

THE JOURNAL OF THE NSW BAR ASSOCIATION | SUMMER 2012-13

# barnews



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## **Suppression and non-party access**

Judicial pensions: time for reform?

Can counsel settle expert reports?

Old Phillip Street

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# THE JOURNAL OF THE NSW BAR ASSOCIATION | SUMMER 2012-13 barnews

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## Editor's note



In this issue *Bar News* looks at the question of judicial pensions. Professor Brian Opeskin of Macquarie University examines the cost of the federal judicial pension scheme and asks whether the scheme in its current form can be maintained or whether, as the title to his piece suggests, it is now time for reform.

It's a complex issue and Professor Opeskin raises some interesting questions. *Bar News* has prepared a short response to some of those questions, which appears at the conclusion of Professor Opeskin's piece. Further contributions from readers on this topic would be welcome.

At the heart of the debate is the need, whatever the cost, to ensure that the public's confidence in the administration of justice is maintained by ensuring that the most meritorious barristers and solicitors continue to accept appointment to judicial office, and that judicial independence is preserved.

Attorney General Greg Smith SC discusses the contribution of Irish-

Australian lawyers to the Australian legal system, particularly in the nineteenth century. Among others the attorney general looks at the contribution made by one of his distinguished predecessors, Sir John Plunkett.

Fiona Roughley and Sandy Dawson have contributed the first part of a two part article looking at important recent developments in the area of non-publication, suppression and non-party access to documents. In this first part they discuss new legislation regulating suppression and non-publication orders. The second part, to be published in a future issue, will deal with non-party access to information used in proceedings.

David McClure examines the new military court proposed by *Military Court of Australia Bill 2012*. If the Bill is passed this new military court will exercise original and appellate jurisdiction over Australian Defence Force personnel charged with service offences. David McClure questions whether the system contemplated by the Bill – which would involve the disengagement of military officers from this layer of the military justice system – is an improvement on the existing one, and whether it may be susceptible to Constitutional challenge.

In the Practice section Garth Blake SC and Philippe Doyle Gray grapple with the contentious question of whether counsel can settle independent expert reports. After an exhaustive review of the authorities and the leading texts, they conclude that counsel may, and even should, take part in settling expert evidence, at least to some extent: identifying and directing

the expert witness to the real issues, for example, or suggesting that the report does not adequately illuminate the reasoning leading to the expert's opinion.

*Bar News* is delighted to publish the O'Dea Oration delivered by the Hon T E F Hughes AO QC on the occasion of the conferral of his honorary doctorate of laws by the University of Notre Dame Australia. In this address Hughes QC deploys his vast experience to consider the art of advocacy, which, as he remarks, Sir Owen Dixon described as the soul of the law. Hughes QC says that his remarks are directed at young people about to embark on a career at the bar or in active practice, but they can also be appreciated by anyone interested in learning more about this most elusive art.

As the journal of the NSW Bar Association we thank the outgoing president of the association, Bernard Coles QC, for all his fine work since May 2011, and welcome the new president, Phil Boulten SC, whose inaugural column appears on the following page.

Lastly, *Bar News* takes this opportunity to wish all its readers a very happy and relaxing summer break and all the best for the New Year.

**Jeremy Stoljar SC**  
**Editor**

## Royal commission welcome, but due process must be followed

By Phil Boulten SC



It is a great honour to take on the role of president of the association. I am looking forward to the challenges ahead. I know that I will have the support of the Executive and a very gifted group of bar councillors as we all deal with a number of important issues for the bar this year.

I wish to acknowledge the work that our outgoing president, Bernard Coles QC, undertook on behalf of us all during his term. Amongst other things, Bernie took over the running of the association at a time of flux, with the process of development of a National Legal Profession model still a matter of continuing consideration. He also played a steady hand during some sensitive Federal Court litigation last year involving the silk selection process. I wish him well in his future career.

Over the next 12 months the New South Wales Bar will be contributing to the continuing development of what will, hopefully, be a truly national legal profession. We now have National Bar Rules and we will shortly have legislation in NSW that reflects the ground work that our former president and now chief

justice, Tom Bathurst, undertook on our behalf. In line with the National Rules and the model legislation, the bar will remain truly independent.

The independence of the bar and the inter-related cab rank rule is what makes practising as a barrister so worthwhile. Fearless and well considered advocacy are the essential hallmarks of the bar and need to be maintained. I strongly favour our existing model of sole practice in a collegiate environment.

This year the bar will give further thought to the shape of the silk selection process. The reforms that were introduced a few years ago in the wake of the Gyles Report mean that the selection protocol now emphasises the nature of applicants' practices. Objective analysis of applications using the relevant criteria is at the heart of every decision. But there is always scope for refinement and improvement and the Bar Council will be considering the issue again over the next few months.

Any substantial proposal for change will, of course, be the subject of consultation with the bench and bar. I wish to highlight at this point, though, that I regard the undoubtedly objective contributions that the silk selection committee receives from the judges of this state to be an essential feature of the system. To maintain judges' confidence in the process it will be necessary to ensure that their views are received in strict confidence.

It is timely then to express my personal pleasure at the appointment of 12 female silks this year. It was a year where the standard of applications was particularly high. It was also clear

at the outset that there was going to be a higher number of successful women than normal. But the committee was delighted when eventually so many excellent female candidates appeared on the final list.

2013 will be a year where law and order issues will be prominent in the association's consideration. The Law Reform Commission's recommended changes to the Bail Act have yet to be considered by parliament. The bar was entirely supportive of the commission's proposed liberalisation of bail laws. Ian Temby QC acted as our public advocate on this topic this year and he will be to the forefront of the public discussion when the government flags its considered response.

The bar has joined with the Law Society in its criticisms of the government's proposed amendment to the police caution – which effectively legislates for the undermining of an important aspect of an accused person's right to silence. This proposal has been met with fairly widespread criticism amongst barristers – including many who do not practise at the criminal bar. I will be attempting to convince our legislators that this measure is unnecessary when it goes to parliament after Christmas.

The Legislative Council's Select Committee of Inquiry into the partial defence of provocation has proven to be a little more controversial amongst barristers with many recognising that the current nature and scope of the defence can sometimes lead to surprising results. Yet, the bar has decided to advocate in favour of maintaining the defence, even if it is to be modified to better reflect modern attitudes to



violent responses sourced in sexual jealousy.

The royal commission into paedophilia will be a major feature of the national legal landscape next year. The Commonwealth and state and territory governments are currently coming to terms with the formal and procedural scope of the inquiry.

This is an important opportunity for people of good will throughout the country to focus on the way that organisations that care for children and young people can put structures in place that both guard against harm and that lead to the early and proper detection of perpetrators.

There needs to be vigilance, too, to ensure that whenever serious allegations of child sexual assault are made against somebody that the process of handling the response is undertaken calmly and responsibly. The criminal justice system must be maintained as the venue for the determination of guilt or innocence and for the setting of appropriate penalties following findings of guilt.

Finally, I would like to congratulate the association's latest life members.

At its meeting on 11 October 2012 the Bar Council bestowed life membership upon the Hon Kevin Lindgren AM QC and the Hon Justice Anthony Meagher. Justice Lindgren was central to the

development and implementation of the bar's education program over many years, and conducted the recent comprehensive review of the association's educational programmes. Justice Meagher provided essential and very effective advice and assistance with the association's negotiations with professional indemnity Insurers for many years. We greatly appreciate their efforts on our behalf.



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## Letters to the editor

Dear Sir,

I have lived with the recounting by my father, a solicitor, and others, in the late 1960s at least, of the occasion when a fully robed and wigged barrister walked down Phillip Street (?) eating the meat pie, when at the same time the president of the Bar Association happened to be walking in the opposite direction towards the barrister. The reported reaction of the president was one of 'horror' (no pun intended there).

The incident, naturally, then came

before the Bar Council and the barrister was not only identified but was the subject of disciplinary action and censure.

On all accounts from those who I knew and were practising barristers at the time, there was never any doubt in their minds as to the identity of the so called 'offender'.

The Bar Association's archives might reveal the record of complaint and disciplinary action. Otherwise the story and account may have to be

left to memory and hearsay.

It appears Poulos was also 'horrified' by the sight of his experience in Queens Square. Your editorial team may wish to call for any corroboration of the incident and report any such further 'sightings'.

I would concur with Poulos in that Millar had a very 'startling disregard for the probities of the profession'.

A J McQuillen

The executive director of the Bar Association has advised *Bar News* that the archives do not record a complaint or any disciplinary action associated with this matter.

The editor

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# Judicial pensions: time for reform?

By Brian Opeskin, professor of legal governance, Macquarie University

## The rise and rise of long-term costs

In July 2012 the Australian Government Actuary released its latest triennial report on the long term cost of the pension scheme for federal judges.<sup>1</sup> At 30 June 2011, the unfunded liability of the scheme amounted to \$782 million—an increase of 38 per cent in nominal terms (27 per cent in real terms) in just three years. This was the fourth substantial rise since the cost of the scheme was first pegged at \$267 million in 1999, despite the fact that the number of serving judges included in the estimates has declined steadily from 131 to 102 over that 12 year period. For the first time the Actuary also provided long term cost projections, estimating an accrued liability of \$3,342 million by 2054–55. This is a very large number, and yet a very conservative one because it rests on the implausible assumption that the courts covered by the scheme—the High Court, the Federal Court and the Family Court—will not increase in size over the next 40-odd years.<sup>2</sup>

The future cost burden of the judges' pension scheme raises an important issue of public policy. The scheme is non-contributory in the sense that it is funded from consolidated revenue and judges make no financial contribution during their years of service towards their later pension entitlements. Is the scheme sustainable in the long term? The answer to this question has implications beyond the federal sphere because the scheme is replicated to a substantial degree in every Australian state and territory, other than Tasmania.<sup>3</sup>

