settlement behind closed doors rather than utilising the forensic skills and persuasive advocacy in open court. Although the burden on the advocate in mediation is different from the burden on an advocate in a hearing before the Court, the advocate's experience, knowledge and forensic judgments are integral to the client achieving the best outcome from mediation. ...

The issue of the "ripe" time to refer a matter to mediation is vexed. Some matters have a better chance of a mediated settlement if referred later in the litigious process whilst others may settle earlier in the process. It will depend very much on the particular dispute. However I stress that the Court depends on the legal representatives to analyse not only the legal issues in the dispute but when it comes to picking the time for referring the matter to mediation, to also analyse the financial, motivational or emotional issues that are driving their clients. These matters, about which the Court will know little or nothing, may be pivotal to the prospect of reaching a mediated settlement.'

Twenty-five years of Bar News

By Ingmar Taylor and Kate Williams

The first issue of *Bar News* was published 25 years ago in 1985. The idea of publishing a journal for the bar came from the Hon. Murray Gleeson AC, then president of the Bar Association, who wrote in the inaugural issue:

It is hoped that it will provide, on a different level, some of the facilities of the Common Room: a medium for scandalous information; an occasion of privilege for defamation; and a forum for ideas about the Bar.

What the Bar needs is a good free journal.

Gleeson QC¹ asked the Hon. Justice McColl, then a busy junior barrister and member of the Bar Council, to be the editor of the journal. McColl accepted the challenge and served as the editor of *Bar News* from 1985 until 2000, when she became president of the Bar Association. Justin Gleeson SC then took over the reins as editor of *Bar News*. Gleeson SC recalls:

When Ruth McColl SC (as her Honour then was) asked me to be editor in 2000, I was surprised at the vote of confidence and her risky move. At that time, it was a given that a silk would be needed for any role of importance within the Bar Association. But I appreciated her invitation and set about trying to progress the work she had done over many years – painstaking and unrewarded work – to build a journal of relevance, importance and above all interest to our members. It was not then, nor probably now, widely appreciated within the bar, how much time and energy McColl had put in to ensure *Bar News* came out. Through the 1990s the committee was very small, the stories and the articles were largely generated by her, the typing was mostly done by her secretary, and the proofing was done by McColl herself.

Over the five years that I was editor, I think there were three main areas of advancement: first, we were able to expand the committee which produced each issue so that a broader pool of the bar was drawn upon, and the content was of increasing interest to members. Secondly, we were able to put out an issue consistently at least two times each year and thus build a rapport with members. This was due to the financial commitment of the Bar Council and the support of Philip Selth as executive director, for which I am grateful. Thirdly, we strived hard to expand the content (and corresponding size) of the journal, so that, consistent with the push into continuing legal education, our journal regularly included case notes and short articles on matters of legal importance to members. Hopefully this was done while also continuing the broader and more humorous or light-hearted comment which has always marked out *Bar News*.

Gleeson SC remained editor of *Bar News* until 2005, when Andrew Bell SC took on the role.

In addition to undertaking all of the work described by Gleeson SC in the 1980s and 1990s, McColl also prevailed on her sister, Christine McColl, to pen cartoons for the early issues of *Bar News*. Artwork was also commissioned from Simon Fieldhouse, then a solicitor and now an established visual artist. Fieldhouse's work graced the cover of the Summer 1985 issue of *Bar News* and his work continued to appear in many subsequent editions. Jim Poulos QC, then also a busy junior barrister, was delighted to find a public forum for his sketches and contributed to the artwork from the early days. The late Fred Kirkham, subsequently a judge of the District Court, was also a regular contributor of sketches. He submitted a cartoon for the Summer 1985 issue of *Bar News* starring himself and Poulos. It exaggerates only slightly the height discrepancy between Kirkham, a former Olympic rower, and his



The view from across the Dingo fence

May I make an immediate disclaimer. The title is not mine. It was invented by Murray Gleeson QC as he sat beside me at the recent annual general meeting of the Law Council of Australia.

“Write something,” he said. “Write something in a light-hearted vein, something that will at the same time make my constituents laugh and justify the resistance by Queenslanders to the intrusion of southern practitioners into the Queensland courts.”

It has often been said that in practice interstate counsel would not wish to exercise, or exercise to any intrusive degree, the right to practice in Queensland. This seems to be contradicted by the Western Australian experience.

I am told that there are eight resident silks in Perth, but that twenty-seven visiting silks have taken advantage of the right to practice there.

Views may of course change, even, it may be said, in Queensland.

good friend Poulos. The first three issues of *Bar News* published in 1985 chronicle a time of change for the New South Wales Bar in many respects.

In his editorial piece published in the inaugural issue of *Bar News* in Winter 1985, Gleeson QC stated: ‘The problems of the bar in 1985 are more than sufficient to tax us.’

In the Summer 1985 issue, the Hon. Roger Gyles AO, then newly elected president of the Bar Association, wrote:

I do not need to catalogue all of the problems we face as barristers and collectively as a Bar.

Escalating costs (particularly for accommodation), consistently inadequate revision of scales of fees ... and the current threat to several significant areas of work, combine to make survival difficult for those without established practices in commercial work or some other lucrative specialty.

The proliferation of chambers, the growth of regional Bars, the increase in numbers of practising barristers, and the widely differing work background of new entrants to the Bar make the establishment and maintenance of uniform professional standards of competence and ethics more difficult than hitherto.

To say that the New South Wales Bar Association is a trade union is about as unseemly and indecorous as (to take one of Gleeson’s illustrations) submitting to a Federal Court judge that he has no jurisdiction.

Nonetheless, it is the essential truth. It is also a truth recognised by those with whom we must deal. It is not something for which we need to apologise.

McColl JA recalls that the bar was then under threat from solicitors demanding rights of appearance, was having

to adapt to the concept of an external disciplinary regime in advance of the passage of the *Legal Profession Act 1987* (NSW) and was introducing new measures to maintain high standards of competence and ethics in an expanding bar. These measures included changes to the Reading Program, which were reported in the Spring 1985 issue of *Bar News*, and an expansion of the Complaints Committees reported in the Summer 1985 issue.

In this context, the traditional ‘two thirds rule’ was under threat. Potential unintended consequences of the rule are illustrated in the following extract from the Winter 1985 issue of *Bar News*:

STITT QC: I would like to put a couple of propositions to you.

WOMAN WITNESS: You would? My luck has changed at last.

HIS HONOUR: I think you had better wait until hear what the proposition is.

At the next adjournment Stitt QC happened to be in the same lift as the witness and the exchange continued:

WITNESS: Still interested in that proposition?

STITT QC: You have to realise, whatever I get, my junior gets two-thirds.’

The inaugural issue of *Bar News* generated debate about the prohibition on New South Wales barristers practising in Queensland. Gleeson QC invited the then president of the Bar Association of Queensland, Ian Callinan QC, to write something to ‘justify the resistance by Queenslanders to the intrusion of southern practitioners into the Queensland courts’. Under the

title 'The view from across the Dingo fence', Callinan QC wrote in the Winter 1985 issue of *Bar News*:

The Queensland Bar's view, and indeed as I understand it, the views of the Queensland Government are that there should be a strong Queensland Bar, and ready access by the Queensland public to that Bar: that that strength and access should not be put in jeopardy by an unrestricted right of practice by other barristers from out of Queensland.

Having made this attempt at explaining the prohibition as a matter of principle, Callinan QC promptly acknowledged that it was really a matter of Queenslanders protecting their own turf:

There is a suspicion in Queensland – we are usually neither suspicious nor, I observe here, xenophobic – that perhaps it is presently a little easier for a junior to make a beginning in Queensland than elsewhere.

It is rather unlikely that Queensland juniors would wish to put at risk this advantage, if advantage there be.

This was delightfully illustrated in a cartoon by Christine McColl.

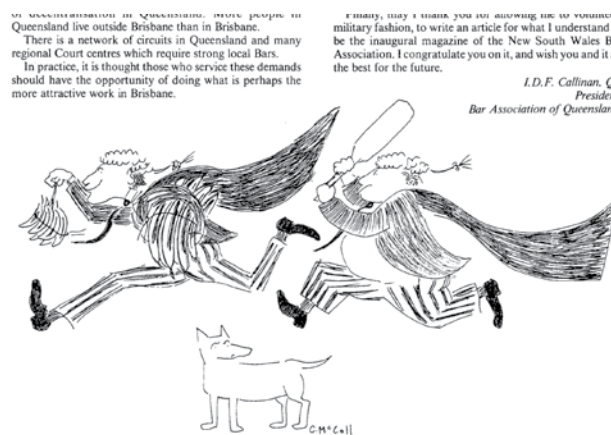
Callinan QC's article generated a response in the Summer 1985 issue of *Bar News* from David Malcolm QC, then president of the Western Australian Bar Association and subsequently chief justice of Western Australia. Writing under the title 'The alternative view across the rabbit-proof fences', Malcolm QC said:

I support the principle that a litigant in Australia should be able to choose his solicitor and counsel from among the Australian legal profession. This is not to say that I do not support the view that there should be a strong Western Australian Bar and ready access by the public to that Bar.

I do support that view with enthusiasm. It is a view which is shared by the Western Australian Bar Association and I believe, the Government and Judiciary in this State.

It does not follow that the strength and access of the Western Australian Bar will be jeopardised by the existence of an unrestricted right of practice by other barristers from out of Western Australia.

In 1989, the High Court held in the landmark case brought by Sandy Street SC that the Queensland rule limiting admission to practice in Queensland to residents of Queensland who were not practising in any



other state was contrary to s 117 of the Constitution.²

In 1985, the right of appeal to the High Court had recently been abolished and appeals were by special leave.³ The bar had responded to this development by exercising more frequently the right of appeal from the New South Wales Court of Appeal to the Privy Council, by-passing the High Court. This prompted the following plea from the Hon. Justice Michael Kirby, then newly appointed president of the New South Wales Court of Appeal, in the Winter 1985 edition of *Bar News*:

Australian appeals to the Privy Council – this magnificent imperial anachronism into which new life has unexpectedly been breathed – should, in my view, be terminated without delay.

It has made many notable contributions to our jurisprudence in the past. But the time has come for Australian lawyers to shoulder the responsibility of their own legal system and to rise to the challenge which only legal independence from the Privy Council will facilitate.

His Honour's remarks proved to be prophetic. The right of appeal from state courts to the Privy Council was abolished by the *Australia Act 1986* (Cth).

Incidentally, the appointment of Justice Kirby to the New South Wales Court of Appeal had proved wrong a prophecy by the Hon. Michael McHugh QC AC (then also a judge of the New South Wales Court of Appeal). As *Bar News* reported in the Winter 1985 issue under the title 'Famous Last Words':

At the time the President of the Court of Appeal, Mr Justice Kirby, was appointed to the Conciliation and Arbitration

Commission in 1975, he was appearing with Mr Justice McHugh (then McHugh QC) in an equity case.

In the course of the case the following exchange occurred:

KIRBY: I am going to take a job on the Arbitration Commission.

McHUGH: What! As a Commissioner?

KIRBY: No. As a Judge.

McHUGH: Michael, you are only 35. If you take that job you will sink like a stone. Nobody will ever hear of you again.

Another change shaping the nature of practice at the bar in 1985 was the increasing computerisation of legal information.

Writing in the Spring 1985 issue of *Bar News*, R H

Macready (now associate justice of the Supreme Court of New South Wales) expressed the concern that 'most members of the Bar do not appear to be computer literate'. Macready proceeded to enlighten readers by providing a description of the contents and facilities offered by the databases then available and even setting out step by step instructions for the purchase of computer equipment:

In general the equipment would, if one were purchasing equipment to install in one's own chambers, comprise (i) a terminal which consists of a keyboard and a screen, (ii) a modem which allows the communication between the terminal and the data base and (iii) a printer.

The communication medium for such equipment in the Sydney area is via Telecom telephone lines and it is desirable to have a line specially installed for this purpose.

Whilst members of the bar have now embraced computer technology (although few will remember what a modem is), it is open to debate whether they have paid due attention to the warning issued by Sir Laurence Street, then chief justice of New South Wales, in the Winter 1985 issue of *Bar News*:

Computerisation of judicial decisions in readily accessible form will prove to be a most valuable servant, but we must be on our guard lest it abandon its role of service and tend towards dominating the practice and administration of the law.

There is a risk of the system overtaking the substance of our law. By this I mean that there is room for justifiable fears that the day-to-day administration, and even more importantly the development, of the law may be crushed under too great a weight and proliferation of decided cases being fed into the data base.

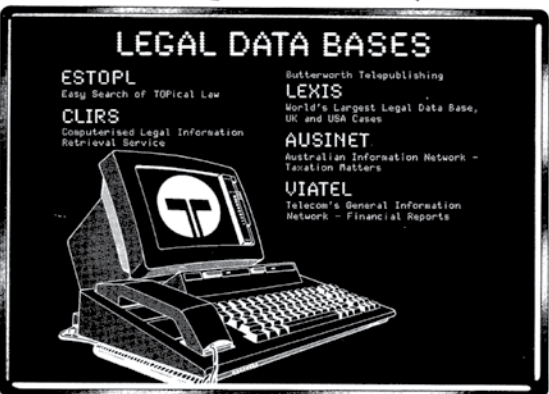
...

The computer enables us to break the limiting bounds of the ordinary human intellect and research capacity. There will no longer be the same absolute necessity for selectivity and subjective evaluation of those cases that are of real worth.

...

It would be a tragedy if the computer became little more than an unedited means of providing access to a great deal more cases than we have been able thus far to accommodate intellectually.

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Christine McColl's illustration of the problem that concerned Sir Laurence also depicts, we think, the burden felt by barristers today poring over the endless streams of judgments, legislation and other information circulated by email to be read and assimilated into one's working knowledge of the law overnight. It is comforting, however, to reflect that there are some things that have not changed. The 'seven deadly sins' identified by Justice Kirby writing in the Winter 1985 issue of *Bar News* provide invaluable guidance today for novice and experienced advocates alike:

Failing to state at the outset the basic legal propositions which the lawyer hopes to advance in the course of the argument.

Reading large passages of legal authority on the apparent assumption that literacy is confined to the Bar table and is lost upon elevation to the bench.

Failing to plan adequately the structure of legal argument so that it moves swiftly and economically to the central factual and legal issues of the case.

Failing to supply proper written submissions, and the chronology now required, in good time before the hearing.

Failing to supply lists of legal authorities in time to permit the books to be got out.

Squandering the great value of oral advocacy which remains, from first to last, to enter the judicial mind and to persuade.

Failing to add a proper touch of interest and humour to advocacy, including, worst of all, failing to laugh appropriately at judicial humour, injected deftly to relieve the tension or tedium of the court.

It is just as well that Gleeson QC had designated *Bar News* as 'an occasion of privilege for defamation'. The inaugural issue printed the text of a speech by Meagher QC (as his Honour then was) at a dinner held in honour of the retirement of Kenny QC, Officer QC and Sullivan QC after 50 years' practice at the bar. His caricature of Gleeson QC has since become famous:

People call him 'The Smiler'.

This, no doubt, is on the *lucus a non lucendi* principle. It was on this principle that the ancient Greeks called the awful Avenging Furies 'you kindly ones'.

When one visits Gleeson – at any of his homes – one passes fish ponds wherein contented piranhas glide between the bones of inefficient solicitors and discarded juniors and arrives eventually at a grey house and ultimately The Baleful Presence itself.

For those wishing to take a step back in time, all of the previous issues of *Bar News* from 1985 to date are available on the New South Wales Bar Association website and provide amusing and informative reading.

From 2000, *Bar News* has published all of the Sir Maurice Byers lectures in each year's Winter edition. Thus, there is preserved the important lectures on constitutional history, theory and practice and legal reasoning of Sir Gerard Brennan AC KBE, Justice McHugh AC, Professor Leslie Zines AO, Justice Keith Mason AC, Justice Gummow AC, David Jackson AM QC, Dame Sian Elias, Justice Heydon AC, Gageler SC and Bennett AC QC.

In addition, *Bar News* has produced a number of thematic issues over the years on topics such as:

- Regional and security issues (Summer 2001/2)
- Women at the NSW Bar (Winter 2004)
- Working with statutes (Winter 2005)
- The junior bar (Winter 2006)
- Expert evidence (Summer 2006/7)
- Mediation and the bar (Winter 2007)
- Capital punishment (Summer 2007/8)

The current editor and editorial committee of *Bar News* are pleased to play a role in continuing to provide the bar with a good free journal and a forum for ideas. They wish to acknowledge and thank past editors McColl JA and Justin Gleeson SC and members of past



WHAT THE BAR NEEDS

In the early part of this century an American Vice-President, Thomas Riley Marshall, rescued himself from the obscurity that usually overtakes holders of that office by observing: "What this country needs is a good five-cent cigar."

In one respect time has not dealt kindly with his proposition. Changes in the value of money have produced the result that a five-cent cigar would today be a disgusting article, quite unlikely to be made of tobacco.

Worse still, the recreational practice to which he referred is now widely regarded as acceptable only when indulged in by consenting adults in private. The ash-tray is as useful in polite company as the cuspidor.

Nevertheless, the homespun wisdom underlying the thought is to be admired. It is based on the recognition that to complicated problems there are often simple solution, and that the remedy to public difficulties may be found at a more private level.

The problems of the bar in 1985 are more than sufficient to tax us. We know well enough what we do not need.

editorial committees for their dedication to this cause, and also barristers and others who submit material for publication in *Bar News* from time to time.

Although it is invidious to single out particular contributors, four rate a particular mention. Lee Aitken, formerly of the bar and now a professor at the University of Hong Kong (but still regularly spotted in the coffee shops of Phillip Street) gave birth to Bullfry in his piece 'The Last QC' in *Bar News* (Winter 1996). Bullfry returned in a more reflective mood in a piece styled 'Juniors' (Spring 2000) in which he was brought to life by the pen of Poulos QC. Over the last decade, Aitken and Poulos in tandem have regularly cast their satirical and withering eyes over developments in, and characteristics of, the modern profession to create

what should be published as an anthology chronicling the New South Wales Bar at the beginning of the twenty-first century. Circuit Food, rebranded Coombs on Cuisine (again illustrated by Poulos QC) ran for many years and was the late lamented John Coombs' Leo Schofieldian-inspired (or was it vice versa) roving and rambling reviews on post-settlement/victory lunch haunts around town and in favoured circuits. Any serious lunchers are invited to step forward to fill the void. More recently, David Ash has embarked on a series of detailed and diverting profiles of each of the justices of the High Court to hale from the New South Wales Bar. Four down, 19 to go (and counting). He is also the indefatigable but now 'outed' Rapunzel, creator of the *Bar News* crossword.

The contribution of Chris Winslow of the Bar Association must also be singled out. Chris has been involved in the production of *Bar News* for more than a decade and has seen its transition from a reasonably slender and more ephemeral publication to a substantive bi-annual journal featuring an eclectic mix of serious academic and historical work which also tracks and records important professional developments, events and appointments. Gleeson SC refers to Winslow as the 'sine qua non' of *Bar News*:

the secretary of the editorial committee, the liaison officer with the typesetter and printer, the advertising man, a source of content and, above all, an astute observer, supporter and intelligent nurturer of all that is the best in our somewhat idiosyncratic profession in the modern world.

At a recent Bar Council meeting, the Bar Council threw its support behind *Bar News* moving to three issues per year, which it is proposed to publish in April, August and December.

Endnotes

1. As this is an historical article, persons are referred to initially by their present titles and subsequently by their titles at the time of relevant events.
2. (1989) 168 CLR 461.
3. *Judiciary (Amendment) Act 1984* (Cth).



Entrenching rights in the United States and Canada

By Brian Rayment QC

Four main models are known in the English speaking world for a comprehensive bill of rights:

- (1) an entrenched form of the bill of rights with a power of nullification of inconsistent legislation given to the courts, as in the United States;
- (2) an entrenched form of the bill of rights with a power of nullification given to the courts, but with a power in the legislature to override the bill of rights in the case of particular laws, as in Canada;
- (3) a legislative form of the bill of rights with a power of nullification given to the courts, as was the case in Canada before the Charter of Rights was included in its constitution (but it was applicable only to the Canadian parliament, as distinct from the provinces); and
- (4) a legislative form of the bill of rights which allows the courts a dialogue role, but leaves the ultimate decision about what to do with legislation which conflicts with recognised rights to the legislature, as in Victoria and the Australian Capital Territory.

When Victoria set up the committee which recommended the law in question it stipulated that nothing more than the fourth model should be adopted.¹ When the Rudd government established the Australian Human Rights Consultation which reported last year, the terms of reference constrained the Consultation with the requirement that it not recommend a constitutional amendment, thus restricting it to models (3) or (4) in practice. When the Consultation reported, it recommended model (4) and the government promptly rejected the recommendation.

It is not surprising that politicians do not want a bill of rights added to the national or state constitutions, because, as they know, the main reason to have a bill of rights is that we do not trust politicians. From the point of view of a government, it would be a check on its own power, and confer a veto upon the courts in areas upon which the bill of rights impinge. Moreover a constitutional change has the mark of permanence and amendments to the national constitution are notoriously difficult to procure. If the states were to entrench a bill of rights, then the mechanism for their undoing or amendment has usually involved a

referendum. The surprise is not that we do not have a bill of rights complying with models (1) or (2), but that others do have a bill of rights in that form, and that the changes in question came about with the consent and active involvement of the legislatures.

Looking at the matter from the point of view of the governed, the generally understood rationale for having a bill of rights in the western world seems to be that there should be limits to how far even a democratically elected government should be allowed to go in taking away or restricting freedoms of individuals and minorities. Therefore the adoption of models (3) or (4) could fall short of the needs which a bill of rights is designed to meet. Placing the ultimate decision about the interference with such rights in the hands of the legislature means that unintentional interferences with such rights may probably be avoided, but that intentional interferences will probably not.

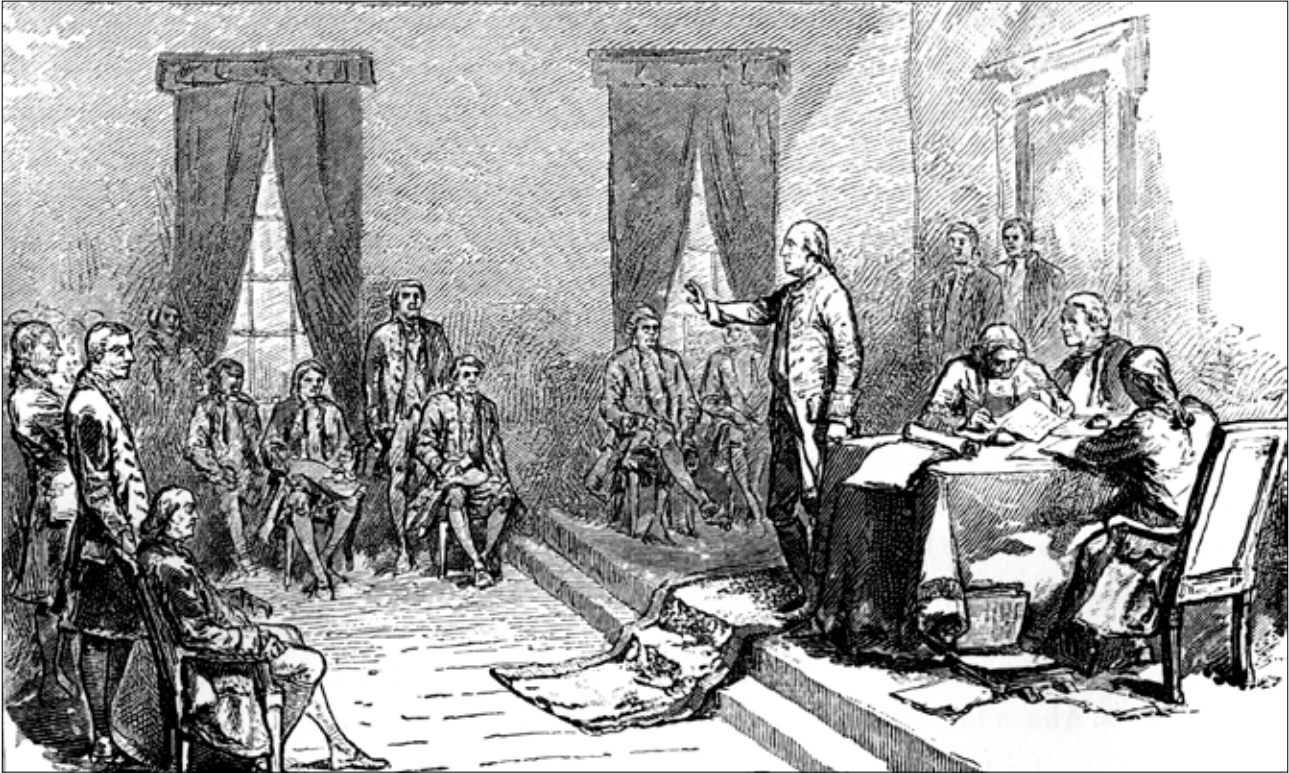
On the other hand, great care is required in the selection of the rights protected if the rights are to be enshrined in the constitution, if models (1) or (2) are adopted, because amendments to the constitution are so difficult to bring about, and guarantees of rights no longer recognised as requiring protection might be difficult to remove. Models (3) or (4) do not have that difficulty.

This paper will seek to recount the main circumstances which led to the introduction of model (1) in the United States, and to the introduction of model (2) in Canada. It will also discuss some Australian responses to each of those developments.

The United States

In the form in which the main body of the Constitution of the United States as we now know it was first written, at the Philadelphia Convention which reported on 17 September 1787, there were some guarantees of individual rights and liberties, but the document omitted all of the first ten amendments to the constitution, which today, together with further amendments added after the Civil War, are known as the Bill of Rights.

The Philadelphia Convention had been charged with



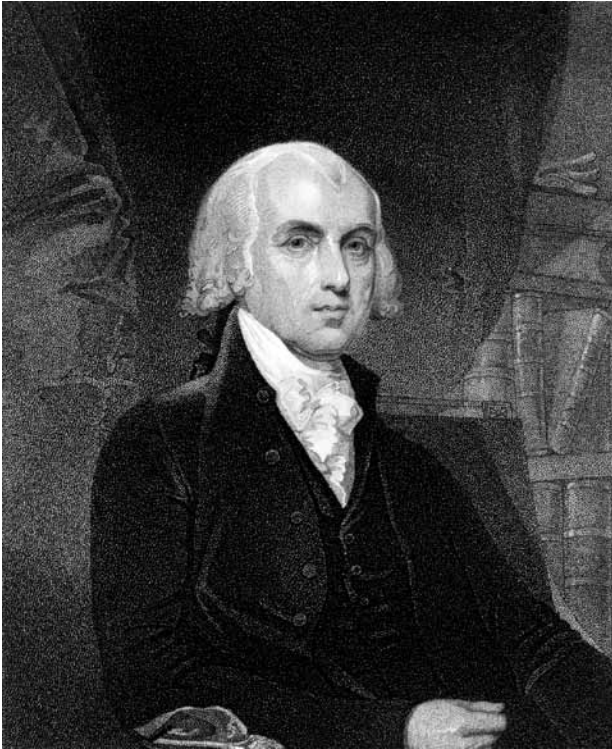
Engraving of the Convention at Philadelphia, 1787, published in *Popular Descriptive Portraiture of the Great Events of Our Past Century*, by R M Devens in 1787. Image: iStockphoto.

‘the sole and express purpose of revising the Articles of Confederation’², the first constitution of the United States, which was regarded as a flawed and unworkable document. It also had no guarantees of individual rights. The convention created a document which owed little to the first constitution, and Madison was a leading figure in its conception and preparation.³ The convention met in the absence of the public, and Americans were largely unaware of the task it was performing. It may be that one reason why its deliberations were kept secret was fear that the delegates would be recalled for exceeding their authority.⁴ Washington, as president of the convention, spoke very little over the four months of its deliberations, but on one of those occasions, he warned delegates not to let drafts of the constitution fall into other hands.⁵ The deliberations took place over the long summer of 1787, and the delegates were anxious to complete their task. Towards the end of the convention, one of Madison’s fellow Virginians, George Mason, urged the delegates to include guarantees of individual rights in the draft constitution. He was

supported in this proposal by the governor of Virginia, Edmund Randolph, who, like Mason, also had other objections to the convention document.

Mason had, in the same year as the Declaration of Independence, 1776 successfully propounded at the Virginian Constitutional Convention of that year a Declaration of Rights. Madison himself, as a young man, had assisted in the drafting of the clause in the Virginian Declaration of Rights guaranteeing the right to the free exercise of religion.⁶ The Virginian Declaration of Rights was influential in others of the thirteen states, all of which debated the inclusion of bills of rights⁷ and many of which did include bills of rights in their constitutions. Others, including New York, did not.

The move in the states to include bills of rights in their constitutions was largely due to a desire to avoid the repetition by duly elected state legislatures of the kind of oppression that British rule had brought to the American colonies. The strength of American objection



James Madison. Picture: iStockphoto.com

to that oppression may be seen in the passionate language in which the Declaration of Independence is expressed. Not all states, as noted earlier, adopted such clauses, and a division of opinion about the need for comprehensive protection, and about the rights deserving protection, was evident in the differences between the various state constitutions themselves.

The constitutional debates in the various states of the previous decade, and the various innovative forms of government debated or adopted in the states, including various forms of the bill of rights, had left behind a seasoned group of statesmen and thinkers ready to consider and criticise the document which the convention produced.

Opposing Mason's proposal at the Philadelphia Convention to add a bill of rights, Richard Sherman of Connecticut argued that the rights protected by state constitutions 'are not repealed by this Constitution; and being in force are sufficient'. He asserted something which was later also asserted at the Australian constitutional conventions, that the legislature to be set up under the constitution 'may be safely trusted'.⁸

Mason in his reply pointed out that laws of the United States were to be paramount to state bills of rights.⁹

The primary objection to the inclusion of a bill of rights at the convention seems to have been based on the perceived lack of necessity to do so, because of the fact that the federal government was to be one of limited powers, and the belief that the exercise of those powers would not impinge on individual rights.¹⁰

In the end the convention document was approved by unanimous vote of the delegates voting as states from each of the twelve states attending, and the convention president, George Washington, was first to sign the document. Madison appended his name to the document as one of the Virginian delegates. Both Randolph and Mason refused to do so.

The convention proposed that the document be transmitted to the states for ratification by delegates elected by the people in at least nine states, after which the constitution would come into effect. For this purpose, it desired the Continental Congress (of which Madison was also a member) not to amend the document produced by the convention before its passage to the People's Conventions. At the conclusion of the deliberation of the convention Madison returned to the Continental Congress in New York, where he played a key role in bringing about that result¹¹, and the convention draft was sent to the states for ratification without comment from the Continental Congress.

While Madison was in New York, he was enlisted by Andrew Hamilton¹² to become one of the writers of letters to New York newspapers under the shared pseudonym 'Publius' (the Public Man). The three writers were Hamilton, Madison and James Jay. The purpose of the correspondence was to urge in New York ratification of the Philadelphia Convention document of 17 September 1787, and the election of delegates to the People's Convention who would favour that course. That correspondence is now known as the Federalist Papers. The use of the pseudonym was convenient in that it enabled Madison not to reveal his southern origins to the readers in New York. The essays were widely distributed throughout the country.

He wrote many of those papers, some¹³ referring

incidentally to the omission of a comprehensive bill of rights. Andrew Hamilton himself took up the pen as Publius in Federalist No. 84 which dealt most extensively with that matter, and that paper is regarded as the classic statement of early Federalist objections to the inclusion of the bill of rights in the constitution. He was concerned to answer some of the arguments of those opposed to the ratification of the Philadelphia Convention document, who had also mobilised a campaign in New York and the other states. They were known as the Anti-Federalists. They were mainly opposed to the centralisation of power in the federal government, and the diminution of state power, but they were most effective in urging the adoption of a federal bill of rights. They produced pamphlets, letters and other publications urging the states not to ratify the convention document; they sought the calling of a second convention to rewrite the document produced by the Philadelphia Convention; and they opposed ratification of the Philadelphia Convention document.

Federalist No. 84

Hamilton drew attention first to those provisions of the convention document which did guarantee rights. Chief among them were the right to a jury trial for all crimes (Article III, section 2, cls 3), and the clauses guaranteeing the privilege of habeas corpus, except in cases of rebellion or invasion and forbidding bills of attainder and ex post facto laws (Article 1, section 9).

Hamilton's main argument was that Magna Carta and the Petition of Right assented to by Charles I and the Declaration of Right presented by the Lord and Commons to the Prince of Orange in 1688 were stipulations applying as between kings and their subjects which had no application to constitutions professedly founded upon the power of the people. He said that under a constitution in which the people are sovereign, they surrender nothing and as they retain every thing, they have no need of particular reservations. Democracy itself, he suggested in effect, was a sufficient guarantee of individual liberty.

He characterised the US Constitution as a document intended to regulate the general political interests of the nation, rather than a document intended to

regulate every species of personal and private concern. Moreover liberty of the press, he argued, was a subject matter so vague that any definition of it would leave the utmost latitude for evasion. Liberty of the press was one of the rights protected by the Virginia Constitution, for example.

He argued that it would be dangerous to include comprehensive bill of rights provisions in the constitution, because they would operate as exceptions to rights not granted, and afford a colourable pretext for a suggestion to claim more powers than were granted.

To the views asserted in 1788 by Publius in Federalist No. 84 may be contrasted the publication under the pseudonym of the Anti-Federalist writer 'John deWitt' of October 27, 1787. He put it that:

A people, entering into society, surrender such a part of their natural rights, as shall be necessary for the existence of that society. They are so precious in themselves, that they would never be parted with, did not the preservation of the remainder require it. They are entrusted in the hands of those, who are very willing to receive them, who are naturally fond of exercising of them, and whose passions are always striving to make a bad use of them – they are conveyed by a written compact, expressing those which are given up, and the mode in which those reserved shall be secured.¹⁴

A key point adverse to the convention document was made by 'Centinel' No. 1¹⁵ (October 5, 1787). He observed that the people should not be precipitated into this form of government unless it is 'a safe and proper one'. He added: 'For remember, of all possible evils, that of despotism is the worst and most to be dreaded'.¹⁶ He described the convention document as setting up in practice a permanent aristocracy, and castigated it for failing to provide for the liberty of the press and for failing to provide for the preservation of jury trial in civil cases.

The constitution without guarantees in the nature of a bill of rights was thus attacked on the ground that it might produce tyranny.

David J Siemers, in his book *Ratifying the Republic* (Stanford University Press 2002)¹⁷, has drawn attention to a pamphlet now persuasively identified as having

been written by Mercy Otis Warren¹⁸ sometime between the ratification by Massachusetts and that of Maryland. Her pamphlet was published under the pseudonym '*A Columbian Patriot*'. She characterised the constitution before its amendment as monarchic, by which she meant tyrannical. As a result of the amendments, she said in later writings, published after the ratification of the Bill of Rights, citizens' rights had been safeguarded and power had been reserved to the states and a monarchical government had been avoided in the United States. The Bill of Rights in its final form was not so satisfactory to other prominent Anti-Federalists.¹⁹

The Anti-Federalists thus used the argument which had persuaded the majority of the states to include bills of rights in their constitutions: that a failure to do so may cause the people to suffer from the same kind of tyranny from their own legislature as they had under the yoke of the British Crown.

Madison's contributions to the writings of Publius having been completed, he was pressed to return to Virginia, and to seek election as a delegate to the People's Convention for its ratification by his home state. A minimum of nine states was required to ratify the Philadelphia convention, and Virginia was a critical one for several reasons. It was the 'most important state politically in the South if not the nation. It was by far the largest state geographically, comprising what is today Virginia, West Virginia and Kentucky'.²⁰ Moreover it was the place of residence of George Washington, whom the people desired to have as their first president. If Virginia did not ratify, it would not be part of the union, and Washington's presidency would not have been possible. And Madison learned that Mason would be a delegate to the Virginian convention, and anticipated that his opposition to the document might result in a failure to ratify. Madison went home to seek election to the People's Convention, and was elected.

The course of the proceedings at Richmond, Virginia, which led to the ratification by a narrow majority of the People's Convention of the State of Philadelphia is well documented.²¹ One of those who supported Madison at the People's Convention was John Marshall, the future chief justice of the United States.²² When

the vote was cast in favour of ratification, Virginians probably thought theirs was the (critical) ninth state to ratify, because news of the ratification by the actual ninth state, New Hampshire, some four days earlier, had not arrived in Richmond at the time of the vote.²³ Madison played a leading role in the deliberations of the Virginia Ratifying Convention. Throughout that convention he opposed the addition of a bill of rights to the constitution.²⁴ His main opponent was Patrick Henry, a powerful Virginian politician, a leading Anti-Federalist and an accomplished orator.

In the end it was James Madison who moved at the first US Congress for a series of amendments to the US Constitution which emerged from the Senate as twelve amendments, ten of which became known as the Bill of Rights, after they were ratified by the necessary number of states as amendments to the US Constitution. His position as a Federalist was well known and his sponsorship of the amendments, involving as it did a radical change of his own position, must have been very important to their adoption.

Madison's opposition to a comprehensive bill of rights being included in the constitution may have been overcome by four main factors: First, he recognised that many of the people had grave misgivings about the failure of the convention document to include a bill of rights. The ratification by a number of states, including his own, was a narrow thing because of the absence of a bill of rights.²⁵ A number of states, while voting for ratification, had expressed the earnest hope that the document would be amended by adding rights protection.

Secondly, Thomas Jefferson, who was at the time minister for France, engaged in correspondence with Madison urging that he support a bill of rights in the new constitution.²⁶

Thirdly, when the US Constitution came into force, Madison had stood for the new Congress as a candidate for a Virginian electorate, the boundaries of which were sculpted by Patrick Henry to include Anti-Federalist voters, and Henry encouraged the prominent Anti-Federalist James Monroe to stand against Madison for the seat. (Madison would later appoint Monroe as his

secretary for state and Monroe would succeed Madison as president). Madison was able to secure his election to Congress after promising his electorate that when in Congress, he would seek to add a bill of rights to the constitution.

In the fourth place, Madison feared that if a bill of rights was not added to the constitution, Anti-Federalist forces in a number of states would succeed in a move to call a further constitutional convention to reconsider the constitution and thus potentially undo what had been achieved in Philadelphia.²⁸ A further convention would be called under Article V if two thirds of the states required it. In the event no such majority was achieved by the Anti-Federalists, following the ratification of the initial Bill of Rights amendments.

For the drafting of the federal Bill of Rights Madison drew upon the constitution of his home state of Virginia, to which, as noted above, he had himself contributed. He proposed some amendments which did not survive the Senate. In particular he proposed that the states should be prohibited from violating the equal rights of conscience or the freedom of the press, or the trial by jury in criminal cases. He regarded that provision as one of the most important²⁹, but the states' house did not agree. The Civil War amendments made in the following century would achieve Madison's desired result.

By 1791, four years after the convention document, Amendments I-X had been agreed to by the requisite number of states and became part of the constitution.³¹

The fourteenth amendment, made after the Civil War, contained a citizenship clause which provided that all persons born or naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. It continued:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XV, another amendment enacted



following the Civil War, guaranteed the right of citizens of the United States (including, as was particularly intended, that of black Americans in the southern states) to vote and provided that that right 'shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude'.

The right to bear arms

The most controversial right recognised in the United States Constitution is that comprised in Amendment II: 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed'. The provision was held in *District of Columbia v Heller* 554 US 290 (2008) to invalidate a law passed in the federal District of Columbia banning the possession of handguns in the home. On 28 June this year in *McDonald et al v City of Chicago, Illinois et al*, 561 US (2010) the Supreme Court by a 5–4 majority held that the provisions of the second amendment extended to the states by virtue of the fourteenth amendment's due process clause, so that a law in force in Chicago prohibiting the possession of handguns in the home for the purpose of self-defence was invalid.

Madison had originally proposed in the lower house an amendment which used similar language to the second amendment.

The protection is analysed by the Supreme Court as fundamental to the American understanding of ordered liberty, as a part of the basic right of self-defence. In

Heller, the Supreme Court concluded that citizens must be permitted to use handguns 'for the core lawful purpose of self-defense' (slip opinion at p.58). For this view the Supreme Court resorted to letters and papers from Anti-Federalists and to Federalist No. 46, which Madison wrote. The court stated that Anti-Federalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government. The court in *McDonald* examined materials dating from the time of adoption of the fourteenth amendment following the Civil War, and concluded that the right to keep and bear arms was still recognised in a majority of states at the time of the fourteenth amendment: Slip opinion at p.30.

The *McDonald* majority opinion rejected as a test for the purposes of the fourteenth amendment the view contended for by the respondents that the due process clause protects only those rights 'recognised by all temperate and civilised governments' and ruled that the American experience alone was relevant, even if others might disagree.

If the modern (or modern enlightened) approach in the United States to the bearing of arms is similar to that in this country, which favours significant restrictions being placed upon gun ownership, then there would be plainly a case to seek amendment of the provisions of the second amendment. Such an amendment would today in the USA require the consent of a three-fourths majority of fifty states.

To Australian eyes, the second amendment seems to involve recognition of a right that might have commended itself to people, even a majority of the people, in times past but would not so commend itself today. Perhaps that would be enough to procure an amendment under s 128 if the right had been recognised in the Australian Constitution.

The provision recognising the right to bear arms in a model (1) constitution (and for that matter, such a provision if it were included in a model (2) constitution) certainly signals a possible problem, and the problem exists not only with the selection of rights deserving protection, but also with the language in which such rights are described. The problem is not merely one of

changing community attitudes, but of a need to debate and anticipate the possible impact of entrenched rights on possible future circumstances.

That problem is to some extent ameliorated in a country like Australia, which, if it does ever entrench rights similar to those protected in the United States and Canada, can at least have regard to decades of Canadian cases, and in the case of the US, centuries of published authority, enabling a government to see how the courts of those countries have reacted to the application of recognised rights in a great variety of different circumstances. A late entrant to the field can be better off in that respect.

Both models (1) and (2) are premised upon the separation of powers, and involve the courts rather than the people or any tribunal elected by the people ruling about the conflict of laws with rights recognised in the Bill of Rights. The courts in America have become more responsive to public opinion in interpreting the Bill of Rights. Barry Friedman of the New York University School of Law has recently published an analysis of the interplay between public opinion and the decisions of the Supreme Court of the United States, and argues that the Supreme Court has by and large responded to public opinion on a number of Bill of Rights issues. The power given to the court of constitutional interpretation and nullification of laws is one that can be withdrawn by constitutional amendment, and is to that extent conditional. He says:

The tools of popular control have not dissipated; they simply have not been needed. The justices recognize the fragility of their position, occasionally they allude to it, and for the most part (though, of course, not entirely) their decisions hew rather closely to the mainstream of popular judgment about the meaning of the Constitution. It is hardly the case that every Supreme Court decision mirrors the popular will – and even less so that it should. Rather, over time, as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people.³²

The view is taken in the United States (and Canada) that judicial review is appropriate in this, as in other, constitutional issues. Despite occasional clashes between government and courts (which are common

on other constitutional and other issues) the courts have been left as the final arbiters on the validity legislation alleged to be in conflict with the bills of rights in both countries.

Australian responses to the adoption of model (1) in The United States

Australia missed its major opportunity to have a bill of rights included in its constitution at the time of the Constitutional Conventions. Not only did we not then adopt one, but by section 128, we placed the choice to introduce possible constitutional change in the hands of politicians. A referendum to amend the constitution must originate in the parliament, and thus therefore submitting it to the vote of the electors must have the support of the government of the day. It must, to be passed, receive the affirmative votes of a majority of the electors in Australia, including a majority in a majority of states.

As is well known, the Australian Constitution is largely concerned with the division of power between the federal government and state governments. In this and other respects it partly resembles the American Constitution as it stood at the time of the Philadelphia draft. The US constitution had much prominence in the debates of the Australasian Federal Convention.

At the early conventions Mr Andrew Inglis Clark, for some time attorney-general for Tasmania, came to be regarded by convention delegates as a specialist on the United States Constitution. He had a special interest in American affairs and American constitutional law. He was the senior Tasmanian delegate to the Federation Conference which met at Parliament House Melbourne on 6 February 1890, and after this Convention concluded he instructed the Tasmanian draftsman to prepare a draft Bill from his notes. That draft Bill is published as an appendix to an article concerning Clark written by John Reynolds at 32 ALJ 62. Importantly, the Bill contained the ancestors of sections 116 and 80 as his sections 46 and 65:

46. The Federal Parliament shall not make any Law for the establishment or support of any religion, or for the purpose of giving any preferential recognition to any religion, or for prohibiting the free exercise of any religion.

65. The trial of all crimes cognisable by any Court established under the authority of this Act shall be by Jury, and every such trial shall be held in the Province where the crime has been committed, and when not committed within any Province the trial shall be held at such place or places as the Federal Parliament may by law direct.

Mr Clark did not in his draft take any other part of the First Amendment than the first part (for his section 46), and did not include in it, in relation to the right of trial by jury, anything corresponding to Amendments V and VI. Indeed the only provision of the Amendments which he seems to have taken up is the first part of the First Amendment.

Reynolds notes in his article³³ in the *Australian Law Journal* that all the delegates at the 1891 Convention received copies of his draft before the opening of the convention.

Importantly, Clark was part of the Drafting Committee established by the 1891 Convention and chaired by Sir Samuel Griffith, which met on board the Queensland Government's steam-paddle-wheeled yacht *Lucinda*, while it cruised on the Hawkesbury River. Presumably Clark's draft was part of the material before that Committee.

Why Clark chose to omit so much from the United States Constitution and its amendments in his draft can only be the subject of speculation. He was, as can now be seen, in a powerful position to have propounded a bill of rights in the drafts of the Australian Constitution but clearly decided not to do so.

As to the provisions which were proposed by Mr Clark, the final form of section 116 was, as Quick and Garran note, substantially the work of Mr H B Higgins at the 1898 Convention session.³⁴

The subsequent history of the drafting of the section which we know as section 80 is discussed in *Cheng v The Queen* [2000] 203 CLR 248 at paragraphs [53]-[54]. What is there pointed out is that the delegates had it specifically drawn to their attention that the effect of the section as it is presently worded would be to give the Commonwealth as prosecuting authority a choice as to whether or not to present an indictment for a crime, and only if the prosecution chose to present

an indictment would there be a right to a jury. The delegates who produced that result (which in America, would have appalled Federalists and Anti-Federalists alike) were the Honourable Edmund Barton and the Honourable Isaac Isaacs.

A clearer indication of the view of convention delegates concerning the entrenchment of fundamental rights emerges from other proceedings at the Melbourne Convention in 1898.³⁵

The Tasmanian Legislative Assembly had proposed the inclusion of a provision about citizenship which drew upon Section 1 of the Fourteenth Amendment of the United States Constitution, and during the 1898 Convention there was discussion about the clause. The clause proposed by the Legislative Assembly of Tasmania was in the following terms:

The citizens of each State, and all other persons owing allegiance to the Queen and residing in any Territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all the privileges and immunities of citizens of the Commonwealth, in the several States, and a State shall not make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth, nor shall a State deprive any person of life, liberty, or property without due process of law, or deny to any person within this jurisdiction the equal protection of its law.³⁶

Mr Isaac Isaacs (then attorney-general of Victoria) compared the language proposed to the similar language of the fourteenth amendment, and referred to the discussion of it in the United States Supreme Court in *Strauder v West Virginia* 100 US 303 (1879). He referred to the fact that the occasion for the fourteenth amendment was the refusal of the southern states to allow African Americans to vote, but that the clause had been successfully invoked by a Chinese in *Yick Wo v Hopkins* in 118 US 356 (1886) who established his right, in spite of the state legislation, to have the same laundry licence as the Caucasians have.³⁷ Mr O'Connor (then solicitor general for NSW and also later a member of the High Court) said that he thought that the part of the Tasmanian draft which it was necessary to preserve was this – altering the wording slightly so as to make it read as I think it should read:

A state shall not deprive any person of life, liberty, or

property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.³⁸

Mr O'Connor also expressed the view³⁹ that whatever privilege we give to our citizens the administration of the law should be equal to all, whatever their colour. He referred to 'one of the Chinese cases' decided in the US Supreme Court, and Mr Isaacs suggested that its name was the one he had previously referred to, *Yick Wo v Hopkins*.

Mr O'Connor when giving notice that he would move that the provision that a state shall not deprive any person of life, liberty or property without due process of law be added by way of amendment to the motion then before the convention, said:⁴⁰

In the ordinary course of things such a provision at this time of day would be unnecessary; but we all know that laws are passed by majorities, and that communities are liable to sudden and very often to unjust impulses – as much so now as ever. The amendment is simply a declaration that no impulse of this kind which might lead to the passing of an unjust law shall deprive a citizen of his right to a fair trial.

In the course of the discussion Mr O'Connor's amendment occasioned criticism from the Honourable Mr Isaac Isaacs and others. Mr O'Connor asserted about the clause:⁴¹

It is a declaration of liberty and freedom in our dealing with citizens of the Commonwealth. Not only can there be no harm in placing it in the Constitution, but it is also necessary for the protection of the liberty of everybody who lives within the limits of any State.

When asked by Mr Simon whether we did not have that under Magna Carta, Mr O'Connor replied: 'There is nothing that would prevent a repeal of Magna Charter by any State if it chose to do so.' When asked to give examples of any misuse of power in colonial legislatures which might indicate a need for the amendment, Mr O'Connor said that there were matters of history in these colonies which it is not necessary to refer to. Dr Cockburn drew attention to the fact that the Fourteenth Amendment was forced upon the southern states after the Civil War so as to ensure that southern planters would not deny the vote to African American inhabitants. He said:⁴²

I do not believe we shall ever have such a condition of things here as will necessitate such a clause in the Constitution. As it formed no part of the original Constitution of America, as it was only introduced by force of arms and not according to the legal limits of the Constitution, I do not think we should pay it the compliment of initiating it here.