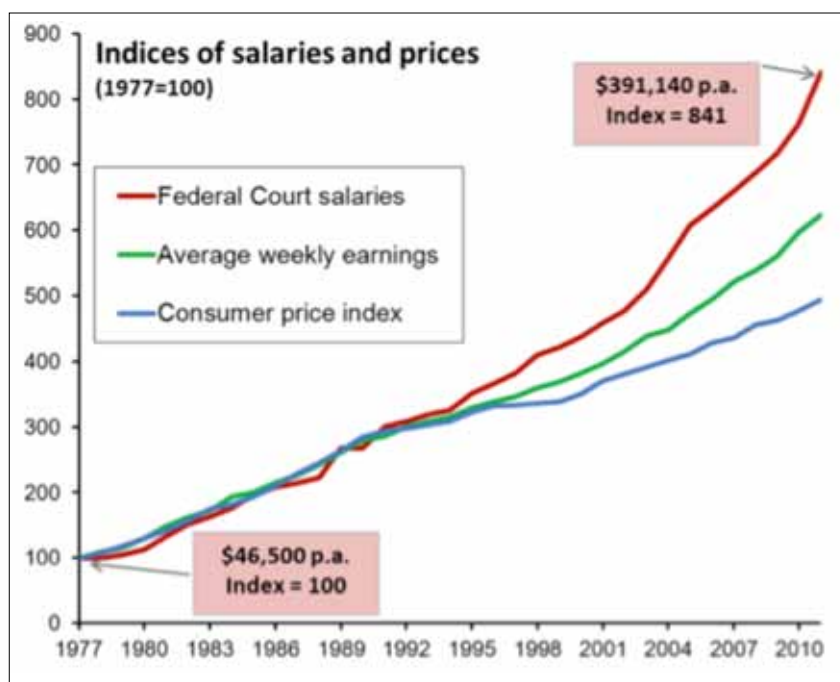
## Parameters of the federal judicial pension scheme

The remuneration arrangements for judges are undoubtedly well known to judges, but are less familiar outside judicial circles. Federal judges are remunerated through a package of benefits that includes salary during their years of judicial service, a judicial pension paid during their years of retirement, and a spousal pension paid to a judge's

1968 (Cth)—and have remained unchanged since the 1970s.<sup>4</sup> Also relevant is the fact that federal judges must retire by 70 years of age.

## Reasons for cost escalation

Why has the cost of the scheme ballooned so substantially over such a short period? One reason identified by the actuary is that judicial salaries have increased



Index of Salaries and Prices, 1977–2010

surviving spouse until the spouse's death. The judicial pension is set at 60 per cent of current judicial salary and the spousal pension is set at 62.5 per cent of the judicial pension. There are two qualifying conditions: to be eligible for the pension a judge must be 60 years of age and have served for 10 years (there are pro-rata arrangements for service between six and 10 years). These key parameters are set by legislation—the *Judges' Pensions Act*

much faster than inflation, and this automatically flows through to pensions. Between 2008 and 2011 salaries increased at an average rate of 5.4 per cent per annum. This is consistent with the long-term growth in judicial salaries, which has outstripped both inflation and average weekly earnings since the early 1990s (see *Figure 1*). The cost of the pension scheme is very sensitive to assumptions about future salary increases,<sup>5</sup> but from a



policy perspective there is little that can or should be done about this. Federal judicial salaries are set by the Remuneration Tribunal, subject only to disallowance by parliament,<sup>6</sup> and the statutory independence of the tribunal is an important pillar in maintaining the independence of the judiciary.

The second reason for the escalation in cost is demographic—judges are living longer.<sup>7</sup> Australia already has one of the highest life expectancies in the world—currently 79 years for newborn boys and 84 years for newborn girls—and by 2056 these figures are projected to rise to 94 years for males and 96 years for females. What effect will these changes have on the viability of the judicial pension scheme?

Substantial increases in life expectancy over the next 45 years will impose a very significant strain on the system of judicial remuneration. This is because the long tail of judicial and spousal

pensions will continue to lengthen, while the period of judicial service remains tightly constrained—at the lower end, by the need to acquire legal skills prior to judicial appointment; and at the upper end, by mandatory retirement of federal judges at age 70. As an illustration, consider the position of a male Federal Court judge who is appointed at age 50 and retires at age 60, as soon as his pension vests.<sup>8</sup> Based on actuarial and demographic data, the government can expect to pay pensions to the judge and his spouse for 33 years beyond his retirement. At the current salary level (\$391,140 per annum),<sup>9</sup> the total benefits are equivalent to a payment of \$1.56 million for each of the 10 years the judge serves on the bench. These calculations are based on *current* longevity. By 2056, when life expectancy at birth will extend to the mid-90s, a judge who serves for 10 years can expected to be paid more than four times as

much in retirement and death than during active service. A scheme that produces such perverse outcomes invites review.

A third factor identified by the actuary as having the potential to increase the cost of the scheme in the future is the changing retirement patterns of federal judges. Under the present scheme, once the qualifying conditions are met, the same pension is payable on retirement regardless of how many years' service a judge has rendered. Historically, judges tended to remain on the bench until they reached the age of mandatory retirement at age 70, so that a long pension tail was often balanced by a long period of active service. In recent times, a larger number of judges have retired soon after their pension vests. This led the actuary, in 2005, to triple the assumed retirement rates for judges aged 61–64 years, and in the latest report he notes that secular trends in this direction may lead to

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further revisions in assumptions in the future.

### A changed environment

The escalating cost of the pension scheme may not be sufficient, on its own, to justify reform. However, the milieu in which the pension scheme operates has altered dramatically, and this must also be considered. First, the demographic reality of an ageing population is confronting government policy everywhere. It is an irresistible force from which there is no escape, and is reflected in the practice of the Australian Treasury—now mandated by legislation—to deliver periodic *Intergenerational Reports* to assess the long term sustainability of current government policies over the following forty years.<sup>10</sup> The judicial system will also need to respond to these demographic pressures if it is to maintain the confidence of the public.

Secondly, the employment circumstances of potential judicial appointees have changed significantly in the past 20 years. The introduction of mandatory superannuation in 1992 has provided increased retirement security for all Australians. Today, a legal practitioner might make 20–30 years of superannuation contributions before his or her judicial appointment. This provides significant financial resources for retirement, apart from the pension.

Thirdly, many judges today have an expectation of professional life after the bench—as acting judges, arbitrators or commissioners—which did not exist when the current federal pension scheme was crafted. As former chief justice

Murray Gleeson has remarked, this is a major shift in attitude in the profession,<sup>11</sup> and gives many judges the prospect of substantial post-retirement income.

Fourthly, spouses too have greater financial security than in times past. Nowhere is this more evident than in the increasing labour force participation rate of women of working age, which is now above 65 per cent. The financial dependency of spouses was a major argument for generous judicial pensions when the current scheme was first debated. Although we have not yet arrived at a point of gender equality in employment, progress in that direction should be considered in evaluating the current scheme.

Finally, there has been a transformation of the federal judiciary, with the establishment of new courts with significant jurisdiction,<sup>12</sup> and the appointment of many new judges to administer justice in those courts. A generous pension scheme adopted for a small number of federal judges in a different era may no longer be appropriate for present circumstances.

### Directions for reform

These problems deserve a remedy, but the answer is not simple. Judicial office must continue to be attractive to the most meritorious barristers and solicitors, most of whom have lucrative alternatives in the legal profession. The challenge is to design a system of judicial remuneration that is cost-effective and sustainable in the long term, without eviscerating the benefits paid to judges. The system must also recognise the

paramount importance of judicial independence, which requires remuneration to be high enough for judges to resist pressure from any quarter and avoid seeking favour, in their last years in office, among those who might facilitate post-retirement earnings.

Three policy changes should be given serious consideration. The need for reform is pressing because any change in the remuneration of federal judges must comport with the requirement in s 72(iii) of the Constitution that ‘remuneration shall not be diminished during [a judge’s] continuance in office’. There seems little doubt that this limitation applies equally to serving and retired judges. The practical result of this is that any change in pension arrangements (other than an extension of the mandatory retirement age) could take effect only for new appointees, and the *impact* of such changes will not be felt until those new appointees begin to retire, many years hence.

First, the maximum retirement age of judges should be increased beyond 70 years so that judges can choose longer working lives if they are capable of doing so. In 2009, the Senate Legal and Constitutional Affairs References Committee made just such a recommendation.<sup>13</sup> Second, the minimum age at which judges qualify for the judicial pension should be increased from 60 years to align with community expectations (the age pension will soon be available only from age 67). There is precedent for this in Victoria, where state judges must generally attain age 65 before they can access their judicial pensions. And thirdly, the minimum years of

service needed to qualify for the judicial pension should be increased beyond the current ten years. Again, there are precedents: in South Australia, state judges receive the maximum pension of 60 per cent of salary only after 15 years of service; and 15 years was also the qualifying period for justices of the High Court (the first federal judges) from 1903 to 1948.

These are modest proposals. Whether discussion is limited to these or extended to include bolder options (e.g. contributory schemes, removal of spousal benefits, or recalibration of pension rates), it is important that the legal community have the debate. In this author's view, it is only through prompt action that the remuneration framework for judges will be able to meet the inexorable pressures of tomorrow's demographic change.

## Endnotes

1. Australian Government Actuary, *The Judges' Pension Scheme: Long Term Cost Report 2011* (Department of Finance and Deregulation, 2011).
2. The assumption is credible in relation to the High Court, which has had no more than seven justices for the past century. See James Popple, 'Number of Justices' in *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 505. Beyond the High Court, the assumption is unrealistic.
3. See Brian Opeskin, 'The High Cost of Judges: Reconsidering Judicial Pensions and Retirement in an Ageing Population' (2011) 39 *Federal Law Review* 33, 45–6.
4. The qualifying condition of 60 years of age and 10 years' service was introduced in 1948; the pension rate of 60 per cent was introduced in 1973 (up from 50 per cent): see Opeskin n 3, 61.
5. The actuary has estimated that an additional one per cent per annum salary increase would add \$100 million, or 13 per cent, to the cost of the scheme: Australian Government Actuary, n 1 above, 18.
6. *Remuneration Tribunal Act 1973* (Cth) s 7.
7. Other demographic changes that have driven cost increases are the higher proportion of judges with spouses (hence there are more spousal pensions to pay), and the larger age differential between male judges and their (younger) spouses (hence spousal pensions are paid over a longer period).
8. The example is taken from Opeskin, n 3 above.
9. Remuneration Tribunal, 'Determination 2011/10: Judicial and Related Officers: Remuneration and Allowances' (Remuneration Tribunal, 2011).
10. *Charter of Budget Honesty Act 1998* (Cth) s 21.
11. Murray Gleeson, 'A Changing Judiciary' (Paper presented at the Fifth Colloquium of the Judicial Conference of Australia, Uluru, 7–9 April 2001).
12. Brian Opeskin, 'Federal Jurisdiction in Australian Courts: Policies and Prospects' (1995) 46 *South Carolina Law Review* 765.
13. Australian Senate, 'Australia's Judicial System and the Role of Judges' (Legal and Constitutional Affairs References Committee, 2009) [4.16], [4.21]–[4.26].

## Response to Professor Opeskin

*Bar News* thanks Professor Opeskin for this very interesting and informative piece. The issue of judicial pensions raises many policy questions and *Bar News* would welcome further contributions on this topic. In the meantime a few preliminary observations can be made.

Professor Opeskin uses the example of a male Federal Court judge who is appointed at age 50 and then retires at age 60, as soon as his pension vests. Professor Opeskin says that at current salary levels and life expectancies the total benefits which would be payable under the pension scheme to a judge in this position could end up being \$1.56 million for each of the ten years the judge serves on the bench. He concludes that a scheme that produces 'perverse outcomes' of this kind invites review.

This hypothetical example is of course possible. But it is certainly not typical. An analysis by *Bar News* of Federal Court judges who were serving judges in 1999 or who were appointed in 2000 or 2001<sup>1</sup> reveals the following:

1. There were 50 judges serving in 1999 and a further four were appointed in 2000 and 2001, being a total of 54 judges.
2. Of those 54 judges, eight are still sitting (as at 19 October 2012). The length of service of the remaining 46 judges was as follows:  

20 years or more .....	6
15–19 years .....	14
11–14 years .....	17
10 years .....	3
Under 10 years .....	6

3. Of the three judges who served for 10 years, only one left the Federal Court at the age of 60 and this was on appointment to another court. The other two judges retired at the ages of 64 and 70 years respectively.
4. Of the 17 judges who served 11–14 years, seven judges were 65 years of age or above, eight were between 60 and 64 and two were under 60 years of age. This does not distinguish between the reasons for which these judges retired (for example due to ill health or who were appointed to another judicial or government position).

In short, appointment at 50 and retirement at 60 is not the typical pattern of judicial service for Federal Court judges. The benefits payable per year of service to a more typical judge, namely one who served longer than ten years and who was older than 60 when he or she retired, would be considerably less than those contemplated by Professor Opeskin's example (the extent less depending on the age and time period involved).

It may equally be said that younger judicial appointees are already disadvantaged by having to remain on the bench longer in order for their pension to vest. Thus, a judge appointed to the Federal Court at the age of 45 or younger already will have to serve at least 15 years until he or she is eligible to receive their full judicial pension. Of the 46 retired judges referred to above, seven were appointed at the age of 45 or younger and another 14 were appointed between the ages of 46 and 49.

Some further observations may be made in respect of the points raised by Professor Opeskin.

First, it is of course correct that some retired judges become mediators, arbitrators or the like, but it is difficult to assess how common this is in the context of all judicial retirements. Plainly it is not the case for all retired judges, it may not even be the case for a majority.

It is equally difficult to assess how many retired judges provide important service to the community by involving themselves in unpaid work (for example, for schools, universities, charities or sporting organisations) – work which may be facilitated by the current pension scheme.

Secondly, if changes to the current arrangements are to be made, the suggestion of increasing the retirement age of federal judges seems a good one, if it can be implemented. In New South Wales the judicial retirement age is 72 and, for acting judges, a maximum of 77.

Lastly, and most importantly, any variations to the age of retirement for federal judges or to the federal judicial pension arrangements should only be considered after an analysis of the effect of the proposed variations on the administration of justice and the efficient working of federal courts, rather than by reference solely to the cost of judicial pensions.

In particular, as is noted by Professor Opeskin, it is of paramount importance to the public's confidence in the administration of justice to ensure that the most meritorious barristers and solicitors continue to accept appointment to judicial office, and that judicial independence is maintained.

**The editor, Daniel Klineberg and Nicolas Kirby**

## Endnotes

1. This period is chosen since (1) paragraph 1 of Professor Opeskin's paper discusses the period from 1999 to 30 June 2011 and (2) a judge appointed after 2001 could not have retired by 30 June 2011 and served 10 years on the bench. The analysis is based on publicly available Federal Court records, judges' entries in *Who's Who in Australia* and other public data.



## Should there be a new military court?

By David McLure



SRAR personnel parade for a Beat the Retreat ceremony. Photo: LSIS Helen Frank / Commonwealth of Australia, Department of Defence.

On 21 June 2012 the Australian Government introduced into parliament the *Military Court of Australia Bill 2012*. The Bill proposes to create a new federal court established under Chapter III of the Constitution, which will exercise original and appellate jurisdiction over Australian Defence Force (ADF) personnel charged with service offences. This article considers whether the system proposed by the Bill is desirable and its susceptibility to further constitutional challenge.

### A (relatively) brief history of military justice in Australia

Before federation each of the Australian colonies had legislation that in differing ways applied statutes of the United Kingdom to provide for the discipline of their naval and military forces. Following federation, the naval and military forces of the states were transferred to the Commonwealth and came under the command of the governor-general.<sup>2</sup> The *Defence Act 1903* (Cth) caused the provisions of the UK Army Act and the Naval Discipline Act to apply to

the new military and naval forces of the Commonwealth while on active service. Under that system, commanders had the authority to summarily punish service personnel for minor offences. More serious offences were dealt with by courts martial.

The *Defence Force Discipline Act 1982* (Cth) (DFDA) was introduced to modernise and consolidate discipline law applicable to the ADF, although most elements of the old system were retained. The DFDA laid out a series of military-specific offences, such as mutiny, insubordination and absence without leave. Additionally, the DFDA created an offence of engaging in conduct that would be an offence against the civilian criminal law of the Jervis Bay Territory. Like the old system, military commanders retained the jurisdiction to summarily try and punish certain classes of minor offences. More serious offences were dealt with by courts martial and a newly created form of service tribunal constituted by a legally qualified Defence Force magistrate sitting alone.

The constitutional validity of the old UK-based system and the DFDA system were challenged in the High Court on numerous occasions. Those challenges culminated in the court's decision in *White v Director of Military Prosecutions*<sup>3</sup> where it was held that the DFDA was a valid exercise of the defence power in s 51(vi) of the Constitution and service tribunals established under that Act validly exercised judicial power standing outside Chapter III.

In 2005 the Senate Foreign Affairs, Defence and Trade Committee undertook a comprehensive review of the military justice system.<sup>4</sup> Among other matters, the committee recommended the establishment of a permanent military court independent of the military chain of command to replace the system of trials by courts martial and Defence Force magistrates. Adopting some of the committee's recommendations, the then government amended the DFDA in 2006<sup>5</sup> to create the Australian Military Court (AMC). The amendments declared the AMC to be a court of record, but not a court for the purposes of Chapter III. In 2009 the High Court unanimously held in *Lane v Morrison*<sup>6</sup> that the AMC was constituted to exercise the judicial power of the Commonwealth otherwise than in accordance with Chapter III and hence its establishment was invalid. In response to the court's decision, the parliament reintroduced the system of trials by courts martial and Defence Force magistrates on an interim basis while the government considered its next move.<sup>7</sup>

## The proposed Military Court of Australia

The proposed Military Court of Australia (MCA) sets out to achieve the same objectives of the invalid AMC. The summary system exercised by commanders will continue, however, the new court will replace courts martial and Defence Force magistrates, save for instances where the MCA determines that it is necessary, but not possible, for it to conduct a trial overseas. The key differences between the AMC and the proposed MCA are:

- the AMC was constituted by legally qualified military judges who were serving ADF members. The MCA will be constituted by civilian judges appointed under Chapter III;
- the AMC allowed for trial by a military judge sitting alone, or by a military judge sitting with a military jury of up to 12 officers depending on the seriousness of the offence. The MCA will try all offences by a single civilian judge sitting alone.

The Bill proposes trial by single judge or magistrate, without a court martial panel or military jury

Since federation, Australia's military forces have employed a disciplinary system which has, at its apex, the trial of serious offences by court martial.<sup>8</sup> In a trial by court martial, the judge advocate and the panel of military officers perform substantially the same function as a judge and jury in a civilian criminal trial.<sup>9</sup> That is to say, the judge advocate decides all questions of law and gives the panel directions of law with which they must comply.<sup>10</sup>

The panel is the sole judge of the facts and decides the ultimate question of whether the accused is guilty or not. If the accused is found guilty, the panel determines the appropriate punishment.<sup>11</sup> This aspect of the military justice system has served the ADF well, especially since the introduction of a statutorily independent director of military prosecutions (DMP) and registrar of military justice in 2005.<sup>12</sup>

The Bill proposes a system that effectively does away with courts martial and entirely removes the involvement of military officers in determining whether ADF members should be found guilty of serious offences and if so, how they should be punished.

Clause 64 of the Bill provides that charges of service offences brought before the MCA are to be dealt with otherwise than on indictment. The purpose of this provision is to avoid the requirement under s 80 of the Constitution that the trial on indictment of any offence against a law of the Commonwealth shall be by jury.

The distribution of the MCA's business will depend on the maximum punishment applying to the offence charged. The Superior Division of the MCA (constituted by a single judge) will deal with offences of a military character having a maximum penalty of between five years and life imprisonment.<sup>13</sup> The Superior Division will also deal with offences against s 61 of the DFDA, picking up the civilian criminal law in force in the Jervis Bay Territory, where the maximum punishment is between 10 years and life imprisonment.<sup>14</sup> The trial of all other offences will be

dealt with by federal magistrates in the General Division.<sup>15</sup>

The proposal to conduct trials by a judge or federal magistrate sitting alone is not the product of a policy decision<sup>16</sup> that it would be better to exclude military officers from the role they currently play in a court martial panel. Rather, as clause 10 of the explanatory memorandum makes clear, 'a jury in a Chapter III court could not be restricted to Defence members and a civilian [jury] would not necessarily be familiar with the military context of service offences'. It can be seen from this that the proposal to conduct trials by a judge or federal magistrate sitting alone without a military jury or court martial panel is the price to be paid for the choice to establish the MCA under Chapter III, based on the recognition that it would be inappropriate for a military court to be constituted by a civilian judge and civilian jury.