Mr Isaac Isaacs opposed the clause on two grounds. First of all he drew attention to problems that might arise from the adoption of the language proposed (as to 'equal protection'), especially insofar as Factories Acts prohibited the engagement of Chinese labour instead of local labour, if the words 'the equal protection of all laws' were adopted from the language of the fourteenth amendment. He reverted to the case of *Yick Wo v Hopkins* where 'it was held by the Supreme Court that the ordinance of the San Francisco legislature was void, and they went on to say further, even if a legislative protection is fair and apparently equal on the face of it, it (i.e. the Act) will be declared void.' He went on: 'if that is so, to put it in plain language, our factory legislation must be void. It cannot expect to get for this Constitution the support of the workers of this colony or of any other colony, if they are told that all our factory legislation is to be null and void, and that no such legislation is to be possible in the future?' Mr Kingston asked: 'That is the special clause relating to Chinese?' Mr Isaacs replied 'Yes'.⁴³

As to the due process provisions he said:⁴⁴

I understand that Mr O'Connor proposes to introduce that portion. What necessity is there for it? Under our State Constitutions no attempt has ever been made to subject persons to penalties without due process of law. That provision was likewise introduced into the American Constitution to protect the Negroes from persecution, and dozens of cases have been brought in the United States to ascertain what was meant by due process of law. At one time it was contended that no crime shall be made punishable in a summary way, but that in every case there would have to be an indictment and a trial by jury. That was overruled, and it was held that you might have process by information. If we inserted the words 'due process of law' they can only mean the process provided by the State law. If they mean anything else they seriously impugn and weaken the present provisions of our Constitution. I say that there is no necessity for these words at all. If anybody could point to anything that any colony had ever done in the way of attempting to persecute a citizen without due

process of law there would be some reason for this proposal. If we agree to it we shall simply be raising up obstacles unnecessarily to the scheme of federation.

Dr Cockburn for South Australia argued that the words in question should not be inserted because they would be a reflection on our civilisation. He asked:⁴⁵

Have any of the colonies of Australia ever attempted to deprive any person of life, liberty or property without due process of law? I repeat that the insertion of these words would be a reflection on our civilisation. People would say 'Pretty things these States of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustice'.

Mr O'Connor said that he did not think there was presently any such protection. He added:

We are making a Constitution which is to endure, practically speaking, for all time. We do not know when some wave of popular feeling may lead a majority in the Parliament of a State to commit an injustice by passing a law that would deprive citizens of life, liberty or property without due process of law. If no State does anything of the kind there will be no harm within this provision, but it is only right that this protection should be given to every citizen of the Commonwealth.

Dr Cockburn described the amendment as 'very necessary in a savage race'.⁴⁶ Mr Isaacs asked: 'What is the good of it? It is an admission that it is necessary.' Mr O'Connor remarked that Mr Clark of Tasmania thought the amendment of importance and pointed out that it had been put in the United States Constitution. Mr O'Connor added:

It should also be put in this Constitution, not necessarily as an imputation on any State or any body of States but as a guarantee for all time for the citizens of the Commonwealth that they should be treated according to what we recognise to be the principles of justice and of equality.

Sir Edward Braddon (Tasmania) suggested that the clause as it stood was calculated to do more harm than good: 'It will cause friction between the states and the Commonwealth, and also involve considerable interference with the rights of the several states.'⁴⁷ A desire not to alienate state support may be discerned in others of the speeches against Mr O'Connor's motion.

The matter was put to a vote and those in favour of the

amendment proposed numbered 19. Those against numbered 23. Mr Edmund Barton voted in favour of the amendment together with Mr O'Connor, and Mr HB Higgins voted against it together with Mr Isaac Isaacs.

The conclusion seems to be that when it became necessary for the delegates to consider the inclusion of a due process provision in our constitution, they rejected it mainly on the ground that it was not necessary at all and that in effect the state legislatures could be relied upon not to infringe any such requirement. That view, in American terms, would assign the majority at the Melbourne session of the convention to the position originally adopted by the Federalist camp while in the relevant respect future Justices Barton and O'Connor agreed in some respects with the Anti-Federalists, and in effect with views espoused by Madison at the time he moved for the bill of rights amendments in the US Congress.

A significant problem with the stance taken by the delegates in the majority is that they seem both to have asserted that there was no need for any guarantee of due process and equality of treatment in relation to minorities, and also that then existing racially discriminatory legislation in relation to Chinese workers and indigenous persons ought not to be interfered with, because the factory legislation would be invalidated, and workers would not put up with it, and oppose the constitution itself. By contrast, Mr O'Connor expressed himself to be in support of the result arrived at in the case of *Yick Wo v Hopkins*. Mr Isaacs put the matter on to the need to get the constitution through. The assertion that there was no need to give the protection proposed by Mr O'Connor (most simply expressed by Dr Cockburn's reference to the protection being 'very necessary in a savage state') was not, in the debate, measured against the racially discriminatory legislation relating to factories. That seems to be plainly enough, legislation enacted by the representatives of the majority directed squarely against the minority. Pragmatic considerations about getting the constitution through were undoubtedly important. But to reject the O'Connor motion on the ground that the politicians could be trusted not to

infringe fundamental rights seems very odd.

It was to be a very long time before Australia prohibited racial discrimination and the problem of state legislation of such a nature persisted until at least 1974. In that year, Queensland passed legislation directed against Aboriginal ownership of large tracts of land and, when sued under the *Racial Discrimination Act* 1975 (Cth), Queensland unsuccessfully attempted in the High Court to have the Act declared to be beyond the power of the Commonwealth in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

A faith at the time of the Constitutional Conventions in the belief that the new federal government could be relied upon not to behave oppressively may also, perhaps, be discerned in the watered down form of the right to jury trial which led to the language used in s 80 which committed the decision as to whether or not a jury would be summoned to the prosecuting authorities.

It is tempting to think that the absence of British tyranny in the dealings with the Australian colonies at the end of the nineteenth century helped to produce the result that the provisions of the bill of rights were largely put to one side at the time of the Constitutional Conventions. We had no recent experience of tyranny at the hands of the empire, and a large measure of self-government. But if that change had occurred by 1900 in the dealings of the imperial parliament, the same was all the more the case thirty years ago in the dealings between the British Crown and Canada. Yet no view such as was adopted at our Constitutional Conventions was taken in Canada in relation to what Canadians described as the 'patriation' of their constitution.

Canada

Canada is another country in which the rule of law was alive and well. Professor Hogg who has written successive volumes of his text *Constitutional Law of Canada* since 1977 (the most recent being a student edition printed in 2010) states in his 4th edition (1997, Toronto, Thomson Canada Ltd) that in order to give an account of the introduction into the Canadian Constitution (The *Canada Act* 1982) of the Charter of Rights it is necessary to refer to the role of the then

Canadian Prime Minister Pierre Trudeau. Professor Hogg says:

The most prominent of the advocates of a bill of rights was Pierre Elliott Trudeau, who was elected to Parliament in 1965, became Minister of Justice in the Liberal government of Prime Minister Pearson in 1967, and became Prime Minister in 1968. His government, which remained in office with only one brief interruption from 1968 until his retirement in 1984, steadily sought to achieve provincial consent to an amendment of the Constitution which would include a new amending formula and a new bill of rights. That long quest culminated in November 1981 with an agreement which included nine of the ten provinces (Quebec dissenting), and which was followed by the enactment of the Constitution Act, 1982 of which Part I is the Canadian Charter of Rights and Freedoms.⁴⁸

The British government agreed to pass the *Canada Act 1982* after its terms were agreed by the nine provinces and thus Canada obtained its (model (2)) constitutional bill of rights, which bound not only the Canadian parliament but also the provinces.

Mr Trudeau's writings disclose his reasoning process. In his memoirs, he makes reference⁴⁹ to having read a number of writers including T H Green in the course of his studies at the London School of Economics. He says that he acquired in those years a conviction that what was important was not the state but the individual.

To understand this reference, Green's work should be situated in its philosophical context.

The provisions of the United States Constitution naturally occasioned great interest among philosophers. Alexis de Tocqueville, writing in the early 19th century, published his analysis of the problem of democracy. In 1835 he published the first part of his influential work, *Democracy in America*. De Tocqueville described the real driving force of democracy as the passion for equality and expressed the fear that the passion for equality was as compatible with tyranny (by the majority) as well as with liberty. He thought that the democratic principle was prone, if left untutored, to a despotism never before experienced.⁵⁰

Much of his analysis was taken up in Britain by John Stuart Mill, who in turn influenced political theory in Britain greatly, especially in the period 1860-1870. The historical sociology of democratic culture on which Mill

relied to identify and explain the nature of the threat to liberty posed by democracy was lifted bodily from de Tocqueville's *Democracy in America*.⁵¹

Mill's *Essay on Liberty* described the struggle between liberty and authority. He said:

Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant – society collectively, over the separate individuals who compose it – its means of tyrannising are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates; and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways and compel all characters to fashion themselves upon the model of its own.⁵²

Mill exercised a dominant role in English thought especially between the years 1860 and 1870. His authority in English universities was compared after his death to that wielded by Hegel in Germany and by Aristotle in the Middle Ages.⁵³

Among those who followed Mill and were influenced by him was T H Green, who lectured in the 1880s. He stressed the need of the state to preserve the individual's autonomy of choice but unlike Mill stressed that real freedom consisted in pursuing the right objects, and that one had a duty to take positive steps, including government action, to liberate other people's powers by giving them the opportunity for real freedom too. Freedom for Green had to be understood not in individual terms, but as what the members of a society could achieve co-operatively. Thus he supported a legal restriction on the liquor trade in order to prevent men, women and children from the danger done by

drunkenness. He presented this as a case of limiting '(the negative) freedom of contract of traders in the interest of the positive freedom of all'.⁵⁴ The thought of Green, and therefore indirectly of Mill and de Tocqueville, became important for its influence upon Canada's prime minister a century later.

Mr Trudeau was finally able to secure the agreement of nine of the ten Canadian provinces (but not Quebec) to the constitution (including the Charter of Rights) by a reluctant compromise: He agreed to the inclusion in the constitution of a clause permitting the Canadian government or the government of any provinces to override it in their respective statutes. This was the so-called 'notwithstanding' clause contained in section 33 of the Canada Act which provides that parliament (meaning the Canadian Parliament) or the legislature of a province may expressly declare in an act of parliament or of the legislature, as the case may be, that the act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7-15 of this Charter.

Speaking of his opposition to this clause, Trudeau wrote in his memoirs:⁵⁵

I saw the Charter as an expression of my long-held view that the subject of law must be the individual human being; the law must permit the individual to fulfil himself or herself to the utmost. Therefore, the individual has certain basic rights that cannot be taken away by any Government. So maintaining an unweakened Charter was important to me in this basic philosophical sense. Besides, in another dimension, the Charter was defining a system of values such as liberty, equality and the rights of association that Canadians from coast to coast would share.

As to the latter point he said:⁵⁶

Canadians have tended to say that they are French Canadians or English Canadians or Ukrainian Canadians or whatever, or simply New Canadians. But what of Canada itself? With the Charter in place we can now say that Canada is a society where all people are equal and where they share some fundamental values based upon freedom.

The influence of the philosophical positions referred to earlier on the remarks made by Mr Trudeau is obvious. Trudeau had also, before entering politics, taught

constitutional law in a Canadian university.

In his 2010 edition Professor Hogg brings up to date the use which has been made in Canada of the 'notwithstanding' clause. He says that Quebec always included the notwithstanding clause in its legislation until 1985, since it objected in principle to the Charter being made binding upon it, and that since 1985 it has used the clause twelve times. Quebec apart, however, the clause has only been invoked three times, twice by provinces and once by a territory. Thus seven of the ten provinces and two of the territories have never used the clause and nor has the Canadian Parliament.⁵⁷

The Charter of Rights protects freedom of conscience and religion; freedom of thought, belief, opinion and expression including freedom of the press; freedom of peaceable assembly; freedom of association; freedom of mobility, residence in any province and to pursue the gaining of a livelihood in any province; the right to life liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice; the right to be secure against unreasonable search or seizure; certain rights arising upon arrest; the right not to be subjected to cruel and unusual punishments; the privilege against self-incrimination; the right to equality before the law.

There were certain features of the Canadian situation that called for the protection of minorities, including in particular the French Canadians. One of the rights guaranteed by the Charter is the right of English or French linguistic minority populations in a particular province to have their children receive primary and secondary school instruction in that language. Other language rights are conferred by the Charter. The presence of those language rights motivated reform, and provided an opportunity for the inclusion of the Charter of Rights as a whole.

Professor Hogg observed with respect to the Canadian Charter of Rights (and the same could be said of the US Bill of Rights) that: ⁵⁸

The Charter will never become the main safeguard of civil liberties in Canada. The main safeguards will continue to be the democratic character of Canadian political institutions, the independence of the judiciary and a legal tradition of respect for civil liberties. The Charter is no

substitute for any of these things, and would be ineffective if any of these things disappeared. This is demonstrated by the fact that in many countries with Bills of Rights in their Constitutions the civil liberties which are purportedly guaranteed do not exist in practice.

An Australian Response to model (2) adopted in Canada

Australia has by and large relied upon the 'main safeguard' to which Professor Hogg refers. The present state of affairs in Australia has not, however, been free of criticism. See, for example George Williams', *A Charter of Rights for Australia*. He identifies as major blemishes on Australia's human rights record the failure to protect indigenous people, the homeless, people with a mental illness, children and immigrants, laws on the topic of mandatory sentencing, the right to vote, laws restricting freedom of speech, and anti-terrorist laws.⁵⁹ The recommendations of the Australian Human Rights Consultation also involve serious criticism of the current lack of comprehensive protection of rights.

Another significant criticism of the absence of a bill of rights in this country was made by the Honourable Michael McHugh AC QC, in his speech (now published on the New South Wales Bar Association website) entitled 'Does Australia Need a Bill of Rights?' Mr McHugh there reviews existing rights protections in this country and expands upon a view which he expressed on the bench in *Al-Kateb v Godwin* (2004) 219 CLR 562: See in particular [73] at pages 594-595. The circumstances which led to that litigation (indefinite detention with no prospect of release for a stateless man who came here without a visa) certainly sounds like a cruel and unusual punishment, something which the Canadian and United States bills of rights (drawing upon Magna Carta) would make impermissible. Mr McHugh describes himself in the speech as a late convert to the bill of rights.

The Hawke Government established the Constitutional Commission which reported on 30 June 1988. It consisted of Sir Maurice Byers CBE QC, the Honourable E G Whitlam AC QC, the Honourable Rupert Hamer KCMG (former Liberal premier of Victoria), Professor Enid Campbell OBE and Professor Leslie Zines. The final report⁶⁰ is a very scholarly document which is

held in high regard among constitutional lawyers. The present solicitor-general for the Commonwealth rightly remarked when delivering the annual Sir Maurice Byers address for the NSW Bar Association⁶¹ in 2009 that it should form part of every constitutional lawyer's library. In volume 1 of the report consideration is given to international treaties which Australia has ratified, and to the Canadian position in particular. The report recommended that a range of human rights closely similar to those specified in the Canadian Charter of Rights should be incorporated into our constitution. The report recommends that a new chapter be inserted into the constitution which would guarantee:

- freedom of conscience and religion;
- freedom of thought, belief and opinion; and of expression;
- freedom of peaceful assembly and of association;
- the right of every Australian citizen to enter, remain in and leave Australia;
- freedom of movement and residence in Australia for everyone lawfully within Australia;
- freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief;
- the right not to be subjected to cruel, degrading or inhuman treatment or punishment, or to medical or scientific experimentation without the subject's consent;
- the right to be secure against unreasonable search or seizure;
- the right not to be arbitrarily arrested or detained, and certain other rights when a person has been arrested or detained;
- the rights of a person arrested for an offence and the rights of a person charged with an offence; and
- that no one shall be liable to be convicted of an offence which did not constitute an offence when it occurred.⁶²

The reasoning of the committee is detailed and measured. The report also recommends that existing

freedoms, relating to trial by jury, property rights and freedom of religion be extended in a number of respects. The right to jury trial should, the committee recommends be extended to all serious crimes, and not only to crimes punishable by Commonwealth law.⁶³ It recommended that the guarantee of just terms in s 51(xxxi) should be extended to the states and territories.⁶⁴ It reported that freedom of religion should be guaranteed in the states and territories, and should be extended to overcome the result of a number of High Court decisions about the existing guarantee.⁶⁵

Events overtook the final report in that the Hawke Government elected to put certain limited proposals to a referendum in a desire to achieve constitutional amendments at the time of the 1988 Bicentennial and the referendum failed. The report has not subsequently been the subject of action by any government.

The report suggests answers to a number of possible objections to the inclusion of a bill of rights in our constitution including particularly the objection which is often put forward that judges may not be competent or reliable enough to interpret bills of rights provisions.⁶⁶ The same question occupied some 90 minutes of televised debate in Canada before the Charter of Rights was finalised.

The report also proposes an answer to the criticism that to give such a role to the High Court might politicise the judiciary. If any future government desires to consider questions relating to the bill of rights, this report should clearly be given serious consideration.

Having set out an account of the suggested objections to judicial review⁶⁷ the report continued:

9.132 There emerges, therefore, the problem of the legitimacy of judicial review. At its broadest, the argument is that the attempt to transfer controversial issues relating to rights from the sphere of politics to the more benign realm of law is mistaken in principle. As Professor JAG Griffith wrote in 1979, 'law is not and cannot be a substitute for politics'. In his view, such devices as the constitutional entrenchment of rights 'merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a Supreme Court to make certain kinds of political decisions does not make those decisions any less political'.

9.133 Griffith writes from a radical standpoint. However,

the critique of judicial review is by no means the exclusive property of the Left. Liberal Party politician, Mr JM Spender QC, MP, speaking at a conference on Human Rights in 1986, noted 'the immense difficulties that can be encountered when you pass laws, dealing with rights which are so vague in content that the interpreters and the creators of the rights become the courts'. In his view:

If you want the courts to be creators of rights in a very general sense, that is one thing, but that is very different from our system, and I'm not at all sure that I want that to happen. I believe that the creators of rights should be Parliaments, clearly expressing their intent in statutes which are as precisely drawn as possible.⁶⁸

9.134 The point is not to deny legitimacy to the judiciary, but to decide upon the appropriate judicial functions in the protection of human rights. Even their sternest critics sometimes admit that the courts present a valid forum for reasoned debate on matters of principle, very different in nature to that offered by Parliament. Amongst other things, the courts provide a forum in which the circumstances of individual cases are of paramount concern. This does not dispel the distrust of the judicial review function held by many of those who are in broad sympathy with the objects of entrenched rights and freedoms, but who, nevertheless, are opposed to the idea of entrenchment.

9.135 What case then is there to support the legitimacy of judicial review as an integral part of constitutional guarantees?

9.136 We have already stated that fundamental to liberal democracy is the attempt to reconcile the principle of majority rule with a concern for individual rights. Democracy in this respect is designed not only to reflect the will of the majority, but also to protect the rights of minorities and to ensure that there are adequate checks and balances against the misuse of official power.⁶⁹ It can be argued that an independent judiciary determined to interpret the Constitution generously, avoiding 'the austerity of tabulated legalism', is essential to this scheme.⁷⁰ The following points can be made in support of the judiciary's role in enforcing constitutionally entrenched rights:

(a) The Australian judiciary has the confidence and trust of the people and it will be seen popularly as the appropriate body to act as a human rights 'watchdog'. Historically, the High Court has acted in an independent and responsible manner. There is no reason to suppose that in the new circumstances, it will abandon this approach or that it will compromise its impartiality in any way.

(b) The judicial process itself has many advantages in relation to the function of a human rights 'watchdog'. For example, the publicity which will inevitably accompany litigation involving human rights will ensure that the moral and educative purpose of entrenching rights in the Constitution will be realised. The doctrine of binding precedent will further ensure that a declaration made in one case will benefit many other people whose cases will not need to be litigated.⁷¹

(c) It is an effective system for the protection of rights because politicians and administrators will be restrained from formulating policies and laws which they know will be contested in the courts.

(d) While it is accepted that the new role envisaged for the courts involves a change in our constitutional arrangements, the extent of the change involved needs to be kept in perspective. The claim that judges, in enforcing constitutionally entrenched rights, will be performing a function essentially different from that which they now perform is to overstate the case. According to the Victorian Parliament's Committee on Legal and Constitutional Affairs, in Australia generally 'we are comparatively used to judicial review to prevent these bodies from 'adversely affecting human rights would probably not involve the same degree of intellectual trauma as might be experienced in a legal system where Parliament enjoys unbounded sovereignty, such as that of the United Kingdom.⁷² Indeed, since Federation, the High Court has often engaged in judicial review of politically controversial matters, for example, in its interpretation and application of section 92 of the Constitution. Furthermore, in interpreting legislation and applying the common law, judges generally do adjudicate questions of civil liberties.⁷³ To some extent, judges already make evaluative choices and influence the share and content of the laws.⁷⁴ With the constitutional entrenchment of rights, they would have more opportunity to do so, but there is no suggestion that judges will approach the task in an irresponsible or naive way.

(e) In Australia, the power of judicial review will only be granted to the judges if the people so decide at referendum. Any argument which holds that judicial review is undemocratic would be severely weakened if the Constitution is amended. It could be argued, indeed, that the courts would only be enforcing the will of the people.

(f) Similarly, if the argument that the protection of individual and minority rights is a fundamental aspect of liberal democracy is accepted, then the case for the legitimacy of judicial review is further strengthened.

This is especially so if it also agreed that the judiciary is an appropriate forum for the adjudication of hard cases involving conflicts between individual rights and social policies or collective interests.

(g) The judiciary will often be in a better position to decide these hard cases in a principled and rational way than a legislature. A judge of an independent judiciary is insulated from the demands of a political majority whose interest the asserted right would affect and so is in a better position to make an impartial evaluation of the arguments.⁷⁵ 'Because they are not compelled by electoral self-preservation simply to reflect existing community moral values and prejudices, judges are free to move forward to a more enlightened viewpoint on a controversial subject. They can stake out a position that the people may well accept once they see it spelled out, but that an electorally accountable body would have been loath to risk proposing in the face of current attitudes.'⁷⁶ Furthermore, howsoever it decides, a court is expected to offer reasoned justification for its decision.

(h) When courts come to decide issues arising under constitutional guarantees of rights and freedoms, they are concerned primarily with the circumstances of individual cases. Parliaments, in contrast, are concerned with the making of general rules, and in formulating them may not always appreciate how they will work out in practice. Parliaments may, by inadvertence rather than design, enact legislation which trespasses unduly on individual rights and freedoms. Judicial review of parliamentary legislation in the context of concrete cases will often prompt parliaments to review their legislation in the light of the judicial findings.

(i) Finally, the ability of parliaments to perform a 'watchdog' function with respect to legislation and administrative action is far more restricted in fact than the theories of parliamentary sovereignty imply. Problems of time, complexity and the domination of legislatures by executives generally are among the factors which mitigate against a parliament closely monitoring such things.

9.137 Were the courts to be required to undertake the function of interpreting and enforcing new constitutional guarantees some modifications in their approach to the judicial review function might well be considered desirable. For example, a more liberal approach to appearance of persons as *amici curiae* might be thought desirable;⁷⁷ likewise, changes in rules regarding what facts may be judicially noticed and established.⁷⁸

When discussing whether, and if so how, the rights in question should be set out in the constitution, the

report looked at the matter from the point of view of the electorate, rather than of the government. The report explains the basis on which the committee proceeds:

9.98. First, we have taken the view that if the electors were to agree that certain rights and freedoms are sufficiently important to merit constitutional protection, they are unlikely to accept that the protective provisions should be capable of alteration otherwise than in accordance with the present procedures which apply to alterations of other provisions of the constitution.

9.99 Secondly, we have also considered it unrealistic to suppose that electors would wish to have rights and freedoms guaranteed under the Constitution, but then denied the facility to seek enforcement of the constitutional guarantees to the same extent as they can presently seek enforcement of other provisions of the Constitution. In other words, we have proceeded on the basis that constitutional entrenchment of further rights and freedoms would attract the processes of judicial review evolved since Federation.

A matter upon which the commission differed⁷⁹ was whether the 'notwithstanding' clause of the Canadian Constitution should be incorporated into the Australian Constitution as part of the bill of rights provisions. Interestingly it was Professor Enid Campbell and Professor Leslie Zines who thought that such a provision should be included, and Sir Maurice Byers, Mr Whitlam and Sir Rupert Hamer took the view preferred by Mr Trudeau that it should be excluded. The majority recommended model (1) and the minority recommended model (2).

Mr Trudeau had to accept the 'notwithstanding' clause in order to secure the consent of those provinces (other than Quebec) that had until then been opposed to the Charter on the ground that it limited the sovereignty of their legislatures.⁸⁰ Despite the objection of Quebec, the imperial parliament agreed to make the Canada Act binding throughout Canada.

Interestingly, Mr Trudeau himself had found it necessary to suspend the Bill of Rights, which was legislation (in a model (3) form) introduced by his government in 1968 before the Charter. There was a national emergency when, in 1970, a politician and a British diplomat were kidnapped by Quebec Nationalists and it was desired by his government to introduce martial law for a period

of time. This his government did with the War Measures Act of 1970. This was no doubt a matter with which he was taxed when he opposed the 'notwithstanding' clause in the Charter.

The matter which divided the Byers Commission is likely to be a very important matter when, if ever, serious consideration is given to the introduction of a bill of rights into our constitution. The power to override is not one which only the federal government may insist upon. A bill of rights in model (1) or (2) must surely also affect the states. The states could today by ordinary statute passed under s 6 of the Australia Acts entrench bill of rights clauses in their constitutions, but there is no hint that any of them wishes to do so, and the only charter of rights legislation which has been put in place so far, in Victoria and the ACT, is legislation which fits within model (4), which not only gives the final say to the parliament, but denies a power of nullification to the courts. A recognition that governments (especially ones considering the amendment of the constitution to add a bill of rights) would be vitally concerned about sovereignty, and might refuse to propound the bill of rights if it were suggested to take the form of model (1) may have influenced the minority view in the Byers Commission. If there is to be a power of overriding, a solution which would go some way towards the preservation of the most important features of a bill of rights may be to limit the power of overriding to cases such including national or state emergency, with, or perhaps even without, a power of judicial review of the occasion for its exercise. Even a non-reviewable limitation would at least permit a government to be held to public account for an abuse of the power. In any event, if the Canadian experience provides any guide, governments in this country may be sparing in their use of any power of overriding which may be included.

Endnotes

1. See Byrnes, Charlesworth and McKinnon, *Bills of Rights in Australia* (UNSW Press, 2009) at 110-111.
2. Quoted by Labunski, *James Madison and the Struggle for the Bill of Rights* (New York, Oxford University Press, 2006) (hereafter Labunski) at p.15.
3. See Garry Wills, *James Madison* (New York, Times Books, 2002) (hereafter Wills) at p.27.
4. This suggestion is made by Wills, at p.36.
5. Labunski, at p.4.

6. This seems to have been inspired by his experience in his student days at Princeton, where religious freedom was practised and defended; and by a disgust at the imprisonment of Baptist preachers at the instance of the established (Anglican) church in Virginia: See Wills at pp. 15-18.
7. Ralph Ketcham in his introduction to the collection entitled *'The Anti-Federalist Papers and the Constitutional Convention Debates'* (Signet Classic, 2003) p.3.
8. Quoted by Labunski, at p.9.
9. The supremacy clause, Article VI.
10. Labunski, at p.9.
11. See Labunski, at 13, 15-22.
12. See Wills, at 29-30.
13. Federalists 38,44,46 and 48.
14. In a letter republished in the collection referred to in n7 at pp 194-198, 195-196.
15. Published in the same collection referred to in n7 at 228-237.
16. At 236.
17. *Op. cit.* at 44-45.
18. Reprinted in *The Complete Anti-Federalist*, ed. Herbert J. Storing (University of Chicago Press, 1981) volume 4 at 270-287, especially at 276. The identification of the author is referred to by Storing at p.270.
19. Patrick Henry, who was Madison's main Anti-Federalist opponent at the Virginia convention which resolved to ratify the Philadelphia Convention document, and others remained dissatisfied with the amendments: see Wills at p.40.
20. Labunski, at p.28.
21. For example, see Labunski, chapters 4 and 5 and sources there cited.
22. Labunski at p. 101.
23. See Labunski, at p.66.
24. Wills, at p.39.
25. In Virginia, 80 were in favour and 88 against a motion calling on the Congress to propose, inter alia a declaration of rights to the States before ratification: Labunski at p. 112.
26. Labunski at p. 62 n60 and sources there cited.
27. Labunski at p. 167-171.
28. Labunski at p.190 describes this as Madison's primary motive for the introduction of the amendments.
29. Labunski at p. 227.
30. Labunski's appendices at pages 265-280 trace the history of the amendments from those proposed by Madison until final ratification.
31. The history of the ratification is traced in Labunski, chapter 10.
32. Friedman, *The Will of the People* (Farrar, Straus and Giroux, New York, 2009) at p.14.
33. 32 ALJ at p.65.
34. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (reprinted by Legal Books 1995) at p.951.
35. I am indebted for the reference to this topic of debate to the work of Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia History Politics and Law* (University of New South Wales Press 2009 at 25).
36. Cited at pages 667 of the Official Record of the Debates of the third session of the Australian Federal Convention, Melbourne 1898.
37. Ibid at pp 668-669.
38. Ibid at p. 673.
39. Also at p. 673.
40. At p.683.
41. Also at p.683.
42. At p.686.
43. The remarks of Mr Isaacs and the interchange with Mr Kingston are at p.687.
44. At pp. 687-688.
45. At p.688.
46. At p.689.
47. At pp. 689-690.
48. *Op. cit.* at page 800.
49. At page 47, Pierre Trudeau, *Memoirs* (McClelland and Stewart, Toronto, 1993).
50. *History of Political Philosophy* edited by Leo Strauss and Joseph Cropsey, Chicago 1987, p. 763.
51. See Alan Ryan, *Mill in a Liberal Landscape*, printed in the *Cambridge Companion to Mill* edited John Skorupski (Cambridge 1998) at p.499
52. John Stuart Mill *On Liberty* printed in JS Mill *On Liberty and Other Writings* (Cambridge 1989) at p.8.
53. See Skorupski's introduction to the collection referred to in n38 at p.1.
54. See Peter Nicholson, *The Reception and Early Reputation of Mill's Political Thought* (printed as part of the collection referred to in n51 at pp. 484-485).
55. At p.332.
56. Ibid.
57. PW Hogg, *Constitutional Law of Canada* (2010 student edition) (Toronto, Carswell Books,2010) at paragraph 39-4.
58. Hogg, (1997 edition), at p.802.
59. George Williams, *A Charter of Rights for Australia*, (UNSW Press, 2007) at 14 and 18-32.
60. *Final Report of the Constitutional Commission*, 2 vols, Australian Government Publishing Service, Canberra, 1988.
61. The paper is printed in *Bar News* (Winter 2009) available on the website of the NSW Bar Association.
62. Chapter 9 of the *Final Report*.
63. Paragraph 9.745.
64. Paragraph 9.747.
65. Paragraphs 9.784-9.834.
66. Paragraphs 9.126-9.137.
67. Paragraphs 9.127-9.131.
68. John Spender 'Politics, Power and a Bill of Rights', L Spender (ed) *Human Rights: The Australian Debate* (1987) 246, 251-2.
69. J McMillan et al, op cit, 335.
70. A Bill of Rights for New Zealand, 44-5.
71. J McMillan et al, op cit, 333.
72. *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, 92.
73. J McMillan et al, op cit, 335.
74. Consider, for example, the manner in which courts have, in recent times, re-shaped the principles according to which they review administrative action, and, in particular, extended the application and scope of the principles of natural justice.
75. R Dworkin, *Taking Rights Seriously*, (1977) 85.
76. PC Weiler, 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 18 *University of Michigan Journal of Law Reform* 51, 71-2.
77. See Australian Law Reform Commission, *Standing in Public Interest Litigation* (1985) 153-5, 159-61.
78. See Appendix M, 'Fact Finding in Constitutional Cases'.
79. Paragraph 9.212.
80. Hogg *op. cit.* at page 908.

Changes at the Bar of England and Wales

The Fifth World Bar Conference was held in Sydney in April. One of the issues discussed at the conference was the recent approval by the Bar Standards Board of England and Wales of changes to the structure of the profession to permit barristers to form partnerships and other 'alternative business structures.' Barristers are now permitted to practise in Legal Disciplinary Practices under regulation by the Solicitor's Regulation Authority, without having to re-qualify as solicitors or surrender their independent practice at the bar.



Members and former members of the bar in England, Scotland, Northern Ireland, Ireland and Africa participated in a discussion of the changes, their application in England and Wales, and their potential application in other jurisdictions. Of concern to the English Bar, and to the bar in other countries, is the potential impact of the changes on the independence of the bar and the operation of the cab rank rule.

Nicholas Green QC provided an overview of the changes in England and Wales and a commentary on the current state of the English Bar and the need to balance the competitive pressures faced by the English legal profession against the traditional standards necessary to preserve an independent bar committed to the practice of advocacy and specialist advice.

Mr Justice Wallis offered a perspective from his time at the South African Bar, both before and after the time of apartheid, and discussed his concern that the opening of commercial avenues of practice such as partnership has the potential to interfere with the independent bar's role in preserving the rule of law, as commercial considerations and conflicts of interest associated with collective practice limit the operation of the cab rank rule and thereby access to justice for clients in need of representation in the hardest of cases.

The changing face of the Bar of England and Wales

Nicholas Green QC, Chairman, Bar Council of England and Wales

The threat of government interference

The *Legal Services Act 2007* was in many respects a classic piece of governmental interference. The legal market in England and Wales is hyper-competitive. A very recent government consumer survey demonstrated that over 90 per cent of users were essentially content with the service they received. One might wonder therefore what the pressing need was which justified this new piece of legislation.

The Bar Council considered that the bill, as drafted in its early form, presented a real threat to the independent bar and to the values it considered to be in the public interest. In particular the bar contended strongly that the objectives of the legislation should be

explicitly set out and should include supporting the constitutional principle of the rule of law, improving access to justice, encouraging an independent, strong, diverse and effective legal profession, and promoting and maintaining adherence to professional principles.

Ultimately, the government accepted that these principles should be enshrined in the Act. Section 1 (1)(a) – (h) stipulated a series of regulatory objectives, which include those already mentioned as well as those of protecting and promoting the interests of consumers, and promoting competition in the provision of services. The net effect is that the Legal Services Act is not the slave of competition. The bar accepts that competition is a perfectly legitimate objective to be served, but

it must be balanced against those values which any genuinely independent legal profession should hold dear.

The Legal Services Act 2007

The legislation is a long and complex instrument. The main points of interest may be summarised as follows.

First, the Act requires professional bodies to split their regulatory from their representative functions. There is no single monopoly regulator responsible for the legal profession. The key point is that within a profession, regulation must be properly independent. But that independent regulatory arm still can sit within a single organisation. Under the Act the primary duty to regulate is imposed upon the 'Approved Regulator'. In the case of barristers this is the Bar Council. However, the responsibility for regulation has been delegated to a ring-fenced independent regulatory arm, the Bar Standards Board ('BSB'). The independence of the BSB is substantial and real, but it is subject to certain logical limitations. In practical terms, the Bar Council and the BSB work well together.

A second important feature of the Act is that it requires the removal of restrictions on 'Alternative Business Structures' or 'ABS'. Traditionally barristers have operated exclusively out of chambers of self-employed individuals. Following recent rule changes adopted by the BSB, barristers may now operate in partnership with solicitors, and the bar is presently working on a series of new business structures known by the somewhat unglamorous title of ProcureCos. [T]he mere fact that they are 'alternative' does not mean to say that, by that fact alone, they are to be feared.

The third major development brought around by the Act was the categorisation of standards as regulatory. Under the Legal Services Act a 'regulatory arrangement' includes what are termed 'qualification regulations' (see Section 21). Qualification regulations includes any rules or regulations relating to requirements which must be met by any person in order for them to be authorised by the regulator to carry on an activity which is reserved legal activity. Under this somewhat tortuous definition would fall the responsibility for regulators to set standards of advocacy. The government has

for some time been seeking to encourage standards of advocacy in criminal defence work. The net effect would be that if you wanted, for example, to appear as counsel in a complex murder or terrorist trial you would have to be accredited to be able and competent to take on a case of that complexity. The ramifications of an accreditation process for criminal defence are wide ranging.

A fourth major development under the Act was that responsibility for service (as opposed to professional) complaints are to be addressed by a new body independent of the profession altogether called the Office of Legal Complaints.

A fifth major development is the institution of a new overarching regulator, the Legal Services Board ('LSB'). This added a layer of administrative bureaucracy to the legal market such that the LSB sits at the apex of the pyramid with, below it, the Approved Regulators for each discreet profession within the legal market.

The bar and the pressures upon it

There are approximately 15,500 barristers in England and Wales. Of this total, roughly 12,200 are self-employed and just over 3,000 are employed barristers. Many of these employed barristers work in the government legal services. There are approximately 1,450 QCs. At the last count there were 734 sets of chambers of which about 350 were in London and just short of 400 outside of London. There are approximately 1,700–1,800 new recruits called to the bar per annum, but only about 500 pupillages and new tenancies. With regard to the split of publicly funded and private work, about 5,000 barristers do publicly funded work mainly or exclusively in the fields of crime and family law. The importance of this is that the publicly funded sector is a large segment of the bar and therefore government and legal aid policy has a major impact on the strategic thinking of the Bar Council.

Turning to the pressures upon the bar these include, for obvious reasons, the changing economic climate. The existence of a substantial and deep-rooted recession has exerted great pressure upon legal aid. Demand for legal aid has substantially increased but the present budget has been frozen to 2006 levels and all governments

will, in the future, be under pressure to reduce the scope and extent of legal aid in order to contribute to government policies to reduce the national debt. One consequence of this is that the government has been ruthless in seeking to extract efficiencies out of the system and sees one way of doing this as allocating more money to fewer and larger units who can extract greater economies of scale and thereby (they hope) give better 'value for money' to government. In short, size matters.

A second pressure lies in the fact that there are rapid changes in the purchasing habits and practices of purchasers of legal services who, as with government, seek better value for money. Clients are seeking to commoditise work and outsource it in ever-larger chunks. If the bar is to continue to gain work it has to be in a position to contract with large clients who have decreasing in-house capability to conduct legal work.

A third major pressure on the bar is increased competition. Solicitors have enjoyed rights of audience in the higher courts since 1990. Solicitors, as a profession, are seeking to reduce the amount of work they allocate by way of instructions to the bar. This is especially acute in criminal defence work because of the way in which legal aid is structured. A preponderance of government funds are allocated, in the first instance, to solicitors who thereafter have the choice of whether to keep the advocacy element of the work in-house or instruct external counsel.

Changes at the bar

The bar is changing in response to these pressures. In November 2009 the BSB adopted a series of rule changes: allowing legal disciplinary partnerships, i.e. mixed partnerships between solicitors and barristers; allowing bar only partnerships (but only in principle because at present no entity regulation powers exist within the BSB); an increased right to conduct litigation so that barristers in the future may collect evidence, prepare statements, conduct correspondence, attend police stations; increased direct access; permission to act in a dual capacity (e.g. as an employed barrister for part of the week and a self-employed barrister for the rest of the week); and, removal of the restrictions

on sharing a premises. The BSB is presently preparing consultations on entity regulation and wider direct access.

... the Bar Council has introduced a new model for the bar. It is called 'ProcureCo'. A ProcureCo is a corporate bolt-on or adjunct to chambers.

What we want and what we don't want

With regard to what the bar really wants, or does not want, it is clear the bar does not want fusion with solicitors. It does want to maintain its predominantly self-employed, referral, status. It does not want partnership. Rules governing conflicts of interest mean that were the bar routinely to go into partnership they would not be able, as they do now, to appear regularly against each other. [1] It is not felt that partnership as a commercial or corporate vehicle offers sufficient practical advantages to the bar to make it more attractive than the present *modus operandi*. In any event, the bar wishes to retain the traditional chambers structure as its core organisation.

At the same time the bar needs increased flexibility and increased direct access. It wants greater flexibility to address a very rapidly changing market. It wants to 'fight back' at solicitors who are encroaching into advocacy traditionally performed by the bar.

In the light of this the Bar Council has introduced a new model for the bar. It is called 'ProcureCo'. A ProcureCo is a corporate bolt-on or adjunct to chambers. It will enable chambers to contract directly with block contractors such as local authorities, the LSC or other financial bodies such as banks or insurance companies who are seeking to commoditise work and move from a system of case-by-case instruction to block contracted outsourced legal work. For regulatory reasons a ProcureCo can only procure i.e. it can only facilitate provision of legal services by others. It cannot provide legal services itself. This might occur in the fullness of time if the BSB engages in 'entity regulation'. At that point the BSB will regulate such ProcureCo

vehicles and they will become, in effect, 'SupplyCos'. Even if and when this is permitted it will remain highly unlikely that the bar will move away from its traditional chambers structure due to the conflicts rule. However, a ProcureCo or SupplyCo will give to the bar a greater flexibility to engage in new activities and to compete more vigorously with solicitors in all areas of work.

The chambers of the future will be much more flexible than it is at present. It will have a range of corporate and commercial vehicles which orbit the traditional sets of chambers but which the chambers use for contracting with a wide variety of corporate and governmental purchasers of legal services.

The Future of the bar

In (say) five years time we expect to see a bar that is still very much advocacy-focussed. It will still largely, but not exclusively, be a referral profession and it will have a much larger litigation tail than at present, probably incorporating direct access to clients. The chambers of the future will be much more flexible than it is at present. It will have a range of corporate and commercial vehicles which orbit the traditional sets of chambers but which the chambers use for contracting with a wide variety of corporate and governmental purchasers of legal services.

With standards for criminal defence work in the process of being instituted there will be a premium on high quality continuing education. The Inns of Courts and the circuits will provide this *par excellence*.

In all of this the role of regulation is important. Having a separate regulator specialising in advocacy is a real selling point. It operates as a brake on any movement towards fusion which might otherwise occur.

Lessons both generally and for other bars

Finally, some lessons.

First, contrary to initial expectations, the 2007 Act has actually created an opportunity for the bar to strengthen its position in the face of an extremely challenging and difficult economic climate. The bar can, notwithstanding the climate, improve its position

provided it is bold and imaginative.

Secondly, 'ABS' for the bar need not necessarily be feared. In bringing about change the BSB is moving steadily and upon the basis of detailed research and evidence. The Bar Council also is prepared to move incrementally and creatively as the ProcureCo project demonstrates.

Thirdly, the profession will change. It has no choice. And it is up to us to ensure that as the recession recedes the bar is stronger, not weaker. It is also up to us to fight to preserve our traditional strengths and standards since we believe, fervently, that these are powerfully in the public interest.

Fourthly, as to lessons for other referral bars, the starting point for you is to challenge any assumption made by your governments that there is a need for intervention. If it be the case, as it is in the United Kingdom, that consumers are essentially content with the legal services they receive, and the market is competitive, and the profession is held in high esteem domestically and abroad, then one must pose the question – why intervene at all?

Furthermore, when considering whether the regulatory position in England and Wales can be transplanted elsewhere, remember that the Bar of England and Wales is a large bar. It is clear that what may apply to the England and Wales Bar will not necessarily translate directly to other jurisdictions which have different economic and cultural defining parameters.

Fifthly, and perhaps one of the most important points – so far as regulation is concerned the key here is to bring regulation within the profession. To my mind there is a very real danger of permitting regulation to be detached from the profession. Conversely, a regulator which operates from within the profession will, by definition, be made up in substantial part of practitioners (though

in all probability with a strong lay leavening), and it will be in touch with its regulated constituency and its client base. A regulator from within is, in my firmly held belief, far more likely to operate in the best interests of the profession and the public interest.

The Bar Council has very recently drafted an entirely new set of constitutional documents for the profession which gives the BSB its own constitution and entrenches its independence. If a regulator is 'within' a profession can with considerable confidence leave that body to do its job. As the bar evolves, and necessarily becomes more commercial in its outlook, there is a commensurate need to be vigilant to preserve its key strengths of independence, integrity and collegiality. Do not be scared of tough regulation. If the public is to continue to trust the bar then an integral factor of preserving that trust will be the existence of effective and rigorous regulation.

The BSB and the structure of the profession

Mr Justice Malcolm Wallis, High Court, South Africa

[I]f it is so, as Nicholas [Green] has said, that after the current changes have been implemented the English Bar will 'look and smell and feel the same' I wonder why we are having this debate. However I fear that this may not be entirely so and I trust that friendly concern for what is about to happen to the barristers' profession in England and Wales will not be taken amiss.

[T]here are important differences between the organisation of the bar in South Africa and that in England and Wales. In South Africa numbers are about 2000, based in 13 centres in an area roughly the size of mainland Europe. In each centre there is a separate bar and the General Council of the Bar is a federal body. The South African Bar, like many European jurisdictions, only covers advocates in private practice and does not include advocates in employment, even those in the service of the National Prosecuting Authority. Nor is membership compulsory. Whilst advocates

form groups for administrative reasons and share administrative facilities, the system of clerks is unknown and relationships between advocate and attorney are direct, not mediated through a clerk. Lastly the bar is not as yet subject to regulation or oversight by any governmental body although that is under debate with a proposed Legal Practice Bill.

Having said that, however, the similarities are far greater than the differences. In both countries individual practice, collegial relationships, the operation of the cab rank rule, and the rules of client confidentiality and the avoidance of conflicts of interest are recognisably similar. In both the focus is on the representation of clients in courts and tribunals and the furnishing of expert legal advice. In both the practitioner is required to be independent and owes a fundamental duty to the court. We train young advocates in the same way. We share a common heritage.

Inevitably ... fundamental alterations to the manner in which the profession operates in England and Wales will be felt in jurisdictions such as our own where politicians, legislators and competition authorities will look to what has happened there for guidance.

Inevitably, therefore, fundamental alterations to the manner in which the profession operates in England and Wales will be felt in jurisdictions such as our own where politicians, legislators and competition authorities will look to what has happened there for guidance. And once those changes occur in England and Wales they will, as the BSB recognises, be irreversible.

My overwhelming impression as an outsider is that two commercial considerations are central. First there are the perceived interests of consumers and second there is the concern of the bar at the prospect of being excluded from various types of legal work. The

perspective was a commercial one and a belief that the proposed changes would benefit consumers by making it simpler and cheaper for them to obtain access to legal services. Whether that occurs in practice I take leave to doubt, but that is the theory.

My second point emerges from the discussion of ProcureCos in the road show handout. Again viewing matters as an outsider and stripping away the oddity of creating a company to 'procure legal services' when what you mean is procuring legal work for lawyers, this is about enabling barristers to compete for work. Similarly the creation of different practice structures is for the benefit of practising barristers to facilitate their being in practice. The bar is being subjected to substantial commercial pressures and so the drivers of change are commercial as Nicholas has freely conceded in his remarks.

I find this focus on the commercial troubling because it does not start with a concern for the function of the legal profession in a democracy.

I find this focus on the commercial troubling because it does not start with a concern for the function of the legal profession in a democracy. Is it part of – indeed an essential part of – the ongoing pursuit of justice under the rule of law, or have we finally achieved the doom, stated by Marx and Engels in The Communist Manifesto, of converting the lawyer into a paid wage labourer? It poses a challenge to the notion that apart from their commercial worth there are broader and more important values that should enjoy priority in assessing the lawyer's role. When it is proposed to tamper with the structure of the legal profession these questions need to be answered.

Three changes are pertinent to the bar as an institution. They are barristers practising in legal disciplinary practices regulated by the Solicitors Regulation Authority without re-qualifying as solicitors; the possibility of barristers practising in barrister-only

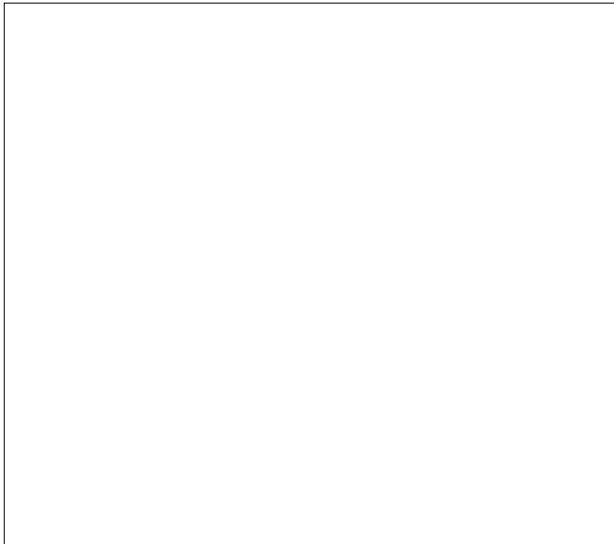
partnerships and the operation of the cab rank rule.

Barristers practising in LDPs will in effect become solicitors. The fact that the SRA is the regulator signals that clearly, but I can speak from our own experience. This is what has happened with the Legal Resources Centre that was established in 1979 as a public interest law firm involving advocates and attorneys committed to the protection of civil liberties. It is now to all intents and purposes a firm of attorneys and I predict that the same will happen with LDPs.

If barristers continue to provide a highly skilled litigation service they will survive as a separate group within the legal profession. If they do not, then they do not deserve to survive.

The other two changes, which I view as linked, are more significant than one that enables people to change sides in the profession. The latter has always happened and if it is thought desirable to facilitate it then so be it. I am also not concerned about the spectre of fusion. If barristers continue to provide a highly skilled litigation service they will survive as a separate group within the legal profession. If they do not, then they do not deserve to survive. More important are the reasons that underpin the prohibition on partnerships and the cab rank rule.

Identifying those values is not always easy. Broadly they fall under the rubrics of access to justice and independence. [W]here there is a substantial body of barristers, as there is in England and Wales it is easier to discount them because numbers mask the issue of access to justice. The attractions of partnership seem to me obvious in terms of greater security; ease of commencement of practice; the ability to manage work within the practice and the ability to cover for one another when a barrister is unavailable. Perhaps it relieves some of the pressures of administration and the stress of individual practice. Whilst Nicholas tells us that



An apartheid notice near Cape Town. Photo: Getty Images

in his discussions there is no interest in partnerships that does not surprise me because he is speaking to people who enjoy the advantages of individual practice in reasonably secure circumstances.

For me the people it will attract will come from the frightening figures he gave us this morning – 1800 calls a year and only 500 pupillages and a like number of tenancies in chambers. What happens to the balance? I predict that the attractions of barrister-only partnerships will initially come from this group as they strive to obtain access to the profession, and its attractions will grow from there. I am afraid therefore that I cannot share the view that the Bar of England and Wales will continue to ‘look and smell and feel the same’. I view barrister partnerships as a danger there and even more so in countries that are smaller or where there needs to be an emphasis on resisting government overreach. Let me explain briefly why I say that.