The Bill proposes a system that is out of step with the civilian justice system and the military justice system of Australia's closest allies

A single judge of the MCA will have the power to try members of the ADF for a number of DFDA offences punishable by life imprisonment, such as s 15B aiding the enemy whilst captured, s 15C providing the enemy with material assistance, s 16B offence committed with intent to assist the enemy and s 20 mutiny. No civilian court will have the jurisdiction to deal with those offences. Additionally, a single judge of the MCA will have the power to try civilian offences picked up by DFDA s 61 which are also punishable by life imprisonment, such as murder (*Crimes Act 1900*

(ACT) s 12) and numerous offences in the *Criminal Code 1995* (Cth). In most cases where such an offence was committed by an ADF member on operations overseas, a civilian court would not have jurisdiction to deal with the matter.<sup>17</sup>

The system proposed by the Bill will be out of step with the civilian criminal justice system. Under Commonwealth law, offences punishable by imprisonment for a period exceeding 12 months are generally indictable offences and therefore tried by a judge and jury. Offences punishable by imprisonment for a period not exceeding 12 months are generally summary offences and are tried by a magistrate.<sup>18</sup>

A number of Australian states and territories have legislative regimes allowing for the trial of indictable offences by a judge alone. Initially, a trial by judge alone was permitted only at the election of the accused. More recently, a number of states<sup>19</sup> and the ACT have allowed for a judicial discretion to order a trial by judge alone. One of the primary uses that has been made of judge alone trials is where there has been highly prejudicial media reporting of a matter leading to a fear that a fair jury trial could not be secured.<sup>20</sup> No Australian state or territory has adopted a system of mandatory judge alone trials for serious offences.

If the Bill is enacted, Australia will be alone among its closest allies such as the United States, the United Kingdom, Canada and New Zealand in having a system that limits the trial of serious service offences to a civilian judge without the option of a court martial panel or military jury.



Australian soldiers providing security at Malalai Girls School in Tarin Kot. Photo: Able Seaman Jo Dilozenzo /Commonwealth of Australia / Department of Defence.

### **Will the Bill achieve the objectives that justify a separate military justice system?**

In *Re Tracey; ex parte Ryan*,<sup>21</sup> Brennan and Toohey JJ reviewed the development of the British military justice system from around the time of the reign of Charles I. Their Honours noted that at the time, the regulation of a standing army was needed for:

...the preservation of the peace and safety of the kingdom: for there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a mutiny act. An undisciplined soldiery are apt to be too many for the civil power; but under the command of officers, those officers are answerable to the civil power, that they are kept in good order and discipline...<sup>22</sup>

ADF doctrine embraces the importance of maintaining discipline, not merely for the

*... a military justice system that is effectively administered and participated in by military officers enhances the authority of commanders which in turn, contributes to the effectiveness of the organisation as a fighting force.*

purpose of protecting the civil population from an undisciplined army, but as an integral element of establishing an effective fighting force.<sup>23</sup> A disciplined and well-led defence force is one that is likely to possess the skill, morale and dedication required to undertake the hazardous duties expected of its members both on operations and in training.

The need for a disciplined and law-abiding defence force is obvious, but what is the benefit of achieving that effect in a separate military justice system? Theoretically, there

is nothing that the military justice system does that the civilian legal system could not be empowered to do. If it was thought expedient to do so, the jurisdiction to investigate, prosecute and try any offence against the DFDA could be vested in the civilian police, prosecuting authorities and courts. The point of distinction is that a military justice system that is effectively administered and participated in by military officers enhances the authority of commanders which in turn, contributes to the effectiveness of the organisation as a fighting force.

#### **What is the advantage of trying serious offences by a court martial panel?**

While the vast majority of the activity in the ADF military justice system is conducted in summary hearings before commanders, the relatively fewer hearings of more serious charges before courts martial are no less (and in some cases, more) important.

In the United States, consideration has previously been given to removing the role of military officers on a court martial panel in determining the punishment to be imposed upon convicted members. In 1984 an advisory commission reported to Congress that if sentencing by judge alone was adopted, an important source of feedback would be lost, and another bonding link between the military justice system and the command might be severely weakened.<sup>24</sup>

Those observations are equally apposite to the ADF.

Recognition of the importance of the involvement of military officers in the conduct of military trials is to be found in the reforms undertaken since the 2005 Senate committee report. In the explanatory memorandum to the bill introducing the now defunct AMC, the then government said that the philosophy underpinning its approach to the design of the AMC was that:

A knowledge and understanding of the military culture and context is essential. This includes an understanding of the military operational and administrative environment, the unique need for the maintenance of discipline of a military force in Australia and on operations and exercises overseas. The AMC must have credibility with, and acceptance of, the Defence Force.<sup>25</sup>

#### *The involvement of military officers in a court martial ties the system to the community it serves, namely, the ADF.*

The force of this observation has not been diminished by the demise of the AMC following the High Court's decision in *Lane v Morrison*.<sup>26</sup> The involvement of military officers in a court martial ties the system to the community it serves, namely, the ADF. Decisions in which military officers have participated are more likely to attract acceptance and be credible to members of the ADF. Participation in the military justice system encourages a shared sense of responsibility for the maintenance of discipline, in a way that an externally imposed system will not.

#### **What is the benefit and cost of establishing the Military Court of Australia under Chapter III of the Constitution?**

The key benefit of establishing the MCA under Chapter III of the Constitution is that the judges and federal magistrates will enjoy the independence attached to such an appointment and thereby stand apart from any command influence. Possibly of lesser importance will be that the parliament will be prevented from conferring on the MCA jurisdiction that is incompatible with the exercise of the judicial power of the Commonwealth.<sup>27</sup>

As discussed above, the price to be paid for these benefits is the loss of the ability to try serious offences

with a court martial panel or a military jury.<sup>28</sup> The question is: is that price too high?

The ADF currently has two permanent judge advocates and occasionally utilises a reserve judge advocate. It is difficult to see how in theory or in practice the conduct of their duties is improperly influenced by ADF commanders. Judge advocates are appointed to the judge advocates' panel on the nomination of the judge advocate general (JAG), who is a judicial officer appointed by the governor-general. Judge advocates are not appointed to particular cases by



commanders, but by the registrar of military justice. DFMs are appointed to a case upon nomination by the JAG.<sup>29</sup>

Judicial independence in the military, as in the civilian sector, is not an end in itself. Rather, it is a measure to enhance the prospect of the system arriving at just results according to law. In the United States, where this topic has been the subject of debate, one judge advocate considered that if military judges were replaced by civilian judges, 'the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively'.<sup>30</sup>

The Bill attempts to ameliorate the loss of the ability to try serious offences with a court martial panel by confining appointments to the MCA to persons who, by reason of experience or training, understand the nature of service in the ADF.<sup>31</sup> While this is a valuable measure and an admirable ideal, the reality is that there will be very few candidates for judicial appointment who have had recent command experience and fewer still with operational experience. To say so does not cast any doubt on the skills or dedication of the judicial officers who might be appointed to the MCA. Rather, it is submitted that a system in which military officers participate in the trial of serious offences with the assistance of a legally qualified judge is likely to be a better one, both in terms of the accuracy of decision-making<sup>32</sup> and the credibility of such decisions in the perception of the

public and members of the ADF.

Major General the Honourable Justice Brereton<sup>33</sup> recently reflected on the benefits of a court martial panel in the context of a military prosecution that generated considerable controversy. His Honour said:

The pre-occupation of some with the supposed benefits of a Ch III court in this context is, I suggest, misconceived. The military justice system, though something of a hybrid, is fundamentally a disciplinary, not a criminal, jurisdiction. Most of our professional disciplinary systems have tribunals which are dominated by members of the relevant profession, with a legal advisor or chair, for instance in New South Wales, the Medical Tribunal for medical practitioners, and the Legal Services Division of the Administrative Decisions Tribunal (and its various predecessors) for legal practitioners. They bear many similarities to the court martial, from which they might well be historically derived. There is a risk that retrospective forensic analysis of an incident that required an immediate decision and response by soldiers in the urgency, danger and fog of battle, undertaken years later over days in a courtroom, may give insufficient weight to the pressures of the circumstances in which the soldiers were operating. I do not think there is much risk of that in a court martial, in which the tribunal of fact is a panel of military officers, who will bring their specialist knowledge, understanding and experience to the task – just as do the doctors to the Medical Tribunal. For my part, I would suggest that such a court martial is better equipped to judge prosecutions for service offences than a judge of a Ch III court without operational military experience.<sup>34</sup>

### **Will the proposed system be held to be valid?**

As already noted, the Bill attempts to avoid the requirements of section 80 of the Constitution by specifying that all charges will be dealt with otherwise than on indictment. On several occasions the High Court has dealt with the question whether there are limits to the parliament's power to prescribe what is and is not an indictable offence for the purposes of section 80. While it is clear that the balance of authority favours the conclusion that the parliament's power in this regard is unlimited, there have been a number of powerfully expressed contrary views, not the least of which include Dixon J in *Lowenstein*<sup>35</sup> and Deane J in *Kingsell v R*.<sup>36</sup> The Bill's proposal to allow the MCA to deal with offences carrying a punishment of life imprisonment may well be considered to be a suitable vehicle to reconsider this question. In *Cheng*<sup>37</sup> the court declined to reconsider the issue, however, Gleeson CJ, Gummow and Hayne JJ said that if s 80 were to be re-interpreted as a constitutional requirement for trial by jury in the case of all serious Commonwealth offences, the occasion for doing so would be where there was a legislative denial of trial by jury in the conduct of a prosecution involving issues susceptible of trial by jury.<sup>38</sup>

No doubt those involved in the development of the Bill hope that the proposed arrangements will finally put to rest the constitutional uncertainty that has, at times, shadowed the military justice system for the last 30 years. History

suggests, however, that a challenge to the system proposed by the Bill is inevitable.

## Conclusion

The Bill proposes a system where charges are preferred by the DMP who is statutorily independent of command, to be heard and determined by civilian judges in a Chapter III court. The almost complete disengagement of military officers from this layer of the military justice system undermines its objective of maintaining a disciplined and effective fighting force. It is submitted that a military justice system that has the flexibility to permit the trial of serious offences by a court martial panel is better than one that does not. The existing system of courts martial does that in a way that is constitutionally valid and accords with modern standards of fair trials.

The potential for a successful constitutional challenge to the MCA should be a strong deterrent to the Bill's passage. It would be deeply inconvenient if the ADF had to undergo a repeat of the disruption caused by the High Court's decision in *Lane v Morrison*.<sup>39</sup> The safer and better course is to utilise the existing system approved by the High Court in *White v Director of Military Prosecutions*.<sup>40</sup>

The Bill has been the subject of a recent inquiry by the Senate Legal and Constitutional Affairs Legislation Committee. The government members of the committee recommended the Bill's approval.

*The almost complete disengagement of military officers from this layer of the military justice system undermines its objective of maintaining a disciplined and effective fighting force.*

The Coalition and Greens members recommended an amendment to allow trial by civilian jury for serious offences. That is an option that neither the government nor the ADF would appear to want. The Bill is expected to return to the parliament for further debate.

## Endnotes

1. David McLure is a reserve officer in the Australian Army. The views expressed here are his own.
2. Constitution, ss 68, 69.
3. (2007) 231 CLR 570.
4. Senate Foreign Affairs, Defence and Trade Committee, The effectiveness of Australia's military justice system (2005)
5. *Defence Legislation Amendment Act 2006* (Cth).
6. (2009) 239 CLR 230
7. *Military Justice (Interim Measures) Act (No. 1) 2009* and *Military Justice (Interim Measures) Act (No.2) 2009*.
8. See: *Lane v Morrison* (2009) 239 CLR 230, [38] – [45].
9. There are also significant differences, eg. it is a trial by the accused's superiors, not his/her peers.
10. DFDA s 134(4).
11. DFDA ss 132 – 134.
12. *Defence Legislation Amendment Act (No. 2) 2005* (Cth).
13. *Military Court of Australia Bill 2012*, schedule 1, items 1 – 18.
14. *Ibid*, items 19 – 22.
15. *Ibid* s 65.
16. At least not one that is disclosed in the explanatory memorandum or the second reading speech.

17. One obvious exception is the war crimes offences contained in division 268 of the Criminal Code. See also *Crimes (Overseas) Act 1964* (Cth) s 3A(10).
18. *Crimes Act 1914* (Cth) ss 4G, 4H.
19. New South Wales, Queensland and Western Australia.
20. For a helpful analysis of the state regimes, see Jodie O'Leary, 'Twelve angry peers or one angry judge: An analysis of judge alone trials in Australia' (2011) 35 *Criminal Law Journal* 154.
21. (1989) 166 CLR 518.
22. *Ibid* 557.
23. Australian Defence Doctrine Publication 00.1 Command and Control (2009) 1-2. Australian Defence Doctrine Publication 00.1 Leadership (2007).
24. The Military Justice Act of 1983 Advisory Commission Report, 14 December 1984, 20
25. Explanatory Memorandum to the Defence Legislation Amendment Bill 2006, [4].
26. (2009) 239 CLR 230.
27. *Kable v Director of Public Prosecutions (DPP) (NSW)* (1996) 189 CLR 51.
28. *Cheattle v R* (1993) 177 CLR 541 at 560.
29. DFDA ss s 119, 129C, 179, 196.
30. Fansu Ku, 'From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century' (2009) 199 *Military Law Review* 52 – 53.
31. Bill clause 11.
32. ie. findings of fact and decisions on guilt and punishment based on the panel's specialised military knowledge and experience.
33. Major General Brereton is a justice of the Supreme Court of New South Wales and an experienced commander in the Army.
34. Justice Paul Brereton, 'The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law' (2011) 85 *Australian Law Journal* 91.
35. *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 582
36. (1985) 159 CLR 264, 307 – 322.
37. *Cheng v R* (2000) 203 CLR 248,
38. (2000) 203 CLR 248, [43].
39. See DMP's submission to the committee dated 13 July 2012
40. (2007) 231 CLR 570.

### Plain packaging

Victoria Brigden reports on *JT International SA v Commonwealth of Australia*; *British American Tobacco Australasia Limited v the Commonwealth* [2012] HCA 43 (5 October 2012)

On 15 August 2012 the High Court rejected the constitutional challenge brought by tobacco companies in respect of the federal government's controversial 'plain packaging' legislation for tobacco products. The court published its reasons on 5 October 2012 in six separate judgments, those of French CJ, Gummow J, Hayne and Bell JJ, Heydon J (dissenting), Crennan J and Kiefel J.

The *Tobacco Plain Packaging Act 2011* (Cth) (Packaging Act) regulated the appearance and packaging of retail tobacco products, including prohibiting the use of various trade marks on packaging, other than the use of a brand, business or company name for the relevant product.

JT International SA (JTI) and members of the British American Tobacco Group (BAT) brought separate proceedings in which they contended that the Packaging Act effected an acquisition of property otherwise than on just terms, in contravention of s51(xxxi) of the Constitution.

Each plaintiff company owned or exclusively licensed registered trade marks, designs or patents in various cigarette brands, and argued that they held various rights as a result, including those in trademarks and get-up, copyright, substantial reputation and goodwill, registered designs, patents, packaging rights and intellectual property licence rights.

The court held that the Packaging Act would not result in an acquisition of property of the plaintiffs otherwise than on just terms.

A number of issues were considered by the court in determining whether there was an acquisition of property under s51(xxxi) including:

- whether the plaintiffs' intellectual property rights constituted property for the purposes of s51(xxxi);
- whether the Commonwealth 'controlled' the plaintiffs' use of their intellectual property by the Packaging Act and in so doing, effected an indirect acquisition of property; and
- whether the restrictions and stricter requirements as to packaging imposed by the Packaging Act resulted in a benefit or advantage 'relating to' the ownership or use of property<sup>1</sup> to the Commonwealth so as to trigger the 'just terms' requirement.

#### French CJ

His Honour found that the asserted property was a mixture of statutory or derivative non-statutory rights. His Honour noted that it is settled that goodwill is a form of property, and that the rights associated with a get-up are rights to protect goodwill. In this context, his Honour found that while there is no 'property' in a get-up, rights associated with the plaintiffs' get-up are exclusive rights which are negative in character and support protective actions against the invasion of goodwill.<sup>2</sup>

His Honour recognised that there was an important distinction between the taking of property and its acquisition, and held that the mere extinguishment of rights was not an acquisition. His Honour cited with approval an observation made by Mason J in *The Commonwealth v Tasmania* (Tasmanian Dam Case)<sup>3</sup>, approved by the majority in *Australian Tape Manufacturers Association Ltd v The Commonwealth*<sup>4</sup> that:

....it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.<sup>5</sup>

His Honour held that on no view could it be said that the Commonwealth acquired a benefit of proprietary character by reason of the operation of the Packaging Act on the plaintiffs' property rights, agreeing with the reasons of Gummow J, and Hayne and Bell JJ.<sup>6</sup>

His Honour observed that the legislative scheme imposes controls on the marketing of tobacco products. While that may constitute a 'taking' of rights in that it limits the plaintiffs' enjoyment of their rights, it does not involve the accrual of a benefit of a proprietary character to the Commonwealth which would constitute an acquisition.<sup>7</sup>

#### Gummow J

Gummow J held that there was sufficient impairment of the plaintiffs' statutory intellectual property to amount to a 'taking' of the plaintiffs' property. However, this was not an acquisition.

His Honour noted that it could not be said that the various species of statutory intellectual property rights

such as those arising from trade marks, designs, patents and copyright did not fall within the ambit of s51(xxxi) merely because other rights conferred by federal statute had been held to fall outside it.<sup>8</sup> His Honour observed that at general law the goodwill attached to the business of the plaintiffs from exploitation of trade marks and get-up is property,<sup>9</sup> but noted that these were not affirmative rights.<sup>10</sup>

His Honour considered the position in the United States in relation to the taking clause of the Fifth Amendment. His Honour considered that there were important distinctions between the US and Australian constitutions in relation to 'taking' and 'acquisition', and emphasised that s51(xxxi) is concerned with an acquisition, rather than taking, of property.<sup>11</sup>

Gummow J then considered three leading decisions in relation to involuntary taking of property in order to determine the extent of impairment of proprietary rights necessary to enliven s51(xxxi): *Minister of State for the Army v Dalziel*<sup>12</sup>, *Bank of NSW v the Commonwealth*<sup>13</sup> and *The Tasmanian Dam Case*<sup>14</sup>.

His Honour concluded that the operation of the Packaging Act would result in a taking of the various items of intellectual property,<sup>15</sup> but held that the goodwill associated with the get-up of packaging required further consideration.<sup>16</sup>

His Honour rejected JTI's contention that there could be an acquisition within s51(xxxi) which is not proprietary in nature for being inconsistent with authorities, and rejected the further contention that the pursuit of the objects of improvement of public health as set out in s3 of the Packaging Act confers an advantage upon the Commonwealth amounting to an acquisition, because the Commonwealth did not receive a benefit or advantage which was proprietary in nature.<sup>17</sup>

In relation to the 'control' and 'benefit and advantage' arguments, Gummow J agreed with the reasons of Hayne and Bell JJ that to characterise compliance with federal law as to the appearance of cigarette packaging as 'control' by the Commonwealth had no bearing upon the question of whether there was a proprietary relationship between the Commonwealth and packaging.<sup>18</sup>

### Hayne and Bell JJ

Hayne and Bell JJ likewise found that there was no

acquisition, even assuming that the Packaging Act effected a 'taking'.<sup>19</sup>

Their Honours noted that s51(xxxi) was concerned with matters of substance rather than form and that 'acquisition' and 'property' were to be construed liberally. However, a liberal construction did not 'erode the bedrock' of s51(xxxi), namely, that there be an acquisition of property.<sup>20</sup> For this reason the plaintiffs' argument that s51(xxxi) could be engaged even when no 'property' was acquired was rejected.

In considering whether the Commonwealth obtained a benefit or advantage that was proprietary in nature, their Honours found that the effect of the Packaging Act was no different from legislation requiring warning labels to be placed on products, and that such legislation typically effected no acquisition of property.<sup>21</sup> Their honours further held that compliance with the Packaging Act created no proprietary interest.<sup>22</sup>

### Crennan J

Her Honour noted that the Packaging Act did not effect a transfer of the plaintiffs' rights to the Commonwealth or any other person of their intellectual property.

Her Honour noted that a brand name appeared to be the essential aspect of distinction of a product from competitors' products<sup>23</sup> and that, used alone, the brand names in question had the capacity to attract and maintain goodwill. An exclusive right to generate sales volume by reference to a distinctive brand name was a valuable right.<sup>24</sup>

Crennan J found, therefore, that this case was not analogous to authorities as to deprivation of the substance and reality of proprietorship because the plaintiffs in this case still had the ability to use their brand names to distinguish between their products and therefore to generate custom and goodwill.<sup>25</sup> Her Honour held that s51(xxxi) was not directed to preserving the value of a commercial business or item of property. That did not constitute a taking equivalent to an indirect acquisition.