First, partnership limits the availability and accessibility of counsel with particular skills. There is a natural tendency in advocates’ groups or sets of chambers to bring together people with common practice areas. At present that does not limit availability but a partnership will, certainly in smaller countries where those skills are in short supply. It will do so directly,

because rules against conflicts of interest will prevent members of the same partnership from acting on opposite sides in a case, but also I think in other more subtle ways. It will I predict increase costs because the costs of attorneys and solicitors are always higher than those of the independent bar. It subjects the barrister to constraints that infringe independence of thought and action because the partnership relationship will demand it. There will be a reluctance to represent unpopular clients that is characteristic of larger law firms. The point is that partnerships inevitably undercut the independence of the practitioner by making her or him subject to the discipline of the group in a way that cannot happen at present. In a partnership obligations are owed to one’s partners that necessarily constrain the ability of the barrister to act independently.

South African lawyers know what it is like to practise law in a society where the rule of law is ignored; where law is an instrument of oppression not a guarantor of freedom.

Lastly I fear that the time will arrive when the ProcureCo tail will wag the barrister dog. I doubt whether the cab rank rule can prevent this. I would be interested to know when last in any of the jurisdictions represented at this conference there was a complaint that the cab rank rule had been breached. The ‘rule’ is less a rule than an ethos that barristers understand and follow and it provides a protection for them in taking on unpopular cases, which are the ones that matter. No-one gives a jot about a barrister representing a client accepted by society. The rule exists for outlaws and unpopular causes.

The cab rank rule can only be enforced against an individual not a firm, and in a firm its impact will be diluted because conflict of interest rules mean that it can only apply to one member of the firm at a time. And once the rule is confined, as it will be in practice, to individual practitioners some enterprising specialist in competition law will point out that it is discriminatory

and anti-competitive and that will be its quietus. And when that happens who will represent the truly unpopular people and causes in society? These rules exist for times of stress and crisis and once lost they will not be recoverable. As the BSB has said the change is irreversible.

South African lawyers know what it is like to practise law in a society where the rule of law is ignored; where law is an instrument of oppression not a guarantor of freedom, and where the legal profession's independence – not only instrumental independence but independence in mindset and approach to the practice of law – is essential in order to protect ordinary members of society from an over-powerful government.

It was that independence, nurtured by the fact that every advocate was bound by the cab rank rule; that

every advocate was available in every case to high and low; that every advocate was free from the commercial restraints that partnerships and corporate structures impose upon their members, that enabled many advocates in South Africa to fight for the rule of law, to resist apartheid and to use the courts creatively to bring about change.

It is largely because of those traditions of independence that we were able to reconstruct our legal system after apartheid and create legal institutions that function in a democratic society under the rule of law. Tampering with these fundamentals places the ability of the profession to play that role at risk. And we should remind ourselves that it is when societies are at risk that we need lawyers to play that role.

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Using the 'hot tub': how concurrent expert evidence aids understanding issues

By the Hon Justice Steven Rares*

Introduction

Australian courts and agencies have been acknowledged as having the most experience with the 'hot tub' method in which experts give their evidence concurrently. This is not a parochial boast, but recently appeared in the American Journal *Anti-Trust*.¹ Another recent article in the *Oregon Law Review* stated that the innovation itself is attributable to Australia.² The purpose of this paper is to explain, first, a little bit of history about expert evidence, secondly, the purposes and technique of concurrent evidence, and thirdly, perhaps concurrently, the technique's virtues.

Expert evidence is not a new phenomenon. However, some experienced commentators have observed that in contemporary times, the use of expert evidence 'has increased dramatically ... both in its frequency and its complexity'.³ When expert evidence is tendered in contested proceedings, traditionally each party will call one or more expert witnesses whose evidence in chief supports that party's case. Cross-examination is the traditional common law method for testing that evidence. Experience of the forensic use and testing of expert evidence in this way has often produced a number of concerns:

- each expert is taken tediously through all his or her contested assumptions and then is asked to make his or her counterpart's assumptions;
- considerable court time is absorbed as each expert is cross-examined in turn;
- the expert issues can become submerged or blurred in a maze of detail;
- the experts feel artificially constrained by having to answer questions that may misconceive or misunderstand their evidence;
- the experts feel that their skill, knowledge and, often considerable, professional accomplishments are not accorded appropriate respect or weight;
- the court does not have the opportunity to assess the competing opinions given in circumstances where the experts consider that they are there to assist it⁴ – rather experts are concerned, with



justification, that the process is being used to twist or discredit their views, or by subtle shifts in questions, to force them to a position that they do not regard as realistic or accurate;

- often the evidence is technical and difficult to understand properly;
- juries, judges and tribunals frequently become concerned that an expert is partisan or biased.

In 1999, an empirical study of Australian judges found that 35 per cent considered bias as the most serious problem with expert evidence.⁵ And another 35 per cent considered that the presentation or testing of the expert was the most serious problem. This was manifested in their differing concerns about poor examination in chief (14 per cent), poor cross-examination (11 per cent) and the experts' difficult use of language (10 per cent).

The 'hot tub' offers the potential, in many situations calling for evidence, of a much more satisfactory experience of expert evidence for all those involved. It enables each expert to concentrate on the real issues between them. The judge or listener can hear all the experts discussing the same issue at the same time to explain his or her point in a discussion with a professional colleague. The technique reduces the chances of the experts, lawyers and judge, jury or tribunal misunderstanding what the experts are saying.

In this paper, I will review the use of concurrent expert

evidence generically. As will appear, the technique is of general application. I have seen it used to deal with topics as diverse as accounting, quantity surveying, fire protection requirements, wildlife paths, metallurgy, naval architecture, expert navigation of Panamax size (230m) container ships in a gale, mechanical engineering, the appropriate flooring for elephant enclosures in zoos and the mating of those mammals. Even in copyright, it is not difficult to imagine the utility of concurrent evidence where expert questions of similarity, economics or copying arise. And like all forensic tools, things can go wrong, such as asking one question too many.

A short historical excursion

Courts have struggled for a long time with the consequences in the adversarial system of the use by each party of an expert whose evidence, at least in chief, favours that party. Prof Wigmore suggested that the remedy lay in ‘... removing this partisan feature: i.e. by bringing the expert witness into court free from any committal to either party’.⁶ There was a fear in judges that this object is not easy to achieve. Sir George Jessel MR observed in a patent case that sometimes the court had appointed its own expert under an inherent power to do so. He lamented:⁷

It is very difficult to do so in cases of this kind. First of all the Court has to find out an unbiased expert. That is very difficult.

Earlier he had discussed the way parties searched for experts to find one or more who would give evidence in support of that party’s case, leaving the rest as discards, about whom the court would know nothing. He said that he had been counsel in a case where his solicitor had consulted 68 experts before finding one who supported their client’s case; hence his mistrust of the system of ‘opposing’ experts.

Expert evidence has been a provocative topic, both among lawyers and experts. In the twelfth edition of *Best on Evidence* published in 1922 the learned authors, who included Sidney L Phipson, said:⁸

... there can be no doubt that testimony is daily received in our courts as ‘scientific evidence’ to which it is almost profanation to apply the term; as being revolting to

common-sense, and inconsistent with the commonest honesty on the part of those by whom it is given.

On the other hand, Prof Wigmore⁹ evoked a vision that giving expert evidence was akin to coming to a graveyard or indeed the calvary, saying:

Professional men of honorable instincts and high scientific standards began to look upon the witness box as a golgotha, and to disclaim all respect for the law’s method of investigation. By any standard of efficiency, the orthodox method registers itself as a failure, in cases where the slightest pressure is put upon it.

No doubt many have had the experience of seeing an eminent and reputable expert in their field subjected to a cross-examination calculated to evoke the very response which Prof Wigmore noted. Such persons come away from the forensic experience justifiably scarred and disdainful of it as a process for eliciting intelligent and appropriate examination of expert opinion. They can be so discouraged by their forensic experiences that they no longer wish to be involved in assisting courts.

Experts have long been used in court cases. Sometimes the expert is a person appointed by the court to assist it. In admiralty matters, judges in England have sat since the sixteenth century with (usually two) elder brethren of Trinity House to assist and advise them in assessing who was at fault in cases concerning marine casualties. The elder brethren were usually skilled, experienced master mariners.¹⁰ One set of whom advised the trial judge, another set advised the Court of Appeal, and yet another set, the House of Lords. Although Sir Winston Churchill also was made an elder brother, as a result of his having been first lord of the Admiralty, I doubt he assisted in any proceedings in the Probate, Admiralty and Divorce Division. More recently, Justice Heerey, appointed an expert as a court assessor to sit with him in a patent case under the provisions of s 217 of the *Patents Act 1990* (Cth).¹¹ The parties paid for the cost.

Lord Sumner once cautioned about courts deferring to assessors’ opinions. They, like experts, have a place that he aptly described:¹²

Authority for the proposition that assessors only give advice and that judges need not take it, but must in any case settle the decision and bear the responsibility, is both

copious and old. It is for them to believe or to disbelieve the witnesses, and to find the facts, which they give to their assessors and which must be accepted by them. If they entertain an opinion contrary to the advice given, they are entitled and even bound, though at the risk of seeming presumptuous, to give effect to their own view.¹³

By leaving the questioning entirely in the control of counsel, who may or may not fully understand the subject matter, an expert can be made to look as bad as the engineer and fire assessor cross-examined by Norman Birkett KC on the cause of a fire in a motor vehicle. Birkett's first question to the expert was the memorable line: 'What is the coefficient of the expansion of brass?' The 'expert' was destroyed by his inability to even understand the question let alone respond to Birkett in an appropriate way. Some criticisms have been advanced subsequently of the line of questioning, including Birkett's failure to identify the inherent assumption in the question as to the proportions of copper and zinc making up the particular specimen of brass to which the question was supposed to relate. Perhaps a true expert may have been able to respond immediately that he needed that information before being able to answer the question, in which case Birkett may have been thrown back on his resources or been shown up himself.¹⁴

Concurrent evidence is a means of eliciting expert evidence with more input and assistance from the experts themselves in lieu of their, perhaps unfairly, perceived role as being inherently, even if not consciously, biased to the case of the party calling them. This is not my perception, but has developed as Jessel MR once described through a distrust of expert evidence:¹⁵

... not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained. I am sorry to say the result is that the Court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.

It is not inherently bad that experts might not reach the same conclusion. As Justice Downes has stated extra-judicially 'the fallacy underlying the one-expert argument lies in the unstated premis[e] that in fields of expert knowledge there is only one answer'.¹⁶

Contradictory evidence can assist the tribunal of fact, simply because it elaborates the alternatives.

The task for a judge, or a jury, in assimilating the differing views of persons eminent in their fields and then arriving at their assessment of the evidence is no easy one. As *LW Street J* noted, in some forensic disputes, the court does not choose between the experts, preferring one opinion over another, but uses their differing views to assist in reaching its own conclusion.¹⁷ Valuation and issues of similarity in copyright cases are examples that readily spring to mind, as well as expert economic evidence.¹⁸

Often in my experience at the bar, the real dispute between experts did not lie in their conclusions at all. Rather, it was that they had proceeded on different assumptions. Because they were briefed by the particular litigant paying them, they were not asked to opine as to whether, if they accepted the other experts' assumptions, they would come to the same conclusion as the other expert. Instead, the experts debated the assumptions. This was largely a sterile exercise for them, since they did not have knowledge of the primary facts.

One feature of the process of conventional expert evidence is that the cross-examiner often will spend a great deal of time asking about the assumptions on which the opposing expert has based his or her conclusions. Then there will be a lengthy time interval until the defendant's or respondent's expert gets into the witness box and the context in which the second expert's evidence is given will be different and, perhaps, significantly so, to that earlier.

In the Federal Court of Australia, and in other tribunals presided over by Federal Court judges, concurrent evidence is also used. Indeed, Lockhart J, when president of the Trade Practices Tribunal, was credited with being instrumental in introducing the technique to Australian jurisprudence.¹⁹ One of the first uses of the 'hot tub' in court proceedings in Australia was by Justice Rogers in an insurance case in 1985.²⁰ By 1992 Sir Laurence Street AC KCMG was using the technique in arbitrations and court references and had published his standard directions.²¹

Concurrent expert evidence is used extensively in the

Land and Environment Court of New South Wales, principally as a result of the enthusiasm of the Hon Justice McClellan, when chief judge of that court. His Honour's enthusiasm spilled over into the Common Law Division of the Supreme Court of New South Wales where he is now chief judge at Common Law.²² In addition the Administrative Appeals Tribunal uses the technique robustly and its president, Justice Downes, has written extensively on the topic.²³

Concurrent evidence in practice

Initially, and my own experience is to this effect, uninitiated counsel are highly suspicious of concurrent evidence. That suspicion evaporates once they participate. Why is this so? It is because of the efficiency and discipline which the process brings to bear.

Pre-trial directions

The way concurrent evidence generally works, though individual judges or tribunals may have their own variants, is that after each expert has prepared his or her report, there is a pre-trial order that they confer together, without lawyers, to prepare a joint report on the matters about which they agree and those on which they disagree, giving short reasons as to why they disagree. Sometimes this process will identify that the experts agree on everything that each has said in his or her reports, on the basis that the opposing expert accepts the assumptions which the other has used. Thus, the role of the expert evidence is finished, and the question resolves into one of dry fact proved by lay witnesses or other evidence. That was my experience in a previous case where I ordered the experts to prepare a joint report: *Australasian Performing Right Association Ltd v Monster Communications Pty Ltd*.²⁴

On most other occasions, the range of difference between the experts, which had been apparently vast if one put their two reports side by side, reduces to a narrow point or points of principle. In *Strong Wise Ltd v Esso Australia Resources Ltd*²⁵ I explained the way in which I had taken the concurrent expert evidence from groups of experts in different fields.

Another forensic benefit from the preparation of joint expert reports before the trial is that counsel can be

made aware of any relevant factual issues that are contentious between the experts. This can focus and narrow the need for cross-examination of lay witnesses because the joint reports may show that some factual differences do not matter.

In the courtroom

Generally, at the conclusion of both parties' lay evidence or at a convenient time in the proceedings, the experts are called to give evidence together in their respective fields of expertise. It is important to set up the court room so that the experts (there can be many on occasion) can all sit together with convenient access to their materials for their ease of reference. One microphone is then made available for all of the experts.

The judge explains to the experts the procedure that will be followed and that the nature of the process is different to their traditional perception or experience of giving expert evidence. First, each expert will be asked to identify and explain the principal issues, as they see them, in their own words. After that each can comment on the other's exposition. Each may ask then, or afterwards, questions of the other about what has been said or left unsaid. Next, counsel is invited to identify the topics upon which they will cross-examine. Each of the topics is then addressed in turn. Again, if need be, the experts comment on the issue and then counsel, in the order they choose, begin questioning the experts. If counsel's question receives an unfavourable answer, or one counsel does not fully understand it, he or she can turn to their expert and ask what that expert says about the other's answer.

This has two benefits. First, it reduces the chance of the first expert obfuscating in an answer. Secondly, it stops counsel going after red herrings because of a suspicion that his or her own lack of understanding is due to the expert fudging. In other words, because each expert knows his or her colleague can expose any inappropriate answer immediately, and also can reinforce an appropriate one, the evidence generally proceeds directly to the critical, and genuinely held, points of difference. Sometimes these differences will be profound and, at other times, the experts will agree

that they are disagreeing about their emphasis but the point is not relevant to resolving their real dispute.

The experts are free to ask each other questions or to supplement the other's answers after they are given. The only rule is that the expert who has the microphone has the floor. Generally the experts co-operate with one another and freely and respectfully exchange their views. Often one will see them arriving at a consensus which becomes clear through the process.

A great advantage of concurrent evidence is that all the experts on the topic are together in the witness box at the one time, answering the one question on the same basis. Everyone is together on the same page. This is a world away from a traditional cross-examination of each expert in the various parties' cases, sometimes happening days, if not weeks, apart with a raft of other evidence having interposed. The judge is able, just as the lawyers, to understand the issue. The experts feel capable of explaining the matters to the judge and putting their points of view in a way in which they feel free to use their knowledge and experience. Justice McClellan described the process as:²⁶

... essentially a discussion chaired by the judge in which the various experts, the parties, advocates and the judge engage in an endeavour to identify the issues and arrive where possible at a common resolution of them. In relation to the issues where agreement is not possible a structured discussion, with the judge as chairperson, allows the experts to give their opinions without constraint by the advocates in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in a public forum.

Some examples of concurrent evidence

In *Strong Wise*²⁷, there were eight expert witnesses who gave oral evidence over five separate areas of specialised knowledge. I will briefly describe the process and my experience of it. Each had prepared at least one principal report, some prepared a responsive report. In the pre-trial phase, I directed that the experts in each relevant discipline should confer together, without the parties or their lawyers, and prepare a joint report that set out the issues on which they agreed and those on

which they disagreed, giving brief reasons for their differences. I also directed that the experts, in each discipline would give evidence concurrently. Here, the experts and their fields were 3 master mariners; 2 naval architects; 2 structural engineers; 2 metallurgical engineers; and 2 mechanical engineers. A number of other experts gave written reports that were accepted without the need for cross-examination.

The joint reports were extremely useful in crystallising the real questions on which the experts needed to give oral evidence. Experience in using this case management technique generally demonstrates considerable benefits in practice. First, the experts usually will readily accept the other's opinion on the latter's assumptions. This position is often lost in long reports that debate, not that opinion, but the assumptions which, in turn, usually depend on the facts that need to be found. Secondly, the process then usually identified the critical areas in which the experts disagreed.

When each concurrent evidence session began, I explained that the purpose of the process was to engage in a structural discussion. Each expert was asked to summarise what he (all were male) thought were the principal issues between him and his colleague(s). Each was free to comment on or question his colleague on what he had said both during the introductory part and throughout the process. After each expert had outlined the principal issues (usually one did this and the other agreed that it was a fair summary or added some brief further remarks), counsel identified the issues or topics on which they wished to cross-examine. I then invited whichever counsel wished to begin questioning to do so. The experts sat at a table where they had ample room to place their reports and materials. They had a single microphone for whomever was speaking, so that the transcript would record the relevant evidence and they would exercise self-discipline in responding. Often when one had given an answer, the other would comment, or agree, thus narrowing the issues and focussing discussion. From time to time counsel could and would pursue a traditional cross-examination on a particular issue exclusively with one expert. But, sometimes when one expert gave an answer, counsel,

or I, would ask the other about his opinion on that same question.

The great advantage of this process is that all experts are giving evidence on the same assumptions, on the same point and can clarify or diffuse immediately any lack of understanding the judge or counsel may have about a point. The taking of evidence in this way usually greatly reduces the court time spent on cross-examination because the experts quickly get to the critical points of disagreement. At the end of his second session of concurrent evidence, one witness from London said that he had been in court before but that this had been a very different and positive experience for him.

Another significant benefit of the process is generally a substantial saving of court time and costs. In my first experience of the technique, a valuation case in the Land and Environment Court before the then chief judge, Justice McClellan, there were many experts in various fields.²⁸ The evidence in their reports amounted to over one metre in height. Yet most of the expert evidence, apart from that of the four valuation experts was, ultimately, the subject of joint reports on which all points were agreed. In the remaining few reports where there was disagreement, the area of dispute was narrowed to one, two or three small points of principle that were dealt with in concurrent evidence in blocks of between 10 and 30 minutes. The two valuers for the applicant asserted that the value of the easement was between \$20 million and \$30 million. The two for the resuming authority argued that it was worth in the order of \$1 million or a little more. Their concurrent evidence concluded in a day and a quarter.

In such a dispute, in a conventional trial, an individual valuer would have been cross-examined probably for over a day, and four would have been likely to take well over six days. There would have been extensive attacks on the selections of comparable properties, the varying assumptions of the land's development potential and the like. And, in that case the only reason the valuation evidence went longer than a day, was that one of the experts changed his evidence because of newly agreed expert evidence from another field that affected the costs of development. That change required further cross-examination.

The Judicial Commission of New South Wales and the Australian Institute of Judicial Administration jointly produced a DVD of that experience entitled *Concurrent Evidence – New Methods with Experts*. It is the largest selling publication of the Judicial Commission. It provides a good example of how the technique works. Modesty prevents me from identifying the other counsel whose participation with Bernie Coles QC in the re-enactment, directly from the transcript, is partly featured on the DVD.

Justice McClellan has observed, as have I, that the process removes the ordinary tension that exists in a conventional trial where expert evidence is led. The experts feel that they are able to explain their views, and if need be, defend them, in an intellectual discussion with their fellow expert or experts. Each of the expert's presence with the other or others induces them to be precise and accurate. Generally, they are less argumentative than in a normal confrontational cross-examination process. Each knows that the other expert is able to understand exactly what he or she is saying and, so cannot rely on the technique so criticised in the passage I quoted earlier from *Best on Evidence*.

Criticisms of concurrent evidence

Concurrent evidence, like the curate's egg, is only good in parts. The decision whether to proceed or continue with taking evidence concurrently may be influenced by the need to ensure fairness in the trial process. Some critics, including the prominent economist, Henry Ergas, and Justice Davies formerly of the Court of Appeal of the Supreme Court of Queensland, have expressed concern that 'hot tubs' may result in the more persuasive, confident or assertive expert winning the judge's mind, by, in effect, overshadowing or overwhelming the other's.

Mr Ergas suggested that the 'hot tub' was a response to a perceived problem that experts, in giving complex economic evidence, would 'dumb down' their analysis into accounts that were little more than analogies to their underlying reasoning so as to enable the lawyers, or decision-makers, to understand the concepts. He feared that this would result in economists, not trained in or familiar with the forensic analysis involved in

cross-examination, rarely approaching the 'hot tub' in a structured and systematic way. He thought that 'hot tubs' were especially at risk of being dominated by participants who were more confident or assertive, traits which were unrelated to the merits of the analyses being presented. He also considered that time constraints could often mean that the discussion remained at a relatively superficial level, thus further limiting its value.²⁹

Justice Davies echoed similar criticism. He expressed a concern that the judge could be left with two opposed, but comparatively convincing, opinions by equally well-qualified experts neither of whom had been shaken in the process. He suggested that the 'hot tub' protracted, rather than shortened proceedings and that it was too cumbersome, expensive and 'too adversarial'.³⁰ He was obviously suspicious of the likely integrity of the whole process.³¹ He speculated like, Sir George Jessel MR more than a century before, that the parties' solicitors or counsel would audition the best expert to give evidence in court (as if that would be a new consideration). Justice Davies also argued that the parties' lawyers would see the experts in conference before giving evidence and suggest how best to answer questions in a way consistent with the respective expert's stated opinion and the party's case.

Those criticisms have not been validated in practice. Contrary, to those spectres, experts generally take the various courts' expert codes of conduct very seriously³². After all, in general they value their reputations and integrity. But more fundamentally, the joint report process often reveals that one party's case on a critical point will succeed or fail. This is because the experts are able to understand, through professional exchanges, what each has said and on what assumptions. The frequency of experts in joint reports agreeing on critical issues shows that the experts retain their independence and cut through the parties' different instructions to each, to reach the core question which they then answer.

Additionally, Justice Davies' fear of the experts being coached does not appear to be related only to the possibility of an expert giving concurrent evidence. Coaching is equally possible where traditional forms of

expert evidence are to be used. Giving evidence can be daunting. Provided that the discussion remains at the level of assisting or familiarising the expert with the task of giving his or her own actual opinion in evidence, there can be no criticism. However, a lawyer or other person must not interfere with the integrity of the expert's evidence or seek to manipulate it. The rules of professional conduct for lawyers still apply.

Another legitimate concern is that 'hot tubs' are controlled idiosyncratically by the individual judge or tribunal.³³ Indeed, the structure of the concurrent evidence process may vary from case to case with the same judge or tribunal member as it can, from topic to topic during the one 'hot tub' session.

However, the same may be said of a conventional cross-examination. Horses need to suit courses. Not every set of expert witnesses on every issue will proceed with a topic in the same way. That may be because the issue in dispute between the parties, or one set of experts, or on one topic between experts, may be of a character that requires a particular approach, while other issues require different approaches. My experience has been that where it is necessary to engage in a rigorous, structured cross-examination of an aspect of the expert opinions, it is possible to do so in a conventional way. Conventional and effective cross-examination as to credit is also, equally, possible. One example is shown on the DVD to which I referred earlier.

Overall experience of concurrent evidence

Concurrent evidence, in general, greatly reduces the hearing time. It efficiently and effectively identifies the issues. By the judge allowing each expert to explain himself or herself, both at the beginning and at the end of the whole process, it is possible to allow them to feel they have done justice to themselves even where a cross-examination has occurred during the 'hot tub' in a conventional way. Where, as sometimes happens, the expert does not feel he or she has been treated fairly in cross-examination, they can then explain what they think their point was. Whether the judge or tribunal accepts the explanation is a different question. Even at this final stage the basis of what the expert is then saying may be revealed to be self-serving as opposed

to giving a true explanation. And if the parties' lawyers consider that something arises which, in fairness, they wish to pursue out of any final explanation, they can then have a further opportunity to test it by cross-examination.

No system is perfect. There are many flaws in each of our systems for obtaining evidence in court, but like Sir Winston Churchill's analysis of democracy, it may be the worst possible system, but it is the best that anyone has yet invented. At the end of the process one or more of the experts on occasion has volunteered that they have found this to be a much more satisfactory way of giving evidence than in a conventional cross-examination. Gary Edmond criticised such responses by suggesting that they should be viewed with caution given the power relationship between the judge or tribunal member and the witnesses appearing before them.³⁴ I agree that caution is appropriate but not determinative.

Experts participating in the two cases I had at the bar using concurrent evidence expressed satisfaction to me, in my then role, that they had found this to be a better experience than that in conventional trials. There does not appear to be much written adverse criticism by experts who have participated in the process of concurrent evidence suggesting that any felt they were not able to get their points across, were overawed, overborne or outperformed by another 'hot tubber'. Again, one cannot draw too much from this since people rarely wish to explain publicly why they felt inadequate in a previous performance. Nor am I aware of anecdotal discussion of actual instances of these suggested problems occurring.

Conclusion

Litigation is an expensive, lengthy, stressful, and not always exact, means of undertaking a decision-making process. At the end of the day the judge or jury must select whether they are satisfied or persuaded that one of the competing versions is to be preferred or accepted. Like other witnesses, experts will leave impressions on judges based on demeanour, including their apparent persuasiveness, whether giving evidence alone or in a 'hot tub'.

Nonetheless, at least where judges are the tribunals of fact, the modern approach of courts was summarised by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*.³⁵ It is that courts are cautious about the danger of drawing conclusions too readily concerning truthfulness and reliability solely or mainly from the appearance of witnesses. They pointed out that in recent years scientific research has cast doubt on the ability of judges or anyone else to tell truth from falsehood accurately on the basis of such appearances. They said that considerations of this kind have encouraged judges both at a trial and on appeal to limit their reliance on the appearance of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. Their honours cited³⁶ an incisive observation of Atkin LJ:³⁷

... I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.

Because the experts have conferred and produced joint reports before going into the 'hot tub', the field of dispute is generally narrowed. Not all cases will suit the process. It may be that in patent cases, where the whole case revolves around conflicts within fields of expertise, concurrent evidence is not likely to assist a judge. Heerey J's expedient of an assessor may prove a better alternative. But concurrent evidence allows advocates to focus on the critical differences, with the assistance of their respective experts in the box, and, at the same time to hammer home the strengths of their own, and the inadequacies in the other, expert's reasoning processes. In the end, concurrent evidence is generally likely to produce more ounces of merit which will be worth more to a judge than pounds of charisma or demeanour.

Endnotes

* A judge of the Federal Court of Australia. A paper presented at the New South Wales Bar Association Continuing Professional Development seminar: *Views of the 'Hot Tub' from the Bar and the Bench*, Bar Association Common Room, on 23 August 2010. This paper is a revised and updated version of an earlier paper given at the 14th Copyright Law and Practice Symposium in Sydney in October 2009: *Expert Evidence in Copyright Cases – Concurrent Expert Evidence and the 'Hot Tub'*, Copyright Reporter Vol 28 No 1 (March 2010). The Judicial Commission of New South Wales will

publish this paper in March 2011 in (2011) 10(2) *The Judicial Review*. The author gratefully acknowledges the assistance of his associates, Will Bate-man and Andrew Low in the preparation of this paper.

1. Lisa C Wood, *Experts In The Hot Tub* (2007) 21 Anti-Trust 95.
2. Megan A. Yarnall, 'Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?', 88 Or. L. Rev 311 (2009) at p 312.
3. The Hon Geoffrey L Davies, *The Changing Face of Litigation*, (1997) 6 J. Jud Admin 179, 188.
4. see too the Hon Sir Laurence Street AC KCMG, *Expert Evidence in Arbitrations and References* (1992) 66 ALJ 861.
5. Ian Freckelton, Prasuna Reddy & Hugh Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*, Australian Institute of Judicial Administration Incorporated, 1999 p 37.
6. *Wigmore on Evidence* (Chadbourn Revision) Vol II §563 at 762.
7. *Thorne v Worthing Skating Rink Company* (1876) 6 Ch D 415n at 416.
8. S.L. Phipson, *Best on Evidence*, 12th edition, London: Sweet & Maxwell Ltd, 1922 at 438-439: see also Sir Louis Blom-Cooper QC, 'Historical Background' in Sir Louis Blom-Cooper (ed) *Experts in the Civil Courts* (2006) at 1-8 [1.01]-[1.22]; Carol Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (1994) at 97-102.
9. *Wigmore* above n 3, §563 at p 760. See too Blom-Cooper, above n 3, at 6-7 [1.15]-[1.17]; Tal Golan, *Laws of Men and Laws of Nature* (2004) at 110-118.
10. See the discussion of the role of the elder brethren in English Admiralty trials and appeals in Jones, above n 5, at 38-45; *Owners of the SS Australia v Owners of Cargo of the SS Nautilus ('The Australia')* [1927] AC 145 at 150 per Viscount Dunedin, at 150-153 per Lord Sumner, with whom on this issue at 157 Lords Carson and Blanesburgh agreed.
11. *Genetic Institute Inc v Kirin-Amgen Inc (No 2)* (1997) 78 FCR 368; affirmed *Genetic Institute Inc v Kirin-Amgen Inc* (1999) 92 FCR 106 at 117-118 [36]-[37] per Black CJ, Merkel and Goldberg JJ at 117-118 [35]-[37]. Sir Louis Blom-Cooper QC suggested that a movement for reform of expert evidence grew in the mid-19th century, spurred on by two scientists who were deeply scarred by the experience of giving evidence in an adversarial forum. One of the key proponents, Mr Robert Angus Smith, a sanitary chemistry, wrote in 1859 that when giving expert evidence in court:

the scientific man in that case simple becomes a barrister who knows science. But this is far removed from the idea of a man of science. He ought to be a student of the exact sciences, who loves whatever nature says, in a most disinterested manner. If we allows him or encourage him to become an advocate, we remove him from his sphere; we destroy the very idea of his character; we give him duties which he never was intended to perform.

His proposed solution was, among others, to give the judge an assessor who examined the expert and made an independent report to the judge: S Blom-Cooper QC, above n 5, at 7. This solution drew on the practice of the Courts of Admiralty.

12. *The Australia* [1927] AC 145 at 152.
13. *The Alfred* (1850) 7 Notes of Cases, 352, 354; *The Swanland* (1855) 2 Spinks, 107; *The Magna Charta* (Privy Council) (1871) 1 Aps. M.L.C. 153; *The Aid* (1881) 6 P.D. 84; *The Beryl* (1884) 9 P.D. 137, 141, per Brett M.R.; *The Koning Willem II*. [1908] P. 125, 137, per Kennedy L.J.; *The Gannet* [1900] A.C. 234, 236, per Lord Halsbury.

Lord Sumner continued:

Such being the position of the judges, what is that of the assessors? In Admiralty practice they are not only technical

advisers; they are sources of evidence as to facts. In questions of nautical science and skill, relating to the management and movement of ships, a Court, assisted by nautical assessors, obtains its information from them, not from sworn witnesses called by the parties (*The Sir Robert Peel* (1880) 4 Asp. M.L.C. 321; *The Assyrian* (1890) 6 Asp. M.L.C. 525), and can direct them to inform themselves by a view or by experiments and to report thereon (24 Vict. c. 10, s. 18, sub-s. 1).

14. see the account of *R v Rouse* (1931) given by JW Burnside QC in (2003) 124 *Victorian Bar News* 55-56.
15. *Thorne* 6 Ch D at 416n.
16. Hon. Garry Downes, *Problems with Expert Evidence: Are Single or Court-Appointed Experts the Answer?*, 15 J Jud Admin 185 (2006)
17. *Archer, Mortlock Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd* [1971] 2 NSWLR 278 at 286E-F.
18. *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 438-439 [663]-[666] per Tamberlin J.
19. In the DVD 'Concurrent Evidence – New Methods with Experts' produced by the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration, the Hon John Lockhart AO QC outlined his involvement with the history.
20. *Spika Trading Pty Ltd v Royal Insurance Australia Ltd* (1985) 3 ANZ Insurance Cases 60-663 (in the Commercial List of the Supreme Court of New South Wales).
21. *Expert Evidence in Arbitrations and References* (1992) 66 ALJ 861.
22. see also his keynote address to the Medicine and Law Conference, Law Institute of Victoria: *Concurrent Expert Evidence* (29 November 2007).
23. see also Administrative Appeals Tribunal, *An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal* (November 2005); Downes J, *Concurrent Expert Evidence in the Administrative Appeals: The New South Wales Experience* (29 February 2004).
24. (2006) 71 IPR 212; [2006] FCA 1806.
25. (2010) 267 ALR 259 at 284-285 [92]-[97]; [2010] FCA 240.
26. The Hon P McClellan: *Concurrent Expert Evidence* (29 November 2007) at 19; see also *Strong Wise* (2010) 267 ALR 259.
27. 267 ALR 259 at 284-285 [93]-[97].
28. *Ironhill Pty Ltd v Transgrid* (2004) 139 LGERA 398; [2004] NSWLEC 700.
29. Henry Ergas, 'Reflections on Expert Evidence' (2006-2007) *Summer Bar News* 39 at 42-43.
30. Geoffrey L Davies, 'Recent Australian Development: A Response to Peter Heerey' (2004) 23 *Civil Justice Quarterly* 388 at 398-399.
31. *Ibid* at 377-398.
32. The Federal Court's Code is in *Practice Note CM7: Expert Witnesses in the Federal Court of Australia*, issued by the Chief Justice on 25 September 2009.
33. Gary Edmond, 'Secrets of the 'Hot Tub': Expert Witnesses, Concurrent Evidence and Judge-led Law Reform in Australia' (2008) 27 *Civil Justice Quarterly* 51 at 68.
34. Edmond, above n 22 at 74.
35. (2003) 214 CLR 118 at 128-129 [30]-[31].
36. *Fox* 214 CLR at 129 [30].
37. *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The 'Palitana')* (1924) 20 Ll L Rep 140 at 152; see also *Coglan v Cumberland* [1898] 1 Ch 704 at 705.

The Sexual Assault Communications Privilege Pro Bono Scheme

By Catherine Gleeson

In April 2009 the Women's Legal Service, together with the New South Wales Bar Association, Freehills, Clayton Utz and Blake Dawson and with the assistance of the Office of the Director of Public Prosecutions launched a pro bono referral program directed at offering assistance to complainants in sexual assault proceedings who wish to make a claim of Sexual Assault Communications Privilege (SACP). The scheme was initially limited to trials in the District Court, but participants have offered assistance in other courts in and outside Sydney.

SACP is a statutory privilege created by the provisions of Part 5, Division 2 of Chapter 6 of the *Criminal Procedure Act 1986* (NSW). Its object is to protect records of counselling communications (whenever made and whether or not related to the event about which a report of sexual assault is made) made by complainants in sexual assault matters. The policy basis for the privilege is that disclosure of confidential records of counselling in the course of a sexual assault trial is likely to cause harm, and may lead to a reduction in reports of sexual assault, withdrawal of complaints once made, and disruption of the counselling process.

Since inception, the legislature has recognised that the disclosure of counselling records in response to subpoenas issued in sexual assault trials has the potential to cause significant embarrassment and trauma to a sexual assault complainant. The potential outcomes have been recognised as being contrary to the public interest.¹

The principal challenge facing those who may be affected by disclosure of counselling records in sexual assault trials is the need for information and legal representation to enable them to protect their rights. The ODPP cannot give advice to complainants in relation to this aspect of their rights. Further, the protection of privileged material often rests on the hope that the recipient of a subpoena seeking counselling records is aware of the existence of the privilege and raises the issue. Complainants frequently do not receive notice that a subpoena has been issued or that a party seeks to use evidence of their counselling records until it is too late.

The object of the pilot program was twofold: first, to provide sexual assault complainants with free legal advice and representation in relation to claims for sexual assault communications privilege, and second, to provide a practical reference for submissions in relation to legislative reform of the privilege, both in New South Wales and in relation to the Commonwealth Model Uniform Evidence Bill. This article deals with the author's personal experiences in the former context, both as a solicitor at one of the participant firms and as junior counsel since coming to the bar.²

Legislative framework

A series of amendments made in response to a restrictive interpretation of the scope of the privilege by the Court of Criminal Appeal³ has broadened the scope of the privilege considerably.

What is protected?

The starting point for identification of counselling communications protected by the SACP provisions is whether they fall within the definition of 'protected confidences' in section 296 of the CPA. A protected confidence is a confidential counselling communication made by, to or about a victim or alleged victim of a sexual assault offence (s 296(1)). Counselling communications fall within section 296 even if the communication is made before the acts constituting the relevant sexual assault offence occurred or are alleged to have occurred; and even if not made in connection with a sexual assault offence or alleged sexual assault offence or any condition arising from it (s 296(2)).

A counselling communication will be caught by the legislation if made in a number of circumstances. These include:

- (a) communications by a person (the 'counselled person') to another person (the 'counsellor') who is counselling the person in relation to any harm the person may have suffered (s 296(4)(a));
- (b) communications to or about the counselled person by the counsellor in the course of counselling (s 296(4)(b));
- (c) communications between the counsellor and another person who is counselling, or has at any time

counselled, the person (s 296(4)(d));

(d) communications about the counselled person by a counsellor or a parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process (s 296(3), s 296(4)(c)).

The legislation defines a counsellor as a person who has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm; and listens to and gives verbal or other support or encouragement to the other person, or advises, gives therapy to or treats the other person, whether or not for fee or reward (s 296(5)). The definition is deliberately broad and is intended to encompass persons such as psychiatrists and psychologists as well as more general medical practitioners and those who have no formal medical or psychological qualifications but training or experience in counselling or other support services.

The relevant counselling must be undertaken in relation to any harm the person may have suffered (s 296(4)(a) ff). The term 'harm' is again defined broadly, to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm, such as shame, humiliation and fear (s 295(1)).

When is disclosure permitted?

The SACP provisions create a staged process for protection of counselling communications.

The preliminary stage

Pursuant to section 297, there is an absolute privilege against production or adduction of evidence of protected confidences during preliminary criminal proceedings (including committals and bail hearings). This means that all that need be demonstrated at this stage is that documents sought by subpoenas or sought to be used in evidence record protected confidences.

The trial stage

Pursuant to section 298, the privilege is qualified at the trial stage, so that protected confidences may be revealed with the leave of the court. At this stage, the court must investigate the probative value of the

documents containing or recording the protected confidences and balance the public interest in protecting sexual assault complainants from harm against the public interest in a fair trial of the issues in the proceedings.

The documents containing the protected confidences are to be produced to the court for the purpose of undertaking this exercise. Section 298 of the CPA provides that a person cannot be required to produce a document which records a protected confidence, and that leave is not to be granted to adduce evidence of protected confidences, unless the court is satisfied that:

(a) the evidence will, either by itself or having regard to other evidence adduced or to be adduced, have substantial probative value (section 298(1)(b)(i); (4)(a)) CPA);

(b) other evidence of the protected confidence or the contents of the document is not available (section 298(1)(b)(ii); (4)(b)) CPA); and

(c) the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm must be substantially outweighed by the public interest in inspecting and admitting evidence of substantial probative value (section 298(1)(b)(iii); (4)(c)) CPA).

In undertaking the balancing exercise, the court is required to take into account the likelihood, and the nature or extent, of harm that would be caused to the complainant if inspection were permitted or the contents of the documents were disclosed (s 298(2), (5) CPA).

The complainant may be granted leave to appear in the proceedings for the purpose of protecting the privilege (s 298(7) CPA). Where the jury has been empanelled, any hearings on questions of privilege are to be conducted in the absence of the jury (s 298(8) CPA).

Consent and misconduct

Disclosure of protected confidences may also be effected by consent (s 300) and the privilege may be lost if the counselling communication was made in furtherance of a crime or fraud (s 301).

The misconduct exception to the privilege is similar to

those contained in Part 3.10 of the *Evidence Act 1995* (NSW). The consent provision is not. It does not provide for general or implied consent or waiver of privilege by acting in a manner inconsistent with the maintenance of the privilege as provided for in sections 121 and 122 of the Evidence Act. For the purposes of section 300 of the CPA, consent must be given in writing and must expressly relate to the production or adducing of the protected confidence in the proceedings.

The SACP Scheme in practice

The referrals system

The SACP referrals scheme is facilitated by the ODPP. When the DPP identifies a SACP issue (typically, when it comes to their attention that subpoenas have been issued seeking the complainant's counselling records), they obtain the consent of the complainant to pass on his or her contact details and details of the subpoenas for the purpose of referring the matter to WLS.

WLS then circulates the referral to the member firms for acceptance. If no member firm is able to accept the referral, WLS often assumes conduct of the matter. The member firm that accepts the referral then briefs counsel from a panel of barristers who have agreed to participate in the scheme. Sometimes the member firms brief counsel directly, sometimes counsel is obtained by an email referral to all barristers on the panel. Heather Sare of the New South Wales Bar Association is instrumental in co-ordinating the Bar's contribution to the scheme.

Typically, member firms and counsel then consult with the complainant and obtain instructions in respect of potential claims for privilege.

Co-operation with the ODPP and defence

In the writer's view it is essential that the complainant's representatives co-operate with both the ODPP and the Defence when acting in respect of SACP claims. Much can be achieved by accommodating the parties to the trial to the extent consistent with maintenance of the privilege.

In the writer's experience, the most efficient way of enabling a speedy resolution of privilege claims over material sought by subpoena is to seek orders for the complainant's representatives to have first access to any

material that is produced for the purposes of identifying protected confidences, and then arranging for a regime to enable the parties to access non-privileged material without delay. This narrows the volume of the material at issue significantly.

One of the most significant issues faced by the participants in the SACP scheme is non-compliance with the notice requirements in the legislation. Section 299 prevents the production or adduction of protected confidences unless the party seeking to do so gives reasonable notice in writing to the parties and the complainant. The party seeking production of the documents may still access the documents with leave in the absence of notice.

Whether through oversight or otherwise, section 299 is a provision honoured more in the breach than the observance. This creates significant difficulties for complainants. Often the barrister participants in the scheme are asked to appear the day before the return date of the subpoena or the first day of the trial, when the ODPP receives information of the issue of subpoenas. When notice is given, it is often very late. When it is not, the complainant is left to hope that an objection will be raised by the party producing the document. The busy registries of the District and Local courts have been known to miss an objection that is raised in writing by a counsellor when producing documents.

Difficulties can also arise with the provision of notice by the police and prosecution. In more than one matter in which the writer has appeared, protected confidences have appeared in the police brief. Sometimes the complainant had consented to this, sometimes she had not. None of the writer's clients had received advice in relation to their right to claim the privilege before consent was given. The fact that some protected confidences are 'out in the open' makes it difficult to sustain an argument that other protected confidences should not be revealed, despite the restrictive terms of the consent provisions in section 300.

It is important to raise awareness of the SACP legislation among criminal defence lawyers, investigating police, and prosecutors. Leaving aside the damage that can be done to a complainant if her counselling records

are unnecessarily disclosed, the provision of adequate notice is a procedural benefit to all parties. The earlier a complainant is notified of the intention to seek access to counselling communications, the less likely it is that a claim for privilege will unduly disrupt the parties' preparations for trial.

Conducting the hearing

The conduct of an application under section 298 of the CPA is not without its difficulties. The judge and complainant have access to the documents. The defence and prosecution do not. The party seeking to access protected confidences must therefore satisfy the court that the material sought is of substantial probative value without having seen it. It is however essential that this be so. It is recognised that harm may be suffered by victims of sexual assault when it is discovered that the accused's lawyers have been permitted to look over their counselling records.⁴ The Court of Criminal Appeal has recognised the necessity of the protected confidences at issue being kept from the defence during argument.⁵

The complainant is similarly hamstrung in making arguments as to whether the evidence is of substantial probative value. The complainant's representatives are not in a position to know the whole of the evidence and arguments that may arise at trial, particularly those that might be raised by the defence, and how the protected confidences may bear on them. A detailed discussion of the contents of the documents during argument is not possible for fear of defeating the privilege. Most importantly, it should be borne in mind that the complainant's representative's role is to identify and protect privileged communications, not to make a judgment on whether they may contain material of substantial probative value. That is the onus of the party seeking disclosure.⁶

In the writer's experience, the proper approach is for the defence to be asked to identify the forensic purpose for which the documents are sought, and to satisfy the court that documents satisfying that purpose would be of substantial probative value. This requirement is no greater than the defence's usual obligations when seeking to access documents produced in response to a subpoena.⁷ By identifying with precision the issue the documents are likely to go to, and the importance

of that issue to the defence case, defence counsel will avoid being seen to wish to do no more than trawl through the complainant's personal records in the hope of uncovering fodder for cross-examination on credit.

The structure of subsections 298(1)(b) and (4) is such that the defence must establish substantial probative value, and the absence of alternative evidence from a non-privileged source, before the court turns to the balancing exercise in subsection 298(1)(b)(iii) and (4)(c). If the defence fails to do so, there is nothing for the court to balance against the public interest in protecting counselling communications.

In so far as is possible, it is also sensible to make the task of the judge who has to examine the documents to see if they are privileged, or if they ought be produced, as easy as possible. Often these matters will not be determined until the first day of the trial and the judge, prosecutor and counsel for the defence are usually anxious to empanel the jury and get the trial moving. In a recent case in which the writer was involved all of the documents the subject of a claim for privilege were paginated and put behind the subpoena in separate tabs in a folder. This made identification of the document easy so any concerns the judge had could be addressed without identifying the document or its contents.

The balancing exercise required by section 298 essentially rests on a comparison of the probative value of the material sought to be inspected after production and then adduced as evidence and the harm that may be caused to the complainant by the disclosure of the material. In a sense, once the court is satisfied that the material is of substantial probative value and is not available elsewhere, the public interest in ensuring that the accused is afforded a fair trial by admission of the evidence is a powerful reason to allow inspection of and adduction of the relevant protected confidences. One would expect that such evidence would be admitted (subject to the protections outlined below) in all but the most exceptional cases.

The complainant's representative faces a difficult task in satisfying the court that harm will be caused to a complainant in anything but the most general sense. This is because the source of evidence of the likelihood

of subjective harm is likely to come from either the complainant or his or her counsellor, and is likely to disclose the substance of counselling communications. If evidence of specific harm is relevant (for example from a treating psychiatrist or other medical practitioner), it should be obtained with the consent of the complainant in compliance with section 300 and orders should be sought that the evidence be heard in camera. This was the course taken in one of the matters in which the writer provided assistance.

The final element to bear in mind is that the issue of whether documents recording protected confidences should be produced is separate from the question of whether those documents should then be admitted into evidence. Some defence lawyers and judges have expressed the view that the issue is exhausted once the documents have been disclosed to the defence. That is not the case. Section 298 expressly provides for the questions to be dealt with separately. Consideration of whether the evidence is of substantial probative value will differ at the evidence adducing stage, particularly when the tender occurs after much of the other evidence in the trial has played out.

In addition, the risk of harm to the complainant by disclosure of counselling records in open court is likely to be of a different magnitude than the risk of harm by inspection of counselling records by the accused and his or her representatives. The latter risk is related to the traumatic effects of revealing intensely private and personal details to the accused, the former includes the additional shame and humiliation of revealing these personal details to strangers in the courtroom, and potentially to the public at large, and then to have those details used against them.⁸

Ancillary orders and the media

If documents recording protected confidences are ordered to be disclosed to the defence, or leave to lead evidence of protected confidences is granted, the court may make a range of orders designed to limit the harm that may be caused by the disclosure. Pursuant to section 302 of the CPA, the court may make such orders as are necessary to protect the safety and welfare of any protected confider, including, but not limited to:

(a) orders that all or part of the evidence be heard or

document produced in camera,

(b) orders relating to the production and inspection of documents (such as an order that access be limited to named legal representatives of the parties),

(c) orders relating to the suppression of publication of all or part of the evidence given before the court, and

(d) orders relating to disclosure of protected identity information.

The types of orders that may be made are a complement to the orders provided for in Part 5, Division 1 of Chapter 6 of the CPA for the protection of the complainant while giving evidence, in particular those set out in sections 291 to 292, as well as section 578A of the *Crimes Act 1900* (NSW). Section 302 empowers the court to make similar orders when evidence of protected confidences is led through witnesses other than the complainant.

Suppression orders have been made in respect of evidence concerning protected confidences, over the objection of representatives of the media. The public interest in open justice and fair reports of court proceedings is another element to be weighed in the balancing exercise comprehended by the SACP provisions.⁹ While the need to protect sensitive witnesses and avoid deterrence from giving evidence has long been recognised as providing an exception to the general principle of open justice,¹⁰ this will not be the case in relation to every complainant, and nor would it automatically be assumed that mere embarrassment or distress would be sufficient to ground a non-publication order.¹¹

However, there will be circumstances in which the harm that is likely to be caused by publication of the contents of counselling communications will outweigh the need for open justice, and may not be overcome by the restrictions on disclosure of the complainant's identity by s 578A of the *Crimes Act*. This is because the publication of intensely private counselling communications in association with the event to which the proceedings relate, and the discussion of those records by the public at large, may cause significant shame and humiliation to the complainant and may disrupt the complainant's continuing treatment. Where there is evidence that specific harm will flow from the publication of counselling communications,

orders that the proceedings be heard in camera and orders suppressing publication of the content of the counselling communications will be appropriate.

Conclusion

The SACP Pro Bono scheme is a rewarding opportunity to provide assistance to people in great need of protection and assistance in the course of what is, for most sexual assault complainants, an extremely stressful and traumatic experience. It is also a great opportunity for members of the Bar to participate in the development of an interesting and difficult area of law. In the writer's experience, complainants referred to the scheme are grateful for the assistance provided by the scheme, and comforted that evidence of their counselling records will only come to light where it is necessary for that to occur. However, at the end of a long and difficult trial in which numerous records are sought of varying relevance, this may be small comfort. One benefit that will, it is hoped, emerge from the continuation of the scheme is that awareness of the privilege among practitioners and counsellors will be raised, so that counselling documents are sought only where their contents are likely to have a real bearing on the issues in the case.