As to control, her Honour found that because actions in respect of trade marks and product get-up remained open to the plaintiffs, it could not be said that there was an indirect acquisition of the plaintiffs' rights and entitlement not to use their property.<sup>26</sup>



## Kiefel J

Kiefel J held that the mere restriction on a right of property, or its extinction, did not mean that a proprietary right had been acquired by another.<sup>27</sup> Her Honour distinguished *Dalziel*, and the *Bank Nationalisation Case* from the present,<sup>28</sup> and held that a closer analogy to the restrictions placed upon the plaintiffs was that of restrictions placed on land for town planning and other public purposes. Her Honour noted that these would not normally constitute an acquisition of land by a local authority.<sup>29</sup>

Her Honour rejected the plaintiffs' argument that the possible achievement of the statutory objectives under the Packaging Act was enough to amount to an acquisition. Her Honour commented that there may be a statutory objective of acquiring property, as in the *Bank Nationalisation Case*, but there was no such purpose apparent in this case. While the plaintiffs' businesses may be harmed as a result of the Packaging Act, the Commonwealth did not acquire property.<sup>30</sup>

## Heydon J

Brief mention must be made of Heydon J's dissenting judgment.

After reviewing the relevant authorities, his Honour found it unnecessary for the Commonwealth or some other person to acquire an interest in property for s51(xxxi) to apply, but only to show that the Commonwealth or some other person obtained some identifiable benefit or advantage relating to the ownership or use of the property.<sup>31</sup>

His Honour rejected the submissions of the Commonwealth that the right of JTI and BAT to use their intellectual property on cigarette packaging was not property, and observed that by the removal of the right the proprietors were denied the use of the 'last valuable place on which their intellectual property could lawfully be used', bringing about 'an effective sterilisation of the rights constituting the property in question'.<sup>32</sup>

Therefore, the legislation deprived the proprietors of their statutory and common law intellectual property rights, and gave new, related rights to the Commonwealth, being the rights of control over the plaintiffs' intellectual property and the surfaces of the plaintiffs' chattels<sup>33</sup>. That control was a 'central element

of proprietorship'.<sup>34</sup> Heydon J held that such rights were closely connected to the proprietors' former property rights.<sup>35</sup> His Honour described the control as a 'measurable and identifiable advantage relating to the ownership or use of property'.<sup>36</sup>

His Honour rejected the Commonwealth's argument that the Packaging Act provided 'just terms' in the form of fair dealing between the tobacco companies and the Australian nation.<sup>37</sup>

Finally, his Honour highlighted the significance of this and further decisions on s51(xxxi):

After a 'great' constitutional case, the tumult and the shouting dies. The captains and the kings depart. Or at least the captains do; the Queen in Parliament remains forever. Solicitors-General go. New Solicitors-General come. This world is transitory. But some things never change. The flame of the Commonwealth's hatred for that beneficial constitutional guarantee, s 51(xxxi), may flicker, but it will not die. That is why it is eternally important to ensure that that flame does not start a destructive blaze.<sup>38</sup>

## Endnotes

1. *Mutual Pools & Staff Pty Ltd v the Commonwealth* (1994) 179 CLR 155 at 185 per Deane and Gaudron JJ.
2. At [39].
3. (1983) 158 CLR 1.
4. (1993) 176 CLR 480 at 499-500 per Mason CJ, Brennan, Deane and Gaudron JJ.
5. At [42].
6. At [42].
7. At [44].
8. At [103] – [105].
9. At [106].
10. At [107].
11. At [118].
12. (1944) 68 CLR 261.
13. (1948) 76 CLR 1.
14. (1983) 158 CLR 1.
15. At [141].
16. At [142] – [143].
17. At [147].
18. At [150].
19. At [164].
20. At [169].
21. At [181].
22. At [183].
23. At [288].
24. At [293].
25. At [294].
26. At [300].
27. At [357].
28. At [358] – [362].
29. At [363].
30. At [372].
31. At [200].
32. At [216]; *Newcrest Mining (WA) v The Commonwealth* (1997) 190 CLR 513 at 635 per Gummow J.
33. At [217].
34. At [224].
35. At [218].
36. At [226].
37. At [236].
38. At [241].

# The doctrine of penalties

Thomas Prince reports on *Andrews v Australia and New Zealand Banking Group Limited* [2012] HCA 30

The High Court has given new life to the doctrine of penalties, holding that the doctrine is not limited in scope to contractual provisions operating on a breach of contract. This is significant departure from the pre-existing law established by the New South Wales Court of Appeal's decision in *Interstar Wholesale Finance Pty Limited v Integral Home Loans Pty Limited*<sup>1</sup>.

## Background

The applicants represent a group of approximately 38,000 customers of ANZ who are seeking in proceedings in the Federal Court a declaration that various bank fees charged by ANZ are void or unenforceable as penalties. There are five categories of bank fees in issue, described as honour, dishonour, non-payment, over limit and late payment fees.

At first instance, Gordon J answered a number of separate questions directed to the issue of whether the various fees were payable on a breach of contract and, if so, whether they were capable of being characterised as penalties. Her Honour found that the late payment fees were payable on a breach of contract and therefore were capable of being characterised as penalties. However, her Honour found that the remaining fees were not payable on breach of contract by the customer, and were instead charged as a consequence of a decision by ANZ to afford or to decline the provision of further financial accommodation to the customer. Accordingly, following *Interstar*, Gordon J found that the remaining fees were not capable of being characterised as penalties.

The applicants sought leave to appeal to the full court of the Federal Court from Gordon J's answers to the separate questions, and part of that application was removed directly into the High Court.<sup>2</sup> The High Court (French CJ, Gummow, Crennan, Kiefel and Bell JJ in a joint judgment) granted leave to appeal, set aside part of the answers given, and declared that the fact that the fees were not charged upon breach of contract, and that the customers had no responsibility or obligation to avoid the occurrence of the events upon which the fees were charged, did not render the fees incapable of characterisation as penalties.

## Doctrine of penalties not limited to breach of contract

The High Court rejected statements of Mason and Deane JJ in *AMEV-UDC Finance Limited v Austin*<sup>3</sup> that the modern doctrine of penalties is a doctrine of law not equity and that the equitable jurisdiction to relieve against penalties had 'withered on the vine'. Relying on a range of historical materials but, principally, a number of 18<sup>th</sup> century Chancery cases concerning penal bonds, the court rejected the proposition, propounded in *Interstar* and accepted in England,<sup>4</sup> that the doctrine of penalties is limited in application to contractual provisions operating upon a breach of contract.

The High Court explained that a contractual stipulation is, prima facie, a penalty where it imposes upon one party ('the obligor') an additional detriment to the benefit of the other party ('the obligee') and the stipulation is, in substance, in the nature of a security to the obligee for the satisfaction of another stipulation ('the primary stipulation'). The primary stipulation need not be another contractual obligation of the obligor but may be simply the occurrence or non-occurrence of an event. The detriment imposed upon the failure of the primary stipulation need not be the payment of money, but may include the transfer or use of property to or for the benefit of the obligee.

## Conditions of relief against penalty

The High Court emphasised that relief against a penalty is only available if two conditions are satisfied. First, compensation susceptible of evaluation and assessment in money terms must be made to the obligee for the failure of the primary stipulation. Secondly, the value of the benefits to be provided under the penalty must, in the sense described in the established cases such as *Dunlop Pneumatic Tyre Co Limited v New Garage and Motor Co Limited*,<sup>5</sup> be incommensurate with the interest protected by the primary stipulation. Where relief is available, the obligor will be relieved from performance of the penalty only beyond the extent of the compensation payable to the obligee for the failure of the primary stipulation.

## A Pyrrhic victory?

The High Court's conclusion that the fees in question were not incapable of characterisation as penalties was a significant win for the applicants. However, in

its reasons the court noted that a further issue was presented as a result of Gordon J's findings that the fees other than the late payment fee were charged for further financial accommodation provided to customers. The court drew attention to, and approved, a line of cases<sup>6</sup> to the effect that a contractual term that on its proper construction merely requires the payment of money or the transfer of property by one party as the price for obtaining additional rights is not a penalty. However, this issue was not directly raised by the separate questions answered by Gordon J and the court indicated that it must await further trial, along with the grounds upon which the applicants submit that the penalty doctrine applies to the bank fees.

Thus, while the case is an important one with respect to the doctrine of penalties it is perhaps also another illustration of the dangers of separate questions.

### Endnotes

1. (2008) 257 ALR 292.
2. Pursuant to section 40(2) of the *Judiciary Act 1903* (Cth).
3. (1986) 162 CLR 170 at 191.
4. *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399 (HL).
5. [1915] AC 79, applied in *Ringrow Pty Limited v BP Australia Pty Limited* (2005) 224 CLR 656.
6. Including *Metro-Goldwyn-Mayer Pty Limited v Greenham* [1966] 2 NSW 717 (CA).

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# Care in the drafting of pleadings

Susan Cirillo reports on *Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Limited v Australian Securities and Investments Commission* [2012] HCA 39

The High Court unanimously upheld appeals by Fortescue Metals Group Limited (Fortescue) and its chairman and chief executive, Andrew Forrest against claims made by ASIC. The decision highlights the care that needs to be given to the drafting of pleadings.

## Background

In late 2004, Fortescue, a publicly listed company, signed three agreements titled 'Framework Agreement', each with one of three state-owned bodies of the People's Republic of China, known by their acronyms as CREC, CHEC and CMCC. The agreements together related to a proposed mining project to consist of a mine, a port and a railway to link the two.

The three agreements were substantially identical. For example, the CREC agreement, among other things, provided for the parties to 'jointly develop and agree' on certain matters including 'a General Conditions of Contract suitable for a Build and Transfer type contract' and contained a clause stating that the 'document represents an agreement in itself', recognising that a 'fuller and more detailed agreement', 'will be developed later'.<sup>1</sup>

After signing the CREC agreement, Fortescue sent a letter and a media release about it to the Australian Stock Exchange (the ASX) dated 23 August 2004. During argument in the High Court, ASIC's central case was treated as sufficiently identified by reference only to the 23 August 2004 communication. The press release began:

[Fortescue] ... is pleased to announce that it has entered into a binding contract with ... [CREC] ... to build and finance the railway component of the Pilbara Iron Ore and Infrastructure Project.

In 2006, ASIC commenced proceedings alleging that, by describing the agreements as 'binding contracts', Fortescue contravened,

- s 1041H of the *Corporations Act 2001* (the Act) by publishing notices in relation to a financial product (shares in Fortescue) that were misleading or deceptive or likely to mislead or deceive; and
- the continuous disclosure requirements of s 674 of the Act.