Endnotes

1. Second Reading Speech, *Evidence Amendment (Confidential Communications) Bill 1997* (NSW Hansard, Legislative Council, 22 May 1997, the Hon Jeff Shaw MLC, 1120-1121).
2. This article is not intended to be a statement on behalf of the participants of the pro bono program or anyone else. The experience of each barrister participating in the program is likely to be different. Case studies are available elsewhere: see *National Pro*

- Bono Resource Centre News* Issue 54 'Sexual Assault victims service meets a gap in need' 27 August 2009 <http://www.nationalprobono.org.au/page.asp?from=1&id=255>. The writer wishes to thank Andrew Coleman SC, a fellow participant in the scheme, for his helpful comments on the article. Any errors are the author's alone.
3. See *R v Young* (1999) 46 NSWLR 681 (the SACP provisions as then enacted applied only to the adducing of evidence and did not apply to the production of documents by subpoena) and *R v Norman Lee* (2000) 50 NSWLR 289 ('counselling' as then enacted confined to treatment of mental conditions by skilled professionals). A discussion of the earlier decisions and some of the amendments in response appeared in an earlier edition of *Bar News*: Bartley G 'Sexual Assault Communications Privilege Under Siege' *Bar News* Summer 2000-2001, 6-12.
 4. See A Cossins and R Pilkinton, 'Balancing the Scales: The case for the inadmissibility of counselling records in sexual assault trials' (1996) 19(2) UNSWLJ 222 at 225; ALRC Report 102, 'Uniform Evidence Law' (2005) at [15.78], citing the results of a survey by the Australian Institute of Criminology.
 5. *R v Norman Lee* (2000) 50 NSWLR 289 at [14] per Heydon JA.
 6. Second Reading Speech, *Evidence Amendment (Confidential Communications) Bill 1997* (NSW Hansard, Legislative Council, 22 May 1997, the Hon Jeff Shaw MLC, 1121).
 7. Although establishing that the evidence is likely to be of substantial probative value is obviously a much higher bar than establishing that it is 'on the cards' that the material sought may assist the defence case. See *Alister v The Queen* (1983-1984) 154 CLR 404 at 469-470; *R v Saleam* (1989) 16 NSWLR 14 at 18; *Principal Registrar of the Supreme Court of New South Wales v Tasthan* (1994) 75 A Crim R 498 at 504; *Ran v The Queen* (1996) 16 WAR 447 at 453 per Franklyn J; *Attorney General (NSW) v Chidgey* (2008) 182 A Crim R 536 at [5].
 8. See *O'Connor v The Queen* (1995) 130 DLR 4th 235 at 288; Second Reading Speech, *Evidence Amendment (Confidential Communications) Bill 1997* (NSW Hansard, Legislative Council, 22 May 1997, the Hon Jeff Shaw MLC, 1120-1121); Dawson, 'Production of Therapeutic Records to the Defence: Emerging Principles' (1998) 5(1) *Psychiatry, Psychology and Law* 63 at 67.
 9. *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 481 per McHugh JA.
 10. *R v Savvas* (1989) 43 A Crim R 331 at 336; *R v CAL* (1993) 67 A Crim R 562 at 564.
 11. *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131 at 142-143.

Stop press

Since the time of drafting this note the New South Wales Government has announced new laws designed to enhance protections of victims of sexual assault. The proposed changes follow submissions made by the participants in the SACP Pilot. The attorney general also announced funding for the creation of an independent specialist unit to provide free legal representation to complainants seeking to make claims for privilege in sexual assault trials, and to raise awareness of SACP among the legal profession, government departments and counsellors. At the time of going to press, the bill had not been made publicly available. The AG's announcement discloses that the principal change to the existing laws will be to provide an automatic right to complainants to appear in criminal proceedings and object to the production of documents or adducing of evidence containing protected confidences. The SACP provisions as presently drafted generally involve the record holder raising an objection to production, and the complainant appearing only with the leave of the court.



MOU between New York and New South Wales

An address by the Hon JJ Spigelman AC, delivered at the New York State Bar Association International Section Meeting, Sydney, 28 October 2010.

The chief judge of New York, Jonathan Lippman, who appears at this conference by web cast, and I have agreed on the terms of a memorandum of understanding to consult and co-operate on questions of law. We will sign this MOU at the end of our presentations to this plenary session.

The purpose of the MOU is to create an innovative mechanism for determining a question of law of one jurisdiction, which arises in legal proceedings in the other jurisdiction. The traditional mechanism for determining such issues is to treat the question of law as if it were a question of fact and to determine it on the basis of expert evidence. This method has numerous inadequacies, including cost and delay but, perhaps most significantly, will often lead to conclusions that are just plain wrong.

The mutual co-operation mechanism which we are announcing today, and which follows a similar MOU between the Supreme Court of New South Wales and the Supreme Court of Singapore announced in June, we are both convinced will serve as a model for adoption between additional jurisdictions. If that happens then the inadequacies of the present system can be ameliorated to a substantial degree.

The multifaceted process called globalisation has expanded the scope and range of cross-border legal issues which arise in the course of dispute resolution. There will be an increase in the number of cases in which a court will not decline jurisdiction on *forum non conveniens* grounds, even though a question of foreign law must be determined.

Let me illustrate the difficulties that arise in this respect by referring to the resolution of an Australian commercial dispute under a contract governed by New York law. Dr Louis Weeks, a United States geologist, advised BHP to search for oil off the southern coast of Australia. His advice was taken and the success of the exploration was the start of the process that has transformed a domestic steelmaker into the world's largest mining conglomerate. It led to the discovery of Australia's largest oil field and its major gas field for domestic use.

Dr Weeks was granted what was described as an



'overriding royalty' of two and a half percent of the gross value of all hydrocarbons produced and recovered by BHP and its successors in the relevant area. Originally, BHP acquired exploration permits which, over the course of the next forty years, were converted into different forms of title, some of which were surrendered and re-acquired. Dr Weeks's successors in title, a company called Oil Basins Ltd, contended that the words 'overriding royalty' were area based, and its rights depended only on the production and recovery of hydrocarbons in a relevant area. BHP contended that the words 'overriding royalty' had acquired a technical meaning in New York oil and gas law so that the overriding royalty did not extend to extraction from some of its titles.

Of central significance was a judgment in the Appellate Division of the Supreme Court of New York Court in which the words 'overriding royalty' had been interpreted. The parties relied on expert evidence, including two extremely experienced and accomplished jurists. They gave diametrically opposite evidence about the applicability of the New York judgment.

One expert for BHP was Judge Howard Levine, who had been a judge for some thirty years including a decade as an associate judge of the Court of Appeal. The expert called on behalf of Oil Basins was Judge Richard Simons, who also had some three decades experience as a judge, including fourteen years as an Associate Judge of the New York Court of Appeal. The tribunal preferred Judge Simons.

This was a commercial arbitration. The arbitral tribunal consisted of two retired Australian judges, who agreed in the result, and an American oil and gas lawyer who dissented. Accordingly, the conflicting opinions of two senior retired American judges had been adjudicated upon, as a finding of fact, by two senior retired Australian judges. The reason that this dispute is known to us, unlike the usual position with commercial arbitrations, is because there was a challenge to the arbitral award on the basis that the tribunal did not give adequate reasons.

The difficulty in expressing the reasons for choosing between the opinions of two equally qualified experts arose because, as a matter of substance, the retired judges on the arbitral tribunal decided the matter as lawyers rather, than as deciders of fact. That is to say, the two retired Australian judges decided the issue in the same way as they would decide a question of domestic law. To regard this process as some sort of factual determination is a fiction.

The example I have chosen involved commercial arbitration. I appreciate that the arrangement that we are announcing today does not extend to that form of dispute resolution. Indeed, in international commercial arbitration there is no such thing as 'foreign law'. International commercial arbitrations are required to decide the matter before them in accordance with the law applicable to the relevant dispute which will often not be the law with which the arbitrators are most familiar.

I am convinced that the kind of reference mechanism that we are initiating today can play a useful role even in the context of arbitration. One of the principal disadvantages that has emerged as a result of the dominance of international commercial arbitration is that the development of legal principles in the law chosen to govern the particular relationship is significantly impeded. Whether it is the law of England or the law of New York, both of which are frequently chosen as the law of international commercial contracts, the fact that so much of the law that is thrown up by contemporary commercial relationships is being determined in arbitral awards that remain confidential,

is of concern because it prevents the development of commercial law.

The basis of international commercial arbitration is respect for the autonomy of the commercial parties who have chosen to submit their disputes to arbitration. In contexts where commercial law is still developing, it is quite likely that both parties to a particular arrangement will have a mutual interest in the further development of that law. Where that occurs, both parties may consensually wish to have the matter determined on an authoritative and public basis by the courts. It is perfectly consistent with the fundamental principles of international commercial arbitration that an arbitral tribunal can be empowered, at the request of both parties to a dispute, to refer a specific question of law for determination by the relevant court.

Even in the context of court proceedings, where public interest considerations are entitled to override the consensus of the parties, in New South Wales we have decided, at this stage, to proceed only on the basis of the agreement of the parties. This is reflected in the Rules of the Supreme Court of New South Wales which establish a procedure for ordering, with the consent of the parties, that proceedings be commenced in a foreign court in order to answer a question of foreign law that has been identified as being in dispute in proceedings in the NSW Supreme Court.

Often these issues arise when a party to proceedings in the NSW Supreme Court seeks a stay of proceedings on *forum non conveniens* grounds. In deciding such an application the fact that the whole or part of the proceedings is governed by foreign law is always a significant matter. However, it is not the only factor entitled to weight. It would be open to the court to reject the application for a stay on the condition that a discrete issue of foreign law is determined in the overseas jurisdiction pursuant to our rules.

There is a longstanding alternative mechanism employed in this state for referring the whole, or any part, of proceedings to a referee appointed by the court. The reports of such referees are brought back to the court to determine whether or not the court will adopt the reasons and orders proposed by the referee.

Our Rules now expressly contemplate the reference of a specific question of foreign law to such a referee.

I envisage that, in jurisdictions other than New York, a referee on a question of foreign law will probably be a senior retired judge from the relevant jurisdiction and will conduct proceedings in that jurisdiction, with the assistance of foreign lawyers appearing for the parties. Pursuant to the MOU and the Administrative Order proposed by Chief Judge Lippman, a member of the New York Panel of Referees could be appointed to act as a referee under our Rules.

The Rules of the Supreme Court of New South Wales expressly authorise the court to exercise its jurisdiction on an issue of Australian law in order to answer a question formulated by a foreign court, which arises in proceedings in that court. We believe that this is permissible under our existing legislation but, to put the matter beyond doubt, I have requested that express

provision be made in either the Supreme Court Act or in the Civil Procedure Act to this effect. I understand that there are constitutional limitations upon courts in the United States in this regard and they will be addressed by Chief Judge Lippman.

Over recent decades an enhanced sense of international collegiality has developed amongst judges. There are many more opportunities for interaction at conferences and on visits by judicial delegations. This has considerably expanded the mutual understanding amongst judges of other legal systems. It has transformed the concept of judicial comity. Where two legal systems trust each other, the way Australian jurisdictions trust United States jurisdictions, the kind of interaction for which this MOU provides will be readily accepted. I hope, and I believe Chief Judge Lippman agrees, that our initiative will be taken up between each of our courts and other jurisdictions and beyond.

NY to Sydney: navigating currents in international law

The following is an abridged version of Chief Judge Jonathan Lippman's speech, delivered via videolink at the New York State Bar Association International Section Meeting, Sydney, 28 October 2010.

I had the privilege of meeting Chief Justice Spigelman when he was visiting New York City this Summer. We had a really interesting conversation based on our shared perspectives as the chief judges of states that are so influential within our respective countries, and we talked about the many problems and interests we have in common.

One of the topics we discussed was how the current financial crisis is affecting the court systems in New South Wales and in New York, recognising that this crisis is very much international in scope. Given the interconnected nature of our global economy, we are seeing, as a result of the global financial crises, an increasing amount of litigation involving foreign parties, cross-border legal issues, and the interpretation and application of foreign law.

It is increasingly common these days for a court adjudicating a dispute in one country to have to apply the substantive law of another country. But it

can be particularly difficult for the adjudicating court to ascertain and apply another country's law due to language barriers or the lack of available sources about the other country's laws and legal systems. Even where the other country is a prominent one whose laws are readily available, there may not be a controlling precedent on point and the adjudicating court is put in the uncomfortable position of having to decide what the other country's law is. At times, this is little more than judicial guesswork.

It was interesting to hear the chief justice explain how the process for the determination of foreign law questions by Australian courts has been somewhat unsatisfactory, particularly the prevailing approach of relying on the parties' expert witnesses to explain what the applicable foreign law is and how it should be applied. As the chief justice noted, the experts' testimony routinely conflicts with each other, and so there is a feeling among the Australian Judiciary that they are not receiving sufficient or definitive guidance

about the correct application of foreign law to an actual dispute.

He also pointed out that this process results in foreign law being treated as a question of fact in Australia, and not of law, and that, as a result, the judges there very often don't feel that they are in the best position to interpret close or open questions of foreign law, or to exercise their discretion in any kind of nuanced way in individual cases.

There really should be a better way – a mechanism whereby courts of different countries can communicate with each other so that the adjudicating court can receive reliable and neutral assistance in its efforts to correctly apply the law of the foreign nation.

What he proposed to me, and it immediately resonated with me, was that we should try to work together to develop some kind of formal protocol to facilitate mutual cooperation and assistance between our respective court systems.

That made a lot of sense to me. New York City remains the world's commercial, financial and legal center. Many of the leading lawyers and law firms specializing in international law are located here, and many deals and contracts are negotiated and finalized here, with New York law often governing.

Clearly, the New York courts have a strong interest in assisting foreign courts in arriving at fair and correct decisions involving the determination and application of New York law. This is clearly in the best interests of our state economy, our sophisticated legal community and our own judicial system.

Moreover, with the accelerating pace of globalisation, courts all around the world will increasingly be called upon in the future to decide cases involving the laws of foreign nations. Shouldn't we as bar leaders and judges be more proactive in recognizing this trend and taking steps now to respond to it and advance the administration of justice internationally?

On a more practical level, the fact of the matter is that cases involving the application of foreign law can be among the most challenging and time-consuming for domestic judges, who are not trained in or familiar with

foreign law systems and/or foreign languages.

And the current systems for ascertaining foreign law in the United States are far from perfect. This was made clear only last month by the United States Court of Appeals for the 7th Circuit, in the case of *Bodum USA v La Cafeteire, Inc.*, which involved a contract dispute between a French firm and a British firm. The contract was written in French and the dispute was clearly governed by French substantive law. Judge Easterbrook wrote the majority opinion for the three-judge panel – all very well-known and influential jurists here in the United States.

All three judges were in clear agreement about how to interpret the contract. Yet Judge Posner and Judge Wood filed separate concurring opinions that focussed specifically on the practice of using expert witnesses to establish foreign law.

Federal Rule of Civil Procedure 44.1 provides that courts may consider expert testimony when deciding questions of foreign law. However, in Judge Easterbrook's view:

Trying to establish foreign law through experts' declarations not only is expensive (experts must be located and paid) but also adds an adversary's spin, which the court then must discount.

Judge Posner in his concurrence not only agreed with that statement but went so far as to call the reliance on expert witnesses an 'unsound judicial practice.' He wrote:

Lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client.

According to Judge Posner, judges should, whenever possible, search through published materials and treatises because this is a better means of providing what he called 'neutral illumination' on issues of foreign law. In his view, the use of experts is excusable only when the foreign law is the law of a country with an obscure or poorly developed legal system where no secondary published materials are available. Judge Wood's filed a concurring opinion that passionately

defends the same system criticized by Easterbrook and Posner. According to Judge Wood:

Exercises in comparative law are notoriously difficult, because the U.S. reader is likely to miss nuances in foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another . . . It will often be most efficient and useful for the judge to have before her an expert who can provide the needed precision on the spot, rather than have the judge wade through a number of secondary sources. . . . It is hard to see why the expert's views cannot be tested in court, to guard against the possibility that he or she is just a mouthpiece for one party.

And by the way, this discussion is quite relevant to the New York State courts as well, where proof of foreign law is governed by CPLR 3016(e) and CPLR 4511(b). These provisions require that foreign law be pleaded, and that the parties furnish the court with 'sufficient information to enable it to comply with the request' to take judicial notice of foreign law.

As a practical matter, New York judges are in the same position as their federal colleagues in terms of having to either rely on the parties' expert witnesses, or appointing a special master to report back, or having to do their own independent research. What my federal colleagues on the 7th Circuit don't say in their opinions, but which I know to be true at the state level – where our caseloads are just overwhelming, approaching nearly five million new filings annually – is that our courts are simply too busy to make independent determinations of foreign law. As a practical matter, they are constrained to rely on the experts produced by the parties.

What's also quite interesting to me about the *Bodum* case is the absence of any discussion about alternative approaches to ascertaining foreign law – approaches that might be more effective than judges doing their own research or relying on the testimony of expert witnesses. Is there a better way that we just are not talking about?

One such alternative is a system that would allow certification of questions of law between the courts of foreign countries. The certified question of law has a long history in the English-speaking world, going

back to the British Law Ascertainment Act of 1859 and the Foreign Law Ascertainment Act of 1861. The first Act permitted a court in one part of the British Commonwealth to remit a case for an opinion on a question of law to a court in another part of the Commonwealth. The second Act allowed questions of law to be certified between British courts and courts of foreign countries, provided that each country was party to a convention governing such a procedure.

Here in the United States, we have a shorter but now extensive history with certification of questions of law, a history that arises from our separate state and federal judicial systems and that dates back to the U.S. Supreme Court's 1938 ruling, in *Erie Railroad v. Tompkins*, that 'there is no federal common law' and that 'the law to be applied in any case is the law of the state,' as 'declared by its legislature in a statute or by its highest court in a decision.'

Since that time, every state except North Carolina has adopted a system, either by constitution, statute or court rule, that allows for certified questions of law from the federal courts. Typically, the federal courts and/or the high courts of sister states may send unsettled questions of state law to the state's highest court for authoritative resolution, thereby eliminating the need for federal or other state courts to engage in speculation about the law of a particular state.

I can speak from personal experience in saying that this system has worked beautifully for many years in New York. The New York Court of Appeals is authorized under our state constitution to answer certified questions of law from the US Supreme Court, any US Circuit Court of Appeals or the highest court of any state. In a typical year, we receive anywhere from five to 10 certified questions, almost entirely from the Second Circuit Court of Appeals, but we have also answered questions from the Eleventh Circuit, the Third Circuit, and the Supreme Court of Delaware. All told, we have answered almost 100 certified questions over the years.

From my discussions with my federal colleagues, there is no question that certification has become an increasingly important tool for federal courts seeking to ascertain New York law, particularly where the Court of

Appeals has not previously spoken on a particular issue.

All of which brings me back to my conversation with Chief Justice Spigleman. I think we both felt that some kind of procedure along the lines of the certification model would be very helpful, and we both felt that our respective judicial systems should exercise a leadership role in pursuing workable mechanisms for international judicial assistance that would contribute to the fair, objective and expert application and resolution of questions of New York and Australian law.

Certainly, Chief Justice Spigelman has already been pursuing that objective at the international level, as evidenced by the innovative agreement between the supreme courts of Singapore and New South Wales, which provides that if a contested legal issue in proceedings before one party is governed by the law of the other party, then each party can direct the litigants to take steps to have that legal issue determined by the courts of the party of the governing law.

Now, while I was very much interested in working with Chief Justice Spigelman to formalise cooperation between our respective judicial systems, I also knew that what he really wanted – having an Australian court refer certified questions of New York law to the Court of Appeals for authoritative resolution was not possible under existing law.

Our certified question procedure was established pursuant to a state constitutional amendment back in 1985. Unfortunately, the language of that amendment did not include the courts of foreign nations. And because the jurisdiction of the Court of Appeals is delineated very specifically under Article VI, § 3 of the New York Constitution, the only way for the court to assert jurisdiction over certified questions from foreign courts would be to amend our constitution once again.

While I intend to propose just such an amendment in the future, amending the constitution here in New York is always a difficult and uncertain multi-year process, requiring approval by two separately elected legislatures, followed by the approval of the state's voters at the ballot box.

Aside from this problem, there were other concerns that we had to grapple with in trying to establish a suitable

protocol, including the prohibition against courts issuing advisory opinions, judicial ethics concerns, and prohibitions on judges accepting a public office or trust. So it was clearly going to be a challenge to implement our shared goal of facilitating cooperation and consultation between our court systems.

What we came up with is certainly a more informal arrangement than I suppose the chief justice initially contemplated, but I very much believe that it will help accomplish our desired goals while making sure that New York's courts and judges do not exceed their powers or act inappropriately.

What we came up with, essentially, is something akin to a 'judicial referee system,' a standing panel of five judges – one from the Court of Appeals and one justice each from our state's four appellate divisions, our intermediate appellate court. Each one will be asked to serve on this panel based on their outstanding reputations and their demonstrated experience and interest in resolving international and commercial law matters.

These volunteer judicial referees will be available, not in their adjudicative capacities but in their *unofficial* capacities, to offer responses to questions of New York law referred to them by the Supreme Court of New South Wales. Such questions would be referred with the consent of the litigants involved.

Pursuant to our Memorandum of Understanding, the terms each referral must identify: (1) the precise question of New York law to be answered; (2) the facts or assumptions upon which the answer to the question is to be determined; and (3) whether and, if so, in what respects the referees may depart from the facts or assumptions and/or vary the question to be answered.

In addition, the MOU makes clear that the question presented must be a substantial question of law so that the referee panel is not asked to expend time and resources addressing issues that are not central to the resolution of the Australian proceeding.

Of course, the Supreme Court of New South Wales would be available to provide reciprocal assistance to our appellate courts with regard to questions concerning the articulation and application of

Australian law – again with the litigants’ consent. But I’ll let Chief Justice Spigelman explain the procedures in place in Australia.

Getting back to the New York procedure, the five judicial referees will be randomly assigned by me to work collegially in panels of three members. They will be expected to issue joint writings as expeditiously as possible – we hope in no more than a few weeks after receiving an assignment. Consistent with the general nature of any referee system, the Supreme Court of New South Wales would have the discretion to adopt, vary, or reject the referees’ report in whole or in part.

Because the judges here in New York would not be acting as a *court*, or in their official adjudicative capacities, but rather as referees, we avoid the advisory opinion problem. In this regard, it will be necessary for the referees’ reports to contain a clear disclaimer that their reports are not intended to serve as official or binding articulations of New York law, and do not carry precedential authority. Again, the Supreme Court of New South Wales will be free to give the reports whatever weight, if any, they deem appropriate, although we certainly hope and expect that the referees’ conclusions will enjoy a strong presumption of validity.

This judicial referee protocol falls short of the ideal – the kind of direct court-to court assistance embodied in the certified question procedure. But even so, I do firmly believe that allowing these experienced New York judges to employ their collective expertise, best judgment and discretion to offer answers to questions of New York law still advances the ball tremendously, because quite frankly, the Supreme Court of New South Wales can have great confidence that it is receiving a thorough, reliable report on the status of New York law, a report that emanates from a neutral and highly credible source.

If nothing else, this agreement serves as a model for the future, and a model for the rest of the world, demonstrating the advantages of cooperation and comity in dealing with the growing number of transnational legal disputes. In the future, such cooperation will be essential to the fair administration

of justice around the globe, to the continued growth of international commerce, and to the strengthening of ties between different legal systems and nations.

And speaking of the future, I believe the great increase in global trade and transnational legal disputes requires us as judges, practitioners and citizens of different nation states to think very seriously about how we will go about making sure that our own judicial systems around the world are capable of rendering decisions that are fair and accurate, and that respect the law and legal systems of foreign nations.

In this regard, I really do believe the time has come for us in New York and the United States to consider adopting constitutional and statutory provisions that allow our domestic courts to accept certified questions from foreign courts.

We should also explore international conventions governing the certified questions of foreign law. As I mentioned previously, there is precedent for such an approach in the British legal tradition.

Here we are now in the twenty-first century, and we have been far too slow to recognize this new reality within our domestic judicial systems, and it is time to catch up. I think the time has come for our courts here in the United States, state and federal alike, to examine the Uniform Certification Act more closely, particularly with regard to expanding the use of certification in order to assist foreign courts that are in the position of having to adjudicate critical issues of US state and federal law. As I mentioned earlier, I for one will explore a constitutional amendment to that effect here in New York.

In the meantime, I think it’s incumbent upon all of us to be creative, and to explore any and all helpful models, including Memoranda of Understanding between individual judicial systems, like the one being signed today, that will allow the courts of different nations to cooperate and assist each other in determining questions of foreign law in a more definitive, efficient and cost-effective manner.



Security for costs against impecunious corporate plaintiffs

By Hugh Stowe

Applications for security for costs may not excite the passions of the advocate (or the judge before whom they appear), but they can be of substantial practical and strategic significance in the conduct of litigation. This article addresses the principles and practicalities of applications for security for costs against impecunious corporate plaintiffs.

Jurisdiction

Jurisdiction arises under section 1335(1) of the Corporations Act, the rules of court,¹ and the court's inherent jurisdiction.

Although there may be 'subtle differences' between the formula and operation of the court rules and section 1335 in relation to the application for security against impecunious corporate plaintiffs,² for practical purposes the test is the same: *first*, the defendant must satisfy the jurisdictional threshold that there is 'reason to believe' that the plaintiff corporation will be unable to meet an adverse costs order; *second*, the court must be satisfied that its discretion should be exercised in favour of ordering security.³

There is no equivalent right for a defendant to obtain security for costs against impecunious natural persons: 'a natural person who sues will not be ordered to give security for costs, however poor he is'.⁴

The justification for the ordering of security against impecunious corporate plaintiffs has been described as follows: 'An individual who conducts his business affairs by medium of a corporation without assets would otherwise be in a position to expose his opponent to a massive bill of costs without hazarding his own assets. The purpose of an order for security is to require him, if not to come out from behind the skirts of the company, at least to bring his own assets into play'.⁵

Jurisdictional threshold: 'reason to believe' plaintiff 'unable to pay costs'

The applicant for security bears the burden of proving there is a 'reason to believe' the plaintiff is unable to meet an adverse costs order. Mere speculation as to the insolvency or financial difficulties likely to confront the plaintiff company is not sufficient.⁶ However, it is not necessary to establish that incapacity to meet a

costs order 'as a matter of probability'. It is sufficient if 'credible evidence establishes that there is reason to believe there is a real chance that in events which can fairly be described as reasonably possible the plaintiff corporation will be unable to pay the costs'.⁷ 'The testimony suggesting an inability to pay must have some characteristic of cogency or, to put it another way, must be sufficiently persuasive to permit a rational belief to be formed'.⁸ The testimony need not positively exclude the possibility that the company may be able to meet a costs order.⁹

'The court is required to form an opinion about what the financial position of the plaintiff will be at the time of judgment and immediately thereafter. The financial position of the plaintiff at the time when the application is made will be an important guide, but is not the sole consideration'.¹⁰ Other factors include the impact of the outcome of the trial, the costs associated with the trial, and the success or otherwise of the applicant's business and investments in the meantime.¹¹

'A corporation 'will be unable to pay' the costs within the meaning of the section if it can only do so if given extended time to realise assets which might be difficult to realise...The company will also be unable to pay the costs within the meaning of the section if the payment would be one that will amount to a preference of the defendant over other creditors such that the payment would be liable to be set aside either as a preference or as a fraudulent disposition....in the event of the plaintiff corporation later going into liquidation...'¹²

The formal accounts of a company may constitute credible testimony for the purpose of this rule.¹³ Unaudited financial reports of the company may be admissible on this issue, so long as they are signed by the directors. However unaudited reports will be of limited probative value, and reports unsigned by the directors may be properly excluded entirely as evidence.¹⁴ The failure by a party resisting security to adduce relevant and available evidence in relation to its financial capacity to meet an adverse costs order will strongly support a finding that the threshold test is satisfied.¹⁵

A suggested strategy for the preparation of applications

for security: first, investigate whether publicly available information gives rise to a suspicion of plaintiff's inability to meet adverse costs order (e.g., accounts, evidence of default to creditors, cessation of trade, general business difficulties, absence of property holdings); second, if there is sufficient evidence to raise a suspicion of insolvency, write to the plaintiff with concerns, and invite the provision of information which would address those concerns; third, if no adequate reply, then commence application for security; fourth, if necessary, seek production of documentation corroborating financial difficulties after motion for security has been filed (e.g., financial statements, management accounts, bank statements).

Discretion to grant security

Establishing a 'reason to believe' that the corporate plaintiff will be 'unable to pay' an adverse costs order does not dictate that security will be ordered. It is merely a jurisdictional threshold, which triggers the exercise of the discretion to grant security. However, once the defendant crosses that threshold, the evidentiary burden then shifts to plaintiff to satisfy the court that security should be refused for some reason.¹⁶

'The law is now settled that the discretion to order security for costs is unfettered and should be exercised having regard to all the circumstances of the case without any predisposition in favour of the award of security'.¹⁷ 'The only limitation is that the discretion must be exercised judicially,¹⁸ which itself militates against self-imposed rigid rules or restrictions'.¹⁹

'As in any case involving the exercise of an unfettered judicial discretion, the court's determination rests upon the balancing of the interests of the litigants in question; the court determines whether 'the balance of the relevant considerations' favours an order for security.²⁰ Hence, one way to approach the issue is to balance the hardship the defendant is likely to suffer if successful and there is no security for its costs against the hardship the plaintiff may suffer if ordered to give security.^{21/22}

Criteria guiding exercise of discretion: *KP Cable Investments*

Notwithstanding the unfettered nature of the discretion,

'there are a number of well established guidelines which the court typically takes into account'.²³ The most commonly cited set of guidelines comes from the decision of Beazley J in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, at 196-198.²⁴ The factors enumerated in that case are addressed below.

1. That such applications should be brought promptly

In determining what is 'prompt', 'defendant is entitled to some little time to try to estimate the ambit of the case they have to meet' before being required to apply for security.²⁵

In considering whether delay should militate against the grant of security, a critical issue is 'whether the plaintiff has, by his inaction and standing by, placed the defendant or a third party in a situation in which it would be inequitable and unreasonable to place him if the remedy were afterwards to be asserted'.²⁶ Many recent authorities affirm that if a plaintiff has suffered no material prejudice because of the delay, 'the significance of delay reduces or may substantially disappear'.²⁷ The relevant prejudice generally relates to the fact that 'during the period of delay, the plaintiff would have spent money on the litigation which would be wasted if the proceedings are brought to an end because security cannot be provided'.²⁸ The occurrence of such prejudice logically presupposes that the ordering of security would thereafter stultify the further conduct of the proceedings. In order to demonstrate such prejudice, it is generally necessary to prove that 'not only will the plaintiff be unable to provide the required security from its own resources, so that costs incurred during the period of delay would have been wasted, but also that those standing behind the plaintiff who could be expected to benefit from the litigation are unable to provide the required security'.²⁹ However, some authorities suggest that delay may be relevant even in the absence of proven prejudice.³⁰

The fact of delay and prejudice is only one factor in the discretionary balance and is not necessarily fatal to an application for security.³¹ The 'longer the delay, the proximity of the hearing and the more acts done during the interval, the greater the significance of the delay'.³²

Other factors relevant to the materiality of delay are whether the intention to seek security had been earlier foreshadowed,³³ and whether a reasonable explanation has been proffered for the delay.³⁴ While an application for security for costs after a trial has commenced may succeed, it has been suggested that such instances will be 'rare'.³⁵

2. That regard is to be had to the strength and bona fides of the applicant's case are relevant considerations

'There is no doubt that the bona fides of the claim and its merits, at least to the extent that it must be reasonably arguable, are material factors'.³⁶ However, it is recognised that it is a 'rare' case in which a court is even able to form any view as to the strength of the respective parties' cases on an application for security, in view of the early stage at which applications are made and the interlocutory nature of the application.³⁷ Many authorities caution against the appropriateness and practicality of the conduct of a mini-trial in relation to the application for security for costs.³⁸ Consequently, beyond determining that there should be a 'bona fide and arguable claim', 'it seems doubtful whether...it is usually appropriate for the Court to canvas the merits of the litigation in any detail'.³⁹ 'As a general rule, where a claim is prima facie regular on its face and discloses a cause of action, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide with a reasonable prospect of success'.⁴⁰ Therefore, once the court is satisfied that the claim is bona fide with a reasonable prospect of success, the merits of the underlying claim will generally be regarded as a neutral factor.⁴¹ This is particularly so when it is simply impossible for the court to form any realistic view of the prospects of success.⁴² However, in the rare case where prospects can be meaningfully assessed on the application for security, they may still be relevant in the discretionary balance: an assessment that the prospects of success are poor will weigh in favour of a grant of security,⁴³ and a determination that the prospects of success are high will weigh against security if proceedings would otherwise be stultified.⁴⁴

3. Whether the applicant's impecuniosity was caused by the respondent's conduct the subject of the claim

If it were established that the defendant's conduct were the cause of the plaintiff's impecuniosity, that would be a matter 'most relevant' to the exercise of discretion.⁴⁵ However, this is difficult to establish.

The plaintiff carries the onus of establishing that the defendant was the cause of impecuniosity. To discharge that onus, the plaintiff must establish 'both the adequacy of their financial position before their dealings with the opponents and that the opponents' actions have caused or at least materially contributed to the claimants' inability to meet an order for security for cost'. This will require demonstration that the company would have been in a position to meet any costs order but for the defendant's conduct.⁴⁶ 'The plaintiff must be able to support the allegation with relatively straightforward and unambiguous evidence of a fairly compelling nature, because otherwise the hearing of the issue of security might become a trial within a trial'⁴⁷: i.e., courts reluctant to entertain complex and contentious evidence. It is not sufficient: (a) to 'rely merely on the pleadings, unless there are relevant admissions in the pleadings obviating the need to call evidence. If there are no such admissions, the plaintiff is required to call evidence to discharge its onus';⁴⁸ (b) that the defendant's conduct merely 'contributed' to the impecuniosity. There must be a 'real causal connection' or a 'material contribution';⁴⁹ (c) that it is possibly 'arguable' that the defendant's conduct contributed to the impecuniosity;⁵⁰ (d) that the defendant's conduct merely diminished an opportunity to cure the plaintiff's original impecuniosity.⁵¹ The courts are particularly cautious in finding a 'causal connection', when the claim is based upon a loss of profit, rather than the 'infliction of damage' (which cause out-of-pocket losses).⁵² Where the evidence shows the plaintiff always to have been in a poor financial position, it may be difficult to draw the causative link necessary for a conclusion that its lack of funds has been caused or substantially caused by the defendant.⁵³ Proof that the defendant was the cause of the impecuniosity will be material only when the order of security would stultify proceedings.⁵⁴

4. Whether the respondent's application for security is oppressive

The concept of oppression is used in two senses. First, it relates to circumstances in which the application for security is brought for 'improper purposes'. In the 'rare' cases where that could be established, it would preclude security being ordered.⁵⁵ Second, the expression most often used to describe circumstances where the ordering of security would stultify or stifle the conduct of the hearing.

The fact that the grant of security would stifle or stultify proceedings is a 'powerful factor' to be taken into account,⁵⁶ but does not mandate that security be refused⁵⁷. 'A plaintiff who wishes to submit that an order for security would stifle the litigation bears the onus of showing that this is so'.⁵⁸ It is a heavy onus.

Mere impecuniosity of the corporation does not of itself establish that proceedings would be stultified. The courts take a pragmatic approach, and recognise that funding from third party sources may in a practical sense be available.⁵⁹ Consequently, 'a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless [the corporate plaintiff] establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means'.⁶⁰ Therefore, 'a proceeding cannot be regarded as stultified unless those who stand behind the impecunious plaintiff are unable (not unwilling) to provide the requisite security for costs'.⁶¹ An assessment of the claim of stultification will therefore 'require an examination of the various sources that the plaintiff might have available to it for the provision of security. That, in turn, requires an analysis of who it is that might benefit from the litigation if it is pursued to a successful conclusion'.⁶² If the company does not adduce such evidence, the claim of stultification will fail.⁶³ Those who relevantly stand behind the company for the purpose of this rule include (at least) shareholders, those beneficially entitled under a trust of which the plaintiff is trustee⁶⁴ and significant creditors of a company.⁶⁵ A company in liquidation should also demonstrate the absence of available litigation funding.⁶⁶

The inability to provide security must be positively substantiated. A mere assertion in an affidavit that a person is 'unable to provide security for costs' is not probative, and will be struck out.⁶⁷ Generally, the plaintiff should adduce documentary evidence which substantiates the party's financial position.⁶⁸ 'A court may infer financial ability to meet an order for security where the plaintiff adduces no or insufficient evidence of their financial position or willingness to contribute,⁶⁹ or where such persons do not put forward hardship on financial grounds'.^{70/71}

The failure to prove stultification does not necessarily mandate that security should be ordered.⁷² Further, if it can be shown that those persons who may benefit from the litigation 'are reasonably unwilling, even though possibly able, to provide the security, that may be a factor that would be taken into account' in assessing whether security should be ordered.⁷³

5. Whether there are any persons standing behind the company who are likely to benefit from the litigation and who are willing to provide the necessary security

'An important factor informing the exercise of the discretion is the existence of persons who stand behind an impecunious plaintiff who seek to take the benefit of our system of justice (i.e. share of the proceeds of victory) without the corresponding burden (i.e., a potential adverse costs order)'.⁷⁴ 'Ultimately...the question to be determined by the court is whether it is fair that the person being sued by the company should be in the position of having to incur substantial costs... and being at risk of liability for the company's costs, and yet have no real chance of recovering costs even if the action is unsuccessful, when there are persons who would benefit from the proceedings, who face no risk of liability for costs themselves and are either unwilling or unable to provide security'.⁷⁵

6. An issue related to the last guideline is whether persons standing behind the company have offered any personal undertaking to be liable for the costs

The provision of personal undertakings by those who stand behind the company (irrespective of whether

the persons have sufficient means to meet an adverse costs order) is a material factor in the discretionary balance which may 'weigh heavily' in the discretionary balance.⁷⁶ There is an unresolved question as to whether the provision of such personal undertakings precludes security for costs being ordered. The matter has been left open in the Court of Appeal.⁷⁷ The conflicting caselaw on this point is summarised in *Prynew Pty Ltd and Anor v Nemeth and Ors* [2010] NSWCA 94, at [32]-[37].

7. Security will only ordinarily be ordered against a party who is in substance a plaintiff, and an order ought not to be made against parties who are defending themselves and thus forced to litigate.⁷⁸

There have been a number of principles developed to determine when a plaintiff is properly characterised as being 'in substance the defendant' (and therefore not liable to provide security for costs): (a) when the plaintiff commences proceedings to halt or resist 'self help' measures resorted to by the other party;⁷⁹ (b) when the plaintiff had no practical alternative but to commence proceedings to defend its property (or otherwise preserve certain other valuable rights);⁸⁰ (c) when the other party should have been the one to commence proceedings if it had acted 'in the appropriate way';⁸¹ (d) when the defendant took the first material step in the legal dispute (albeit by a process other than the actual commencement of litigation: e.g., service of a statutory demand);⁸² (e) there is some authority for the proposition that, when claims and cross-claims are on, a party's claim may be characterised as being in substance defensive 'if the circumstances are such that either party could just have easily been the plaintiff'.⁸³ There is some uncertainty as to whether the characterisation of the plaintiff as in substance the 'defender' (rather than 'attacker') precludes security being ordered as a matter of principle,⁸⁴ or is simply a powerful factor sitting in the balance⁸⁵.

Other discretionary factors

There are a number of other factors recognised as weighing in the discretionary balance.

Impecuniosity of the corporate plaintiff

Although there is no predisposition in favour of the granting of security, the inability of the plaintiff to meet the costs of the successful defendant not only triggers the jurisdiction for security for costs, but also constitutes an important (and sometimes decisive) role in the discretionary balance.⁸⁶ Nonetheless, there is certainly no automatic rule to the effect that an impecunious or insolvent company will be ordered to provide security except in special circumstances.⁸⁷

Magnitude of risk of inability to satisfy costs order. It is relevant to assess the magnitude of the risk that the plaintiff would not be able to satisfy an adverse costs order.⁸⁸ This contemplates both an assessment of the plaintiff's prospects of success, and the likelihood that the plaintiff will not be able to meet an adverse costs order.

Co-plaintiffs

There is a general rule that security will generally not be ordered against an impecunious corporate plaintiff, if (a) there is a co-plaintiff against whom no security for costs will not be ordered; and (b) there is a complete overlap (or 'interlocking') between the claims brought by the co-plaintiffs, such that both plaintiffs will be liable for the whole of the defendant's costs (if the plaintiffs fail in the proceedings). The rationale for this rule is that the defendant in that situation has no entitlement to security against the co-plaintiff, and is 'really in no worse position' by reason of being sued by the impecunious corporate plaintiff. Consequently, the defendant should not be entitled to the privilege of security for its costs, merely because of the fact that an impecunious corporate plaintiff happens also to be joined as a plaintiff.⁸⁹

However, security may be ordered against a corporate co-plaintiff where there is no complete overlap or 'interlocking' between the claims of the co-plaintiffs (so that the co-plaintiffs will be jointly liable for the whole of any adverse costs order). Therefore, 'where the various plaintiffs' claims have different elements and aspects, so that they will not all necessarily succeed or fail together, although the existence of individual plaintiffs is a factor that diminishes the defendant's

claim to be entitled to security against the corporate plaintiff, it does not extinguish. And where the degree of overlap between the claim of the individual and corporate plaintiffs is comparatively small, such that separate orders for costs might be made in respect of each of the plaintiffs, it is usually appropriate that an order for security be made'.⁹⁰

There are a number of further qualifications to the rule about co-plaintiffs, by operation of which security may be ordered against an impecunious corporate plaintiff, notwithstanding the presence of co-plaintiff against whom security could not be ordered: *first*, if the natural person has been joined as a co-plaintiff for the purpose of avoiding the necessity of providing security;⁹¹ *secondly*, if the natural co-plaintiff is otherwise involved in some form of abuse of process;⁹² and *thirdly*, many authorities recognise that the existence of co-plaintiffs (against whom security could not be ordered) is not dispositive of an application for security for costs, but it is simply one of the factors to weigh in the discretionary balance.⁹³ In other words, it should be seen as 'a factor diminishing the defendants' claims to security, but not extinguishing it'.⁹⁴

...the extent of the interest of the funder in the litigation will be relevant to determine the proportion of costs for which security should be required. However, if the plaintiff and the funder do not disclose the extent of the interest, then the court may make no discount in relation to the proportion of costs for which security is required.

Company in liquidation

When a company is in liquidation and the cause of action is brought by the liquidator in his personal capacity (rather than by the company), security will generally not be ordered against the liquidator⁹⁵ (e.g., unfair preference claims, insolvent trading claims). However, in such cases the liquidator will be personally liable for an adverse costs order. There is no restriction on the ordering of security in relation to proceedings

brought by a company in liquidation.

Litigation funding

The existence of a litigation funder is a matter which strongly favours an order for security for costs. 'Although litigation funding is not against public policy...the court system is primarily there to enable rights to be vindicated rather than commercial profits to be made; and in my opinion, courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails.'⁹⁶ This principle applies if the party funded is a liquidator.⁹⁷

There are a number of qualifications to this principle. First, security will not be ordered if:⁹⁸ the funder is contractually bound to indemnify the party in relation to an adverse costs order; the party undertakes to the court to enforce that indemnity; and the party undertakes to the court to inform the opposing party if the funding agreement is terminated (so that an application for security can be made). Secondly, the extent of the interest of the funder in the litigation will be relevant to determine the proportion of costs for which security should be required. However, if the plaintiff and the funder do not disclose the extent of the interest, then the court may make no discount in relation to the proportion of costs for which security is required.⁹⁹

Nature of the defendant

'The nature of the defendant may be relevant to the exercise of the discretion to make an order. The courts are reluctant to make an order which would have the effect of shutting out a small company from making a genuine claim against a large well-resourced and amply funded body such as the State, a council or a major corporation'.¹⁰⁰

Public interest

It is relevant to consider whether there is particular public interest in the litigation.¹⁰¹ 'Typical case scenarios where the public interest may operate against an order for security are those likely to involve curial determinations on areas of law that require interpretation or

clarification – thus potentially benefiting more than just the plaintiff on the record – and where the claim is otherwise brought by the plaintiff to pursue, uphold or maintain some interest common to other members of the community.¹⁰² The question of public interest ‘may have greater weight with a claim which can be seen to have some merit on its face, rather than being merely arguable’.¹⁰³ The question of public interest is ‘likely to arise only in circumstances where a prima facie case of stultification has been made out’.¹⁰⁴ In other words, the argument loses force, if security would not stultify proceedings. The ‘nature of the public interest, the circumstances in which it arises in particular litigation and the basis on which an application for security is made would all be relevant in determining the role of a claim that litigation promotes the public interest’.¹⁰⁵ Some authorities caution against public interest unduly overriding the interests of the parties.¹⁰⁶

Cross-claims

Security for costs in respect of cross-claims

The court has jurisdiction to grant security of costs in respect of a cross-claim: a ‘plaintiff’ is construed as including cross-claimants.¹⁰⁷ A court will not order security against a cross-claimant where the cross-claim arises out of the same matters as the plaintiff’s claim, and is properly characterised as being purely ‘defensive’,¹⁰⁸ in the sense that it is ‘either directly resisting proceedings already brought or seeking to halt self help measures’.¹⁰⁹ By way of apparent extension of this qualification, it has recently been held that no security for costs will be ordered in relation to a cross-claim, if it is ‘reflexive’ of the claim brought by the plaintiff, meaning that positive relief (in the nature of damages or the like) is sought in relation to subject matters and issues arising from the plaintiff’s claim.¹¹⁰ Generally, if a cross-claim ‘extends beyond being purely by way of defence, then the court will have regard to the overall nature of the proceeding and the cross-claim to see whether it can be said that in truth the cross-claimant has become, in substance, a plaintiff’. A cross-claimant may be ordered to give security if (and to the extent) it is in substance the ‘attacker’ with respect to the cross-claim.¹¹¹ However, the mere fact that the cross-claim may introduce some new issues does not of itself justify

the ordering of security against the cross-claimant, if the cross-claim arises from substantially the same facts as the plaintiff’s claim, and is essentially defensive.¹¹² Even if the cross-claim is partly offensive, the court may decline to order security, if there is no evidentiary basis upon which the court can determine the costs attributable to the offensive dimension of the cross-claim.¹¹³

Relevance of cross-claim to a defendant’s entitlement to seek security

The mere fact that the defendant presses a cross-claim does not deprive the court of the power to order security in favour of the defendant in respect of the plaintiff’s claim. It is merely a matter which may feed into the court’s discretion as to whether security should be granted, and (if so) the quantum that is appropriate.¹¹⁴ If the defendant’s cross-claim arises from substantially the same facts as the plaintiff’s claim and is properly characterised as ‘defensive’, the mere fact of the cross-claim should not materially weigh against security being ordered against the plaintiff.¹¹⁵ A consideration which provides powerful support for the ordering of security for costs against a plaintiff (despite the defendant bringing a cross-claim) is the defendant’s undertaking not to press its cross-claim if the plaintiff’s claim is stayed or dropped.¹¹⁶ On the other hand, if a cross-claim is properly characterised as offensive in character, and the offensive dimensions of the cross-claim overlap the issues traversed by the defence, security for costs will generally not be ordered against the plaintiff.¹¹⁷ However, the facts that a cross-claim is in part offensive and arises from substantially the same facts as the plaintiff’s claim, do not preclude security being ordered in the proper exercise of the court’s discretion. These are merely factors which weigh in the court’s discretionary balance.¹¹⁸

In circumstances where security is ordered against a plaintiff, notwithstanding that the defendant is pressing a cross-claim, the court may make appropriate deductions in the amount of security awarded to reflect the portion of costs which are referable (exclusively or in part) to the cross-claim.¹¹⁹

Security for costs on appeal in NSW

UCPR r50.8 provides that security may only be ordered under the direct authority of the rules 'in special circumstances'. However, the application of section 1335(1) to the granting of security for costs on appeal is not constrained by the requirement to establish 'special circumstances' under UCPR r 50.8. In other words, security for the costs for an appeal can still be obtained against an impecunious corporate appellant (without the need to establish 'special circumstances' under UCPR r 50.8).¹²⁰ Security against an individual can also be obtained under UCPR 50.8.

The concept of 'special circumstances' in relation to orders for the provision of security for costs has been summarised as follows:¹²¹ (1) no order for security should be made in the absence of 'special circumstances'; (2) consideration of what may constitute special circumstances should not be fettered by some general rule of practice; (3) impecuniosity, without more, will usually be insufficient;¹²² (4) an order may be appropriate if the appeal is shown to be hopeless, unreasonable or of an harassing nature; (5) where a bona fide and reasonably arguable appeal would be stifled by an order for security, such an order should usually not be made, and (6) the subject matter of the appeal, including an issue as to the liberty of the individual, or a public interest may provide a reason for not imposing a security order which would stifle the continuation of the appeal.

Quantum of security

The court typically does not 'set out to give a complete and certain indemnity to a respondent'.¹²³ It has been held that 'The effect of this principle is that the Court has a discretion to fix such amount as it thinks fit in all the circumstances of the case. The amount will not exceed the estimate of party and party costs, but it may be less'.¹²⁴ Contrary to what may once have been the case, there is no fixed practice requiring the amount of security for costs to be at approximately two-thirds of the estimated inter parties costs on a party and party basis.¹²⁵ The Court of Appeal has recently held that:¹²⁶ 'it is common practice in accordance with authority to make an appropriate reduction for uncertainties such

Contrary to what may once have been the case, there is no fixed practice requiring the amount of security for costs to be at approximately two-thirds of the estimated inter parties costs on a party and party basis... security is frequently ordered by reference to the court's best estimate of the defendant's likely recoverable costs.

as a trial concluding earlier than anticipated or for changes in the approach of one or other of the parties to the litigation (such as settlement)'; and 'it is usual to fix an amount by way of security which is below the applicant's estimation, so as not to impose an undue burden on the corporate appellant or plaintiff and so that the applicant will bear the risk of over-estimation'. However, security is frequently ordered by reference to the court's best estimate of the defendant's likely recoverable costs.