ASIC alleged also that, Mr Forrest had not exercised his powers or discharged his duties as a director

of Fortescue with the degree of care and diligence required by s 180(1) of the Act.

## Summary of the result

At trial, Gilmour J dismissed ASIC's claims. Keane CJ, Emmett and Finkelstein JJ upheld ASIC's appeals.

In a joint judgment, French CJ, Gummow, Hayne and Kiefel JJ allowed the appeals finding that ASIC did not establish that Fortescue engaged in misleading or deceptive conduct contrary to s 1041H, and consequently, failed to establish a contravention of the continuous disclosure provisions or a breach of Mr Forrest's directors' duties. Heydon J agreed that the appeals should be allowed on different reasoning.

## The pleadings

The plurality noted that at trial, ASIC alleged that Fortescue and Forrest had been dishonest in making the impugned statements, that is, ASIC's allegations were taken to be allegations of 'fraud'. Gilmour J rejected the allegations, finding that the impugned statements were an expression of an honestly and reasonably held opinion. However, in the full court and High Court, ASIC advanced its case on the footing that the impugned statements were misleading or deceptive.<sup>2</sup>

The plurality observed that ASIC pleaded that Fortescue had represented to potential investors that:

- Fortescue 'had entered a binding contract' with CREC, CHEC or CMCC 'obliging' that company to build and finance the relevant infrastructure element, and
- Fortescue 'had a genuine and reasonable basis for making' the relevant statement.<sup>3</sup>

Their honours stated that the latter allegation added nothing to the case of misleading or deceptive conduct which ASIC sought to make. In such a case, 'reference to Fortescue's state of knowledge was unnecessary and inappropriate' and distracted from the two critical questions in a misleading and deceptive conduct case, which are:

- What do the impugned statements convey to their intended audience?; and
- Is what is conveyed misleading or deceptive, or likely to mislead or deceive?<sup>4</sup>



The plurality also observed that the above pleading gave rise to further confusion where it was then pleaded that the impugned statements were false and misleading or deceptive because:

- the agreements ‘did not *state* that [CREC, CHEC or CMCC] *would*, nor did it have the *legal effect of obliging*’ CREC, CHEC or CMCC to do certain things; and
- Fortescue ‘did not have a genuine and/or reasonable basis for making’ the impugned statement because it was aware of the terms of the agreements and ‘knew, or ought reasonably to have known’ that the parties had not agreed on all of the necessary terms to compel the building and transfer of the relevant infrastructure.<sup>5</sup>

The plurality described the latter allegation as a ‘further and radically different sub-paragraph’:

On their face, these allegations mixed two radically different and distinct ideas: that Fortescue *knew* that the statements were false (it had no *genuine* basis for making them) and that Fortescue *should have known* that the statements were false (it had no *reasonable* basis for making them). At common law the first idea is expressed in the tort of deceit and the second in liability for negligent misrepresentation.<sup>6</sup>

This was ‘no pleader’s quibble’ with the plurality emphasising the fundamental requirements for the fair trial of allegations of contraventions of law; that is, the making of clear and distinct allegations.<sup>7</sup> ASIC could not plead a case of fraud as a ‘fallback’ claim in anticipation that Fortescue might claim that the impugned statements were expressions of opinion not fact – it being fundamental that a case of fraud is to be pleaded specifically and with particularity.<sup>8</sup>

The plurality disposed of the appeals by deciding only the misleading or deceptive conduct allegations. In doing so, their honours emphasised the necessity of examining what the statements conveyed to their audience.<sup>9</sup> The audience was identified as ‘investors (both present and possible future investors) and, perhaps as some wider section of the commercial or business community’.<sup>10</sup>

The plurality held that this audience would take what was said as a statement of what the parties to

*ASIC could not plead a case of fraud as a ‘fallback’ claim in anticipation that Fortescue might claim that the impugned statements were expressions of opinion not fact...*

the agreements understood that they had done and *intended* would happen in the future.<sup>11</sup>

In contrast, there was no evidence led at trial to show that this audience would understand the statements as also conveying that the agreements would be enforceable in an Australian or other court.<sup>12</sup> Therefore, the statements conveyed what a ‘commercial audience’ would describe, as a ‘binding contract’<sup>13</sup> and that the parties intended the agreements to be legally binding.<sup>14</sup>

Their Honours rejected the assumption in the full court that the statements, by use of the words ‘contract’ or ‘agreement’,<sup>15</sup> conveyed something about their legal quality. Given the international features of the agreements, it would be ‘extreme or fanciful’ to attribute to an ordinary or reasonable member of the audience the understanding that, if the parties later disagreed, the only question would be one of enforcement in an Australian court.<sup>16</sup>

### Heydon J

His Honour found that the impugned statements were statements of opinion rather than fact because the question of whether an agreement is a binding contract is a question of law, which is a question of opinion.<sup>17</sup>

His Honour rejected the allegations of fraud against Fortescue because, among other reasons, ASIC had conceded that the parties intended the agreements to be legally binding.<sup>18</sup> His Honour also rejected the argument that Fortescue had no reasonable basis for stating that the agreements were binding. This question turned on whether the audience understood that Fortescue said that the parties had agreed on all of the necessary terms for it to be practicable to force compliance with the agreements.<sup>19</sup> His Honour held that the audience would not have understood the statements in this manner and so the statements were not misleading or deceptive.<sup>20</sup>

## Endnotes

1. See *Forrest* [2012] HCA 39 at [12] where the plurality identified seven important common features of the agreements. See also Heydon J at [87] – [88].
2. *Forrest* [2012] HCA 39 at [18] and [28].
3. *Forrest* [2012] HCA 39 at [20].
4. *Forrest* [2012] HCA 39 at [23].
5. *Forrest* [2012] HCA 39 at [21].
6. *Forrest* [2012] HCA 39 at [22]; compare Heydon J at [95].
7. *Forrest* [2012] HCA 39 at [25]; see also at [27] and [70].
8. *Forrest* [2012] HCA 39 at [24] and [26].
9. *Forrest* [2012] HCA 39 at [33].
10. *Forrest* [2012] HCA 39 at [36]. See also Heydon J at [105].
11. *Forrest* [2012] HCA 39 at [37].
12. *Forrest* [2012] HCA 39 at [39]. However, see also Keane CJ's postulation on the 'curiosity' of ASIC's omission to lead evidence in this regard: (2001) 190 FCR 364 at [201].
13. *Forrest* [2012] HCA 39 at [58]; compare Heydon J at [90]–[91].
14. *Forrest* [2012] HCA 39 at [40]; ASIC conceded at trial that the parties intended the agreements to be legally binding (see at [40]).
15. ASIC disclaimed any special reliance on the use of the word 'binding'; see *Forrest* [2012] HCA 39 at [41].
16. *Forrest* [2012] HCA 39 at [50].
17. *Forrest* [2012] HCA 39 at [94].
18. *Forrest* [2012] HCA 39 at [96] – [101].
19. *Forrest* [2012] HCA 39 at [104].
20. *Forrest* [2012] HCA 39 at [105].

## Restrictive immunity

Natalie Zerial reports on *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission* [2012] HCA 33

In accordance with the conventional doctrine of foreign state immunity, domestic governments have long granted immunity to foreign states from domestic court proceedings.<sup>1</sup> There are several historical rationales for the doctrine, most notably the principle of respect for the equality of foreign sovereigns. However, as states began increasingly to engage in transnational commercial activities, the restrictive theory of immunity was developed. Under this approach, the immunity does not extend to cases concerning a foreign state's commercial (rather than governmental) activities.<sup>2</sup>

It is not always clear where or how to draw the line between 'commercial' and 'governmental' activities. In its 1984 *Report on Foreign State Immunity*, the Australian Law Reform Commission observed that arguments in favour of restrictive immunity 'do not point to a single distinction between immune and non-immune cases as appropriate or necessary, whether it is a distinction between 'private' and 'public' law, or between 'commercial' and 'governmental' transactions.'<sup>3</sup>

The line between 'public' and 'private' law in this context was explored in *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission*<sup>4</sup>. The issue in the case was whether the commercial transactions exception to foreign state immunity

applied to proceedings brought by a governmental regulator seeking the imposition of civil penalties for the alleged breach an Australian statute prohibiting anti-competitive conduct affecting Australian markets. The appellant (Garuda) argued that the proceedings fell outside of the commercial transactions exception on the basis that they were public proceedings that were not seeking to vindicate any private right. The High Court rejected this argument, and indicated scepticism of the public / private law distinction on which Garuda's submissions relied.

*It is not always clear where or how to draw the line between 'commercial' and 'governmental' activities.*

### Background

Garuda is 95.5 per cent owned by the Indonesian Government. The remaining 4.5 per cent is held by government-controlled corporations and, at the relevant times, four out of five members of Garuda's board were senior officials of the Indonesian Government.

In its Statement of Claim dated 2 September 2009,

the ACCC claimed that Garuda had breached the *Trade Practices Act 1974* (Cth) (TPA) by entering into anti-competitive arrangements or understandings with other international airlines to impose surcharges on commercial freight services to Australia (TPA, sub-s 45(2)(a)(ii)), as well as giving effect to those arrangements or understandings (TPA, sub-s 45(2)(b)(ii)). The ACCC sought injunctive, declaratory and civil penalty relief.

*The issue in the case was whether the commercial transactions exception to foreign state immunity applied to proceedings brought by a governmental regulator seeking the imposition of civil penalties for the alleged breach an Australian statute prohibiting anti-competitive conduct affecting Australian markets.*

Garuda sought to have the proceedings set aside on the basis that it was entitled to immunity from the proceedings under the *Foreign State Immunities Act 1985* (Cth) (Act). Garuda's motion was dismissed at first instance by Jacobson J, who held that Garuda was not a 'separate entity' under the Act and thus not entitled to assert immunity.<sup>5</sup> Garuda's appeal to the full court was dismissed by Lander, Greenwood and Rares JJ, who held that Garuda was a separate entity, but that the proceedings fell within the commercial transaction exception to foreign state immunity.<sup>6</sup> Garuda applied for, and was granted, special leave to appeal to the High Court.<sup>7</sup>

### Legal framework

Section 9 of the Act provides that '[e]xcept as provided by or under this Act, a foreign state is immune from the jurisdiction of the courts of Australia in a proceeding.' Although Garuda was not a 'foreign state', by the time the proceedings reached the High Court it was no longer disputed that Garuda was a 'separate entity' of Indonesia, and thus entitled to assert immunity under s 9 by virtue of s 22 of the Act.