There are inevitably significant difficulties in estimating the appropriate quantum of security, because applications for security are generally made early in the proceedings when precise estimate of future costs is impossible. The only feasible approach is 'educated guesswork'. The exercise of estimation is a 'speculative one'. 'It is impossible to calculate the amount for security with any exactitude'. 'The Court usually takes a 'broad brush' approach to the determination of the amount'.¹²⁷ 'The process of estimation embodies to a considerable extent, reliance upon the 'feel' of the case after considering relevant factors'.¹²⁸ The Court is not bound to accept a party's estimate, notwithstanding it is the only evidence.¹²⁹ In estimating costs, the courts will typically not 'descend into the minutiae of the claims'. It has been observed that a judge on a security for costs application does 'not sit as a taxing officer to determine the amounts'.¹³⁰ However, the courts will nonetheless frequently closely critique aspects of the estimate, and discount the quantum where the courts conclude the estimates were unreasonably high.¹³¹ Any adjustments made by the court in relation to the parties' estimates will generally be done in a 'broadbrush way'.¹³² In circumstances where there are opposing estimates of

future costs from the parties, and no reasonable basis for preferring one over another, the court sometimes simply splits the difference.¹³³ However, in one case, when the court was faced with competing estimates, and no cross-examination, and no basis upon which to prefer one estimate over the other, the judge concluded that he was left with two courses: 'One is to leave it to the parties to seek to agree on the amounts that should be given by way of security. The other, if the parties cannot agree, is to send that matter to a costs consultant for inquiry and report'.¹³⁴ If the claim is quantified at the time of the application, a court may attempt to quantify security on the basis of estimating a 'reasonable expenditure for costs by reference to the amount at stake, as there should be a proportion between the monies spent preparing a case, and what is in issue'.¹³⁵

It is important that the solicitor who prepares the affidavit possesses (and evidences) general experience and expertise in the conduct of litigation and costs assessment, but also an 'intimate familiarity' with the proceedings in question.

In assessing quantum, it has been held that 'there is to be a balance between ensuring that an impecunious corporation or other applicant does not use the impecuniosity in order to put unfair pressure on another party on the one hand and, on the other hand, between shutting out an impecunious applicant on its entitlement to pursue a legitimate case'.¹³⁶ It may be relevant to take into account the 'quantum of the risk' that the corporate plaintiff will be unable to satisfy a costs order when determining the amount of security.¹³⁷

Past costs

There is uncertainty about the scope for security being granted in relation to costs already incurred. 'The court's discretion is not restricted to making an order for security in respect of only future costs that may

be incurred. It can extend to an order in respect of costs already incurred...A court is nonetheless reticent to order security for costs incurred to date, for in the ordinary case the defendant has chosen to incur those costs without seeking the protection of an order for security. The case may be otherwise where, aside from the defendant's lack of diligence, the plaintiff's impecuniosity has only just come to the defendant's knowledge'.¹³⁸ In some cases the court has ordered security in a sum that includes an allowance for past costs.¹³⁹ Some authorities support the general rule that security not be granted for past costs,¹⁴⁰ others repudiate it,¹⁴¹ and others are ambivalent with respect to the application of that general rule.¹⁴² On an appeal, the court will not order security for costs which include the costs already incurred in the trial.¹⁴³

Period covered by security

In many cases, security is ordered for the period up to the end of the hearing.¹⁴⁴ Some cases hold that where accurate estimation of duration and expense of the hearing are too difficult at the time of application, the court may order security only for preliminary phases of the litigation, on the basis that further applications be made when the parties and the court are in a better position to estimate the length of the hearing.¹⁴⁵

Tranches

It is very common for security to be ordered to be paid in 'tranches', staged at times and for amounts to reflect when the defendant will incur costs.¹⁴⁶

Evidence in support of quantum

The applicant for security bears the burden of putting before the court material that will enable the court to make an estimate of the costs of the litigation.¹⁴⁷ There should be evidence as to what would be recoverable on assessment. This is frequently done by solicitors stating the percentage discount which is typically made on solicitor-client costs in the course of an assessment.

It is important that the solicitor who prepares the affidavit possesses (and evidences) general experience and expertise in the conduct of litigation and costs assessment, but also an 'intimate familiarity' with the proceedings in question.¹⁴⁸ However, even if that

expertise and experience is not evidenced, the court may still seek to quantify the appropriate sum for security, but will probably significantly discount the estimate.¹⁴⁹ The solicitor should set out in his or her affidavit: general experience in litigation; experience with cost assessment process; a detailed list of the tasks required to be undertaken in relation to the conduct of the matter;¹⁵⁰ a specification and substantiation of the time estimated to be involved in the tasks; and the basis for charging. If quantum is disputed, the court is assisted by an estimate from the party disputing costs.¹⁵¹ In larger cases, evidence may be adduced from an independent expert costs consultant in relation to estimates of recoverable costs. However, most applications are run without such evidence.¹⁵² A contested and controversial aspect of an estimate may not be accepted without expert opinion from a costs assessor.¹⁵³ The quantum of security should include a component for GST.¹⁵⁴

Although deponents of affidavits in support of competing estimates are sometimes cross-examined, it is not always so. It has been held that no inference should be drawn from the election not to cross-examine, because it is not 'generally appropriate to embark in cross-examination in these matters'.¹⁵⁵

Method of security

The basic principle guiding the court in determining the form of security is that '[s]o long as the opposite party can be adequately protected, it is right and proper that the security should be given in a way which is the least disadvantageous to the party giving that security'.¹⁵⁶

Hence, security for costs can take one of many forms in addition to payment into court, including payment into court¹⁵⁷, enforceable personal undertaking,¹⁵⁸ bank guarantee,¹⁵⁹ bond or charge,¹⁶⁰ payment into a controlled money account,¹⁶¹ lodgement of title to real or intangible property with solicitors,¹⁶² 'any method agreed in writing between the parties, or in the absence of such agreement, [method]',¹⁶³ security 'in such form as the Registrar determines'.¹⁶⁴ 'Provided it is adequate to achieve its object, its form is immaterial'.¹⁶⁵

Costs in a security for costs motion

Costs on the security for costs motion are generally awarded to the party who succeeds on the motion.¹⁶⁶ However, if the defendant is successful (and an order for security is made) the costs of the application are often reserved or declared to be costs in the cause.¹⁶⁷ If an order for security is not opposed, and the only contested issue is quantum, if the amount granted is substantially less than the amount claimed, an appropriate costs order might be 'costs in the proceedings'.¹⁶⁸ However, the matter remains in the discretion of the court. The circumstances in a particular case may justify the trial judge making no order as to the costs of the application for security.¹⁶⁹

Effect of failure to provide security

If security is ordered, it is usual for there to be an order that proceedings be stayed until the order is complied with.¹⁷⁰ The court rules provide that proceedings may be dismissed if there is non-compliance with an order for security.¹⁷¹ However, the mere failure to comply with an order for the provision of security does not automatically cause or justify a dismissal. In considering an application for dismissal, the ultimate decision reflects the 'interests of justice' on the facts. The following (non-exhaustive) criteria are relevant to the exercise of discretion:¹⁷² (1) the period that has elapsed since security was ordered; (2) the fact that the plaintiff has been on notice of the application for dismissal; (3) the seeming inability of the plaintiff to further fund the proceedings; (4) the prejudice to the defendants; (5) the position of the court. The court is likely to dismiss proceedings if the plaintiff is in default in the provision of security, if there is no explanation provided, and no evidence of the means or intention to remedy the default.¹⁷³

Applications for further security

Security may be ordered at an amount below the defendant's estimate of costs, on the explicit basis that the defendant is entitled to make further applications if the amount ordered proves inadequate.¹⁷⁴ However, general restrictions on the right to apply for variations of interlocutory relief apply specifically to application to vary security: i.e., an 'application to vary an order

for security for costs must be founded on a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the court on the hearing of the original application holding that'.¹⁷⁵ If a party makes an application for further security which exceeds the original order, it will likely fail if there is no explanation for the mistaken original estimate.¹⁷⁶ Courts are reluctant to entertain applications for variations of orders for security made on the eve of hearing.¹⁷⁷ The fact that the original order for security was by consent may weigh against (but does not preclude) applications by either party to vary the order for security.¹⁷⁸

Endnotes

1. UCPR, Rule 42.1, Federal Court Act, sect 56(1), Federal Court Rules, Order 28(3).
2. *Soul Pattinson Telecommunications Pty Ltd v Subex Americas Inc* [2009] FCA 651, [6].
3. *15 Management Pty Ltd v Newstar Sports Management Pty Ltd* [2009] NSWSC 1208, [29]; see also *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744, [20]; *Polstead Pty Ltd (In Liq) v Sandip Shah* [2009] NSWSC 560, [4].
4. *Pearson v Naydler* [1977] 1 WLR 899 at 902; *Green (as Liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105, at [29].
5. *Harpur v Ariadne Australia Ltd* [1984] 2 Qd R 523, 532; see also *Jazabas Pty Ltd and Ors v Haddad and Ors* [2007] NSWCA 291, [12].
6. *Warren Mitchell Pty Ltd v Australian Maritime Officers Union* (1993) 12 ACSR 1, 5.
7. *Beach Petroleum N.L. v Johnson* (1992) 7 ACSR 203, 204; see also *Idoport*, fn 3, [60]; *15 Management*, fn 3, [31]; *Warren*, fn 6, 5; *Reinsurance Australia Corporation Limited v HIH Casualty and General Insurance (in liquidation)* [2003] FCA 803, [15], [21].
8. e.g., *Soul Pattinson*, fn 2, [8]; *Reinsurance Australia Corporation*, fn 7, [17], [19], [20].
9. *Soul Pattinson*, fn 2, [8]; *Reinsurance Australia Corporation*, fn 7, [15].
10. *Beach Petroleum*, fn 7.
11. *Idoport*, [58]; noted with approval in *Strategic Financial and Project Services Pty Ltd v Bank of China Ltd* [2009] FCA 604, [16]; *Reinsurance Australia Corporation*, fn 7, [17].
12. *Beach Petroleum*, fn 7, at 205.
13. *Reinsurance Australia Corporation*, fn 7, [52].
14. *Strategic Financial*, fn 11, [34]-[35].
15. *15 Management*, fn 3, [36]-[38]; *Jazabas*, fn 5, [47]; see also *Strategic Financial*, fn 11, [13]; *FFE Minerals Australia Pty Ltd v Mining Australia Pty Ltd* (2000) 156 FLR 116 at 123(cf at 126-8); *Combined Property Industries (Qld) Pty Ltd v Pullenvale Estates Pty Ltd* (2001) 19 ACLC 765, 768.
16. *Idoport*, fn 3, [60]-[61]; *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564, [35]-[36]; *Baycorp Capital Ltd v Dex Consulting Pty Ltd* [2010] NSWSC 156; *Strategic Financial*, fn 11, [17]; *Reinsurance Australia Corporation*, fn 7, [25]; *Prynew Pty Ltd and Anor v Nemeth and Ors* [2010] NSWCA 94, [16].
17. *KP Cable Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, 13 ACLC 437; *Idoport*, [48]; *Merrag Pty Ltd v Khoury* [2008] NSWSC 1286, [7].
18. *Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1, 3.
19. *Dal Pont*, fn 139, 947.
20. *Buckley v Bennell Design and Constructions Pty Ltd* (1974) 1 ACLR 301, 304; *Rhema Ventures Pty Ltd v Stenders* [1993] 2 Qd R 326, 333.
21. *Dictating Machine Centre v Combe* (1981) 26 SASR 316, 320.
22. *Dal Pont*, fn 139, 953; see also *Tradestock Pty Ltd v TNT (Management) Pty Ltd (No 1)* (1977) 30 FLR 343, 348.
23. *International Greetings (UK) Ltd v Stansfield* [2010] NSWSC 461, [24].
24. *Jazabas*, fn 5, [74], [33]; *Pioneer Park*, fn 56, [47].
25. *Litmus Australia Pty Ltd (In Liq) v Paul Brian Canty and Ors* [2007] NSWSC 670, [26].
26. *Orr v Ford* (1989) 167 CLR 316, at 341; see *Idoport*, fn 3, [74].
27. *Idoport*, fn 3, [70]; *15 Management*, fn 3, [45]; fn 23, [24]; *Rusiti v Alkhoshaibi* [2007] NSWSC 1374, [52]; *Laderma International v Taurean Systems* [2009] NSWSC 905; *Ravi Nominees Pty Ltd v Phillips Fox* (1992) 10 ACLC 1313, 1318.
28. *Litmus*, fn 25, [26]; *Idoport*, fn 3, [70]; *15 Management*, fn 3, [45]; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 563, [28]; *Karl Suleman Enterprises Pty Ltd (in liq) v Pham and Ors* [2010] NSWSC 886, [57].
29. *Litmus*, fn 25, [26].
30. *Corbett v Nguyen and Ors* [2008] NSWSC 1265, [46].
31. *Idoport*, fn 3, [70]; *15 Management*, fn 3, [45]; *Dee-Tech Pty Ltd v Neddham Holdings Pty Ltd* [2009] NSWSC 1095, [12]; *Rusiti*, fn 27, [52].
32. *Liberty Grove (Concord) Pty Ltd v Mirvac Projects Pty Ltd* [2008] NSWSC 48, [7]; *Karl Suleman Enterprises*, fn 28, [57].
33. *Crypta Fuels Pty Ltd v Svelte Corp Pty Ltd* (1995) 19 ACSR 68, 71; *Idoport*, fn 3, [71].
34. *Dee-Tech*, fn 31, [12]; *PG Gabel Pty Ltd (in liq) v Katherine Enterprises Pty Ltd* (1977) 29 FLR 108, 110.
35. *Dee-Tech*, fn 31, [12].
36. *Jazabas*, fn 5, [18]; *Bryan E. Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 514.
37. *Litmus*, fn 25, [26].
38. *MA Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 7 ACLR 97, 100; *J & M O'Brien Enterprises Pty Ltd v The Shell Company of Australia Ltd* (1983) 7 ACLR 790, 793; *Equity Access Ltd v Westpac Banking Corporation* (1989) ATPR 40-972, 50-636; *Ariss & Anor v Express Interiors Pty Ltd* [1996] 2 VR 507, 514; *Print Management Australia v Pasupati* [2009] NSWSC 964, [15]; *Jazabas*, fn 5, [18].
39. *Jazabas*, fn 5, [18].
40. *KP Cable*, fn 17, at 439; see also *Bryan E Fencott*, fn 37, 514; *Jazabas*, fn 5, [18].
41. *Fiduciary*, fn 16, [37]; *Jazabas*, fn 5, [30], [83]-[84].
42. e.g., *Litmus*, fn 25, at [28], *15 Management*, fn 3, at [42].
43. *Sent v Jet Corporation of Australia Pty Ltd* (1984) 2 FCR 201; *Bryan E Fencott*, fn 37, 510.5; *Public Transport Ticketing Corporation v Integrated Transit Solutions Ltd and Anor* [2009] NSWSC 54, [22]; *Epping Plaza Fresh Fruit & Vegetables Pty Ltd v Bevendale Pty Ltd*: [1999] 2 VR 191, 199; *Print Management Australia*, fn 39, [15], [18], [30].
44. *Merrag*, fn 17, [8].
45. *PM Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd* (Unreported, SCNSW, Kirby J, 22/8/2000, BC200005039), [42]; *Lynnebry Pty Ltd v Farquhar Enterprises Pty Ltd* (1977) 3 ACLR 133, 136.
46. *Jazabas*, fn 5, [94]; *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Management Ltd* [2003] NSWSC 609, [96]; *Fiduciary*, fn 16, [87]; *Jazabas*, fn 5, [94]; *Rusiti*, fn 27, [57].
47. G E Dal Pont, 'Law of Costs'; quoted with approval in *Jazabas*, fn 5, [95].
48. *Pymont Raw Materials Pty Ltd (in liq) (Receivers Appointed) v Peter*

- Meier and Anor [2009] NSWSC 227, [19]-[20].
49. See *Dalma Formwork Pty Limited (Administrator Appointed) v Concrete Constructions Group Limited* [1998] NSWSC 472; *Jazabas*, fn 5, [94].
 50. *Modern Woodcraft Pty Ltd v Nott* (Unreported, SCNSW, Young J, 7/3/97, BC9700735), at 10.
 51. *Tradestock*, fn 22, 59; quoted with approval in *P M Sulcs*, fn 46, [43].
 52. *Jazabas*, fn 5, [33]; See further *Baycorp Capital*, fn 16, [16].
 53. *Sabaza Pty Ltd v AMP Society* (1981) 6 ACLR 194, 198; *Impex Pty Ltd v Crouner Products Ltd* (1994) 13 ACSR 440, 444, 445.
 54. *Litmus*, fn 25, [28], citing *BPN Pty Ltd v HPM Pty Ltd* (1996) 131 FLR 339 at 346; *Fiduciary*, fn 16, [101].
 55. *Pioneer Park Pty Ltd (In Liq) and Ors v Australia and New Zealand Banking Group Limited* [2007] NSWCA 344, [55] *Yandil Holdings Pty Ltd v Insurance Co of North America* (1985) 3 ACLC 542, 545.
 56. *Yandil Holdings*, fn 56; see *Idoport*, fn 3, [50].
 57. *Yandil*, fn 56; see *Idoport*, fn 3, [50].
 58. *Rusiti*, fn 27, [56].
 59. *Hastings v Hastings* [2009] NSWCA 294, [14]; *Pioneer Park*, fn 56, [51].
 60. *Bell Wholesale*, fn 18, 591; Quoted with approval in *Hession v Century 21 South Pacific Ltd* (Unreported, NSWCA, 11 September 1992); *Yandil Holdings*, fn 56, 545; *Pioneer Park*, fn 56, [43], [51]; *Jazabas*, fn 5, [32], [77]; *Dae Boong International Co Pty Ltd v Gray* [2009] NSWCA 11, [23].
 61. *Green*, fn 4, [12].
 62. *Sharjade v Darwinia Estate and Anor* [2006] NSWSC 708, [25].
 63. *Sharjade*, fn 63, [26]-[28]; *Jazabas*, fn 5, [91].
 64. *Fodare Pty Ltd v Shearn* [2009] NSWSC 1140, [6].
 65. *Fodare*, fn 65, [14].
 66. *Kavcor Pty Ltd v Kavanagh* [2005] NSWSC 1163, [10]-[11]; *Karl Suleman*, fn 28, [46].
 67. *Fodare*, fn 65, [8].
 68. *Marks-Isaacs v Fowler & Ors* [2005] NSWCA 37, [24]-[25].
 69. *Newtrend Pty Ltd v Oceanic Life Ltd* [1990] WAR 1, 3-4; *MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* (FCA, Sackville J, 28 June 2002, unreported), at [22].
 70. *Attorney-General v Transport Control Systems (NZ) Ltd* [1982] 2 NZLR 19, at 20.
 71. *Dal Pont*, fn 139, 963.
 72. *Dae Boong*, fn 61, [26].
 73. *Dae Boong*, fn 61, [26].
 74. *Green*, fn 4, [12]; see further *BPM Pty Ltd v HPM Pty Ltd* (1996) 14 ACLC 857, 861.
 75. *Dae Boong*, fn 61, [27].
 76. e.g., *KP Cable*, fn 17; 104 *Alice Street Pty Ltd v Jabamark Pty Ltd* [2009] NSWSC 162, [48]; *Instyle Contract Textiles Pty Ltd v Good Environmental Choice Services Pty Ltd* [2009] FCA 1422, [53]-[67]; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] 2 Qd R 187, 192; *Gentry Bros Pty Ltd v Wilson Brown & Associates Pty Ltd* (1992) 8 ACSR 405, 415.
 77. *Jazabas*, fn 5, [3], [78]-[80]; *Prynew*, fn 16; *Pioneer Park*, fn 56, [52].
 78. See also *Aquatown Pty Ltd v Holder Stroud Pty Ltd* (1995) 18 ACSR 622, 623 & 626; *Interwest*, fn 80, 626; *Townsend Controls Pty Ltd v Gilead and Anor* (1989) 14 IPR 443, 447; *Australia Corp Ltd v HIH Casualty and General Insurance Ltd* (in liq) [2003] FCA 803, [82].
 79. *Heller Factors Pty Ltd v John Arnold's Surf Shop Pty Ltd (in liq)* (1979) ACLC 32,446; *Riviera Development Co Pty Ltd v Tantalite Pty Ltd* [1981] 27 SASR 161, 164; *Interwest Ltd v Tricontinental Corporation Ltd* (1991) 5 ACSR 621, 626; *KP Cable*, fn 17.
 80. *Willey v Synan* (1935) 54 CLR 175, 180, 184-5; *Re Travelodge Australia Ltd* (1978) 21 ACTR 17; *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1988) 19 FCR 324, at 328-9; *Classic Ceramic Importers Pty Ltd v Ceramic Antiga SA* (1994) 13 ACSR 263, 267; *Aquatown*, fn 79, 624-5; *Australia Corp*, fn 79, [80]-[81]; *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd* [1999] FCA 764, [6]; but see *Deep Sea Oils Ltd v K M Corporation Pty Ltd* [2000] FCA 944.
 81. *Classic Ceramic Importers*, fn 81.
 82. *Classic Ceramic Importers*, fn 81, 267; See also *Amalgamated Mining Services*, fn 81.
 83. *Public Transport Ticketing Corporation*, fn 44, [45] (This appears to be loose test, difficult to apply).
 84. *Aquatown*, fn 79, 625; *Morlea*, fn 81, [2].
 85. *Aspendale Pastoral Co Pty Ltd v WJ Drever Pty Ltd* (1983) 7 ACLR 937, 941; *HIH Casualty and General Insurance Ltd (in liq)* [2003] FCA 803, [82].
 86. *Rosenfield Nominees Pty Ltd v Bain and Co* (1988) 14 ACLR 467, 470; *Idoport*, fn 3, [56]; *Ariss*, fn 39, at 513-14; *Bryan E Fencott*, fn 24, 510.5; *Public Transport Ticketing Corporation*, fn 44, [22]; . See also *Jodast Pty Ltd v A&J Blattner Pty Ltd* (1991) 104 ALR 248, at 255; *Interwest*, fn 80, 624.
 87. *Webster v Lampard* (1993) 112 ALR 174; *Idoport*, fn 3, [47]; see also *Tradestock*, fn 22.
 88. *Polstead*, fn 3, [15]; *Bryan E Fencott*, fn 37, 510.5; and *Public Transport Ticketing Corporation*, fn 44, [22].
 89. *Harpur*, fn 5, 841; *Maples v Hughes* [2002] NSWSC 617, [18]; *Pioneer Park*, fn 56, [53]; See *Drake v Hunter Douglas Ltd* (1983) 8 ACLR 39; *James and Ors v ANZ Banking Group Ltd* (1985) 9 FCR 442, 447.
 90. *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 1317, [28]-[29]; see also *Ingot Capital Investments*, fn 47, [84]; *K and J Acquisitions Pty Ltd and Anor v Manauzzi and Anor* [2009] NSWSC 279, [48].
 91. E.g., *Australian Building Construction Employees' and Builders' Labourer's Federation v Commonwealth Trading Bank* [1976] 2 NSWLR 371, 373.
 92. *Rajski v Computer Manufacture and Design Pty Ltd & Ors* [1982] 2 NSWLR 443.
 93. *Pearson v Naydler* [1977] 3 All ER 531; *Interwest*, fn 80, 625; *Ravi Nominees*, fn 27, 1317.
 94. *Interwest*, fn 80, 625.
 95. *Green*, fn 4, [45], [65] [82].
 96. *Green*, fn 4, [51]-[53]; [85]-[86]; *Basten JA* (in dissent) at [66]-[80].
 97. *Green*, [49]-[53], [84].
 98. *The Australian Derivatives Exchange Ltd v Doubell* [2008] NSWSC 1174.
 99. *Green*, fn 4, [53], [86].
 100. *Jazabas*, fn 5, [76]; *Pioneer Park*, fn 56, [56].
 101. *Byron Shire Business for the Future Inc v Byron Shire Council and Holiday Villages (Byron Bay) Pty Ltd* (1994) 83 LGERA 59; *KP Cable*, fn 17; *Pioneer Park*, fn 56, [57].
 102. *Dal Pont*, fn 139, 1010.
 103. *Pioneer Park*, fn 56, [57].
 104. *Pioneer Park*, fn 56, [57]; see also *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1995) ATPR 41-444, at 41,006.
 105. *Pioneer Park*, fn 56, [57].
 106. See *Pioneer Park*, fn 56, [57].
 107. *Bevvizz Group Pty Ltd v Transport Solutions Pty Ltd* [2008] NSWSC 1399, [11]-[18].
 108. *Interwest*, fn 80, 626; *Bevvizz*, fn 108, [18], [20]; *Neck v Taylor* [1893] 1 QB 560, 562, 563; *Buckley*, fn 20, 307.
 109. *Interwest*, fn 80, 627.
 110. *Walton Construction Pty Ltd v Illawarra Hotel Co Pty Ltd* [2008] NSWSC 1248, [52]-[54].
 111. See *Bevvizz*, fn 108, [18]-[20]; *New Fenix Compagnie Anonyme d'Assurances de Madrid v General Accident Fire & Life Assurance Corporation Ltd* [1911] 2 KB 619, 625-6; *Interwest*, fn 80, 626; *Saint-*

- Gobain RF Pty Ltd v Maax Spa Corporation Pty Ltd* [2004] VSC 335, [43]; *KP Cable*, fn 17; *Laderma*, fn 27, [21].
112. See *Bevizz*, fn 108, [18]-[20].
 113. *Walton Construction*, fn 111, [55]-[56].
 114. *Putney Group Pty Ltd v The Royal Rehabilitation Centre Sydney* [2009] NSWSC 424, [64]-[65].
 115. *Western Export Services Inc v Jireh International Pty Limited* [2008] NSWSC 601, [89]; *Demag-Lauchhammer Maschinenbau Und Stahlbau GmbH v John Holland (Constructions) Pty Ltd* [1966] 2 NSWLR 3, 7; see also authorities at fn109.
 116. *Concrete Constructions v Dalma Formwork Pty Ltd* [1999] NSWCA 16, [16].
 117. *Sydmar Pty Ltd v Statewise Developments Pty Ltd - (1987) 11 ACLR 616, 627, 629; Concrete Constructions*, fn 117, [15], [24]; *Putney Group*, fn 115, [75].
 118. *Putney Group*, fn 115, [75].
 119. *KDL Building v Mount* [2006] NSWSC 474, [31], [34]; *Bevizz*, fn 108, [20], [31]-[32]; *Putney Group*, fn 115, [62]-[63], [77], [89]; *Interwest*, fn 80, 627.
 120. *Pioneer Park*, fn 56, [2], [22].
 121. *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2007] NSWCA 247, [18]; quoted with approval in *Hastings v Hastings* [2009] NSWCA 294, at [12]; see also *Transglobal Capital Pty Ltd v Yolarno Pty Ltd* (2004) 60 NSWLR 143, and *Porter v Gordian Runoff Ltd* [2004] NSWCA 171.
 122. See further: *Transglobal Capital*, fn 122; *Green*, fn 4, [45], [65], [82].
 123. *Brundza v Robbie & Co* (1952) 88 CLR 171, 175; often quoted with approval, e.g. *Lynx Engineering Consultants Pty Ltd v The ANI Corporation Ltd t/as ANI Bradken Rail Transportation Group* (No 3) [2010] FCA 32, [7].
 124. *Reinsurance Australia Corporation*, fn 7, [94].
 125. *Lynx*, fn 124, at [24].
 126. *Pioneer Park*, fn 56, [8], and [66]; applied *International Greetings*, fn 23, [24]; see also *Sagacious Procurement Pty Limited* (ACN 003 753 526) v *Symbion Health Limited* (ACN 004 073 410) [2007] NSWCA 205, [14].
 127. *Fodare*, fn 65, [16]; *Litmus*, fn 25, [44]; *Wainter Pty Ltd v Freehills (A Firm)* (No 2) [2009] FCA 770, *Barker J* at [9].
 128. *Reinsurance Australia Corporation*, fn 7, [94].
 129. *Baycorp Capital*, fn 16, [24]; *M A Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 7 ACLR 97 at 100.
 130. *Reinsurance Australia Corporation*, fn 7, [71].
 131. *Sagacious*, fn 127, [14]; *Litmus*, fn 25, at [39]ff; *Wainter*, fn 128, [22]ff; *April Fine Paper v Moore Business Systems* [2009] NSWSC 867.
 132. *Litmus*, fn 25, [47]; *Reinsurance Australia Corporation*, fn 7, [96].
 133. *Fodare*, fn 65, [22].
 134. *Sharjade*, fn 63, [52].
 135. *Litmus*, fn 25, [45].
 136. *Capital Webworks Pty Ltd v Adultshop.com.Ltd* [2008] FCA 40, at [14].
 137. *Reinsurance Australia Corporation*, fn 7, [71].
 138. *Dal Pont*, *Law of Costs Australia*, Butterworths, 2003, para 28.35; see *Sagacious*, fn 127, [52].
 139. *Massey v Allen* (1879) 12 Ch D 807; *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* (1985) 1 NSWLR 114 at 122; *Bryan E Fencott*, fn 37, 515.
 140. *Antonias Pty Ltd v Matthew Lepouris Pty Ltd* [2004] NSWSC 654, at [7].
 141. *Litmus*, fn 25, [44]; *ICETV Pty Ltd v Ross* [2007] NSWSC 1232 at [17].
 142. *Djz Constructions Pty Ltd v Paul Pritchard t/as Pritchard Law Group* [2009] NSWSC 359, at [10].
 143. *Sagacious*, fn 127.
 144. *Sharjade*, fn 63, [51]-[51].
 145. *Litmus*, fn 25, [45]; See also *Aspendale Pastoral*, fn 86, 942;
 - Drumduro Pty Ltd v Braham* (1982) 42 ALR 563; *Artex Industries Pty Ltd v Autofab (Australia) Pty Ltd* [2005] FCA 589, [6].
 146. *Ingot Capital Investments*, fn 47, [101]; *Transocean Capital*, fn 124, [42]; *Baycorp Capital*, fn 16, [27]; *Sharjade*, fn 63, [54]; *Reinsurance Australia Corporation*, fn 7, [114]; *April Fine Paper*, fn 132.
 147. *Sagacious Procurement Pty Limited* (ACN 003 753 526) v *Symbion Health Limited* (ACN 004 073 410) [2007] NSWCA 205, per Mason P at [14].
 148. *Nicholls v Michael Wilson & Partners Ltd* [2010] NSWCA 100, at [11].
 149. *Capital at Call Ltd v Toumpas* [2009] QCA 313, at 6.
 150. *Strategic Financial and Project Services*, fn 11, [25] (example list of tasks).
 151. *Baycorp Capital*, fn 16, [23].
 152. *Shepherds Producers Co-Operative Ltd (in liq) v Lamont* [2009]. NSWSC 798, at [10] (costs consultant); *April Fine Paper*, fn 132; *Laderma*, fn 27, [25].
 153. *Litmus Australia*, fn 25, [41].
 154. *Litmus Australia*, fn 25, [55].
 155. *Shepherds Producers*, fn 153, [6].
 156. *Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] 3 All ER 198 at 200.
 157. *National Biofuels Group Pty Ltd v Elbow River Marketing* [2009] FCA 613.
 158. *Ingot & Anor v Macquarie & Ors* [no 5] [2006] NSWSC 255, at [18]; *Billiva Pty Ltd v Eastbrook Estate Pty Ltd, Eastbrook Pastoral Pty Ltd and Monezt Developments Pty Ltd* [2009] NSWSC 209, at [42].
 159. *Gurtler v Finance Now Pty Ltd* [2009] FCA 631; *Djz Constructions*, fn 143.
 160. See, for example, *Aoun v Bahri* [2002] 3 All ER 182, at 193.
 161. *International Greetings*, fn 23, [31].
 162. See, for example, *Green v Australian Industrial Investment Ltd* (1989) 25 FCR 532, 545.
 163. *Hunter Business Finance Pty Ltd v Australian Commercial and Equipment Finance Pty Ltd* [2010] NSWCA 133.
 164. *Fodare*, fn 65; *Snedden v Nationwide News Pty Ltd (No 2)* [2010] NSWCA 117.
 165. *Dal Pont*, fn 139, at 930.
 166. *Fodare*, fn 65; *Snedden v Nationwide News Pty Ltd (No 2)* [2010] NSWCA 117; *MGH Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* (FCA, Sackville J, 28 June 2002, unreported), at [38].
 167. *Collingnon Developments Pty Ltd v Wurth* (1975) 1 ACLR 314, at 316.
 168. *April Fine Paper*, fn 132, [35].
 169. Cf *Combined Property Industries*, fn 15, 765, 769.
 170. *Philips Electronics Australia Pty Ltd v Matthews* (2002) 54 NSWLR 598, at [47].
 171. UCPR, r42.21; Federal Court Rules, 56(4).
 172. *Idoport Pty Ltd v National Australia Bank Ltd* [2002] NSWSC 18, at [24]; *Idoport Pty Ltd v N Australia Bank Ltd* [2002] NSWCA 271, at [28]; see also *Lawrence Waterhouse Pty Ltd v Port Stephens Council* [2008] NSWCA 235, at [21]; *Owners of Strata Plan 61732 Pty Ltd v T R Druce Pty Ltd* [2009] NSWSC 1024, [21]; *Porter v Gordian Runoff Ltd (No 3)* [2005] NSWCA 377, at [24]-[27].
 173. *Austcorp International Ltd v Owers* (No 2) [2009] FCA 1112.
 174. *Baycorp Capital*, fn 16, [24]; *International Greetings*, fn 23, [29]; *Maggbury*, fn 77, 195; *Check-Out Pty Ltd v Eagle Eye Inspections Pty Ltd* (FCA, Emmett J, 21 September 2001, unreported), at [32].
 175. *Gurtler*, fn 160, [12]; *Wainter*, fn 128, [21]; *International Greetings*, fn 23, [30].
 176. *International Greetings*, fn 23, [31].
 177. *Williams v Abbott Australia Pty Ltd* [2003] NSWSC 425, at [21].
 178. *Pampered Paws Connection Pty Ltd (on its own behalf and in a representative capacity) v Pets Paradise Franchising (Qld) Pty Ltd (No 7)* [2010] FCA 626, [17].



The first women to clear the bar in New South Wales

By Jenny Chambers

Early pioneers

In 1824, Saxe Bannister (1790–1877) became the first person to be admitted to practise as a barrister in New South Wales. His admission was concurrent with his being sworn into the office of attorney general of New South Wales with a right of private practice at the first sitting of the Supreme Court on 17 May 1824.¹

Almost a century would pass before a woman was admitted to the New South Wales Bar. That woman was Ada Evans (1872–1947), whose admission took place on 12 May 1921. Ada had graduated from the University of Sydney's Law School in 1902 (and, incidentally, was Australia's first female law graduate). However, before Ada Evans could be admitted to practise, the NSW legislature had to clarify the position as to whether a woman came within the meaning of a 'person' and, concomitantly, could therefore be determined to be a 'properly qualified person' and a 'fit and proper person' as those terms were understood under the *Legal Practitioners Act 1898* (NSW).² The question was resolved by the enactment of the *Women's Legal Status Act 1918* (NSW). That Act relevantly provided that a female should not, by virtue of her sex, be deemed to be under any disability or subject to any disqualification as to preclude her from being admitted or from practising as a barrister or solicitor of the Supreme Court of New South Wales.³

Sadly, by the time that Ada Evans succeeded in her quest for admission, her enthusiasm to practise law is said by her family to have been lost irretrievably and she never proceeded to practise at the New South Wales Bar.⁴ That latter accolade belongs to Sybil Morrison (nee Gibbs) (1895–1961) who was called to the Bar in 1924. Over the next 50 or so years, another 26 women would follow in Sybil Morrison's pioneering stead.

Oral history project

Over recent months, the unique stories of these female trailblazers have been investigated and brought to life by Juliette Brodsky, a freelance broadcaster and journalist, in the form of a multimedia oral history project. The project was commissioned by the Women

Women to practise at the NSW Bar by 1975

		Year of admission
1	Sybil Morrison	1924
2	Nerida Cohen	1935
3	Ann Bernard	1941
4	Beatrice Bateman	1942
5	Klara Rudlow	1953
6	Elizabeth Evatt	1955
7	Kathleen Trevelyan	1957
8	Janet Coombs	1959
9	Helen Knox	1960
10	Susanne Schreiner	1962
11	Mary Cass	1963
12	Cecily Backhouse	1964
13	Anna Frenkel	1964
14	Helen Gerondis	1965
15	Margaret O'Toole	1965
16	Beatrice Gray	1968
17	Jenny Blackman	1968
18	Mary Gaudron	1968
19	Joan Palfreyman	1968
20	Jane Mathews	1969
21	Naida Haxton	1971
22	Francine Ruggero	1970
23	Pat Moore	1971
24	Priscilla Flemming	1971
25	Carmel Marlow	1972
26	Margaret Beazley	1975

Barristers Forum, a section of the New South Wales Bar Association, which set Brodsky the challenging task of identifying the first women to practise at the New South Wales Bar and to then investigate and record these women's experiences of practice.⁵

Brodsky was exhaustive in her research which included combing through the *NSW Law Almanacs* to identify all female admissions in the relevant period; reviewing archival newspapers and audio records held by the National Library of Australia and the ABC; studying academic theses and works. She then contacted and interviewed (where possible) the women and their contemporaries who, inevitably, included members



Nerida Cohen at her desk. Photo: Jonathan Goodman.



Beatrice Bateman and the first five of her seven children, holding baby Gregory. Front row, L to R: Thomas, Beatrice, Rosalind and Edmund. Photo: courtesy of Beatrice Gray

and former members of the judiciary, academics, long standing practitioners and clerks, as well as relatives and friends of the women.

Women at work

The project is comprised of a series of vignettes about each of the 26 women to practise at the NSW Bar by 1975. Each of the interviews provides a unique insight into the challenges and victories of life at the Bar.

A common thread among most of the women interviewed is that, upon being called to the bar, they were advised and confined, at least initially, to practise in family law and matrimonial matters. Although many of the women who followed that path recounted their days of practice fondly, the Hon. Acting Justice Jane Matthews AO (no. 20) – the first woman to take full judicial office in New South Wales, initially in the District Court and later, the Supreme Court and the Federal Court of Australia - took exception to such suggestions. Her Honour recalls: 'I realised fairly early in the piece that most of the women who were there, who were at the bar at the time were specialising in family law, not particularly because they wanted to but because that was really the only area where solicitors were prepared to accept that there was a legitimate place for women barristers. I didn't want to do family law. So I had to make a decision

very early in the piece and did – to refuse, to decline to do family law work. It was really a choice between [doing] family law or starvation, so I chose starvation and it really was very difficult indeed for quite a number of periods, but I've sure never regretted it'.

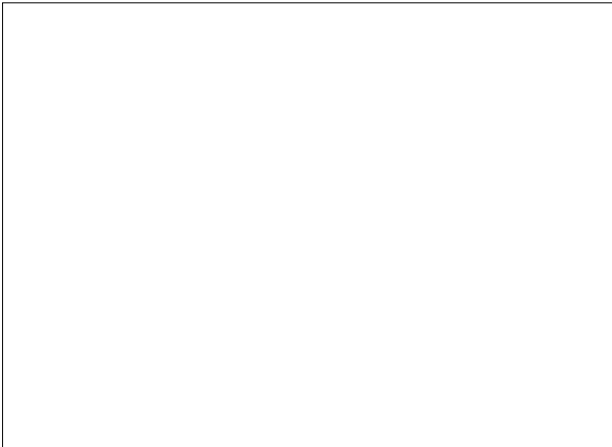
Perhaps not surprisingly, many of the women interviewed for the project have sharp memories of being discriminated against on the basis of their gender in their efforts to establish a practice. The Hon. Justice Margaret Beazley AO (no. 26) recounts that her then tutor, the Hon. Justice Murray Tobias AM RFD 'had a huge difficulty in persuading people to brief me. They didn't consider that a female was appropriate to give

work to and that was just an attitude'. In the face of such adversity, Justice Beazley, who was the first woman to be appointed to the NSW Court of Appeal (in 1996), recalls that her attitude was '[y]ou just keep doing the work that you're given, and it builds up'.

Sue Schreiner (no. 10) tells of how, in protest at her male colleagues' suggestions that she robe in the Divorce Court's toilets instead of in the robing room, she thought: 'Well, this is not right'. She says 'at the time of robing, that's when you finally talk about settlements and all the rest of it and I wasn't going to go in the toilet and change while all this was happening, so



Jenny Blackman AO



Mary Gaudron. Fairfax Photos

I thought 'bugger that'. I bought the brightest pink petticoat I could find and I used to go down and strip down with the men, and at the beginning, it was a bit strange but after a while nobody really noticed'.

On a social level, the barriers between men and women at the bar were also entrenched and it took a certain strength of character and tenacity for some of the more overt aspects of those divides to be broken down. Janet Coombs AM (no. 8) recalls that in her first three years of practice, she and the other female barristers were precluded from attending the annual Bench and Bar Dinner as it was held at the University Club which did not permit women. Desperate to attend the dinner, she lobbied Nigel Bowen, who was the then president of the Bar Association, for change and, subsequently, the dinner's venue was moved to the Wentworth Hotel. Notably, many of the women who participated in the project spoke of Janet Coombs' generosity and kindness to women who came to the bar in, among other things, sharing her chambers and, famously, the fact that for decades she took every new female barrister out to lunch upon their admission.

Brodsky has collected dozens of such anecdotes and histories, including from, and about, women such as:

- the Hon. Mary Gaudron AC QC (no. 18), who aspired to be a barrister from the tender age of eight and went on to be nicknamed 'Mary the Merciless' at the bar and, of course, the first female appointed to the Office of Solicitor General of New South Wales and the first female justice of the High Court of Australia;

- Priscilla Flemming (no. 24), who was the first female at the private bar to be appointed queens counsel in 1985;
- Elizabeth Evatt AC (no. 6) who practised for only a short time but was later appointed the first chief judge of the Family Court;
- Naida Haxton AO (no. 21) who, before coming to the New South Wales Bar, was the first female to practise at the Queensland Bar and who later became the editor of the NSW Law Reports; and
- Beatrice Bateman (no. 4) and her daughter Beatrice Gray (nee Bateman) (no. 16) who, remarkably, were both among the first 16 women to practise at the bar.

Project launch

The project has ensured that the compelling experiences of the first women to practise at the New South Wales Bar is recorded and preserved for years to come. All of Brodsky's records of interviews and research materials will be donated to the Bar Association. The project will launch online in early 2011. Invitations to the launch will be advertised through the Bar Association in due course.

Endnotes

1. C H Currey, *Australian Dictionary of Biography*, Volume 1, Melbourne University Press, 1966, at 55 – 56.
2. Rosalind Atherton (Croucher), 'Early Women Barristers in NSW – solo journeys – the glory of the pioneer', chapter 9 of G Lindsay and C Webster (eds), *No Mere Mouthpiece: Servants of All, Yet of None*, LexisNexis Butterworths, 2002, at 116–120.
3. See Atherton at 116–117.
4. Atherton at 116, citing an interview with Mr Stuart Kyngdon, the great-great-nephew of Ada Evans. It has also been suggested that Ada Evans was not permitted to practise because the then Chief Justice, Sir Frederick Darley, did not approve of women at the Bar: Babette Smith 'A Lady of Law', *Bar News*, NSW Bar Association, 1995, at 39.
5. Female barristers who practised predominantly in other Australian States or Territories (although they may have been admitted subsequently to the New South Wales Bar) have not been featured in the project.
6. Thanks to Juliette Brodsky, author of the WBF multimedia oral history project, for the generous provision of her research to the writer.



One of the 'Laws Women Need'¹

Tony Cunneen discusses the passage of the The Women's Legal Status Act of 1918.

Introduction

The Women's Legal Status Act of 1918 was one of the most significant pieces of legislation affecting the New South Wales legal profession in the twentieth century. This Act gave women the legal right to become lawyers. In addition it gave women the right to be elected to the New South Wales Legislative Assembly. There was protracted lobbying for these rights by a number of women. The bill was eventually presented to parliament by the state attorney general and Sydney barrister, David Robert Hall. The main reason for that exclusively male enclave finally passing the Act after so much delay was that both houses believed that women had proved themselves both worthy and deserving of the right to become lawyers and parliamentarians by their energetic public activities during the First World War. The Act was one of the positive outcomes of an otherwise tragic conflict.

Hockey sticks and abuse at Sydney University

The federation of Australia had not completely solved the problem of the limited legal status of women. Speaking in Maitland on 17 January 1901 Australia's first prime minister, Edmund Barton expressed his approval of universal suffrage but drew the line at admitting 'that the granting of suffrage should entitle women to occupy seats in parliament if elected'.² His comment indicates the kind of grudging recognition of women's rights, which persisted in the federation period. Women were not only barred from parliamentary office, they were also excluded from the legal profession. One courageous woman, Ada Evans, had braved the ire of Professor Pitt Cobbett, dean of law at the University of Sydney, and enrolled to study law while he was absent in 1899. (Sir) William Portus Cullen was acting dean at the time.³ Ada Evans had a long, lonely struggle. Professor Pitt Cobbett was openly dismissive of her. 'Who is this woman?' he exclaimed, and there was much door slamming and chairs banging on floors. His disparaging comments must have been galling in the claustrophobic atmosphere of the Law School, which was then located in the three-storeyed building of Selborne Chambers at 174 Phillip Street and comprised only a handful of students and staff.⁴ Professor Jethro Brown was sympathetic and accorded to her 'the glory



Ada Evans. Photo: Sydney University Archives

of the pioneer'⁵, but she was reportedly so embittered and alienated by the experience of battling to be admitted to practice after she graduated in 1902 that she did not act as a barrister even when she finally had the right to do so.⁶ Sydney University was not in general a comfortable place for women who wanted to espouse feminist causes before the First World War – in fact it could be decidedly intimidating whether or not a woman was at the Law School or the main campus.

In July 1914 the suffragette, Adela Pankhurst,⁷ was touring Australia and visited Sydney University for a speaking engagement before an audience of women. Pankhurst and her audience were subjected to barbarous treatment by some loutish male students who resented what was happening. She was loudly abused as she entered the hall – a most bullying and intimidatory tactic as she was only 152 centimetres in height (less than five feet) and not at all robust. The men were kept outside so they made their presence known by tossing fire crackers in through the windows, jeering loudly, heaving large rocks onto the galvanised iron roof and generally creating mayhem as Pankhurst tried to speak. Their actions caused considerable distress to those inside the hall. Eventually some women armed

themselves with hockey sticks and, in an endeavour to quell the disturbance, sallied forth and roundly belted some of the young men; but the riotous behaviour continued until the crowd had shouted themselves hoarse.⁸ It was no wonder that women wanted a place such as Manning House as their own safe refuge from the loutish behaviour of male undergraduates. This pre-war incident with Adela Pankhurst indicates just how much women's status would change during the conflict. In addition to such overt prejudice, there was legal interpretation of the governing regulations which kept women from becoming lawyers.

The main problem - a 'Person' was not a woman

Apart from issues of prejudice, women were excluded from legal practice at the time for the bizarre reason that the denotation 'person' was interpreted as being male unless specifically stated otherwise. Since only a suitable 'person' could practise as a lawyer, women were ruled out.⁹ Legislation that specifically stated the right of women to practise as lawyers was needed to remedy the situation. Men in positions of power would have to change their attitude towards working with women in public situations if this change was to occur. For fifteen or so years after federation, the men in control of New South Wales did not find any reason compelling enough to have them change their attitude regarding the unsuitability of women to be lawyers.

Apart from the opposition of Professor Pitt Cobbett, influential people, such as the New South Wales attorneys general, Bernard Ringrose Wise KC, Sir Charles Gregory Wade KC and William Arthur Holman either opposed having women in the legal profession or were unwilling to pursue it. There were persistent jurisdictional problems, which meant that 'an impasse developed between the legal profession and the legislature with neither being prepared to take responsibility for the admission of women.'¹⁰ Another, and perhaps more pernicious reason for the delay, was that the men in power, referred to as 'the legislating brotherhood,'¹¹ did not take the request to include women as lawyers seriously, despite women practising in other professions such as medicine. Law was indeed 'a tough nut to crack.'¹²

A 'light and trivial' response

Men in power repeatedly adopted a derisory tone in response to any suggestion that women should be able to become lawyers. On 25 February 1904 Annie Golding, a long-term feminist activist 'of the earnest practical kind'¹³ led a deputation of the Women's Progressive Association to meet with the New South Wales attorney general, Bernard Ringrose Wise KC. Golding requested a variety of reforms, including 'the admission of women to the practice of the legal profession.' Wise KC greeted the fifteen women of the delegation politely, but as reported by the *Sydney Morning Herald*, with the rather underwhelming response that he thought it would be very easy to treat their request in a light, trivial way. (Wise) saw they had given very serious consideration to the matters and were very much in earnest, and he would be wanting in courtesy if he did not receive the deputations in the spirit in which they came.¹⁴

Attorney General Wise KC was a living example of a well-meaning man in power who believed that the law was simply not a place for women. He knew that specific legislation was needed to enable women to practise as lawyers, but he would not initiate it because he thought that women 'were not fitted for court work;' but they could be useful in 'advising and in conveyancing work, and acting as solicitors outside of court.' He also believed that 'men might not agree to their wives being away on juries in criminal cases for three or four days.'¹⁵ This unwillingness to allow women to sit on juries would persist even when women gained the right to be barristers and judges. Despite consistently receiving such patronising responses as that articulated by Wise KC from a succession of politicians, Annie Golding and her two sisters, Belle Golding and Kate Dwyer, persisted with their representations regarding the legal status of women throughout the ensuing decade.

Attorney General Wise KC was not the only male involved in the law to be derisive of women's aspirations. the *Sydney Morning Herald* of the same year reported a speech by one Judge Woodfall to a gentlemen's establishment known as the *Savage Club* in which he said 'ladies were even aspiring to become barristers. Whether as counsel or judges he was sure they would

be a most attractive spectacle.’ This comment was greeted with much laughter, which echoed throughout his speech.¹⁶ Such mockery of women’s aspirations to legal careers percolated throughout the first two decades of the twentieth century and continued even after the bill was passed.

Often the delay in appointing women is referred to as being due to the ‘boys club’ or a ‘legislating brotherhood’ – a reference to established connections amongst men, which reinforce prejudices and can white ant any proposal for gender inclusivity.¹⁷ Women were not a part of any of the informal male power structures of the time. They had not been to those boys’ schools, which educated the social elite. Such schools as Sydney Grammar, The Kings School and St Ignatius Riverview fostered a strong sense of brotherhood amongst their ex-students through well-maintained and much valued alumni associations which could transcend any professional boundaries. Certainly girls’ schools such as Ada Evans’ old school, Sydney Girls High, as well as Ascham and Abbotsleigh worked hard to advance the cause of women but they were not part of the rather exclusive GPS network of boys’ schools. In addition women had not been in the military as many lawyers had, nor had any attended Sydney University Law School – apart from Ada Evans. Women did not play rugby or cricket and were thereby excluded from many male bonding opportunities that could facilitate life long relationships.

The lack of informal connections which would facilitate cross-gender personal bonds and relationships meant that men became professionally and personally close, but in a manner that could exclude women. An exchange of letters in 1916 between (Sir) Adrian Knox KC and James Murdoch of the Red Cross in London provides a rare glimpse into the way such a ‘boys’ club’ could operate to exclude women. Its significance lies in the power of these men – Murdoch was the chief commissioner of the Red Cross in London. (Sir) Adrian Knox KC was a member of a wealthy family, maintained an extensive association with the Red Cross throughout the war and served on a number of their committees. He was later chief justice of the High Court from 1919 to 1930.

‘Cock and hen’ committees

(Sir) Adrian Knox KC lamented having to serve on a particular Red Cross committee then added: ‘When the war is over I hope I never have to act on a cock & hen committee again – at least until the next time.’¹⁸ Knox’s reference was clearly to the necessity of having to work with women and he was obviously keen to avoid it if at all possible. James Murdoch’s reply is most revealing. On 16 December 1916 he wrote to Knox:

I appreciated very much the remark of yours relating to Cock and Hen parties. When I received a suggestion regarding the appointment of three Assistant Lady Commissioners: needless to say, I was not taking any. It appears to me a very strong hand wants to be taken on your side with regard to suggestions similar to those. . .¹⁹

Murdoch’s antipathy towards female assistant commissioners was eventually overcome, but was obviously noticeable to any woman who had to work with him. Lady Mitchell CBE wrote that when she was appointed to the role of assistant Red Cross commissioner in London her task was to resolve various difficulties herself then, if necessary, confer with Murdoch. She wrote that she ‘did not often find it necessary to trouble him.’²⁰ Her frosty tone concerning Murdoch reaches down through the years. Clearly Murdoch was one who despite all legislation was not going to find working with women easy.

What to wear in politics?

Stereotyping and outright prejudice cannot be stopped simply through legislation. The problem was that women were simply not a part of the prevailing public landscape. There had to be new codes of behaviour and dress to accommodate the arrival of women in public life. In such a rule-bound time there was concern over the correct clothing women should wear at political meetings. One correspondent going by the name of ‘Wyee’ wrote of the need for a decision as to whether ‘walking dress or evening dress’ should be worn to such gatherings. She/he described how at one meeting:

some of the women speakers wore evening gowns – cut low at the neck – and hats. Some did not wear hats. In the front rows . . . all women wore full evening dress, diamonds, with gowns of sequined net, quite ball-room raiment. Behind them were rows of less expensive gowns – all

strongly allied to evening dress – and each owner had her hair elaborately dressed and ribboned and banded. Behind these came the foolish virgins – and matrons – those who wore their waiting clothes and consequently kept to the back so they would not spoil the effect.²¹

Attention to such knotty issues persistently trivialised the debate concerning women's issues at the time. Women were as socially restricted by public opinion as to the correct forms of attire and behaviour as they were physically constrained by the hideous whale-bone corsets which fashion decreed they should endure in the cause of an unnaturally distorted 'hour glass' figure. The corsets were a metaphor for the way women's public life was restricted into an unnatural shape, which highlighted feminine allure and decorative values at the expense of social contribution and achievement.

'Salon' society

A number of women worked hard to reverse the policy that so excluded them from public life. Apart from the Golding sisters, Ada Evans lobbied hard for the admission of women into the law. Rose Scott was another woman who worked to improve the legislative position of women.²² Scott was a member of the older generation of feminists who were considered out of step with the younger activists on occasions. Scott was an advocate of such issues as preventing men from being spectators at women's swimming meetings – which would have excluded women from competing in international events. Not everyone agreed with her style but she was still a very significant and persistent lobbyist.

Scott orchestrated Friday evening *salons* in her home in Jersey Road, Woolhara. These events were quirky European style meetings of minds, where polite debate, conversation and ornately mannered social intercourse became an art form. They had their origins in sixteenth-century Italian court life and evoke images of gentlemen scientists in brocaded waistcoats and twinkling, buckled shoes mouthing clever epigrams; where wit was valued and good manners essential. Scott made her salon a legendary, if somewhat anachronistic fixture on Sydney's social network. The salons were, popular, exclusive and unique.

Rose Scott maintained extensive social connections with the legal profession through these gatherings. Among the attendees was the Sydney barrister, John Daniel Fitzgerald, MLC, who was vice-president of the Executive Council, and minister for public health and local government when the Women's Legal Status Bill was debated in 1916–1918. Another prominent lawyer to attend the salon was the chief justice, Sir William Portus Cullen. The utility of the somewhat archaic salons as a means of promoting feminist issues must be called into doubt by the fact that the barrister-politicians, and attorneys general Bernard Ringrose Wise KC and William Arthur Holman were also attendees yet did little to help the cause.²³ The salons were places where diverse opinions were encouraged not condemned – it would have been most impolite to have been so overtly disputatious. Restraint, reason and wit were the hallmarks of salon discourse – not insisting that an opponent actually acquiesce. John Daniel Fitzgerald MLC wrote to Rose Scott in 1912 about his experience of the salon:

How can you find so many interesting animals for your collection? Where do you dig us all up? Pardon my vanity but I always feel so flattered at being in the company of so many interesting people at your salon. Yours is the last of the salons of the world. I believe they have quite died out in the northern hemisphere. More's the pity.²⁴

Despite these regular contacts progress on the issue of women in the law was frustratingly slow. Some women were far more proactive in promulgating the cause.

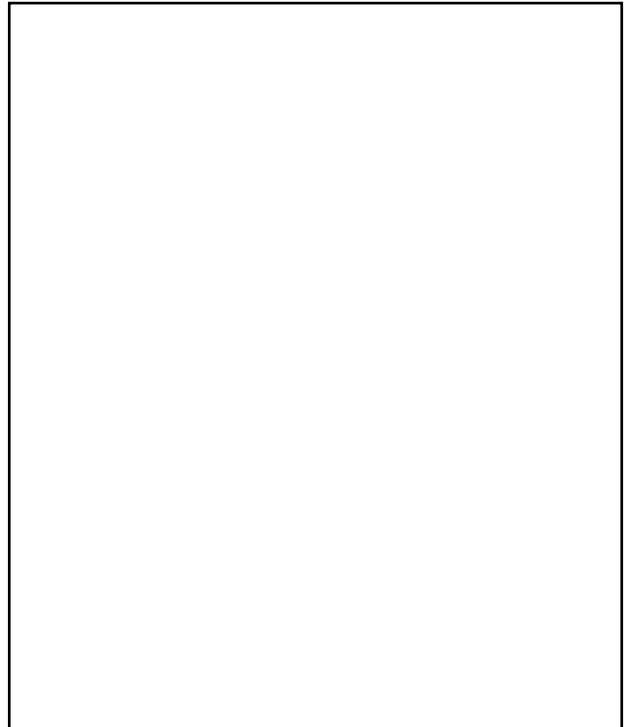
The repeated deputations concerning the legal status of women to the various state attorneys-general finally gained some traction when the Labor attorney general and Sydney barrister, David Robert Hall, indicated his sympathy with the request after he was approached by a deputation of women in September 1913.²⁵ The successful deputation was again led by Miss Golding of the Women's Progressive Association who cited Victoria, France and America as places where the right had been granted. She said that 'it would be just as well to try to crush the oak back into the acorn as crush a woman back to the drudgery of the kitchen.'²⁶ Although she made the proviso that she did not intend to slight the domestic sphere. The issue of women on

juries was one on which even the bill's supporters were reticent. While Hall said he would look into the matter he did not know if it was the parliament or the Supreme Court which had 'the power to effect an alteration.'²⁷ Hall was of a different generation and background from his predecessors, Wise and Wade. He had been educated in Sydney University Law School and knew Ada Evans whom he considered most unfairly treated.²⁸ Still, nothing happened immediately – then everything changed with the war and within days women such as Lady Cullen and her close friend Ethel Curlewis²⁹ were organising public meetings in various locations and giving their houses over to such programs as ambulance classes. Women suddenly operated in the public realm. Women's war-related activities provide the necessary spark which ignited the issue of their legal status beyond the realm of polite debate and ritualistic annual meetings with condescending attorneys general.

In a section on the 'Credibility of Witnesses' in An Outline of the Duties of Justices of the Peace in New South Wales, the barrister, DS Edwards wrote that 'Women are often considered to be more prone to exaggeration than men.'

The First World War and a 'sympathetic' attorney general

Women became much more involved in public life after the outbreak of war in August 1914. Within days there were women speaking in public rallies, organising the plethora of war-related charities and becoming enthusiastic, if sometimes strident, speakers in supporting enlistment campaigns. Many lawyers' wives and daughters, such as Gladys Langer Owen and her mother May, Constance Sly, Lady Cullen and Lady Hughes worked hard to support war-related causes. Their successful efforts were obvious to any observer and gave some confidence to the feminist movement. One Elsie Horder, wrote of the belief that the work of women in the Red Cross 'had entirely demolished the anti-feminist arguments against our usefulness.'³⁰ The chief justice and lieutenant governor, Sir William



Sir William Cullen. Picture by Harold Cazneaux. National Library of Australia

Cullen, was also one who saw that the many activities of women in the war had given the lead to men who were reluctant to enlist. He was heartily cheered by the crowds when he made such speeches stating at one: 'I wish to heaven that some of our men showed the same spirit of devotion here in our midst as the women working for the Red Cross throughout the length and breadth of this fair land.'³¹

The deputations to Attorney General Hall continued. There was steady lobbying within the Labor party. While Hall maintained his sympathy and support for women as lawyers in general he held back on the inclusion of them on juries and had some doubts regarding them as magistrates unless they were specifically trained as such. Hall was concerned that serving on a jury was an obligation which might be onerous for women, but he thought they might be important in cases where women or children were concerned. His other difficulty with the jury issue was that there needed to be a list of women willing to serve on juries.³² But no list existed. So women could not be on juries because they were

not on juries already. The real reason for his reticence on both issues was later suggested to be that he had reservations about women being in judgment over men.³³ Stereotyping of women in the courtroom was common at the time. In a section on the 'Credibility of Witnesses' in *An Outline of the Duties of Justices of the Peace in New South Wales*, the barrister, DS Edwards wrote that 'Women are often considered to be more prone to exaggeration than men.'³⁴

The first attempt – the resistors triumph

In mid August 1916 Australia was united in grief and shock over the sudden rush of casualties from the battles of Fromelles and Pozieres on the Western Front. On the Home Front, the work of the Red Cross, and the profile of the women who were in it, became increasingly important. The lobbying regarding the legal status of women by Kate Dwyer and others finally seemed to have been successful when, on 18 August 1916, Attorney General David Hall stood to read out the Women's Legal Status Bill for the first time in the New South Wales Legislative Assembly. The bill was intended to allow women to be lawyers and to serve in state parliament. Hall's reading was bracketed by lively discussion concerning some timeless issues – a bill concerning the control of the state's forests and then a scheme to augment Sydney's water supply. As with any first reading, there was no debate. At the time of the reading, Hall's Labor party were fighting like cats in a bag over the conscription issue. It was the last months of the first state Labor Government led by William Holman. The Women's Legal Status Bill would have a long history before it was finally passed by both houses. The New South Wales Parliament contained many wily operators who knew how to thwart legislation, and there were plenty of other issues to distract attention from the cause of women.

A number of background factors explain Hall's presentation of the bill. Although he was involved in the bitter split within the Labor party between the industrial wing and the parliamentarians Hall was following Labor Party policy with respect to women. The 1916 Labor Party conference had passed a motion urging the passage of such a bill. Possibly the death in

1915 of Bernard Ringrose Wise KC and the retirement of Professor Pitt Cobbett from daily involvement in Sydney University in 1910, had removed two powerful opponents to the measure. Also, Hall was most sympathetic to Ada Evans' treatment by Professor Pitt Cobbett at Sydney University as well as her subsequent repeated representation to be admitted to practice.

The second reading of the bill occurred on 23 August 1916. Hall gamely introduced the bill by saying that 'It is one which marks another stage in the advancement of women by the removal of disabilities and disqualifications.'³⁵ And then he was interrupted by Thomas Waddell who rose to a point of order.

Waddell, the member for Lyndhurst, was a pastoralist in western New South Wales. He had 30 years experience in the chamber. He submitted that the bill was out of order because it did 'not refer in any way to an amendment of the electoral law.'³⁶ Such a direct reference to the acts to be amended was necessary for any bill to proceed. Rising to support the point of order, Sydney barrister and member for Goulburn in south western New South Wales, Augustus James asserted that the bill amended 'the Constitution Act, the Electoral Act, the Local Government Act, the Neglected Children Act, and the Legal Practitioners Act.'³⁷ Further support for Waddell's point of order came from the Liberal member for Orange, JCL Fitzpatrick. He was typical of those who gave limited support for female ambitions. He had supported 'the right of women to stand for parliament but towards the end of his career claimed that politics seduced them from their homes.'³⁸ If women were to get into law, there would have to be some knotty procedural issues to circumvent. There were plenty of opportunities within the system for obstructionist tactics. The country based members of the lower house had managed to construct some effective procedural impedimenta to the reform.

Hall stuck to his guns. He said that it was a question 'of principle. Every measure must be considered on its merits.' He claimed that 'the title of the bill (was) sufficient to indicate the purposes on the bill.'³⁹ They ground him down. The speaker trawled through precedent including the Women's Franchise Bill, but decided that on balance the Women's Legal Status

Bill as presented by Hall, was out of order. The bill was withdrawn.

Round one went to the resisters

Hall was nothing if not doggedly determined. On 13 September 1916 he tried again, this time with the Women's Legal Status Bill (No. 2). He proposed:

That this House will, on its next sitting day, resolve itself into a Committee of the Whole to consider the expediency of bringing in a Bill to provide that women shall not by reason of sex be deemed to hold certain professions; for that purpose to amend the Constitution Act, 1902, the Parliamentary Electorates and Elections Act, 1912, the Acts relating to local government, justices, magistrates, and other legal practitioners, and certain other Acts.

Again, when asked if he intended to permit women to act as jurors, Hall said he did not.⁴⁰

Waddell was on his feet immediately, but not with a point of order this time. Instead he articulated some blustering obfuscation, which across the distance of time makes it difficult to decide if he was being serious or sarcastic. At first he suggested separate electorates 'with the women on one roll and the men on another.' Then he outlined the nub of his objection. Simply put 'people would not be satisfied with a lady as their parliamentary representative no matter how estimable she might be.' His reasons reveal the stereotyping of gender roles common at the time. According to Waddell it was not possible for a woman to 'look after domestic affairs as well as political affairs (and) properly deal with both.' Furthermore, he continued, 'in no case have constituencies taken seriously the candidature of a woman, because they knew it would be impossible for her to deal with the many problems which men have to deal with in political affairs and which men know much more about than women.'⁴¹ That was the basis of his argument. Plenty of people in the chamber disagreed with him – although the sublimation of women's careers to those of their husbands was well understood. Ada Holman, the wife of Premier William Holman wrote that: 'women's emancipation has arrived – oh, yes! But when a wife's

Unfortunately for the bill, the delay in the lower house allowed it to be overtaken by the bitter Labor split over conscription.

work clashes with her husband's we all know which takes precedence.'⁴²

'The fair sex'

The debate ground on and it is sometimes difficult to determine whether or not the stereotyping of the supporters was worse than the resisters. Mr Fuller in the Legislative Assembly challenged the image of female incapacity presented by Waddell. In Fuller's words he had 'had the privilege of an acquaintance with some women who as far as knowledge of land and mining laws is concerned, stand very much higher than a great number of men . . .' Women were 'in the engineering school, and one of the most capable architects in the city (was) a woman.'

Then he went on to say that 'there is no doubt that amongst the fair sex there are plenty of brains, as they show when they get the opportunity of using them.'⁴³ A modern audience may well find his comments about 'the fair sex' (a term which was often

used to describe women at the time) as paternalistic – a common reaction to reading speeches from those times. According to the various speakers in the debate, men worked, took care of business, organised and managed the country while women's contribution to civilisation was presented as delicacy of feeling and refinement of character. Such stereotyping was not restricted to men. Feminist writers also considered that women needed to break out of their traditional roles and become much more active in public affairs and 'understand their obligations as citizens.'⁴⁴

Unfortunately for the bill, the delay in the lower house allowed it to be overtaken by the bitter Labor split over conscription. There was an extraordinary political situation on the resumption of parliamentary business on 31 October 1916: there was still, nominally, a Labor government, but the premier, William Holman, and 20 other previously Labor members were declared to be no longer members of the Labor Party by the industrial dominated governing body of the movement. Holman responded by forming a coalition government and appointed a new cabinet on 15 November 1916,

with Hall once again the attorney general. Obviously circumstances had overwhelmed the Women's Legal Status Bill. It must have been galling to the various women who lobbied for it. As Rose Scott had feared, the issue of women's legal status lapsed amidst the bitterness of party politics and was lost in the dramas of a state election and the Great Strike of 1917.

Tarred and feathered and torn dresses – women in public life in 1917

It is problematic to profile women in public life during the turbulent year of 1917: a time of spiralling passionate intensity rarely seen in Australian public life. Politics went ballistic. Women were certainly active in public life and were not above lampooning men or presenting themselves in stereotypical ways. Mrs Waugh, president of the Women's Reform League said during her speech in support of the national candidates for the 1917 federal election that 'Some of the members of that chamber need to be treated as bad boys – given a severe spanking and placed in a corner for three years.'⁴⁵ She may well have had the New South Wales Parliament in mind. Similarly, Mrs Seery who was the selected Labor candidate for Robertson in the same election said in one of her speeches that women 'have an equal right to representation. A woman in parliament would be a housekeeper on a grand scale.'⁴⁶ Certainly politics needed a moderating hand from someone. As regards, being the 'fair sex', circumstances determined that not all women were helpless in the face of adversity.

When one Mrs Frances Egan was declared a 'scab' by the Barrier Branch of the Amalgamated Miners' Association she took matters into her own hands. Her direct action included carrying a revolver and approaching certain union officials with it at various times. Eventually she had one of the officials tarred, feathered and whipped through the streets in the middle of the day. She still managed to get a very sympathetic hearing before Mr Justice Pring when she sued for compensation for loss of earnings caused by her blacklisting.⁴⁷

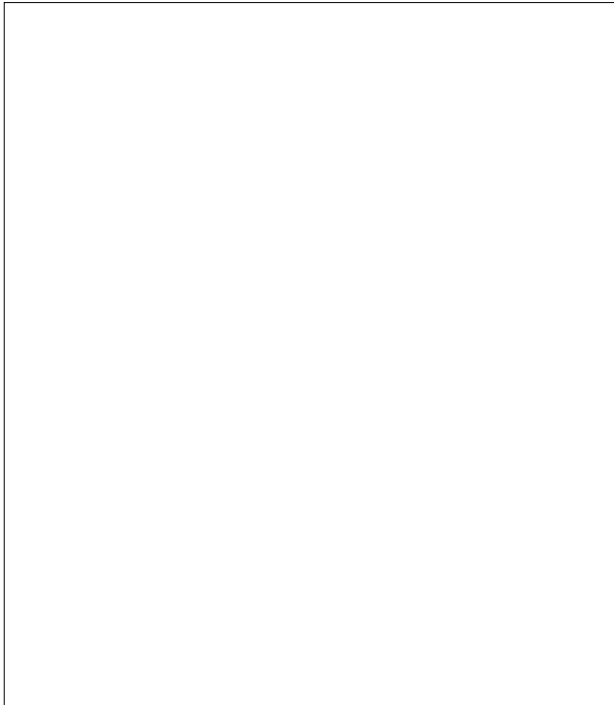
Women's involvement in public life, particularly in 1917, could be as passionate as the men. The issue of compulsory military service provoked what the *Sydney Morning Herald* termed a 'most disorderly scene' at a pro-

scription meeting.⁴⁸ A group of 20 ladies 'hostile' to the idea of compulsion interrupted the meeting and made a dash at some of the conscriptionists and a free fight followed. Women smacked each other's faces, pulled each other's hair, and hurled objectionable epithets at each other. In the scrimmage many dresses were torn.⁴⁹

It is intriguing to speculate on what might have happened at Sydney University in July 1914 if the diminutive Adela Pankhurst had been accompanied to her engagement by the pistol-packing, Frances Egan with her pot of tar and bag of feathers, or some of those redoubtable torn and frayed battlers over conscription had gone forth with hockey sticks. The 'fair sex' certainly knew just how to scrap to the equal of any men when the occasion arose.

Despite the failure of the first attempt to pass the bill in New South Wales, there were continued calls for women to be more involved in public life. There were ringing public statements that women needed to cease to follow what they were told in school or by their female relatives, but instead to seize the moment and 'never go back to replough the old forgotten furrow.'⁵⁰ There were also repeated articles in the *Sydney Morning Herald* concerning the nature of feminism.⁵¹ Lady (Eliza) Cullen, the wife of the chief justice, William Portus Cullen, was president of the Australian Red Cross Society in 1916–1917. She adopted a strong public role. On 6 October 1917 she inspected and addressed the quasi-military parade of 1,200 voluntary aid nurses (VADs) assembled in the Sydney Domain. It was an important role for anyone. Her speech contained the simple exhortation to 'Carry on!' This comment became the motto for the Red Cross in the last years of the war.⁵² Her appearance at the parade in front of so many ladies, crisp and neat in their starched white uniforms, marching with military precision reflected her important position in the Red Cross, which had become one of the most high profile non-government organisations in the country. Women were on the march, literally and figuratively speaking.⁵³

During the war many influential people such as the chairman of the State Recruiting Committee, Professor MacIntyre urged women to seek 'definite promises



Professor (Sir) John Peden, barrister and professor of law, supported the admission of women to the law. State Library of New South Wales

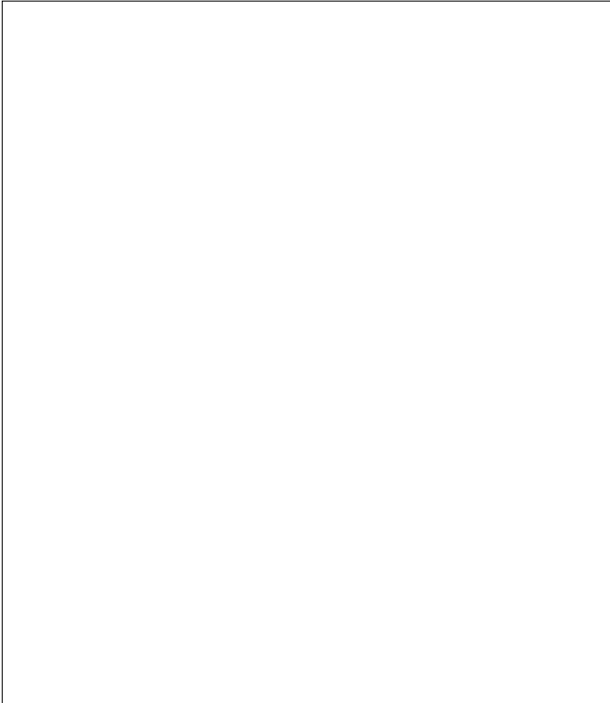
of enlistment from eligible men' in response to the 'urgent need for reinforcements.'⁵⁴ Some women such as Gladys Langer Owen became passionate and regular speakers at recruiting rallies. She put on some extraordinary shows, including flourishing a rifle as the climax of her exhortations to young men to enlist. Her performance was described as 'enthusiasm in excelsis' by the *Sydney Morning Herald*.⁵⁵ There was some criticism of the excesses of such enthusiasm in the *Official History of Australia in the War of 1914–18* in which TW Heney disparagingly referred to a 'Shrieking sisterhood, who took the platform or made the air shudder at afternoon teas and drawing room meetings . . . and protected by their sex, sneered openly at such young men as they chanced to imagine to be shirkers.'⁵⁶ Heney's comment echoes criticism made in 1917 of some women for the 'objectionable practices (of) taunting and gibing at young men in the audience for not enlisting (and making) references to the 'white feather' and other taunts.'⁵⁷ It is possible that some of the women who went into public life carried the cause a little too far.

Sydney University changes its mind

Lobbying for a bill to address the legal status of women continued throughout 1917 and intensified in mid to late 1918. A regular deputationist was Kate Dwyer, the sister of Annie Golding, who had been so patronised by Wise KC in 1904. Rose Scott also accompanied her at different times.

On 18 August 1918 Kate Dwyer gained the agreement of the Senate of the University of Sydney to a request to the New South Wales Government for legislation that would enable women to enter the legal profession.⁵⁸ At the time the decision to support the legislation was made by the Senate there were a number of prominent lawyers and judges active as fellows, including Chief Justice William Portus Cullen and Professor John Peden. The university Senate's support indicates that the presence of a more general sympathy for the admission of women to the legal profession existed amongst the broader legal community.⁵⁹ It may have been significant that the foundation Challis Professor of Law, William Pitt Cobbett, had retired from the Senate.⁶⁰ Furthermore, Professor John Peden's influence in the shaping of the law school was just beginning and he was in favour of the measure.⁶¹ There was general recognition of the need to enrol more women in Sydney University. In 1916 there were 459 women students at Sydney University and in March 1917 the Sydney University Women's Union opened Manning House. Lady Cullen, the wife of the chancellor and patron of the union (Chief Justice Sir William Cullen) performed the opening ceremony. The official party included Sir William Cullen, Judge Backhouse and Mr Justice Street.⁶² There were no fire crackers or rocks on the roof at this ceremony.

Following on from the vote of support by Sydney University, Kate Dwyer led a delegation to Attorney General Hall on 20 August 1918. Rose Scott accompanied her, along with representatives of the Women's Reform league, the Women's Progressive Association, the Women's Branch of the National Association, the Feminist Club, the Domestic Workers' Union, the Horticultural Society, the Public Service Association, the Vocations Club (Technical Colleges), the New South Wales Association of Women Workers, the



Sir Thomas Bavin was one of the senior lawyers who supported the crucial legislation. Photo: National Library of Australia

Caterers and Waitresses Union and the Social Hygiene Association. Again Hall replied 'sympathetically' to this formidable phalanx of women from all manner of organisations.⁶³ There was continuing publicity and various mentions in parliament about when the bill would be introduced. Hall was energised anew. The general mood by 1918 was that the reform was overdue – but the legislation still had to pass through the tangled thicket of parliamentary procedures.

October 1918: Attorney General Hall tries again

On 3 October 1918, in the last weeks of the war and following increasing public agitation, the Attorney General David Hall again introduced a 'bill to provide that women shall not, by reason of sex, be deemed to be under any disqualification to hold certain positions or to practise certain professions (including) local government, justices, magistrates, and legal practitioners.'⁶⁴ The bill would allow women to be lawyers and to sit as members of state parliament. They were already allowed to sit in federal parliament.

Hall gave as his reason

that the work of women during this war shows that they are well able to do their part, and . . . we, who boast to be the most advanced state, are probably the least up to date state in Australia. I do not think there is any other State where a woman may pass an examination to become a barrister or a solicitor but who is not permitted to practise. I remember one woman who passed her examination for admission to the bar seventeen or eighteen years ago when the Chairman and I were studying for the bar. She passed as well as we did . . . but she has not been permitted to practise. She has occasionally communicated with my department asking that she be permitted to practise.⁶⁵

He was clearly referring to Ada Evans. Reference to the advances of the women's movement resonated throughout Hall's speeches in support of the bill. Hall referred to the way the British 'suffragist movement which created so much trouble for the authorities prior to the war, 'had changed to support the war and that Mrs Pankhurst (Adela's mother) who was at the start of the war 'recovering from a hunger strike, went up and down England telling the women that to do nothing when the nation needed help was a crime.'⁶⁶ Hall proved a worthy advocate of the bill. All supporting speeches mentioned as their reason that women had proved themselves during the war – although that support did not necessarily mean that all women would be well treated when the bill was passed.

John Storey, leader of the Labor opposition, spoke in support of the bill. His hyperbole suggests that the bill was the subject of some derision even amongst those who claimed to support it. He said that women would improve the 'morale' and the 'morals' of parliament would 'without a doubt revolutionise the whole of our judiciary and the whole of [the] law code'. He could not help having a sarcastic swipe at his enemies in the legal profession and said that 'with so many old women practising in the courts that it will be a good thing if we can bring in a few young women who will assist us in the better interpretation of the laws.' He too referred to the fact that the war had 'shown that women were capable of doing 'certain classes of work better than men'⁶⁷. Storey later suggested that one of his reasons for supporting it was his hope that it would change the nature of the judiciary – which he held in some disdain.⁶⁸ He said 'Almost every man who appears in court thinks that the presiding official is the worst old

woman he has ever met. As for justice of the peace, I know of such extraordinary decisions given by them in the country that I could not think of a woman who would do anything so silly.⁶⁹

Another significant supporter of the bill was the comparatively recently elected member for the seat of Gordon on Sydney's North Shore – Thomas Rainsford Bavin. He was one of the most influential barristers in the state, having acted for the sprawling business enterprise, Colonial Sugar Refinery Ltd. He was a member of the Sydney University Senate, a member of the Bar Council and connected to the highest levels of government and the judiciary. The combination of both Bavin and Professor John Peden (who had been appointed recently as a member of the Upper House) in supporting the legislation proved a powerful force in favour of the bill. They often acted in tandem to secure legislation during their time in parliament.⁷⁰

Bavin said in his speech that

If any Honourable Member had any doubt before the war as to the right of women to be invested with the full obligations of citizenship, that doubt must have been removed.

He was aware of the technical difficulty which arose from the definition of a person as a male person unless otherwise stated⁷¹ and he wished to ensure that the legislation was worded correctly to prevent any inconsistency. It was a neat point and displayed his awareness of the legal technicalities that could bedevil the bill. His amendment was not supported by the lower house, but raised the ire of one Jabez Wright, the feisty, 60-year-old Labor member for Wilyama who took the opportunity to take a swipe at the way a 'lawyer can amend a bill so as to make it ambiguous.'⁷² Antipathy towards the judiciary was certainly strong amongst Labor members of parliament at the time. Wright had disparagingly once referred to Holman's Nationalist government as having 'too many laws and too many lawyers.' In a fit of post-Labor-split bile he had fulminated that the 'government is a government of lawyers'⁷³ – which he considered a self-evident ultimate condemnation of their worth. His reasoning was perhaps coloured by the fact that the Labor Party had expelled all its lawyers during the split over

conscription. Members such as Jabez Wright were able to connect any bill to some strange personal agendas and attitudes. Wright's speeches displayed a kind of free association style which rapidly took his perorations into a parallel universe. The bill for women's legal status just had to ramble along with him. He generally supplied the comic relief to the chamber – even if it was unintentional. The problem was that the women's legal status bill was mocked by way of association.

The member for Burrangong, Mr Loughlin commented on the 'levity' that was displayed during the debate. Such levity by men was endemic during any discussion of women's rights. It must have been galling to women to have to endure the smirks, chuckles and condescension which marked the issue at all levels – even when it was being passed through parliament. Loughlin also mentioned that civilisation should measure itself by the way it treats women. His choice of example was, however, unfortunate. He said:

You can go into a black's camp and you will find that old King Billy takes all the flesh off the hind legs of the opossum or the wallaby and throws the bone over his shoulder to his gin. That corresponds more or less with the treatment accorded to women folk in the lower grades of civilisation throughout the world.⁷⁴

The themes which resonated throughout the debate were: the absurdity of allowing women to sit in federal but not state parliament; that giving full rights to women was both just and a measure of civilisation, and that the activities and behaviour of women during the war justified the change in status. There was remarkably little reference to England as a precedent. The New South Wales Parliament was still intimately loyal to Great Britain but not slavishly derivative.

Despite the overall support for the measure there were also persistent signs that the men still thought of the bill as some kind of gift from them to women, who had somehow 'proved themselves' worthy of it at last, and that they would be useful helpers in the process of running the country. For example one speaker said that he thought that women had 'certain subtleties of character, certain intuitions, which would probably be of great assistance to us (referring to men) in law-making.'⁷⁵ These comments indicate the extent to

which women were stereotyped along with comments concerning women's 'delicacy of feeling and refinement of character.'⁷⁶ There was still a feeling that the nastier aspects of the world were somehow beneath women's sensitivities.

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Out of order in the Legislative Council

So the bill moved to the Legislative Council on 28 November 1918, but again it hit a substantial procedural block. The Honourable John Garland KC, the minister of justice and solicitor-general proposed that the bill be read a first time, but then the president, Mr Fred Flowers, reluctantly intervened to rule that since the bill was intended to vary the constitution of the Legislative Council it had to originate within that chamber. Since it had originated in the Legislative Assembly it was a 'direct invasion of the privileges' of the Legislative Council, and the bill was ruled out of order. It was then withdrawn.⁷⁷ While the point may well have been trivial, it is an indication of just how difficult it was to overcome the entrenched systemic exclusion of women from public life – even when the men were willing to do so. The bill then had to return to the Legislative Assembly where the proposal to appoint women to the upper house was removed. Then it was passed again by the lower house on the same day as it was dismissed from the Legislative Council. Appointments to the Legislative Council were meant to 'be representative of every section of the community'⁷⁸ – except women.

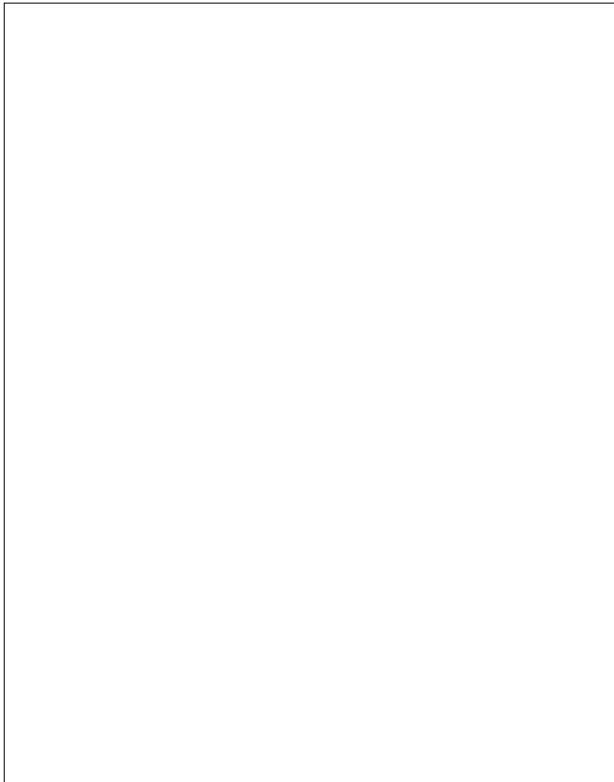
On 5 December 1918 the bill was presented to the Legislative Council by Garland KC. Once again references to the war resonated throughout the

speeches as justification for the reform. George Black was quite poetic when he expressed his 'gratification' that 'the course of the war (had) struck off, as with the blow of a sword, those fetters of conventionality which the centuries have imposed on women.'⁷⁹

One Dr Nash, an honorary lieutenant colonel and medico from the Hunter Valley, opposed the bill. To him, women were as 'good authorities as men on lots of subjects with which they and their children (were) concerned.' However he also believed that there were 'many things not within the province of a woman.'⁸⁰ Nash believed that the business of a 'woman in life (was) to be the mother of the children of the country.'⁸¹ He had lived to this ideal in his private life, where his wife had borne him six daughters. He had his supporters in the lower house. There were clearly more opponents to the bill in the Legislative Council than there were in the Legislative Assembly. These men put forward the usual reasons including that: women did not want to be lawyers; men knew more about the world of business; the bill would 'destroy chivalry'; women had been failures as police officers and that fundamentally the whole idea was simply absurd. To one member, it would be 'an absolute failure' if a woman was ever appointed to the Supreme Court.⁸² Barrister, John Daniel Fitzgerald, quite possibly recalling his stimulating nights in Rose Scott's salon, vigorously opposed Nash and supported the bill.

The somewhat derisory tone of the debate made for some sarcastic stereotyping. SR Innes-Noad speculated on the scenario of a mother who might become a member of parliament having to pass her baby to be held by someone in the chamber while she spoke on an issue.⁸³ Another member commented that the bill was an 'innocent measure' because it was unlikely that a woman would ever be appointed as a judge anyway.⁸⁴ But Nash and his supporters were in the minority. Hall and his supporters had won.

The bill to allow women into the legal profession and the New South Wales Legislative Assembly finally passed on 26 November 1918. According to HV Evatt it was the 'main achievement' of an otherwise fractious and non-productive parliamentary session.⁸⁵ Maybe so, but the bill did not allow women to be appointed



Sybil Morrison. Photo: Sydney University Archives

to the Legislative Council. Women were not accorded that right until 1926. Similarly, the Act did not allow women to sit on juries. In addition, there were still many obstacles to face in the form of entrenched misogyny at the grass roots level. In Beecroft, a suburb in Sydney's northwest, several ladies in late 1918 felt that they could give the Progress Association valuable assistance in certain matters. Considering the success of the local women in organising the Red Cross such an offer was obviously backed by history, but the president of the association said that he felt 'rather frightened at the idea of introducing ladies.' No one in the association could find a rulebook to consult and it was felt that males would drop out if ladies became members. The meeting broke up in laughter at the prospect of 'the fair sex' joining their august but often dyspeptic and dysfunctional deliberations.⁸⁶ The situation was little better in some legal circles. Male law students at Sydney University in the 1920s were openly hostile to the few women who ventured into

their realm. Some of the young men's behaviours, such as catcalling and foot stamping in classes attended by the two pioneering women, Marie Byles and Sybil Morrison,⁸⁷ were reminiscent of that experienced by Adela Pankhurst in 1914.

Conclusion

While women had been agitating for justice since federation, it was their activity during the war which provided the legislators with the public justification they needed to pass the necessary Act. Admiration and respect for the role of women in the war echoed throughout the speeches in support of the Act. The speakers no doubt had in mind the extraordinarily successful activities of women in the Red Cross, the Volunteer Aid Detachments, recruiting campaigns and of course the personal support and tragic grief involving those who served. Lawyers' wives were a particularly influential group who supported the war. Women such as Lady Hughes, Lady Cullen, Mrs Langer Owen, Mrs Ethel Curlewis, Mrs Sly and many others made an incontestable case as to their worth in public life.⁸⁸ Regardless of whether or not the women involved in charities were rich or poor, they made an immense contribution to public life during the First World War. As a result of their public activity women were able to put a forceful case for their inclusion in formal legal office. Even the previously intransigent lawyers and legislators had to take notice. The role of such women in the operation of charitable organisations at the time is not fully appreciated even today. Their story has yet to be told in full.⁸⁹

Despite the Act there was still some time before women were able to take up the positions theoretically open to them. While there was overall support from both sides of parliament, speakers did not give unqualified support for the bill. Each speaker had some reservation or another about the role or responsibility of women in public life. Such avoidance of articulating unreserved support suggests that the 'legislative brotherhood', unconsciously or not, harboured doubts about the whole enterprise. There were entrenched attitudes which excluded women from public life.

Regardless of the difficulties in implementing the law over the coming decades the passing of the bill heralded a new epoch for women and the legal profession. It gave women the legal right to fulfil their potential as citizens and contribute to the body politic in increasingly influential ways. The fact that there are women lawyers now is due to the persistent lobbying by Rose Scott, Kate Dwyer, Annie and Belle Golding as well as many others. In addition, the change was also due to the willingness of Attorney General David Robert Hall to face his fellow men in parliament, endure their somewhat derisive, mocking responses and persist in trying to get the Women's Legal Status Act passed. But ultimately it was the great range of war related activities conducted so effectively by women which made it impossible to say 'No!' to their claim for equal status in the law.

Endnotes

The author teaches English and History and is the Senior Studies Co-ordinator at St Pius X College at Chatswood. This article extends the research presented in two working papers on the legal profession in the First World War, which may be accessed on the website for the Forbes Society for Australian Legal History at <http://www.forbessociety.org.au/>. People with information or interest concerning this topic are keenly invited to contact the author at: acunneen@bigpond.net.au. His previous articles in *Bar News* were on Supreme Court Judges in World War I and the Passage of the Judges' Retirement Act of 1918. The author would like to express his gratitude to the Forbes Society for Australian Legal History for supporting this research.

1. Rose Scott, 'Laws Women Need' - Speech to the National Council of Women 1912. Quoted in J A Allen *Rose Scott: Vision and Revision in Feminism*. OUP Melbourne 1994, pp.218-223.
2. Edmund Barton Policy Speech Maitland Reported in M. Dalrymple Hay *Reminisces of the Law School and Barristers Practising*. Unpublished and undated manuscript. New South Wales Bar Association .
3. J M Bennett 'Out of Nothing . . . Professor Pitt Cobbett 1890-1909' in J and J Mackinolty *A Century Downtown: Sydney University Law School's First Hundred years*. The Sydney University Law School, 1991, pp.41-42. Also, Joan M O'Brien, 'Evans, Ada Emily', *Australian Dictionary of Biography Online Edition*.
4. Present day Selborne Chambers occupies the same site. The Law School moved into University Chambers early in the war.
5. Linda J Kirk 'Poria's Place: Australia's First Women Lawyer' in *The Australian Journal of Legal History*, 1, 1995 75-91. She quotes Professor Jethro Brown in J Bavin (ed) *The Jubilee Book of the Law School of the University of Sydney, 1890-1940*.
6. Rosalind Atherton 'Early Women Barristers in NSW'. In Lindsay, G & Webster, C (eds) (2002) *The NSW Bar 1824-1900 in No Mere Mouthpiece - Servants of All, Yet of None*. LexisNexis Butterworths Australia, p.121.
7. She was the daughter of Emmeline Pankhurst, and sister to Christabel and Sylvia - a family of well known suffragettes. Susan Hogan, 'Pankhurst, Adele Constantia Mary', *Australian Dictionary of Biography Online Edition*, ANU.
8. The incident is well reported in a variety of newspapers of July 1914 including issues of the *Sydney Morning Herald*, the *Sydney Mail* and related publications.
9. Enid Campbell 'Women and the Exercise of Public Functions' in the *Adelaide Law Review*, Vol 1. No 2. 1961, pp. 190-204 . This article gives a good outline of the legal background to the notion that a person was a man, unless otherwise stated.
10. M Thornton *Dissonance and Distrust: Women in the Legal Profession*, Oxford University Press, Melbourne, 1996, p.49. Quoted in Atherton, p.118.
11. J A Allen, pgs.213-214.
12. Ursula Bygott & Ken Cable. *Pioneer Women Graduates of the University of Sydney 1818 - 1921* Sydney University Monographs Number One, Sydney 1985, p. 43. Quoted in Atherton, p.113.
13. Beverley Kingston 'Golding, Annie Mackenzie (1855 - 1934)' *Australian Dictionary of Biography Online edition*. ANU.
14. 'Rights of Women', *Sydney Morning Herald* 25 February 1904, p.5.
15. Ibid.
16. 'Judge's Plea for Women', *Sydney Morning Herald*, 22 June 1904, p.7.
17. See J A Allen's Chapter on this topic.
18. Knox, Sir Adrian (1916) *Letter to Murdoch*. Red Cross Archives. Melbourne.
19. Murdoch *Letter to Knox*. 27 December 1916.
20. Lady Mitchell CBE. *Three Quarters of a Century*, 1940 Methuen & Co. London, p.161.
21. 'Dress and Politics', the *Sydney Morning Herald*, 7 December 1910, p.5.
22. J A Allen p.213.
23. Bernard Wise was the New South Wales attorney general September 1899-June 1904) and minister of justice (July 1901-June 1904).
24. RD Fitzgerald to Rose Scott 1912 quoted in JA Allen, p.214.
25. Atherton 119-120 See Also Enid Campbell Women and the exercise of public functions in *The Adelaide Law Review* 1961; 1(2): 190-204 Available at <http://digital.library.adelaide.edu.au/dspace/handle/2440/15596>
26. 'Claims of Women - Bench Bar and Jury - A Sympathetic Minister' the *Sydney Morning Herald*, 22 September 1913, p.9.
27. Ibid.
28. Atherton 'Early Women Barristers in NSW'. In Lindsay, G & Webster, C (eds) (2002) *The NSW Bar 1824-1900 in No Mere Mouthpiece - Servants of All, Yet of None*. LexisNexis Butterworths Australia.
29. Ethel Curlewis was the author Ethel Turner who wrote *Seven Little Australians* amongst other books. Her husband was a prominent barrister appointed judge in 1917. Lady Eliza Cullen was the wife of the Chief Justice Sir William Portus Cullen. The two families lived near each other in Balmoral.
30. Elsie Horder. 'Women and the War' in *The NSW Red Cross Record* I, 11 Feb 1915, p.47.
31. 'Getting the men - Recruiting problems' the *Sydney Morning Herald*, 24 July 1917, p.16.
32. 'Right to legal Career Sought: A Sympathetic Minister' the *Sydney Morning Herald*, 19 August 1915, p.8.
33. 'Women's Rights: Deputation to Mr Hall' the *Sydney Morning Herald*, 21 August 1918, p.13.

34. DS Edwards *An Outline of the Duties of Justices of the Peace in New South Wales*, 1924 The Law Book Company Sydney, p.128.
35. NSWPD 1916, p.1095.
36. NSWPD 1916, p.1095–1096.
37. NSWPD 1916, pp.1096–1097.
38. Jill Waterhouse, 'Fitzpatrick, John Charles Lucas'. *Australian Dictionary of Biography*. ANU.
39. NSWPD 1916, p.1097.
40. NSWPD 1916, p.1793.
41. NSWPD 1916, p.1793.
42. Ada Holman *Memoirs of a Premier's Wife*. Angus & Robertson, Sydney, p.5. This book was correctly described as 'disappointing' by Heather Radi in Holman, Ada Augusta, *Australian Dictionary of Biography Online Edition*, ANU. Ada Homan generally managed to write a gossipy series of anecdotes about famous people she met with little attempt give any explanation or commentary about events which she must have been party to.
43. NSWPD 1916, p.1792.
44. Jessie Ackermann. *Australia from a Woman's Point of View* originally published by Cassell and Coy Ltd Melbourne 1913. Republished by Cassell and Coy Ltd 1918, p.192. Ackerman was an acute observer of Australia and commented that while Australian women needed to be granted more rights they also had to be more involved in public life.
45. 'Federal Elections – Women's Reform league', the *Sydney Morning Herald*, 13 April 1917, p.9.
46. 'Woman Candidate', the *Sydney Morning Herald*, 13 April 1917, p.10.
47. 'Law Report: A Cooks' Complaint' the *Sydney Morning Herald*, 24 March 1917, p.12.
48. 'Women Fight', *Sydney Morning Herald*, 10 July 1917, p.8.
49. 'Women Fight', *Sydney Morning Herald*, 10 July 1917, p.8.
50. 'Public Opinion', *Sydney Morning Herald*, 2 May 1917, p.12.
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52. *The Red Cross Record*. 8 January 1918. This wartime record is a major primary source of information concerning the Red Cross in World War I.
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57. John D Fitzgerald 'The new Recruiting Campaign' in the *Sydney Morning Herald*, January 1917, p.12.
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63. 'Women's Rights: Deputation to Mr Hall', *Sydney Morning Herald*, 21 August 1918, p.13.
64. NSWPD 1918, p.1954.
65. NSWPD 1918, p.1955.
66. NSWPD, 1918, p.2946.
67. NSWPD 1918, p.1955.
68. For an account of Storey's opinion of judges see 'A Creature of a Momentary Panic' by the author in *Bar News* Winter 2010.
69. NSWPD 1918, p.2949.
70. Hay, p.3.
71. NZWPD p.1918, p.2954.
72. NSWPD 1918, p.2955.
73. NSWPD, 1918, p.2040.
74. NSWPD 1918, p.2951.
75. NSWPD 1918, p.2951.
76. NSWPD 1918, p.2951.
77. NSWPD 1918, p.3067-3068.
78. 'State Parliament – To Open on Tuesday', *Sydney Morning Herald* 12 April 1917, p.15.
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80. NSWPD 1918, p.3463.
81. NSWPD 1918, p.3465.
82. NSWPD 1918, p.3467.
83. NSWPD 1918, p.3466.
84. NSWPD, 1918, p.3469.
85. HV Evatt KC. *Australian Labour Leader: The Story of WA Holman and the Labour Movement*. Angus and Robertson Ltd. 1945, p.467.
86. 'Women in Beecroft Progress Association' *The Cumberland Argus and Fruitgrowers' Advocate*, 19 November 1918, p.6.
87. Linda J Kirk, p.76.
88. The role of charitable organisations in the First World War and women's role in particular have received insufficient attention, although some pioneering work has been done by Professor Melanie Oppenheimer and others, including Josephine Kildea in her excellent thesis on Miss Chomley.
89. Some mention is made of the role of lawyers' wives in the First World War in articles by the author available in *Bar News* and on the website of the Francis Forbes Society for Australian Legal History website.

Mason on Gaudron

Being an extract of Sir Anthony Mason's speech launching *From Moree to Mabo – The Mary Gaudron Story* by Pamela Burton (UWA Press, 2010)



That Mary has had a great and beneficial impact on the law and the practice of the law cannot be doubted. She is a fine and principled lawyer who has been a resolute defender of the rule of law and the values of the common law. She is noted for her insight into constitutional law and her command of administrative law and criminal law. Mary has fought vigorously for equality of opportunity and treatment of women in the law and she has taken up other causes where she has perceived that injustice has been done. Though a strong opponent of discrimination against women, she has been equally strong in her insistence on merit-based advancement. One of her very important victories as a barrister was in appearing for the Commonwealth before the Arbitration Commission

in what was known as the 1972 'equal pay decision', a major step on the road to equal pay for women.

Times have changed. When I entered the Faculty of Law at Sydney University at the end of World War II there would not have been more than 30-40 females in a year of over 300 students. Now female law students outnumber male students in most, if not all, law faculties in Australia.

That situation is not replicated at the Bar which remains a male-dominated profession. And this has consequences for the judiciary because it is from the bar that most judicial appointments are made. The imbalance was even greater when Mary Gaudron was at the bar. Only a woman who had her courage and determination could succeed as she did and follow in the footsteps of that notable Australian Dame Roma Mitchell in South Australia.

It has been suggested that Mary's outspokenness in support of equality for women may have hindered rather than helped her own advancement. You should read the account in the book of her controversial speech at the annual Bar Dinner in the early 1970s. David Bennett is reported by the author as saying:

Whether or not [her] speech advanced or impeded her career prospects must be left for her biographer to explain.

The answer to the Bennett question must be a resounding negative. Mary was appointed a deputy president of the Arbitration Commission some three years later and, in 1981, New South Wales solicitor general. Her appointment as solicitor general, followed by that of Keith Mason, coinciding with the appointment of John Doyle in South Australia and of others in the other states meant that quality of state representation in the High Court was extremely high.

The biography paints a vivid picture of Mary's personality largely through her words and actions. Her personality is described as 'formidable'. She is described as having 'tantrums'. I was not aware of them being directed at me or perhaps I have forgotten them. In my experience, while always vigorously maintaining her own view, she was an extremely co-operative member of the court and would volunteer to do things beyond the call of duty.

Pamela Burton's biography is the story of a career full of life, incident and achievement, of a female barrister who started out without any advantages except ambition, determination, a first-class mind and nimble tongue – mind you, they are themselves advantages which few of us possess – and who became the first female Justice of the High Court and a very fine one at that.



The lawyer's duty to public life

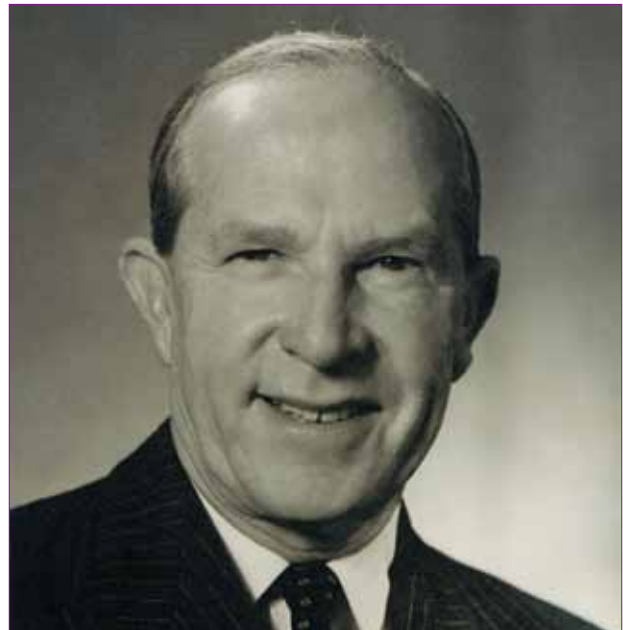
By Senator George Brandis SC, Shadow Attorney-General

The inaugural Sir Garfield Barwick Address to the Legal Practitioners' Professional Branch and the Justice & Attorney General Policy Branch of the New South Wales Division of the Liberal Party, delivered at Sydney on Monday, 28 June 2010

Sir Garfield Barwick, in whose honour this address is named, was a great lawyer and an important politician. Lawyers will, naturally, regard the most important aspect of his career as being his time as chief justice of Australia. For many academic historians, he is these days most often remembered for what is said to have been his controversial advice to Sir John Kerr concerning the termination of Mr Whitlam's commission in November 1975 – although why advice which was both incontestably correct and historically vindicated should be thought controversial, escapes me. To others, particularly citizens of Canberra, he is remembered as the force behind the relocation of the High Court to its proper place at the heart of the national capital, and his architectural legacy will always adorn the shores of Lake Burley Griffin as surely as his intellectual legacy lives on in the pages of the *Commonwealth Law Reports*. One aspect of his career which has not received the attention it deserves is the relatively brief time – barely more than six years – that he spent as a politician. But it is on that period that I want to concentrate tonight, and then make some more general observations about the role of lawyers in political life.

Garfield Edward John Barwick was born here in Sydney on 22 June 1903. (As it happens, I share a birthday with him.) He came from a family of very modest means, but a brilliant scholastic career at Fort Street Boys' High School, that famous nursery of so many great Sydney barristers and judges, followed by an equally brilliant academic career at the University of Sydney which culminated in the award of the University Medal (a rarer distinction in those days than it is now), gave him the grounding and confidence to pursue a career at the bar.

He was called in 1927 and, after an initially difficult start and one notable setback, he rose steadily, taking silk in 1941. By the late 1940s and throughout the 1950s, he had achieved a position of unrivalled leadership of the Australian Bar. By then he was acknowledged, without peer, to be the greatest advocate of his time, and it



was said that he could command a fee well beyond the reach of any other silk. Those years saw him briefed in virtually every important constitutional case in the High Court and the Privy Council. Perhaps the two most famous were the *Bank Nationalisation Case*,¹ which he won, and the *Communist Party Case*,² which he did not. He also appeared for the Commonwealth before the Petrov Royal Commission. He was knighted in 1953.

Barwick had first come to Sir Robert Menzies' attention at the time of the *Bank Nationalisation Case*, and some time towards the end of the 1950s, the idea formed in Menzies' mind of recruiting Barwick to parliament. Menzies was then in his mid-sixties and thoughts of the succession were on his mind. In his memoir *A Radical Tory*, Barwick is frank about the possibility held out to him by Menzies, when, following an initial unsolicited approach by Senator Spooner, a New South Wales Liberal senator – then, as now, most of the behind the scenes political work is done by little-known senators – Menzies came to see Barwick himself. He writes:

Menzies mentioned the personal advantages he thought I could bring to the government. He stressed that I had little more to achieve in practice in the law, and that he

thought I would find satisfaction in a political career. ... He said that the government would profit by my legal, particularly my constitutional, knowledge. He gave me his frank estimation of many of the members of the government and said that if I succeeded in Parliamentary life it might be possible for me in time to succeed to his office when he had left it.⁷³

After initial hesitation, Barwick indicated that he was willing. The problem – the perennial problem in politics – was to find a seat. This problem was overcome when Sir Howard Beale – a minister with whom Menzies did not enjoy a particularly fond relationship – was appointed ambassador to Washington, thereby creating a vacancy in the seat of Parramatta, which Barwick won at a by-election on 8 March 1958. Can I at this point say how flattered I am that Philip Ruddock, Barwick's successor-but-one as the member for Parramatta, and also a Commonwealth attorney-general, has honoured us by his presence here tonight, as have two other former Commonwealth attorneys-general, the Hon. Tom Hughes QC and the Hon. Bob Ellicott QC?

Barwick's period of parliamentary service was brief – indeed, by comparison with the rest of his career, almost minute: he was a member of the House of Representatives for only six years and six weeks. He was soon appointed attorney-general and, after the 1961 election, minister for external affairs as well. Although he was mentioned in the press as a potential successor to Menzies, with the passage of time, the view became settled that the claims of the less-gifted but more-experienced Victorian Harold Holt, who had served in parliament since as long ago as 1935, and was regarded by Liberal Party colleagues as the natural successor, should not be displaced by the brilliant newcomer Barwick. As well as much greater political experience, Holt had something Barwick certainly lacked – that easy affability with the broad diversity of personalities of which any body of parliamentarians inevitably consists, which is usually a requirement of political success. Thus, the culmination of Barwick's career was not the highest political office in the land but, perhaps more appropriately, the highest judicial office. He was appointed as chief justice on 27 April 1964 and went on to serve for a record term of almost 17 years, exceeding by four months the term of service



Sir Garfield Barwick, seen here in 1962 when he was minister for external relations, boarding a plane bound for SE Asia. Photo: Newspix

in that office of Sir John Latham – another eminent silk who had devoted the middle years of his career to service in parliament – indeed, had been the leader of his party, during the time of the Scullin government – but whose hopes for the prime ministership were also thwarted by the claims of a less gifted but more affable man, Joseph Aloysius Lyons.

Perhaps because of its relative brevity, perhaps because Barwick was always identified first and foremost as a lawyer rather than as a politician, appraisals of Barwick's career have tended to neglect his period of political service. Yet he was, for six years, one of the most important politicians of his time. Less than four months passed between Barwick's maiden speech on 14 August and his appointment as attorney-general, following the 1958 general election, on 10 December. It was an office he would hold for the rest of his time in parliament. After the 1961 election, Menzies added to Barwick's responsibilities external affairs as well. In both those offices he was a successful senior

minister, and many of his achievements as attorney-general, in particular, in the long run had a more lasting and permanent effect on Australia than most of his judgments – subject, as the judgments of ultimate appellate courts always are, to the vagaries of shifting judicial opinion in the years that follow.

Perhaps because of its relative brevity, perhaps because Barwick was always identified first and foremost as a lawyer rather than as a politician, appraisals of Barwick's career have tended to neglect his period of political service. Yet he was, for six years, one of the most important politicians of his time.

There are several landmarks of his time as attorney-general which mark him as the most significant law reformer of all Menzies' four attorneys-general, and which either remain largely intact today, or laid the foundation upon which subsequent law reforms were based. The *Matrimonial Causes Act 1959* was the first attempt to use the Commonwealth's constitutional power to create a uniform set of national laws to deal with divorce and matters incidental thereto. It was the precursor of the *Family Law Act* a decade and a half later, and the foundation of much of the existing system of family law in Australia. He initiated the review of personal insolvency laws which ultimately took shape in the *Bankruptcy Act 1966* and has stood the test of time in the half-century since. Barwick was also instrumental in encouraging the states to adopt the harmonious national system of company law – still state-based at that time – found in the uniform *Companies Act* of 1961.

Perhaps the most far-reaching of his reforms was the *Trade Practices Act* of 1965, which, although taken through the parliament by his successor Bill Snedden, was almost entirely Barwick's work. With the very limited exception of the obsolete *Australian Industries Preservation Act* of 1906 – itself essentially

an instrument of economic protectionism rather than market regulation – there had been no previous attempt on the part of the Commonwealth to protect Australian markets from cartels and other forms of anticompetitive behaviour. Barwick's Act – denounced at the time as an unwarranted intrusion upon freedom of commerce – recognised the central role of the Commonwealth in regulating a national economy, and the necessity in such an economy for intervention in the case of conduct which might distort its operations and cause market failure. Just as the *Matrimonial Causes Act* was the precursor to the *Family Law Act*, so was the 1965 *Trade Practices Act* the foundation of both the *Restrictive Trade Practices Act 1971* and, more importantly, the *Trade Practices Act 1974*.

After his appointment to the External Affairs portfolio at the end of 1961, Barwick had the conduct of Australia's foreign policy during some of the most difficult times of the Cold War. Tensions between the Western powers and the Eastern bloc were at their height. Barwick's tenure coincided with the Cuban missile crisis of October 1962 – the most dangerous days of the Cold War – and the revisions to American policy consequent upon it. From Australia's point of view, the most important immediate consequence was the expansion of American intelligence surveillance capability, which led to the request to establish a facility at North West Cape in 1962. (This was the occasion, by the way, when Mr Calwell and Mr Whitlam were famously photographed outside the Kingston Hotel in Canberra, awaiting the direction to the parliamentary party of the trade union warlords on the Labor Party's National Executive – thus framing Menzies' '36 faceless men' campaign for the 1963 election. The more things change, the more they stay the same.)

Even more important, in those years, was the crisis in relations with Indonesia in 1963, which was triggered by Indonesia's opposition to the planned federation of the former British colonies of Malaya, Singapore, North Borneo and Brunei. Barwick was widely credited for his pragmatic handling of a dangerously unstable situation which could well have escalated into a military confrontation. According to historians of the period, Barwick skilfully managed Australia's response to a

situation, which Menzies, whose interest in Indonesia was limited to say the least, and whose sentimentality towards the Commonwealth predisposed him towards the federation, did not sufficiently understand.

So Barwick's political career mattered. In six years, he accomplished more significant law reform than any attorney-general had done or was to do in the quarter-century of postwar Liberal rule, while in foreign policy – a field with which he had little prior experience – it was on his watch and through his diplomacy that Australia avoided a military confrontation with Indonesia which, regardless of the outcome, would have created perceptions in the neighbourhood that Australia was a potentially hostile power, with lasting and damaging consequences for our relationship with the nations of South East Asia.

Nevertheless, when Barwick accepted Menzies' offer of the chief justiceship in April 1964, he did so gladly. His subsequent judicial career is beyond the scope of this address. But of this we can be certain: he was a better judge because of his experience at the highest levels of government. His decision to devote several of the prime years of his professional life to parliamentary service reminds us of the relationship which used to exist between the bar and parliament. It is to that relationship, and its decline in recent times, that I want to devote the balance of tonight's address.

Barwick once said:

Until fairly recent times, when a man became a Queen's Counsel, a seat was found for him in the House. It was expected of him. We have lost that and I think it is a great pity...⁷⁴

Although the remark is an exaggeration, it is the case that, in Barwick's time, a closer relationship existed between the bar and the parliament than there does today, and a period of parliamentary service was regarded as an adornment to a barrister's career. The notion was still about – it is implicit in Barwick's remark, although it seems almost obsolete to modern ears – that it was also, at least for those with the interest and the aptitude, an aspect of the profession's duty of public service.

It was certainly much more common then to see



Sir Nigel Bowen

barristers serving in parliament than it is today. In the six years between 1958 and 1964 that Barwick sat in parliament, he served for at least some of the time with seven other queen's counsel – Menzies, Evatt, Whitlam, Lionel Murphy, Bill Snedden, Tom Hughes and the Victorian Labor Senator Samuel Cohen. Both Barwick's predecessor in Parramatta – Sir Howard Beale – and his successor – Sir Nigel Bowen – were senior members of the New South Wales Bar, and it was within recent memory that another distinguished Sydney silk, Sir Percy Spender, had been the member for Warringah.

In fact, in the 57 years between the time of federation and the time of Barwick's election, a total of 27 king's counsel and queen's counsel served in the Commonwealth Parliament (not including Barwick himself). But in the 52 years since Barwick's election, at a time when the size of the Australian Bar has vastly increased, and the size of the Commonwealth Parliament itself increased from 180 to 226, only 17 queen's counsel and senior counsel have given parliamentary service. In the years before the Second World War, the largest number came from the Victorian Bar, while in the last 60 years, the overwhelming number of senior barristers to enter the Commonwealth

Parliament has been from the New South Wales Bar. Your bar has given us, among those who made an important contribution to Australian political history, Whitlam, Barwick, Murphy, Hughes, Bowen, Ellicott and Spender, while the only significant Victorian silk of the past half-century to serve in the Commonwealth Parliament was Ivor Greenwood. Today, there are only three silks in the Commonwealth Parliament – Duncan Kerr, the Tasmanian Labor MP who retires at the coming election, Mark Dreyfus, the Victorian Labor MP who was elected in 2007, and myself, although there are a number of other accomplished barristers as well, including, from Sydney, Helen Coonan and (in an earlier chapter of his splendidly multi-faceted career) Malcolm Turnbull. And no account of the contribution of barristers to the Commonwealth Parliament in recent years should fail to mention Peter Costello who, at the time of his election as the member for Higgins in 1990, had already made his mark as one of the rising juniors of the Victorian Bar.

The barristers who have served in the Commonwealth Parliament have given disproportionately greater service to the Australian people than any other professional or occupational grouping. Six have been Prime Minister (Edmund Barton, Alfred Deakin, George Reid, William Morris Hughes, Menzies and Whitlam), while seven have been leaders of the opposition: Deakin, Reid, Latham, Menzies, Evatt, Whitlam and Snedden). Three other prime ministers – William McMahon, John Howard and Julia Gillard – were accomplished solicitors before entering parliament while another, Harold Holt, served articles and signed the roll of counsel, but does not appear to have been in regular practice before his election. In all, of the 109 years since federation, Australia has been led by a barrister – in the case of all but Deakin and Holt, a KC or a QC – for slightly more than 39 years, and by a member of the solicitor's branch of the profession for another 13 and a half years. Members of our profession have led the nation, in aggregate, for slightly more than 52 years – almost half of our entire nationhood.

I hope I may be forgiven for wearying you with these fascinating statistics, but they are the best way I can present this paradox: why is it that today, the



Jeff Shaw QC. Photo: Newspix

profession which has historically given so much to the governments and parliaments of Australia, gives so little? In particular, why is it that, in the 20 years since the defeat of John Spender in North Sydney in 1990, not a single senior member of the New South Wales Bar has entered Federal Parliament – although I should acknowledge, of course, that that does not apply to the New South Wales Parliament, following the election in 2007 of Greg Smith SC. Why is it that in the more than 31 years that passed between the death of Ivor Greenwood in November 1976 and the election of Mark Dreyfus in November 2007, only two silks from Victoria – the bar that gave us Deakin, Higgins, Isaacs, Latham and Menzies – served in the Commonwealth Parliament, one of whom, Gareth Evans, was a self-appointed former academic?

The barristers who have served in the Commonwealth Parliament have given disproportionately greater service to the Australian people than any other professional or occupational grouping.

Now I know that it is not for want of trying by a few. But there are so few – and that is the case not just in Sydney, but throughout Australia. The consequence of the reluctance of the legal profession to engage actively in mainstream political life has meant that the great tradition of which Barwick, along with Menzies and

When lawyers are disengaged from public affairs – when parliamentary service is seen not as a worthy professional accomplishment, an aspect of public service, but regarded instead as a slightly disreputable diversion in which no serious lawyer would engage – it impoverishes both the parliament and the profession.

Whitlam, were exemplars, has fallen almost entirely into desuetude. When lawyers are disengaged from public affairs – when parliamentary service is seen not as a worthy professional accomplishment, an aspect of public service, but regarded instead as a slightly disreputable diversion in which no serious lawyer would engage – it impoverishes both the parliament and the profession.

It impoverishes the parliament because the skills which are honed by the study and practise of law – experience of reading statutes and other legislative instruments, the capacity to analyse a large body of information quickly, the ability to think on one's feet and to argue a point of view logically and persuasively, the techniques of the forensic examination of witnesses – are highly adaptable to the demands of parliamentary life. And, of course, a good understanding of the law itself is, if not a prerequisite, nevertheless hardly a handicap, for a lawmaker.

As Cicero wrote in *de Officiis*:

...those whom nature has endowed with a capacity for administering public affairs should put aside all hesitation, enter the race for public office and take a hand in directing the government; for in no other way can a government be administered or greatness of spirit be made manifest.⁵

Max Weber, the great German social theorist whom many regard as the father of sociology, argued that in a post-aristocratic age, when political leadership depended not upon the whim and charisma of the king but upon the depersonalised rationality imposed by the rule of law, lawyers were the most naturally-suited of all the occupations to assume the burdens of political leadership:

Lawyers are the prototype of the modern professional politician. They are available for political activities in economic terms. Through arrangements with their associates they can free their time for politics and continue to receive an income or at least can expect to return to a secure and profitable profession when their political

activity has come to an end. And in another sense they are highly suited for political activities. ... Their legal training is excellent preparation for legislative deliberations, their skill in writing and argument an important factor in campaigns, and their experience in the peaceful contest of the trial a proving ground in the struggle for power.⁶

Now, Weber wrote this in the 1920s, but by and large what he said holds true today.

The reluctance of members of our profession to contribute to political life through parliamentary service does not, of course, suggest that there is any diminution of interest in politics itself – nor any disinclination to the exercise of political power. It is a cliché that the benches, barristers chambers and law firms are full of frustrated politicians. But because so few are willing to make the sacrifices attendant upon parliamentary life, their political instincts are channelled through other outlets. The ambition to change society of some politically activist judges is uninhibited, just as the moral vanity of social justice crusaders – comfortably installed in the ever-growing forest of human rights bureaucracies – knows no bounds. Many of these people are gifted, learned and, if not wise, then at least passionate. Then let them stand for parliament, and subject themselves to the rigours of democratic politics. But, of course, such people never do. When, over the past year, I led the federal opposition's campaign against a Commonwealth bill of rights, I could not help but be struck by the fact that most of the pressure for the idea came from politically-motivated lawyers who would never themselves countenance the idea of leaving their comfortable and sequestered lives to stand for parliament, but were itching to get their hands on a good deal of political power through the back door.

But just as the disengagement of the legal profession from active political life impoverishes the parliament, so it impoverishes the profession as well. Sir Owen Dixon – who, although never politically active himself,

was, as Philip Ayres's biography reveals,⁷ like so many judges an indefatigable gossip about political events, and a frequent source of discreet counsel to his protégé Menzies – gave an address in 1960 to the Second Asian and Pacific Accounting Convention. Taking as his subject the rather unpromising topic 'The Profession of Accountancy', he defined a profession in these words:

It is the essence of a profession that its members master and practise an art. The art must depend on a special branch of organized knowledge, and be indispensable to the progress or maintenance of society, and the skill and knowledge of the profession must be available to the service of the State or the community.⁸

In an age of commercialised professionalism, when the distinction between a profession and any other vocation or calling is at risk of breaking down or being forgotten about entirely, it has never been more important to stress that the service of the community, rather than merely the pursuit of personal gain, is integral to the values and ethics of any true professional man or woman.

I suspect that one of the principal reasons why it is so rare these days to find senior lawyers who do what Barwick did in 1958, and give up their lucrative practices for the modest remuneration which parliamentary service attracts,⁹ is that they are simply not prepared to make the financial sacrifice. In doing so, they neglect the public dimension of their professional obligations of which Dixon spoke. In any event, as Dr Davis McCaughey, the distinguished former governor of Victoria, said in his 1987 Boyer Lectures, when addressing the topic of the role of the professions in modern Australia:



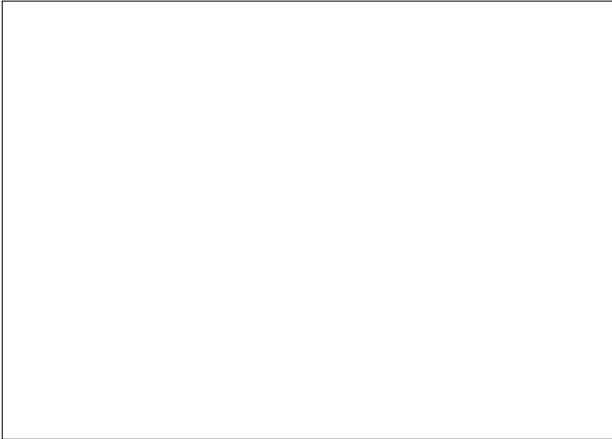
It should never be able to be said of the professional that he is in it for what he can get out of it. He or she is there with something to give – mostly advice, but at all events a service. He is not in the market place to obtain the highest possible price for his commodity ... Hence there grew up a tradition that the remuneration received by a member of a profession should be sufficient to relieve him from financial anxiety and to enable him to live in reasonable comfort and cultivation, but that membership of a

profession should not be thought of as a way in which to amass considerable wealth'¹⁰

In recent years, in this city, a number of people of significant ability have left the world of commerce, where they had the opportunity to earn enormous incomes, to serve in parliament. I think, in particular, of Mike Baird, the shadow treasurer, who sacrificed a lucrative career in banking, and my newest federal colleague, Paul Fletcher, the member for Bradfield, who made a similar sacrifice when he gave up his salary as one of the most senior executives of Optus for the wage of a House of Representatives backbencher. For both these men, the honour of public service was not denominated in material wealth. It is a disappointment to me that so many of our own profession have turned their back upon the opportunity of similar public service because, to put it bluntly, they are too selfish to make the sacrifice that people like Mike Baird and Paul Fletcher were prepared to make – just as, in 1958, did Sir Garfield Barwick.

Those of you who are gathered here tonight – and I am sure there is an equivalent body on the Labor side as well – are both unusual and, in the manner of all unusual people, exceptional. You are unusual because you have remembered what, sadly, too many of our profession has forgotten – a belief in the noble

I suspect that one of the principal reasons why it is so rare these days to find senior lawyers do what Barwick did in 1958, and give up their lucrative practices for the modest remuneration which parliamentary service attracts,⁹ is that they are simply not prepared to make the financial sacrifice.



Greg Smith, Liberal candidate for Epping, outside his office in Epping, Sydney. Photo: Lindsey Moller / Newspix

possibilities of public life, the ethical professional value of service to the community, and the importance – for lawyers, foremost among all of the professions – to be active participants in our law-making processes. The relationship between our profession and the profession of parliamentary service is one of the great traditions of our democracy, which has enhanced our parliaments and ennobled our profession. Its decline has impoverished them both. The people who are gathered here tonight, for this inaugural Garfield Barwick Address to the Legal Practitioners Branch of the New South Wales Division of the Liberal Party, share my belief that it ought to be restored – a belief

of which Sir Garfield Barwick, in his own life and by the many distinctions which marked his great career, was an exemplar.

Though the parliaments of our nation are full of people with LLBs, serious lawyers are a rarity. We have all heard the remark – ‘there are too many lawyers in politics’. The story may be apochryphal, but it is said that when that comment was once made to Sir Robert Menzies, he rounded on his interlocutor and replied, magisterially, ‘My boy, there are always too many lawyers in politics, and there are never enough good ones.’

Endnotes

1. (1948) 76 CLR 1; (1949) 79 CLR 497.
2. (1951) 83 CLR 1.
3. Garfield Barwick, *A Radical Tory* (Sydney: The Federation Press, 1995) pp. 102-3.
4. David Marr, *Barwick*, (Sydney: George Allen & Unwin, 1980), p. 132.
5. Bk I, ch. 21.
6. Reinhard Bendix, *Max Weber: An Intellectual Portrait* (London: University Paperbacks, 1966) pp. 442-3.
7. Philip Ayres, *Owen Dixon* (Melbourne: Meigunyah Press, 2003), pp. 129, 183, 190-1, 223-4.
8. Owen Dixon, *Jesting Pilate* (Melbourne: Law Book Company, 1965), p. 192.
9. Marr estimates that at the time of his election, Barwick’s income from the Bar was about £30,000 per year, by comparison with an MP’s salary of £2,950: *op. cit.*, p. 133.
10. Davis McCaughey, *Piecing Together a Shared Vision* [The 1987 Boyer Lectures] (Sydney: ABC Books, 1987), Lecture 3.

Verbatim

Sir Anthony Mason, launching *From Moree to Mabo: The Mary Gaudron Story*

‘I share two characteristics with Mary Gaudron. The first is that, like her, I am an old convent girl. I attended primary school at Kincoppal Convent, Elizabeth Bay, before it merged with the Rose Bay Convent. The second characteristic is that we emerged from a convent education, hers much longer than mine, without a profound belief in

religion. If religious instruction is the primary role of a convent then we must be counted as conspicuous failures. This comment does not belie the fact that, like many others, we owe a great debt to the convents for starting us out on the great learning journey of life.’

Tutors' and Readers' Dinner 2010

Readers from Bar Practice courses 02/09 and 01/10 gathered at the Ivy Room on Friday, 2 July for the annual Tutors' and Readers' Dinner.



Robert Ranken and Dilan Mahendra



Kate Richardson, Dominique Hogan-Doran and Kate Williams



Richard Beasley and Ross Glover



Jeremy Kirk, James Hutton, Peter Whitford SC, Penny Sibtain and Kate Richardson



Gabriella Rubagotti, James King, Charles Alexander and Bora Kaplan



Brendan Burke, Therese Catanzariti and Joanne Little



Reno Gambi and William Summers



Matthew Hutchings, Richard Lee and Michael Gleeson



Chris D'Aeth and Paresk Khandhar



Lesa Richards and Andrew Bulley



Sandy Street SC, Lesa Richards and Elizabeth Gee



Sandy Street SC, Alan Shearer and Elizabeth Gee

The Hon Justice Peter Garling

On 7 June 2010 Peter Garling RFD SC was sworn in as a judge of the Supreme Court of New South Wales.

His Honour attended St Ignatius College Riverview and then studied Arts/Law at Sydney University graduating in 1977. His Honour practised at David Landa Stewart before commencing practice at the bar in 1979. His Honour initially commenced practice in Garfield Barwick Chambers, moving to the 2nd floor of Wentworth Chambers, and then to Fifth Floor St James Hall, his floor for nearly 20 years. His Honour was appointed senior counsel in 1994.

Garling J practised widely, appearing for private and government clients, in a variety of common law and commercial litigation cases, involving important points of law in negligence, public liability, product liability, insurance law, administrative law and health. His Honour was involved in a number of significant royal commissions and public inquiries, including the Special Commission of Inquiry into Acute Care Services in New South Wales Public Hospitals.

Outside practice at the bar, his Honour was a member of the Army Reserve, Sydney University Regiment from 1970 to 1996; a member of the School Council at Loreto Kirribilli from 2002 and from 2004 chair of the council; a member of the NSW Rugby Union Appeals Tribunal and the Australian Rugby Union Appeals Tribunal, and the Appeal Tribunal of the Australian Paralympic Committee, and a member of the University of Sydney Law Faculty since 2004.

The attorney general spoke on behalf of the New South Wales Bar. Mary Macken spoke on behalf of the solicitors of NSW. Garling J responded to the speeches.

The attorney noted that his Honour

appeared in the inquiries into: the Sydney bushfires in 1994; the Thredbo landslide in 1997; the Glenbrook rail accident in 1999; the collapse of the HIH Insurance Group in 2001; the Waterfall rail accident in 2003; the Medical Research and Compensation Foundation in 2004; and the Pacific Highway road collapse in 2007. Clearly, you have been the counsel of choice when things go wrong.

Because of your extensive knowledge and demonstrated forensic skills, in 2008, you were appointed by the New South Wales Government to conduct the Special Commission of Inquiry into Acute Care Services in New South Wales Public Hospitals. The Inquiry was the most comprehensive of its kind ever seen in this State. Over the ten months of the Inquiry you and your team visited



sixty-one public hospitals, reviewed over 1,200 submissions, held thirty-nine public hearings, and analysed over 30,000 documents. ...

The rigour with which you undertook this Herculean task and the respect in which the results of your work is held are reflected in the fact that, of the 139 recommendations you have made, the Government has accepted 134.

Your significant contribution on this Inquiry alone has the potential to significantly improve our public hospital system.

Ms Macken said that in addition

your Honour has also been considered to have brought the first class action commenced in the Federal Court in the case of *Fischer v Bridgelands Securities Limited* in 1990. The legislation creating group proceedings in Australia at a federal level was not enacted until 1992.

Ms Macken referred to his Honour's involvement with Loreto Kirribilli:

Loreto Kirribilli School Council, which the Attorney noted your Honour has chaired since 2005, will also be tight put to fill your shoes. Your annual reports provide such an in-depth history of the school that they should be bound. Your Honour has lent his legal expertise to assisting with the College Constitution and the structure of the school. Perhaps the only glimmer of light for the board members is that there may be some respite in the need to be exhaustively on top of every single detail in order to keep up with the Chair. Principal Janet Freeman, who is with us

today, is reportedly devastated at the prospect of your departure from her board after six years as the Chair. I also note that there are many here today who have thought or still think that blue and gold were Loreto colours.

Ms Macken referred to his Honour's forebears:

... your Honour is a descendent of Frederick Garling, one of the first solicitors admitted to this Court who was appointed in 1830 as the first Crown Prosecutor in New South Wales. Your Honour's family also tips the scales in terms of numbers of legal practitioners. Your three brothers completed law degrees. Eldest Max gave up practising in favour of becoming a mining entrepreneur. Anthony is a New South Wales District Court Judge, Kim is in private practice and is a former President of the Law Society. Your Honour's wife Jane, also a solicitor, currently lectures at the University of Technology and your eldest daughter Antonia is a solicitor at Freehills. Uniquely, daughter Lucie appears to have escaped the long arm of the law and is an accountant with Price Waterhouse in Sydney.

Garling J did likewise:

My forebear Frederick Garling, in 1824, no doubt heard the public reading of the Third Charter of Justice, by which this Court was founded, from the Georgian School House in Elizabeth Street, opposite where the Francis Greenway building, which this Court occupies, stands. I have wondered whether he thought to himself that he was witnessing the creation of an institution which, 185 years later, would have his descendent as a member.

Frederick (as you have just heard) was one of the first, although according to Garling family folklore, the first, solicitor of the Colony. He was paid 300 pounds by the Government to come to Australia and to serve its citizens. In February 1816 he was appointed an Acting Judge Advocate and presided over the Court of Criminal Jurisdiction in the Colony of New South Wales or, as it is described in the Charter of Justice, "the island of New Holland." Later, in 1824, he became Commissioner to the Court of Civil Jurisdiction known as the Court of Requests. Thereafter, he served as a Clerk of Peace, and he became the first Crown Prosecutor of the Colony. He subscribed as one of the original shareholders for the establishment of the Colonial Bank which became known as the Bank of New South Wales, he provided articles of clerkship to a smart young man called George Wigram Allen, who went on to found Allen Allen & Hemsley, and, by all accounts, Frederick was quite a civil minded person.

Unfortunately, history does not adequately reveal what happened to the 1200 acres of land which was granted to him by Governor Macquarie in the area where Blacktown

now is.

After Frederick, there were then only one or two lawyers in the Garling family until my three brothers and I came along.

... I have had cause recently to pause and wonder quite how all four of the Garling boys came to be lawyers. I have not found a satisfactory explanation unless it be that advanced by my wife Jane, namely, that it simply shows a singular lack of imagination.

Garling J also referred to his experience as an acting District Court judge:

I thought back to my time as a District Court Judge when considering how I might discharge my duties in this office.

I immediately recalled an incident which has taught me how not to discharge my duties as a judge. In my first case, counsel called the plaintiff, after about six questions he asked what seemed to me to be an outrageously leading question. I immediately objected. Fortunately, I did not rise to my feet. A stunned silence fell over the courtroom, I upheld the objection and invited the counsel to ask his next question.

Later in that week I had occasion to be in the presence of Chief Justice Gleeson who was then the Chief Justice of this Court. I thought that I would obtain the benefit of his wisdom on this thorny issue of objections. His Honour was at that stage presiding over a murder trial in the St James Road Court. After asking after his Honour's health and welfare, I asked him how he found dealing with objections with a jury present. He looked at me rather quizzically, he then said "I don't find objections difficult at all". He said "When an objection is made I look intently for about 15 seconds at either the questioner or the objector. Either the question or else the objection has been withdrawn. After two weeks it has not been necessary to give a ruling".

Emboldened by this I returned to the District Court for the next case. I was determined to follow the Chief Justice's guidance. A question was asked, I thought it was plainly objectionable, an objection was taken, I stared at the questioner. He didn't seem to react. I looked at the objector, he didn't seem to react. I looked back at the questioner and after an undue pause, a voice came from the objector, "Does your Honour propose to give a ruling on the objection?" Clearly I had failed where Chief Justice Gleeson succeeded.

The Hon Justice Ainslie-Wallace

Her Honour Judge Ainslie-Wallace was sworn in as a judge of the Family Court of Australia, assigned to the Appeal Division of the Family Court of Australia, on 9 July 2010.

Her Honour attended the Queenwood School for girls, and graduated with an Arts degree in psychology and a Bachelor of Laws from the University of New South Wales in 1978. Her Honour was admitted as a barrister the same year. Her Honour's practice at the bar involved many complex family law cases, including briefs from the Department of Community Services at first instance and in appeals from the decisions of the Children's Court and representing the state in various jurisdictions and at all levels as well as appearing as counsel assisting at inquiries and inquests. Her Honour was appointed a judge of the District Court of New South Wales in 1997 and was appointed a deputy chair of the Medical Tribunal. From 2000 to 2008 her Honour was the District Court's list judge managing child welfare matters.

Her Honour is a board member of the Australian Advocacy Institute, and now the vice chair of the institute. Since 2008 her Honour has been an adjunct professor of law at the University of Technology, teaching a special elective in trial advocacy.

Elizabeth Kelly, deputy secretary of the civil justice and legal services of the Attorney-General's Department spoke on behalf of the Australian Government. Chris Simpson SC spoke on behalf of the New South Wales and Australian bar associations. Ann Rees SC spoke on behalf of the Law Council of Australia. Mary Macken spoke on behalf of the solicitors of New South Wales. Ainslie-Wallace J responded to the speeches. Ms Kelly noted that her Honour had

been described as a youngster who could simply not miss an opportunity to be someone or to achieve something. It comes as no surprise to, therefore, learn that your Honour was front and centre in a newspaper photograph of a group of jubilant young girls pressed up against a barricade to shield the Beatles from excited fans during their Australian tour in 1964.

Ms Kelly noted that her Honour was able to find time for other interests:

I am reliably informed that you are an accomplished singer and pianist and that you are a member of a choir that performs regularly at church and that you are known to pass time in congested traffic by singing your favourite



hymns at the top of your voice with the windows down. Your Honour also has a passion for nearly all things Italian and has become almost fluent in the language.

Simpson SC referred to the historical and social context for her Honour's achievements:

In what would be your Honour's first full year of practice, no woman occupied a seat on the High Court, no woman sat as a judge of the Federal Court of Australia, no woman sat as a judge of the Supreme Court of New South Wales, no woman sat as a judge of the District Court of New South Wales and no woman was a Queens Counsel in New South Wales. It would not be until the following year that Jane Matthews, then a crown prosecutor, would become the first woman appointed to the District Court, and subsequently the Supreme Court. The recently created Family Court was presided over by the Honourable Justice Elizabeth Evatt, but she had come to that position after a career which was atypical in most respects and not one likely to be seen as capable of emulation by a young barrister at the start of her career.

Throughout the whole of Australia three other women only sat on the Family Court of whom only the Honourable Justice Josephine Maxwell, then a little more than four years into her long and distinguished career, sat in New South Wales. By my counts, your Honour, there were no more than about 20 women who were in active practice at the New South Wales Bar. Justice Margaret Beazley was then of five years standing only, and Justice Ruth McColl

was still a year away from her admission. ...You had none of the family or other connections that might have made the journey on which you were embarking easier or likely to be assisted.

Simpson SC also referred to her Honour's application to licence the Women's Lawyers Room within Frederick Jordan Chambers:

...made by undated letter addressed to, but mis-describing, Lionel Robberds QC, the Secretary of Chambers. As a sign that all is forgiven, Robberds is here today. ... [you] told the then board of Frederick Jordan Chambers that you brought with you a wealth of legal experience. It read, under 'Experience':

Redfern Legal Aid Centre: *One day per week in suburban legal firm (clinical legal experience); registration clerk, Commonwealth Court Reporting Service.*

Whilst the board may not have thought the deep learning obtained in those positions suggested you'd be likely to be of assistance to younger barristers, if indeed there were any in chambers, they were no doubt reassured by what your application told them about the range and breadth of the commercial and occupational experience that you informed them of and brought with you: shop assistant, switchboard operator, process worker and filing clerk. ... In 1979, your Honour was ready to strike out on your own, telling the board that you had become aware of shared accommodation available on the 12th floor which you wished to take up.

... by the time of your move, however, your Honour's manner of sparse and to-the-point written expression, which is now so well known, was beginning to take form. A communication that your Honour forwarded to the board and care of the secretary was expressed in these terms:

To Lionel –

Your Honour had, by that time, identified Robberds QCs correct Christian name –

To Lionel (in your role as secretary of the board) –

Quite what other capacity your Honour might have been writing to him, one doesn't know, but nevertheless, and proceeded to say:

Nash and I have terrible trouble with people barging into our chambers without knocking trying to sell, one, typewriters, two, pot plants etc, etc, etc. They never go to the seventh floor and we would have someone at

least once or twice a week come in. Is there any way, apart from mining the corridor that would force people to go to the seventh floor? Thanks.

Ms Rees SC noted that:

In about 1981, the representation of children in family law proceedings in the Family Court in Sydney took on a particular impetus, spearheaded by, amongst others, Justice Josephine Maxwell and a small group of family lawyers at Legal Aid, which included Justice Ryan, Anne Charlton, as she then was, now Anne Connor, and me. And we began to develop the jurisprudence of the role of separate representative.

Your Honour was one of the counsel of choice of that group, and you went on to carve out a pioneer role in that work.

...What distinguished your Honour as a barrister was an absolutely fanatical devotion to preparation. Whether you appeared for the applicant, the respondent or the separate representative, your Honour had prepared the cross-examination of every witness before the commencement of the hearing. During a particularly ghastly trial when you were briefed by me as separate representative for a 10-day trial before Justice Basil Hogan, he announced that the separate representative would cross-examine every witness first, and you were able to proceed with the trial without hesitation.

... You had a reputation as a devastating cross-examiner. I can recall you cross-examining a man who was in protective custody in a – I can't quite remember how he came to be applying for time with his children, given that he was in protective custody, but that was the issue. And your Honour looked at him and said to him so sweetly, "And was that so that others could not prey upon you as you had preyed upon the children?" I don't remember what his answer was, but I don't think it mattered.

Simpson SC said of her Honour's time in the District Court of New South Wales:

Your Honour quickly demonstrated that no noisy bluster, no pedantry or no creation of side issues would stand in the way of your sureness of touch in identifying the issues in a trial, and so it was in crime as well. Your judgments demonstrated restraint; you didn't hound down witnesses and you didn't unnecessarily savage the unsatisfactory witness. As was said of the late Justice Lehane you did not cite authority with such indiscriminate relentlessness, but the reasoning became only a thin trickle, oozing almost invisibly through a marshy and slimy morass of case names.

Ainslie-Wallace J said in a sense it was as though she was coming home:

In the early months of 1979 I made my first ever court appearance here in the Family Court. It was a very difficult adjournment by consent, and I liked the work and I forged quite a career for myself in consent adjournments. I made many more appearances and before I knew what had happened twenty years had passed, as had the flower of my youth.

And in 1997 I accepted an appointment to the District Court and I'm sad to be leaving it. The work and its variety has been endlessly stimulating and challenging and it's an extraordinarily busy court. It has achieved an enviable reputation for efficiency, thanks to the hard work and dedication of the judges of the court, who work prodigiously under the stewardship of the chief judge, Justice Reg Blanch. He has been an inspirational chief judge and I hold great affection for him, and I'll miss him.

I suspect he will have much more time on his hands now that he's not dealing with my endless requests for leave. He may even take up a hobby...

My formative years as a lawyer were spent here, much of it in the company of Justice Ryan, Mrs Rees and Gay O'Connor. Those of you who know them will agree with me that they are formidable women, highly professional and effective lawyers and they are very dear friends. On one occasion the late great Joe Goldstein came upon Anne, Judy and myself in a conference room and commented – I'm giving you the edited version, you will understand – that it looked like the first act from Macbeth.

He may be gone but the analogy lives on, because just a week ago an old friend, seeing the three of us in what he described as a conspiratorial huddle, stirred an imaginary cauldron.

The Hon Justice William Johnston and the Hon Justice Ian Loughnan

Judicial Registrars William Johnston and Ian Loughnan were sworn in as judges of the Family Court of Australia on 12 July 2010.

Toni Peroni spoke on behalf of the Australian Government. Robert Lethbridge SC spoke on behalf of the New South Wales and Australian bar associations. Amanda Parkin spoke on behalf of the Law Council of Australia and the Family Law Section. Justin Dowd spoke on behalf of the solicitors of New South Wales. Their honours responded to the speeches.

Johnston J was admitted as a solicitor of the Supreme Court of the Australian Capital Territory in 1972 and practised as a solicitor in regional New South Wales, then was an officer of the Commonwealth Attorney-Generals Department in Canberra between 1973 and 1980. During this period, his Honour advised the then attorney-general on the administration of family law legislation, and was also involved in other high-profile law reforms, including Australia's first counter-terrorism legislation, and preliminary work in relation to the Hague Child Abduction Convention.

His Honour was appointed deputy registrar of the Family Court of Australia in 1980, and in 1986, principal registrar he joined the Family Court in 1980 as a deputy registrar, becoming the court's principal registrar in 1986. In 1989 his Honour returned to private practice, at Barker Gosling solicitors, where he was responsible for the firm's family law practice, including numerous complex property matters. He was appointed a judicial registrar of the Family Court in 1990.

Loughnan J was admitted as a barrister of the Supreme Court of New South Wales in 1981 after obtaining a Diploma of Law from the Barristers Admission Board and in 1984 a Diploma in Criminology from the University of Sydney. He held a number of clerical and administrative positions up until 1982 in the Family Law Division of the Supreme Court of New South Wales and the Family Court of Australia.

From 1982 until 1984 he was deputy district registrar of the Federal Court of Australia; deputy registrar in bankruptcy, and deputy registrar of the Administrative Appeals Tribunal. He was appointed deputy registrar of the Family Court of Australia in 1984, and appointed principal registrar of the Family Court in 1991. In 1995 he was appointed judicial registrar of the Family Court in 1995. As a judicial registrar his Honour chaired the Future Directions Committee from 1998 to 2000, in addition to his judicial duties.

Lethbridge SC said that:

the consensus at the bar and particularly the Parramatta, Sydney and Newcastle Family Law Bars is that the appointments are overdue [and] having been made, they are welcomed and applauded; ...

May I just say a little about the duty lists which have comprised much of their Honour's work to date? The work in these lists exemplifies the qualities which we, at the Bar, believe each of their Honours will bring to the bench. The qualities, though not exclusively, comprise compassion, clarity of thought, a capacity for hard work, good humour and a good nose for nonsense. Duty lists are perhaps the most difficult area in the Court, because there is almost always too much work to be done in a day; there seems to be a high proportion of litigants in person; and while the Court's duty is to hear and determine disputes in duty lists, is almost always, in one of the party's interests, for nothing at all to happen.

Their Honours have assiduously dealt with their duty lists,

completed them and except where time has not permitted, brought sensible results in situations which are often extremely difficult and emotional. May I give one example of the humour that his Honour, Justice Loughnan, brings to the bench? It is reported that his Honour, in a duty list comprising some 20 or 30 matters, was calling through the list, when at matter two or three he was confronted by two litigants; one in person, the applicant, being an engineer, who set out to inform his Honour, in minute detail, of all aspects of the matter before the Court irrespective of their relevance as to what was to be done on the day. His Honour, despite several entreaties to the engineer to get to the point, was not able to bring him to a point, whereupon his Honour was heard to say:

Note to self: remember to ban self-represented engineers from my list in future.

Finally, there was silence. With silence came his Honour's request for the solicitor for the mother as to what it was that his client sought. There was an application, his Honour was told. His Honour, as is often the case in the duty list, was unable to find it because it hadn't come through the system. So, of course, he asked the mother's solicitor, could he provide a copy. There was much shuffling of paper. There was much talk, but there was no application. At which point, his Honour turned to the engineer and asked if he could help, whereupon a large file was produced and very quickly indeed, a pristine copy of the mother's application was also produced and handed up. His Honour was then heard to say:

Note to self: there are some advantages to having self-represented engineers before you.

The Hon Justice Margaret Cleary

Margaret Cleary was sworn in as a judge of the Family Court of Australia at a ceremonial sitting at the Newcastle Registry on 8 July 2010.

Her Honour graduated with an Arts degree from the University of Sydney in 1978, and then worked as a legal clerk in the Corporate Affairs Commission of New South Wales while studying. Her Honour graduated with a Bachelor of Laws in 1981 and was admitted as a solicitor of the Supreme Court of New South Wales. Her Honour worked at the firm of John Allanson and Associates.

Her Honour was called to the bar in 1986 and read with Larry King QC, moving to Frederick Jordan Chambers in 1985 and built up practice based on the law relating to children and property settlements.

In speaking on behalf of the New South Wales and Australian Bar Associations Adam Mooney said:

By 1984 your Honour had begun to weigh the pros and cons of practising at the bar. At a time when women barristers were fewer than they are today, your Honour went to see Priscilla Fleming QC. Expecting sage advice on starting a practice, or perhaps guidance in learning the art of advocacy, your Honour was taken aback when Fleming QC gave surprisingly simple advice: 'Don't be deterred from coming to the bar', she said. 'All you need to do is save enough money for the first year - because you won't be earning any - and take leave in the middle of the year'. Judging by the number of barristers absent whilst I was researching this speech, Fleming QC's advice is being honoured to this day.

Mooney said noted that her Honour:

acquired a reputation for being calm, respectful of the views of briefing solicitors and always across the finest details of a brief..

...

In real life, family law is a jurisdiction that is fraught with raw emotion, bewilderment and lasting pain. But amidst all of this, your Honour is praised as a person of the utmost integrity, who cares a great deal about the wellbeing of clients. Your sense of humour is also highly prized in times of stress. That said, at least one briefing solicitor has noted the value of bringing a client into your chambers in order for them to be brought down to earth about the prospects of their case

He also referred to some of her Honour's cases:

Your colleagues praise your knowledge of, and obvious respect for, the institution of family law. As practitioners in this jurisdiction will often attest, it is subject to policy shifts by successive governments. But wherever a complex point needs to be explored, your Honour is credited with doing the research in order to understand its evolution.

...

In *Pierce v Pierce* [1998] FamCA 74 your Honour's made an important contribution to the issue of property settlement and the assessment of initial and post-separation contributions. In *Aldridge v Keaton* [2009] FamCAFC 229 – on the question of parenting orders and same sex relationships – your Honour conducted the case a mere five days after the relevant provisions of the Act had come into force. In so doing, you contributed greatly to our understanding of the application of the law on this point.

Mooney concluded:

Your Honour is said to be a strong admirer of judicial brevity, particularly as practised by Associate Justice Macready. A solicitor observed once that his submissions were often returned by your Honour, replete with red lines. In place of those redactions were what he called 'seminal points in submissible form'. I am told that this is good advice for counsel who will be listed to appear before your Honour. That being the case, I'd best conclude.

Appointments to the District Court

There have been three appointments to the District Court of New South Wales from the bar in the second half of 2010.

Her Honour Judge Laura Wells SC was sworn in on 27 July 2010. Her Honour was admitted to the Queensland Bar in 1987 and in New South Wales in 1996. Her Honour was appointed senior counsel in 2009.

Her Honour had been a trial advocate, crown prosecutor, deputy senior crown prosecutor and acting public defender, and had held the position of director of the Criminal Law Review Division at the Department of Justice and Attorney General in 2006–2007.

His Honour Judge Andrew Haesler SC was sworn in on 20 September 2010.

His Honour began his legal career as a solicitor for Redfern Legal Centre in 1982, was called to the bar in 1990, and appointed as a public defender in 1996.

His Honour was the appointed director of the Criminal Law Review Division of the Department of Justice and Attorney General in 1999, providing advice to government in a broad range of areas including sentencing and court diversionary programmes.

Most recently before his Honour's appointment he was the deputy senior public defender.

His Honour Judge Ross Letherbarrow SC was sworn in on 11 August 2010.

He had practised extensively at the common law bar in the District Court and Supreme Court over his 32 years in practice. His Honour was a member of the Bar Council from 1997 to 1999. His Honour had long been a valuable member of the association's Common Law Committee, and was the association's representative on the District Court Rule Committee between 1999 and 2004.



His Honour was also the bar's representative on the Motor Accidents Council between 1999 and 2002. In his speech at his Honour's swearing in, the president of the Bar Association, Tom Bathurst QC, adverted to his Honour's unique qualifications in this regard, not simply because of his Honour's experience in litigation but also his love of sports cars:

At one time or another, you have owned a Corvette, a Porsche, a De Tomaso and a Jaguar XJ6. But the pride and joy was the Jensen Interceptor, reputed to be the heaviest production car ever made. Comedian Ronnie Corbett once said that he liked British cars 'because he liked walking', a fact that would have been appreciated – or not – by your Honour's wife who was driving the Jensen to Newcastle when it broke down and she had to push it to the side of the road. It is believed that the car's performance showed a marked decline when it rained. Eventually, it was sold to another car tragic at the Bar, Andrew Lidden.

The Hon Associate Justice Philip Hallen

On 5 July 2010 Philip Hallen SC was sworn in as an associate judge of the Supreme Court of New South Wales.

His Honour completed his schooling at Randwick Boys' High and graduated with a Bachelor of Arts and a Bachelor of Laws from the University of Sydney. His Honour was admitted as a solicitor in 1976, commencing practice at Bell Cadogan Couston & Gengos and then joining Paul Kennedy & Associates, before commencing practice at the bar in 1978. His Honour joined 13th Floor Selborne Chambers, and was appointed senior counsel in 1997.

Jane Needham SC spoke on behalf of the New South Wales Bar. Mary Macken spoke on behalf of the solicitors of NSW. Hallen AsJ responded to the speeches.

Ms Needham SC described the swearing in as:

... a notable occasion, being the first public swearing-in of an Associate Justice of this Court. The three current and one former Associate Justices received their commissions by an Act of Parliament and so there was no public swearing-in. This ceremony marks the importance of the office of Associate Justice and gives the members of the New South Wales Bar an opportunity to show their appreciation of your Honour's appointment.

Ms Needham SC and Ms Macken referred to his Honour's substantial wills and estate practice, Ms Needham SC saying:

What your Honour doesn't know about the legal consequences of death and dying isn't worth knowing. Your Honour is one of the few people who could speak for an hour to a paper entitled 'Funerals and Burials – Expecting the Unexpected' as your Honour did in a most entertaining and learned way on a panel we shared in 2008.

...

In later years, your Honour appeared in many of the important cases in the succession jurisdiction, *O'Loughlin v O'Loughlin* and *Gregory v Hudson* in the New South Wales Court of Appeal, the *Estate of Cropley*, and *Shorten v Shorten* (each of which are decisions which influence the way costs are applied in the Family Provision and testamentary capacity areas respectively), and in large or complex estates such as *Cassegrain v Cassegrain* and *Whiteley v Clune*, the lost will case in the estate of Brett Whiteley. It was as much your undoubted ability and elegance of expression which made your Honour the leader of the

Probate bar, as much as your Honour's seniority in that field.

...

I, for one, can say that in cases where I was opposed to your Honour, almost uniformly in cases where our respective clients loathed each other in a very immediate and well documented way, we were able to put aside the desire of our clients for us to loathe each other too and managed to rub along quite well. Your Honour was a delightful and scrupulously fair opponent and I think we ran fewer cases against each other than we might have done because we had such fun settling them.

It made good sense to settle against your Honour, as underneath your Honour's charm is the steely resolve of a formidable advocate....

Ms Macken said that:

One self-professed 'Hallen groupie' who has briefed your Honour over a period of some 30 years, was quite effusive in her praise with regard to your excellent analytical skills and your ability to clarify complex issues. Of particular note was your Honour's ability to think laterally and to propose an appropriate but not obvious solution to an issue.

Ms Needham SC referred to his Honour's friendship with Harrison and Davies JJ:

Two of your Honour's best friends, Justice Ian Harrison and Justice David Davies, have been appointed to the Bench in recent years and a perusal of speeches made at their swearings-in means that I am bound to mention that your Honour's preferred mode of motor vehicle transport is a Jaguar XK150S. I cannot imagine your Honour tooling around in a Monaro or on a motorbike.

Ms Macken spoke of the foresight associated with

.. a visit to New Zealand's south island earlier this year where your Honour trekked the area known as Milford Sound [when] the local guides presented you with a photo of yourself in which they had taken the liberty of superimposing a judge's wig upon your head.

Three others in this photo also wore photoshopped wigs, courtesy of the guides. However, these three were in fact judges and not, as one declared to the tour group, drug runners. Three months later, your Honour has duly been appointed to the bench. The Kiwis can now add fortune-telling to their list of credits.

Hallen AsJ read with Dennis Cowdroy, now Justice

Cowdroy of the Federal Court by whom he was introduced

to the delightful Janet Coombs and to the 13th floor Selborne Chambers. Having no idea of protocol, I did not know that you needed to apply in writing to a floor of Chambers for the privilege of becoming a floor member before actually moving in.

I just strolled onto the 13th floor after my admission ceremony and took up residence with Janet. I am told, and I choose to believe, that it is only a fiction spread by you know who in one of his many hilarious speeches that he and David Davies and other floor members did not want me to stay. As it happened, I shared chambers with Janet for the next nine months. I then shared chambers with the now retired Magistrate Malcolm Beveridge.

...

In what is a striking coincidence, I moved into John McLaughlin's chambers when I purchased them in 1981. Now almost 30 years later I am, in effect, doing that again. Effectively moving into but, I am glad to say, not purchasing his chambers. I am very happy that he is here today so that I may publicly wish him well in retirement. As was said recently, also by Ian Harrison, I may be John's successor but I will never be his replacement.

...

The court can rest assured that with Justice Davies' chambers immediately next to mine and with him checking whether I am in, morning and evening, as he has always done, my hours of work will not lessen.

His Honour also said:

Like all junior barristers, I worked with some of the leaders of the bar. Again, without intending any discourtesy to others, perhaps the two who influenced me, particularly in my early years, whether either knew it or not were barristers Peter Young and Joe Campbell, now Judges of Appeal. Unintentionally, I hope, each caused me to question my choice of career as a barrister. Often I would return from his chambers following a conference or a court appearance, so humbled by his breadth of knowledge, capacity to absorb so much so quickly and his court craft, that I asked myself how I could ever be that good. Even

after each went to the Bench and I appeared before him, I sometimes felt the same way. Hopefully, each will not cause me to experience those concerns again in my new role, or at least not very often. I publicly want to thank each for his help and, more importantly, for his inspiration.

I have also been lucky enough to have appeared before equity and probate judges who have mentored me. For a number of years when my career in the equity, probate and the protective areas was developing, the judge who I appeared before most often was the Honourable Philip Ernest Powell. My first experience before his Honour, I confess, was not very promising. Early in the case I heard the words, "Never appear in this court again." I was shocked, I looked at the judge who seemed to be scowling at me. I looked at the plaintiff who appeared to be about to throw up. I then turned to my instructing solicitor and said, 'Did I actually say that out loud?' Luckily, all he said was, 'Don't worry, he didn't hear you!'

I am glad to say that things improved, at least for me, after that, and for as long as I appeared before his Honour we got on very well. I thank him for all his judicial advice and for what he taught me. That he has made a special effort to attend today with his former associate, Trish Hoff, means a great deal to me.

His Honour concluded:

'Do not take this the wrong way, thank you, but I hope I never see you again.' This is part of the valedictory that I have received many times in my career from a grateful party and/or from those who were simply relieved that a case was over. I can only hope that counsel and solicitors appearing in my court do not feel the same way. ...

The Hon John Kearney QC (1921–2009)

Bar News does not generally publish obituaries of judges who have long since retired from office. This is, of course, not out of lack of respect but is dictated by constraints of space and the fact that this journal is fundamentally concerned with barristers and the Bar. The following eulogy in memory of the late John Kearney marks a departure from this general editorial policy principally for the reason that, to a generation of New South Wales barristers, he was universally acknowledged as the ‘model judge’, a sobriquet he never sought but richly deserved. As such, Dyson Heydon’s account of that aspect of his life (as well as a personal account of his career at the Bar) represents an important historical record of a greatly admired member of the Bar Association.



The eulogy delivered by Isaiah Berlin at Maurice Bowra’s funeral contained a somewhat bland account of that colourful figure. Seeking to excuse his restraint, he remarked to a friend: ‘In eulogies one must tell the truth, and nothing but the truth – but not the whole truth’. That is a rule which can safely be broken in the case of John Kearney. For, when the whole truth about him is told, everything revealed is creditable. That is as much the case for the professional side of his life as it is for all the others.

John Kearney was at the New South Wales Bar for 31 years. For the last 15 of those years he was a member of the 8th Floor, Selborne Chambers. For the last four of those years he was a silk. He displayed an enviable degree

of acuity and learning across all the main fields of equity practice of those days. He conveyed a well-founded impression of close familiarity with all conceivable aspects of a problem. The familiarity was generated by many years of work on similar problems. The work was carried out with immense fertility of inquiry and doggedness of will. John Kearney was skill and judgment in action. He attained a supreme mastery of his craft; and not for nothing did his floor colleague, Mr Justice Meagher, confer on him the title ‘Mr Equity’. In him one fine tradition of the New South Wales Bar reached

John Kearney was skill and judgment in action. He attained a supreme mastery of his craft; and not for nothing did his floor colleague, Mr Justice Meagher, confer on him the title ‘Mr Equity’.

its apogee – the tradition which requires a barrister to respond with proper consideration to a well-articulated question from a more junior barrister who has exhausted all bona fide and diligent methods of seeking to solve it. That ethical obligation corresponded with his instinctive and life-long sense of kindness.

His standing amongst his peers was confirmed by election four times

to the Bar Council. He attained the high office of senior vice-president in 1978. That meant that after two years he would almost certainly achieve a high mark of professional recognition – election to the presidency of the New South Wales Bar Association. But this path was almost immediately interrupted by an even happier event for the public of New South Wales – his appointment as a judge in the Equity Division of the Supreme Court of New South Wales. He served for nearly 14 years. The appointment was widely and rightly hailed as a fine one, but it was greater than the government knew.

Pausing at that Rubicon in his professional career, it is striking how late he took silk. That reflects only his modesty and self-effacement. For he had no regard for ranks, offices, titles and honours as such. To him they were only trinkets and tinsel, baubles and sham and show. What counted was fulfilment of obligation – whether as counsel or judge.

In court Mr Justice Kearney was shy, earnest, inquiring and patient. Above all he was courteous. He had the manners of a perfect gentleman. That is because he was a perfect gentleman. He treated famous parties the same way as he treated obscure ones, the rich the same as the poor, the powerful the same as the weak. He treated the most celebrated practitioners, including close friends, in the same way as he treated the most junior, of whom he knew nothing. Many barristers – now in the full flood of prominent careers at the bar or on the bench – will recall his kindness to them when they were very young. They will recall how, during chambers applications for *ex parte* injunctions, he would tactfully explain why some orders would not do and others fitted better with principle. Mr Justice Glass, another colleague on the 8th Floor, himself, like John Kearney, a great judge of impeccable behaviour, rightly called him ‘the gentle judge’. He loved fairness with his whole heart and his whole mind and his whole soul.

But he was no mere innocent abroad. He knew enough about the dark side of human nature to understand at once when his tolerance of weaker or sloppier minds was being abused, or when foolery or trifling was taking place. He would deal with the malefactor at once. And any counsel who attempted to win the day on a false technicality quickly found that Mr Justice Kearney could easily trump that one with a better.

He presided over his court with

grace, dignity, authority and gravity, springing from a profound and scrupulous consciousness of responsibility. In his court the fresh winds of sanity and clarity and calmness blew away the cold fog of obscurity and the heat mirages generated by excessive stress.

His despatch of judicial work was business-like, disciplined and expeditious. He saw the issues steadily, and saw them whole. He never wrote a poor judgment. An unusually large proportion of his judgments entered the law reports. They largely remain of great legal significance. They have entered the treatises, and will long stay there. In them you will find the quintessence of powerful legal analysis.

But these outcomes were not goals of his. He had three goals only. One was to understand the evidence and the arguments precisely. A second was to consider them with application and care. A third was to decide the controversy economically and justly according to law. These goals he achieved in full measure. He saw it as his duty to strive for the right, and he was totally dedicated to that duty. Courts of equity are courts of conscience, and no equity judge ever submitted to the demands of conscience more completely than he did.

He did not pursue false ambitions. Flashy displays of scholarship for scholarship’s sake were not for him. He knew the vanity of human desires for that form of immortality. He felt no temptation to deliver messages to the world.

He was indifferent to flattery or applause. He was not obsessed with fabrication of suave glittering phrases. If he had to criticise unsatisfactory witnesses or errant parties, he did so reluctantly, only when necessary, and only to the extent necessary. He did not indulge in gibes or flouts or jeers. He never abused his office. He never gave any party any feeling that justice had been administered in a slapdash or unfair way. On those factors rests his incomparable reputation as a model judge.

He sat at a time when the Equity Division was passing through a golden age. He was surrounded by immensely capable judges. But even in that age the equity bar, young and old, and not just the equity bar, saw him as a great judge. They saw him as a man utterly dedicated to duty. They saw his performance of that duty as flawless. They saw him as a man of total decency, shining honour, complete probity and adamant integrity. In the common opinion of the bar he was the most respected and the most noble and the most beloved of judges on the Supreme Court in that generation – and perhaps of any generation. The common opinion can be wrong. In his case it is completely right.

He humbled himself. He will be exalted.

By J D Heydon

Bullfry and the abominable sin

By Lee Aitken (illustrated by Poulos QC)

There are only four ways to get on at the Bar – by *huggery* [giving dinners to their attorneys and suppers to their clerks]; by writing a law book; by quarter sessions; by a miracle.

Lord Campbell LC as quoted in JR Lewis, *The Victorian Bar* (Hale 1982) p. 38.

‘Huggery? Surely there is nothing wrong with attending a drinks party?’

‘It all depends who is giving it – if you go to a function, and meet solicitors *accidentally* that is one thing; it is another entirely to attend at their request at the firm to sip champagne and to discuss the firm’s ‘briefing policy’. That smacks rather too much of *touting* for work’.

‘But what’s wrong with that? The firm will no doubt have a quota for briefing women, and others who need a leg up, or over, but that seems fine to me as long as it is just for the Children’s Court. And I can cement my already strong relationship with the commercial and banking boys. I know some fellas who send a card, flowers, and champagne, whenever someone is made senior associate!’

‘Well that is certainly overdoing it – in the old days, in England on circuit, you would be fined in the bar mess for even being seen in the company of a solicitor. That was the abominable sin of huggery! Unfortunately, we have never had a class system at the Sydney Bar, unlike the UK. No-one who is ‘upper class’ would ever think of working as a mere ‘solicitor’ there – the very concept of soliciting says it all – too, too infra dig for words – no – it is either a pocket benefice, a subaltern



in the Coldstreams, or the bar – that is all a gentleman can do – the third son of the family simply gets an overdraft, and comes to chambers in London after Varsity – what does Lord Haldane say? – “I raised the necessary funds under sign of my hand on the strength of what was to come to me in my time!” I am afraid a small house in Muswellbrook inherited from your father, the electrician at the local mine, does not quite have the same cachet. But it still doesn’t explain why, in these free market times, one is not

permitted to solicit business any way one likes – but then I suppose that is what ‘solicitors’ do, don’t they?’

‘Well, things have changed now – must keep up with the times – a spot of flannelling never goes astray. And didn’t you get most of your early briefs from that cousin at Simpsons? And what about that silk who is briefed most of the time by his wife?’

‘There is no sin in relying on family connections, or old retainers. How else are you to get a start at the bar?’



– That’s why the preferred floors sell at such a premium. Most of it is notional goodwill; some is upstream – the new juniors get the older silks into cases which their young solicitor buddies send them; some is downstream; a big ASIC instruction comes in and the three new juniors are deployed to make notes, and watch the silk play solitaire on his Mac, before some tired federal beak for three weeks! All very nice. So it’s a bit like Hansel and Gretel – you get the invite after a double first from Wollongong Tech, and then you are kept in a fattening pen – the ‘Annexe’ to something or other they usually call it – and then when you are ripe for the plucking, they induct you on to the floor with pipes and drums, and a big dinner, and all the solemnity of joining a Guards Regiment in the British Army in days of empire when there were lots of subalterns, and the government was not scrimping on your body armour, so that ten thousand pounds of

education might still succumb to a tuppenny jezzail, to quote the Bard. You can see the same principle at work with a couple of the ‘virtual’ chambers where they still maintain the floor name, and clerk etc., despite being at opposite ends of the street – branding is everything these days’.

‘You’re making it sound like some sort of business – I thought it was a profession’.

‘It’s only a “profession” in the sense that you are paying others for being able to take the high moral ground in your dealings with them – there used to be so much psychological esteem from being a “top silk” that you didn’t mind a roomful of merchant wankers in your chambers, even though they were getting six times your annual screw for knowing sweet FA about anything, except where the dollars were and how to “structure” some piece of chicanery. Add to that

the constant monitoring by the government, and regulators, and the absolute crowing in the press and public generally when there is some minor fall from grace by one of the team. Face it – journalists mainly despise the bar – they have either been cross-examined to death about something, or think that they too could have hit the forensic heights but for some unfortunate episode early in their education, or life story.’

‘Still, the firms can’t do without us’.

‘Well, they’d like to. But, of course, they face two very large problems.

First, to be an effective advocate you need to be in court, day after day, training up – if it costs \$2000 to ‘open a file’, a firm is not going to be able to send a young junior up every morning from its office to mention something before the Registrar, or call on a subpoena. But it is an intimate knowledge of the workings of every court which is the independent junior bar’s stock in trade. Secondly, of course, the largest enterprises don’t have a monopoly on the best work. Someone may come in to chambers from Five Dock with a brief for the High Court. If you worked for one operation only, you could only do the work which it attracted. Anyway, what they like to do now is hang on to matters for as long as possible. Deploy a large team, billing a couple of hundred hours a month, and when the matter comes up for trial, wheel the client’s managing director in to chambers to be told that the case is unwinnable, and it should be

Continued on page 146

The Bar Book Club

By Simon Kalfas SC

2010 is the inaugural year of the Bar Book Club. The Book Club meets every four to five weeks in the Bar Library at 6:00 pm. The date of each meeting and the book to be discussed are advertised in advance in *In Brief*. All members of the bar are welcome to attend.

Despite the fertile intellectual soil that the NSW Bar represents and the well developed reading skills required of practising barristers, the Book Club is not autochthonic. It is the initiative of the Health Sport and Recreation Committee whose touch falls lightly on proceedings; the large, lush and no doubt nutritious plate of fruit left unravaged amongst the debris of wine, cheese and biscuits at the first meeting, has not reappeared.

There have been six meetings so far this year. On average, a group of around ten to fifteen people assemble. In total, something over thirty members have attended at some time. Whilst some members have attended every meeting, the attendance of others depends upon their degree of interest in a particular book. Those attending range from senior silk to barristers in their first few years of practice. Some attending are published or yet to be published authors themselves. All have engaged equally in a robust but relaxed and

convivial discussion of the book then under consideration.

It is desirable but not necessary to have completed or even begun to read the chosen book in advance of each meeting. Inevitably conversation turns from a consideration of the author and the text or context of the book itself, to matters more tangential.

Apart from the all too obvious choice for the first meeting of Dostoyevsky's *Crime and Punishment*, all books have been selected in a reasonably democratic manner by those in attendance at the preceding meeting. A list of suggested books is regularly circulated amongst members and updated. Thanks in this, as in many other respects, are due to the librarian, Lisa Allen.

Books range from the classic to the contemporary. Authors selected so far include David Malouf, Philip Pullman, F Scott Fitzgerald, Annabel Crabb, Blanche d'Alpuget, George Orwell and Judith Keene.

Given the broad range of works compiled in the list of books for future consideration, the already discernable trend over the short life of the Book Club from fiction towards non-fiction will likely be reversed at some stage.

Another clear trend, as the year



has progressed, is that the number of pages involved has become an increasingly significant criterion for the selection of the next book. Perhaps members become distracted by the more prosaic demands of practice. It might be that a longer book could be selected at the end of the year by way of holiday reading for discussion at the first meeting next year.

It is anticipated that future meetings will involve consideration of various modes of writing beyond the novel including biography, history, drama, literary criticism and the art of translation, perhaps even poetry. Any suggestions from members of the Bar are welcome.

For those members of the New South Wales Bar looking for an opportunity to relax and engage with their colleagues beyond the bar table, the Book Club is one option worth considering.

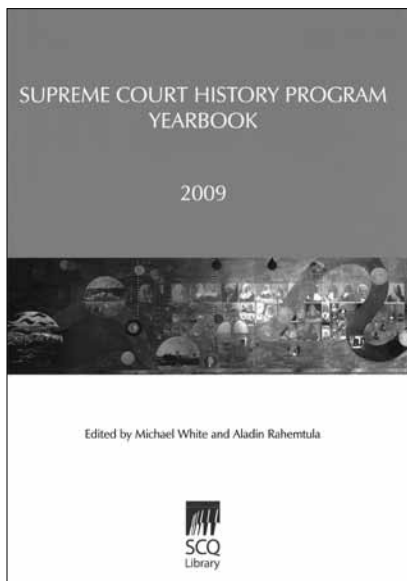
Verbatim

Sir Anthony Mason, launching *From Moree to Mabo: The Mary Gaudron Story*

There is the foreword to the book by Michael Kirby. We live in an age when no book is publishable unless it boasts either a foreword, a launch or a review by Michael Kirby. Perhaps some bestsellers boast all three.

Supreme Court History Program Yearbook 2009

By Michael White and Aladin Rahemtula (eds) | SCQ Library | 2010



If there is to be an almanac focussing on judges, what better place for it to be published than Brisbane, our most judicial city. Of the family of the soldier governor for whom the place is named, it is said:¹

One of the earliest of the family known in history is supposed to have been William Brisbane, who, in 1332, was chancellor of Scotland [Hailes' Annals.] In Brisbane house in the parish of Largs, Ayrshire is preserved an old oaken chair, with the date 1357 and the arms are three cushions or woollsacks, which should seem to have been adopted from the office of chancellor.

The origin of the city name is a tussle between the judicial view and the adversarial view. Two in the blue corner are the panorama ('A place where courts were held; *brys*, a trial at law, and *bann*, a mount; *breasban*, the royal mount.²) and the view that justice though blind is uncomfortably awake ('to bruise the bone'³).

As for the red corner, one source

holds that Brisbane 'was a nickname for a person who had sustained a broken bone. The surname derived from the Old French word, *briser*, which means *to break*, and the Old English word, *bàn*, which means *bone*. This was also a nickname given to a person who was often involved in fights, which resulted in the breaking of bones.'⁴ There is BC and AD. Now there is pre-ADR.

The city motto is '*meliora sequimur*', or 'We strive to be better.'⁵

Doubtless appropriate for a case managing bench. The family motto, on the other hand, is also that of an antediluvian (pre-ADR) bar: '*certamine summo*',⁶ which can be 'At the height of battle!', but is aptly 'Into the list!' (see e.g. *Macbeth*, '... come fate into the list. / And champion me to the utterance!'). If not senior counsel, use with care.

Professional publications know no mean time. Our learned colleagues in Phillip Street publish monthly. This organ is (for now) biannual. A greater frequency promotes currency; a lesser, depth.

The risk we have in the web is that these proportions can be rendered absurd. A frequency which has progressed to immediacy gives no currency unless there is context. A depth which has progressed to a black hole into which all information is indiscriminately sucked is not depth at all, but a kind of infinite and impenetrable shallowness.

We who enjoy these publications can be grateful that the production teams – which, at least in the

case of *Bar News* is a production team of one – are exemplars of the 'steamship effect', where the displacement of an old technology (in this case, the typographical word) by an innovation (the web) in fact stimulates a competing improvement in the former (these journals).

By its yearbook – of which 2009 is the fifth – the Queensland Supreme Court Library gives us another.

This is a standard yearbook only if one starts at the back: the necessary and well-assembled professional agglomeration Legal Personalia; Review of Queensland Legislation; and Review of Cases.

Once one gets to the book reviews, we have something different. Sixteen books reviewed, with one – a tribute to Lord Bingham – receiving two critiques, one from Justice Heydon and one from Justice Keane.

Both pass on personal recollections of Bingham's warmth. One essay in the tribute is Sir John Mummary's 'mercifully lengthy account' of the life of Lord Bowen. With luck it will retell that tale of Bowen's soother to Jessel MR, who bristled at the draft of the 1882 judges' address to the Queen:⁷

Instead of saying that [Your Majesty's Judges are] 'deeply sensible of our own many shortcomings', why not say that we are 'deeply sensible of the many shortcomings of each other'?

Justice Wilson gives a crisply sympathetic assessment of the third edition of Richard Posner's *Law and Literature*, sharing with us Posner's

dilemma as to how literary theorists 'have not been able to explain in simple prose why they cannot explain their theories in simple prose'.

Sometime author the Honourable Ian Callinan passes on the visual arts, giving a favourable albeit robust review of robust writer John McDonald's *Art of Australia* (volume 1).

But it is the middle of this yearbook where we find its meat. It deals with death. Four deaths, in fact; three judges and one solicitor-general.

Anyone who has involved themselves in the editing of an institutional journal will know that death has a resilient popularity: obituaries provide an important opportunity for members of the institution to remember not only their colleague but also the times and the reader's own place in them.

Which is not to say that an obituary cannot be a sad affair. Too often, as readers of *Bar News* will recall, there must be a tribute to a life cut down too soon. With Justice Dutney's death at 54 'during another epic cycling expedition', recollections in this yearbook give another example.

However, the death of a judge usually offers something else. Judges, at least in our common law system, are generally young only before their appointment. Their deaths merit the sadness all deaths merit, but coming without shock as they often do, they give

an opportunity for a professional retrospect, as it were.

In this, the yearbook flourishes, with a diversity of reminiscences on the lives of Peter Connolly and Kevin Ryan, very different and distinguished members of the court. It is no discourtesy to other reminiscers to record names more known to the southern bar, Dr Bruce McPherson, Governor General Quentin Bryce and Justice Susan Kiefel.

And so at the end, to the beginning of this tome, 'Articles'. For those of us who are jaded by the listless and patronising centralism of Sydney and Melbourne, this is the place to splash on a healthy musk of that much and mistakenly maligned perfume known as 'parochialism'.

Tip O'Neill, the Democrat speaker for much of Mr Reagan's presidency, famously observed that 'All politics is local'. So too the law. The thought that a 'common' law could exist without any deference to the idiosyncrasies of locality is nonsensical; those dogmatists who preach universality would do well to ponder the several delights of 'The Observance of Separation Day in Queensland' and 'Reinvigorating Australian Federalism'.

On its face, one of the most parochial of the articles is Justice Thomas's 'Judicial Leap-Frog in the Forties: The Philp-Mansfield Rift'. This is a subject which is remote to most of us, but something which

'fascinated more than a generation of Queensland lawyers', a tale of an (apparently) poisoned relationship between two eminent jurists of decades ago.

Justice Thomas could have related a story which continues to be remote; instead, we have a fine personality play which gives a judicious and informative assessment of a difficult time.

The Yearbook is a superior contribution to the life of Australian law. Editors Professor Michael White QC and Mr Aladin Rahemtula can only be congratulated on producing a work of bounty upon which we of the other states must look jealously. Governor Brisbane was generous enough to name his eldest son 'Thomas Australia', and we Sassenachs hope the editors and the court continue in a generosity of future almanac-making.

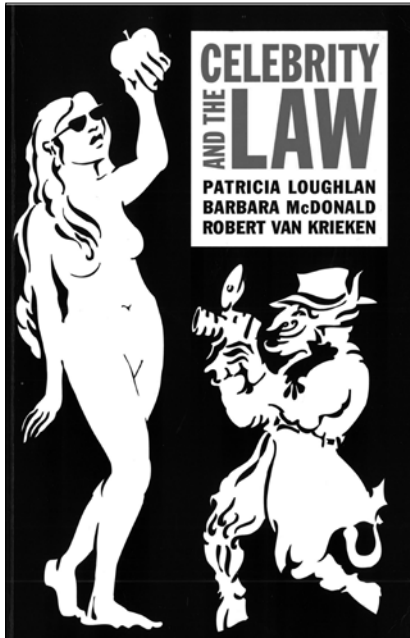
Review by David Ash

Endnotes

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Celebrity and the Law

By Patricia Loughlan, Barbara McDonald and Robert van Krieken | The Federation Press | 2010



What is the difference between fame and celebrity? Fame, its etymology tells us, is being spoken about. Celebrity is this and something more; as the authors say in this excellent overview, celebrity has a degree of *currency* and *activity*.

For those needing a moral compass, observe Matthew Arnold's 'They [Spinoza's successors] had celebrity, Spinoza has fame.'¹ Observe particularly the inverted tense. And for those seeing a distinction without a difference, take comfort in Byron: 'Fame is the thirst of youth'.² (Young Byron would have known that 'fame' is also an obsolete word for hunger, a kind of singular famine, from the Latin *fames*.)

What does the law say? Neither state nor federal interpretation legislation assists. However, statutory criteria for admission to this profession include 'good fame

and character'³; celebrity is not (yet) a prerequisite.

The Tasmanian legislature has prescribed celebrity. For one of the purposes referred to in the *Gaming Control Regulations 2004*, a 'celebrity announcement' is deemed a sporting event.⁴ Semble, this includes an announcement of marriage.

Only Queensland meets the question head on. Section [sic] 2 of the *Instant Casket (TV Scratch-Its Bonus Game) Rule 1992* marks a celebrity as 'a person nominated under section 9(3)...' Section 9(3) provides:

If—

- (a) the Office is unable to contact a contestant; or
- (b) a contestant fails to nominate an eligible proxy; or
- (c) a contestant, or the proxy of a contestant, fails to appear in a game; the Office, or its nominee, is to appoint a celebrity as the proxy of the contestant for the game.

If one sets off the circularity of the definition with the impermanence in the rule's title, the Queensland sublegislature comes closer than the rest of us to the real nature of celebrity; it is a state of default reality. Not for nothing do the authors record the identification by one academic of a 'feedback loop': what consumers view as the norm becomes the norm.

Philosophers and lawyers love to bisect. Descartes' great dichotomy was lapped up by lawyers to become the *mens* and the *actus*.

A fashionable bifurcation of late

Western morality is the purported division between property and rights. Property, it is said, was protected when it needed protecting, and now that we have matured, it is proper to turn our attention to rights.⁵

Leaving aside the possibility that neither is more than a privilege we have eked out from that most fragile of environments, civilisation, there is the question of whether they are separable at all: may they not be merely different ways that different people identify value?

This book records the assertion by Dr Martin Luther King's family that it is entitled to something from the merchandise depicting President Obama with the great man. King's nephew is quoted by the authors as saying 'We're not trying to stop anyone from legitimately supporting themselves but we cannot allow our brand to be abused'. (It has been reported⁶ that Farris also said 'If you make a dollar, we should make a dime', which may show a family predisposition to oratory.)

Rights have had few articulators like King. How odd, then, that the very premise of a right – its (paradoxically personal) universality – should be capable of (an impersonal) alienation.

And if it can be alienated, it can be assigned. Will the Klu-Klux-Klan bring a bold bid to black out bliss in favour of bigotry? And, as the Honourable Murray Gleeson says in a foreword, 'If the Australian law were to recognise such a right of

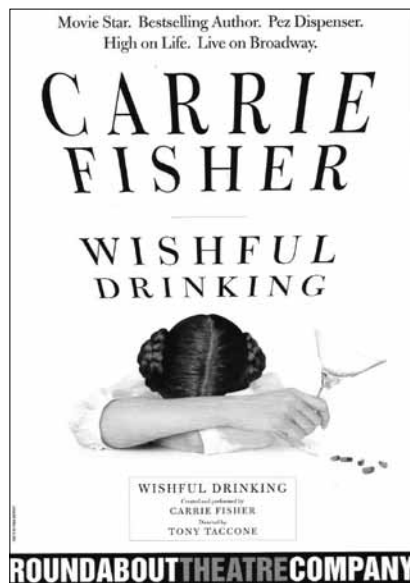
publicity, it would need to address the issue of potential inheritance of the right'. My rights = my property = others' rights to property.

And so the flipside to celebrity. Last night I saw Carrie Fisher give her monologue 'Wishful Drinking'. With approximately half the bar behind my dozen years' admission and with a median age put at 33 to 34 years, I guess about half my readers were merely concepts when Carrie said 'Help me Obi-Wan Kenobe', so eclipsing her parents' combined celebrity.

Fisher deals with manic depression, gay iconicity and celebrity, defining the last as obscurity waiting in the wings. There is a trade-off to keep it at bay: 'George Lucas owns my image; every time I look in the mirror, I owe him money.'

The *Sydney Morning Herald* recently described Gleeson as 'famously taciturn'⁷; least of all for this is he the authors' apt choice to pen the foreword.

Moreover, as an appellate and constitutional judge for over two decades in a common law



country, he is well-suited to assess the worth of a book whose minor premise is the minor premise of any effective commentary on the law, a questioning of the proposition that old law must adapt to new circumstances.

In particular, the authors' deft traverse asks the question that ineffective commentators avoid: are the circumstances we are dealing with forensically 'new' at all, or has the law touched on the problem before?

Each of the authors' and Gleeson's comments on *Dow Jones & Co Inc v Gutnick* seem to me to validate the proposition that orthodoxy is not exactly the worst starting place to assess novelty.

In the future, the past may only have been famous for fifteen minutes. If some of those fifteen minutes could have been spent picking through this readable summary, seize the day. As Carrie Fisher has found, it won't be here tomorrow.

Review by David Ash

Endnotes

1. OED online ('celebrity') [accessed 20/10/2010]. See also Stefan Collini, *Absent minds: intellectuals in Britain*, 2006, OUP, page 478.
2. 'Childe Harold's pilgrimage', Canto III verse 112.
3. *Legal Profession Act 2004*, section 9(1)(a).
4. Clause 6(2)(k).
5. Compare Collini: 'my starting-point is that we need to get away from such implicitly binary classifications ('British'/'normal')', page 5.
6. www.foxnews.com/story/0,2933,451804,00.html [accessed 20/10/2010].
7. Gibson, Snow and Sexton, 'Jogging and yoga help curb anxiety', SMH, 18 October 2010, page 7.

Bullfry (continued)

settled at all costs!

'Your cynicism is becoming very unattractive – I thought it was the highest calling to compose other mens' quarrels, and to counsel them in time of stress.'

'Well, it still is. But the days have

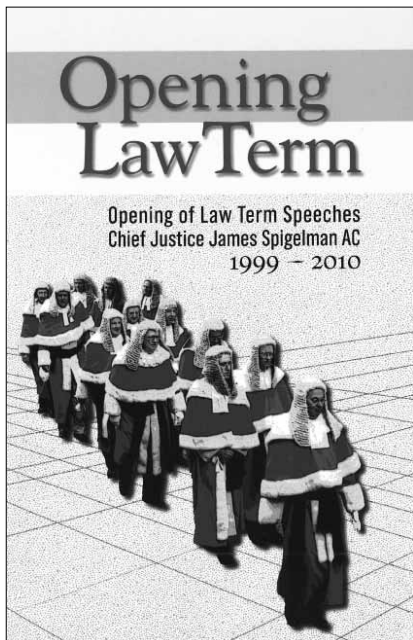
long gone when barristers were household names – all the frisson went when they reduced the penalty for capital murder to 15 on top with a nine year non-parole period. I expect I could get you off on a bond as long as it only your wife you kill'.

'So I shouldn't be going to this drinks thing then?'

'Of course, you can go – but only if you promise to get me an invitation too'.

Opening Law Term: Opening of Law Term Speeches Chief Justice James Spigelman AC 1999–2010

Law Society of New South Wales | 2010



It was no use hanging on to the English notion that you are safe so long as you keep the law. Practically the law was what the police chose to make it.¹

Two indicators of a democracy are a broad suffrage and an engagement of that suffrage by close intervals. No politician can survive without an appreciation of both. One deft exploitation brings a mandate, more than one confers statesmanship.

What of the judiciary? How does this third branch of our democratic governments – frequently criticised by those other branches as lacking any mandate at all – earn for itself the respect that it requires? And, as Orwell's Spanish experience shows, our law requires respect. It has no police.

The common law has been fortunate in that during the period of democracy's birth and development, it has had a goodly share of persons able to articulate a strength out

of what others have decried as a weakness.

Among democracy's (occasionally unintended) midwives, Mansfield in England and Marshall in the United States – and, I think we can now say without too much inferiority, Forbes in New South Wales – articulated and foresaw a rule of law whose power was and remains directly proportional to the rarity with which it has had to be displayed.

For lawyers who become judges, the understanding of this proposition can lead to a personality change upon elevation; there is an intimate acceptance that their opportunities to participate in our political life – a quality of citizenship – is necessarily circumscribed.

Judicial speeches will never please everyone. Many view the merest smile from a judge as a sign of impermissible activism. Many others view speeches as a necessary feature of judgeship; for them, precedent as something which all judges are ethically obliged to ignore. Luckily for the rest, there are more of us and we are in between.

One area in which a judge – particularly a chief justice – has room to move is the set-piece speech. It serves two purposes. The first is to reiterate what politicians have no need to do, the importance of and the vitality of the rule of law. The second is to articulate a position on a particular issue which may need articulation by the judiciary.

The current chief justice brings to the task of speechmaking an

enthusiasm (and hence a focus on vitality) and political experience (which allows him to articulate apolitically).

The current chief justice has already been collected. Tim Castle edited a volume which was published in 2008.² (I am afraid my ignorance precedes me; if any reader of this review knows the noun for a collection of judges' speeches, please write to me care of this organ's editor.)

Castle's volume is by subject, doubtless giving the editor and the speechmaker some latitude in choice, there being 147 speeches given by the chief justice during the decade to 2008. For example, one gets the benefit of the launching speech for Philip Ayres' biography of Sir Owen Dixon, in which the launcher gives a pert and pertinent but not impertinent assessment of 'our most formidable legal mind', opining, surely correctly, that 'To some degree Dixon's depth came at the expense of breadth'.

The current chief justice's depth is a matter for law reporters and not reviewers. But there is no question as to the breadth.

The publishers of the current assemblage (closer?) ran the risk of being forced to ignore the breadth. After all, speeches opening law terms might be regarded as the younger sibling of (vice) regal speeches opening parliament.

However, this is not so, for two reasons. The first, as may be inferred from what appears above, is that apt

chief justice – unlike a merely titular head, who has a constitutional obligation not to outshine the government whose praises he or she must sing – will be articulating their own agendas, not somebody else's.

take on maturity and Monty Python's take on legitimacy.

Chief justices can't always pick the thing for which they will be remembered. While Sir Frederick Jordan would be remembered for a brilliance shrouded by public

not. Sir William Cullen, by most accounts a gentile equity type, appears to have been taken up by the botanists of the common law bar as *eucalyptus cullenii*, a species of ironbark.³

Sir Anthony Mason says in a foreword that a reading of the opening term speeches shows 'not so much a perspective from within the legal system, as a helicopter perspective, a view from above, which enables the viewer to see all the elements and how they intersect with each other'.

His first speech enlists Mozart and Confucius; his (so-far) midterm speech opens with an explanation of why the space shuttle program is confined by the width of two horses' backsides.

The second is that the current chief justice is constitutionally incapable of refusing to draw upon his wider interests to give colour to the formality at hand. His first speech enlists Mozart and Confucius; his (so-far) midterm speech opens with an explanation of why the space shuttle program is confined by the width of two horses' backsides.

Sir Thomas More, along with Thomas Becket something of a hero, rightly dominates the 2008 address whose subject is not merely the rule of law but its most important constituent, a commitment to it. The collection closes with an overview of the long march to a national judiciary and profession, drawing on Darwin's

appearances of 'a few well-frozen words', few will recall him for his intensely private discrimination and humanity, in particular his broad – but, it must be confessed, hardly modern – learning and his involvement in the attempt to save the shattered and disgraced Christopher Brennan.

Sir John Kerr's own effort at saving something different, the King Street Courthouse, was overshadowed by later events. His successor's reputation as a deft administrator and his excellence as a lawyer must necessarily take its place in the popular mind alongside his evidencing of hereditivity.

Sometimes chief justices are remembered for things they are

The current chief justice is fortunate to have had Castle and now the Law Society take the initiative with the collections. His speeches achieve something which most lawyers' speeches do not; they achieve perspective. In times as fast as these, perspective is as rootless as ever, and someone able to place it may have the good fortune to be recalled by a future already turning its back on the rest of us.

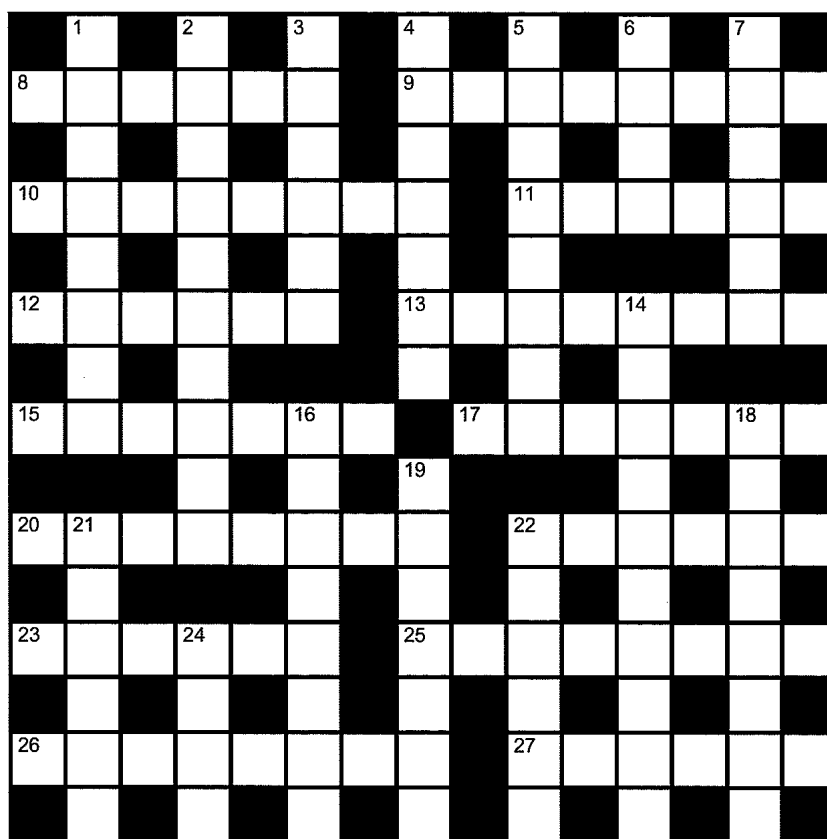
Reviewed by David Ash

Endnotes

1. George Orwell, *Homage to Catalonia*, 2000 (1938), Penguin, p 173.
2. Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998-2008*, 2008, CS2N Publishing.
3. Cullen's ironbark, *eucalyptus cullenii*.

Crossword

By Rapunzel



Across

- 8 Means without where? Withnail without nickel, as well? (6)
- 9 Helix ion (L) out of nothing? (2,6)
- 10 The king's used to be an MP, according to Bentham; Pitt's run, perhaps. (8)
- 11 I rent sounds for the passing. (6)
- 12 Marina the wrong base for this chap. (6)
- 13 Contract maker fragments flower. (8)
- 15 Sounds eager, a sentimental bloke for 'bowen black' heir? (5,1,1)
- 17 A puff of doubt? Shh! (7)
- 20 'Third arm head' (romantic language 'in' church for carbon jumpstart?) (6,1,1)
- 22 Ludicrous lego in Roman building block. (6)
- 23 Here it (or else)... or? (6)
- 25 Speaking space in a cyber teahouse? (4,4)
- 26 To this document, he is about the United Nations and Middle Eastern order. (8)
- 27 Panoramic; to wit Norfolk Island between mid-September and common time. (6)

Down

- 1 Antonym of present tense of unitised upset. Upset. (8)
- 2 One-man phone drops a bizarre occurrence. (10)
- 3 Trick about cheek, or a one armed man's tie? (4-2)
- 4 Russian recording of 'Officeworks'? (3,4)
- 5 Short? Shortly sounds like the former Miss Hello. (4-4)
- 6 Subcontinental butters up de Maupassant? (tu, not vous) (4)
- 7 Pincers left in jetties? (6)
- 14 Grenades or mess got up Eden flower fixture. (4,6)
- 16 Intelligible hereon corrupted in court. (8)
- 18 Financial green nom de plume in charge, after down is out? (8)
- 19 Throw out alternative pilot safety button. (7)
- 21 Devastated, injured to devastation? (6)
- 22 Confer first class bearing within lie. (6)
- 24 Male editor, pay attention! (4)

Solutions on page 152

The Tri-State Bar Football Competition

In contrast to the dreadful conditions during the inaugural contest in 2008, Sydney turned on a beautiful spring day in early September for the third instalment of the annual Suncorp NSW Bar v Victoria Bar Annual Football Challenge Cup. The 2010 program was expanded with barristers from NSW and Victoria being joined by their Queensland counterparts to contest the inaugural Suncorp NSW Bar-Qld Bar- Vic Bar Annual Football Challenge Cup.

The venue was the prestigious St Andrews Oval, Sydney University where the goal posts showed decades of used electrical tape attached to nets that were even older, befitting an ageing NSW team which had prepared for the event by participating, with very mixed results, in the lunchtime Domain Soccer League for a second season. An arranged warm up match against the solicitors in their annual Inter-Firm Soccer Day was aborted supposedly due to adverse weather conditions, although it was heavily rumoured that the prospect of facing a more experienced (if less agile) NSW Bar Football Team may have played its part!

Game 1 – NSW v Victoria

The opening match was between NSW and Victoria. All three silks from the home team arrived late although one had a leave pass. One was heard to comment that he was not required to attend for a warm up as the juniors were sufficiently competent to open the proceedings.



Vahan Bedrossian tussles with Peter Agardy (c) of the Victorian Bar.

In a lively match NSW dominated the first half and led 2–0 at half time with goals to the impressive Bedrossian, who smashed a shot home after great lead-up work by debutant Walker; and another to Stanton, who matched his goal in the 2009 game with a solid strike from six metres in the Lineker style of forward prowess. Statements from Stanton that the goal was more in line with a Maradona version should be viewed with caution.

The Victorian team had started considerably understrength due to some of their players missing flights and called on the home side to help fill the gaps. Not surprisingly, the southerners were heartened when Mahony agreed to switch sides (becoming the first female football representative for the Victorian Bar team), given the tough tackling techniques she had displayed in the 2009 victory by NSW in Melbourne.

The Victorians' chances were also boosted by the presence of Kuklik

of NSW in their goals who kept the score respectable with some fine saves. Patch of NSW is to be congratulated for some great work playing out of position in defence for Victoria, which may or may not have been a factor in Stanton's goal. Sadly, Mahony pulled a calf muscle while playing for the Victorians but not before she had smashed a vicious drive straight at one of her erstwhile colleagues in the NSW defence.

Victoria was strengthened at half time by the introduction of two very recent readers, Ronald Talasasa and Rodgers Tivosia from the Solomon Islands. Coach Agardy (Vic) had obviously recruited heavily and was keen to avoid three straight losses, and is to be congratulated for giving the Tri-State challenge a truly international flavour in keeping with the spirit of the World Game.

NSW was unable to increase their lead in the second half and the game tightened considerably when Victoria claimed a second



Bedrossian in flight with Geoff McDonald and Michael Gleeson joining the charge.

half goal through a penalty. They were given a second opportunity of converting the kick after missing the first attempt as McDonald (NSW) thought that five metres into the penalty area at the time of the penalty kick was 'okay as they do that in Europe and get away with it.' Referee Tiffen did not see it that way and Captain Austin (Vic) then converted the penalty to move the match to within a goal, giving Captain Harris (NSW) a few anxious minutes before the final whistle. NSW held on to justly win the match 2-1 and to claim the Suncorp Annual Football Challenge Cup for the third year in a row.

Best and fairest were Stephen Free (NSW), who dominated the midfield, and Con Lichnakis from Victoria.

Game 2 – NSW v QLD

Given the superior numbers enjoyed by the home team, NSW had a fresh eleven for the second game against Queensland. By this

time the NSW silks were prepared to join the fray.

Philips took over the captain's armband for NSW. Early fears that the youthful, fit looking Qld team would make a strong debut were quickly alleviated in the first half which was dominated by NSW. Habib SC was imperious in central midfield and was extremely unlucky not to score with a cracking low drive from 20 yards out which flashed past the Queensland post. A first half goal from speedy new recruit Walker was followed by a brilliant individual goal in the second half from Bedrossian.

NSW keeper Burchett had very little to do, and in defence Magee, Marshall SC, Gyles SC and de Meyrick were rarely troubled by the inexperienced Qld team, notwithstanding the valiant efforts of their inspirational skipper Selfridge. Patch, restored to his favoured position as NSW striker, continued his previous form of failing to score in the interstate

series and was substituted late. He was last heard muttering of joining the southern bar and threatening revenge. We wish him luck!

Despite controlling the game, NSW could not find the net again and missed the proverbial hatful of chances in finishing the game 2-0 victors. Walker deservedly won best and fairest for NSW, while for Qld Captain Selfridge was an equally worthy recipient.

Game 3 – Victoria v Qld

The final game was between Victoria and Queensland with both looking for bragging rights.

Unfortunately, enthusiasm alone was insufficient for the Queenslanders to match a Victorian team which was not only enthused but refreshed.

The game was dominated by Victoria with three goals to Lichnakis and one to Gurr and one to Connor to win 5-0.

With two wins from its two games the inaugural Suncorp NSW Bar-Qld Bar-Vic Bar Annual Football Challenge Cup was won by NSW and for the third year NSW reigned supreme over Victoria in the Suncorp NSW Bar v Vic Bar Annual Football Challenge Cup.

Special mention for the organisation of the day goes to Lo Surdo of the NSW Bar who spent countless hours making all the necessary arrangements for the three teams. Lo Surdo was greatly assisted by Agardy (Vic) and Selfridge (Qld).

Thanks to Nick Tiffen (clerk, 7



Left: Linesman Lo Surdo keeps a keen eye on Cameron Jackson. Right: Stephen Free on the ball.

Selborne), his daughter Hannah, Lo Surdo and Burchett who officiated.

Thanks also to Katzmann J for presenting the trophies and medallions at the post-match gathering. The event continues in no small part due to the efforts of

her Honour, who whilst president of the NSW Bar Association encouraged barristers away from their desks and promoted exercise as a means of fostering better health and community at the bar. The NSW Bar Football Team acknowledges Suncorp for its

continuing support. The Suncorp series is likely to be headed north next year where it is hoped it will be conducted as part of a mini CPD conference on sports law.

By John Harris, Simon Philips, Anthony Lo Surdo

| CROSSWORD SOLUTION |