Thus, the arguments before the High Court were limited to the application of the commercial transaction

exception to immunity in s 11 of the Act. Sub-s 11(1) provides that a foreign state (including a separate entity) 'is not immune in a proceeding in so far as the proceeding concerns a commercial transaction'. Sub-s 11(3) defines 'commercial transaction':

(3) In this section, commercial transaction means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:

- (a) a contract for the supply of goods or services;
- (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and
- (c) a guarantee or indemnity in respect of a financial obligation;

but does not include a contract of employment or a bill of exchange.

### Judgment

Garuda submitted that the proceedings did not concern a commercial transaction, because the arrangements or understandings were not contractual, and the case did not involve any person seeking to vindicate a private law right in relation to provision of the freight services. The High Court unanimously rejected this submission in a joint judgment of French CJ, Gummow, Hayne and Crennan JJ and in a separate judgment of Heydon J.

The joint judgment held that the broad terms of the chapeau of sub-s 11(3) were, on their own terms, not limited by the subsequent paragraphs (a) to (c). Their honours were unconvinced by Garuda's argument that the proceedings did not 'concern' a commercial transaction because the proceeding did not seek to vindicate a private law right arising from an underlying contract. Their honours stated that '[t]his postulated dichotomy between private and public law as controlling the meaning of 'concerned' in s 11(1) should not be accepted,'<sup>8</sup> and held that the broad definition in s 11(3) does not require that a commercial transaction be an activity of a contractual nature.

Justice Heydon differed from the joint judgment in that he found that the proceedings involved a 'contract for the supply of goods or services' under s 11(3)(a) of the Act. The proceedings involved such a contract in the form of the individual air freight services contracts giving effect to the anti-competitive arrangements.

These contracts were not merely the 'subject matter' or 'factual background' but rather 'an element of a claim made in the relevant proceedings'. The proceedings also fell within the scope of s 11(3) more generally, as even transactions that are in restraint of trade can constitute commercial or trading transactions.

Garuda's private-public distinction suffered a final blow from Heydon J, who stated that 'there is nothing in s 11 or in any other provision of the Act to support the distinctions the appellant sought to draw between public and private rights, between proceedings brought by a regulator and proceedings brought by beneficial objects of the regulating legislation, and between specific statutory norms and general law norms.'<sup>9</sup>

## Endnotes

1. Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at xv.
2. D. Gaukrodger, (2010), 'Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment, 2010/2, OECD Publishing.
3. At xv.
4. [2012] HCA 33
5. *Australian Competition and Consumer Commission (ACCC) v PT Garuda Indonesia Limited* (2010) 269 ALR 98; [2010] FCA 551.
6. *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission (ACCC)* (2011) 192 FCR 393; (2011) 277 ALR 67; (2011) 83 ACSR 35; [2011] FCAFC 52.
7. *PT Garuda Indonesia Limited v Australian Competition & Consumer Commission* [2011] HCATrans 280.
8. Judgment at [41] per French CJ, Gummow, Hayne and Crennan JJ.
9. Judgment at [68] per Heydon J.

## Security assessments and the granting of protection visas

Amy Munro reports on *Plaintiff M47/2012 v Director General of Security & Ors* [2012] HCA 46

In *Plaintiff M47/2012 v Director General of Security & Ors*,<sup>1</sup> the High Court of Australia had cause to consider Clause 866.225 of Schedule 2 to the *Migration Regulations 1994* (Cth), which requires the minister for immigration and citizenship (minister) to refuse to grant a protection visa to a refugee if that refugee has been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (Public Interest Criterion 4002). A majority of the court held that Public Interest Criterion 4002 was invalid.

### The facts

The plaintiff is a national of Sri Lanka. At about 11.10pm on 29 December 2009, he arrived on Christmas Island on a special purpose visa. His visa expired at midnight. Since this time, the plaintiff has been an unlawful non-citizen within the meaning of s 14 of the *Migration Act 1958* (Cth) (Migration Act) and been held in immigration detention pursuant to ss 189 and 196 of that Act.

On 25 June 2010, the plaintiff applied for a protection visa under s 36 of the Migration Act. A delegate of the minister concluded that the plaintiff had a well-founded fear of persecution. As such, the plaintiff was found to

be a refugee within the meaning of the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) (Refugees Convention).

Despite the finding that the plaintiff was a refugee, on 18 February 2011, the delegate refused the plaintiff's application for a protection visa. The reason for the refusal was an adverse security assessment by ASIO, which meant that the plaintiff did not meet Public Interest Criterion 4002.

The Australian Government does not intend to remove the plaintiff to Sri Lanka and there is presently no other country to which he can be sent.

### The questions in the special case

The plaintiff commenced proceedings in the original jurisdiction of the High Court. He challenged the validity of his security assessment and the lawfulness of his detention. On 6 June 2012, Hayne J directed that a special case filed by the parties be set down for hearing by a full court on 18 June 2012. His Honour reserved the following four questions for the court:

1. In furnishing the adverse security assessment, did the director general of security fail to comply with



the requirements of procedural fairness?

2. Does s 198 of the Migration Act authorise the removal of the plaintiff, being a non-citizen:
  - 2.1 to whom Australia owes protection obligations under the Refugees Convention; and
  - 2.2 whom ASIO has assessed poses a direct or indirect risk to security;to a country where he does not have a well-founded fear of persecution for the purposes of Article 1A of the Refugees Convention?
3. Does 189 and 196 of the Migration Act authorise the plaintiff's detention?
4. Who should pay the costs of the special case?

However, the determination of the matter ultimately turned on the resolution of the following question, which was added, by leave, during the hearing:

2A. If the answer to question 2 is 'Yes' by reason of the plaintiff's failure to satisfy Public Interest Criterion 4002, is that clause to that extent *ultra vires* the power conferred by section 31(3) of the Migration Act and invalid?

### The validity of Public Interest Criterion 4002

The plaintiff challenged the validity of Public Interest Criterion 4002. The plaintiff submitted that the criterion was inconsistent with provisions of the Migration Act, which provide for the refusal of protection visas on national security grounds and which attract statutory review processes in the Administrative Appeals Tribunal.

French CJ, Hayne, Crennan and Kiefel JJ held that Public Interest Criterion 4002 was not consistent with the scheme of the Migration Act and was invalid.<sup>2</sup> Some of the factors relevant to that determination were: Public Interest Criterion 4002 is wider in scope than the provisions of the Act, which provide for the refusal of protection visas on national security grounds;<sup>3</sup> Public Interest Criterion 4002 effectively shifts the power of determining the application for a protection visa from the minister to ASIO;<sup>4</sup> and the adverse security assessment cannot be challenged, whereas the Migration Act provides for a merits review process for the refusal to grant visas on security grounds.<sup>5</sup>

### Procedural fairness

The security assessment process in this case, included a lengthy interview with the plaintiff (and his legal advisor and interpreter). During the interview, the plaintiff was provided with an opportunity to address the issues of concern to ASIO. He was also given breaks and the opportunity to consult privately with this legal advisor.

In the circumstances of this case, Gummow, Heydon, Crennan, Kiefel and Bell JJ<sup>6</sup> held that the plaintiff was afforded procedural fairness in the conduct of the security assessment. Bell J noted that the circumstances of the special case made it 'an inappropriate proceeding in which to consider the extent of any curtailment of the obligation of procedural fairness in the conduct of DIAC security assessments by reason of ASIO's statute and the nature of its intelligence work.'<sup>7</sup>

### The lawfulness of the plaintiff's detention

The special case required the court to consider the statutory scheme, which provides for mandatory detention for an indefinite period. It necessarily gave rise to submissions on the applicability and correctness of the decision in *Al Kateb v Goodwin*.<sup>8</sup>

Gummow and Bell JJ adopted Gleeson CJ's construction of the scheme providing for mandatory detention and held that the *Al Kateb* should not be followed.<sup>9</sup> However, French CJ, Hayne, Crennan and Kiefel JJ held that the plaintiff was entitled to have his application for a protection visa considered according to law and that he can be lawfully detained pursuant to s 196 of the Migration Act until his application has been determined.<sup>10</sup> As such, the majority did not consider the applicability or correctness of *Al Kateb v Goodwin*.

### Endnotes

5. [2012] HCA 46.
6. French J at [3] and [71], Hayne J at [221], Crennan J at [381] and [399], and Kiefel J at [461].
7. French J at [71] and Hayne J at [204].
8. French CJ at [71]; Crennan at [396]; Kiefel J at [458].
9. French CJ at [71], Hayne J at [221], Crennan J at [398] and Kiefel J at [458].
10. Gummow J at [140], Heydon J at [253], Crennan J at [380], Kiefel J at [415] and Bell J at [505].
11. Bell J at [498].
12. (2004) 219 CLR 562.
13. Gummow J at [145] and [148] and Bell J at [533].
14. French CJ at [3] and [72], Hayne J at [160] and [225], Crennan J at [404] and Kiefel J at [460].

# Defending a claim for counsel's fees: no costs assessment required

Sharna Clemmett reports on *Branson v Tucker* [2012] NSWCA 310

On 26 September 2012, in *Branson v Tucker* [2012] NSWCA 310, the New South Wales Court of Appeal considered whether a claim by a barrister for fees, brought in the District Court, could be defended by on the basis that the fees charged were unreasonable, in circumstances where no assessment of those fees had been sought by the solicitors within the 60 day time limit provided in s 351(3) of the *Legal Profession Act 2004* (NSW) (LPA). Broadly, the solicitors' defence and cross-claim alleged that the fees charged by the barrister were more than was reasonable or necessary and, as such, charging those fees was a breach of an implied term of the retainer between the barrister and the solicitors, or a breach of a duty of care owed by the barrister.

The barrister had moved the District Court to strike out the defence and cross-claim. The District Court determined that the solicitors' defence and cross-claim should *not* be struck out on the basis that the defence and cross-claim were not unarguable. The barrister appealed from that decision to the Court of Appeal. On the appeal, the barrister argued that the costs assessment regime provided for in Division 11 of the LPA constituted an exclusive regime for quantification of costs that precluded raising issues of reasonableness of the costs by way of defence or cross-claim in the proceedings.

In summary, the Court of Appeal concluded that the costs assessment mechanism established by Division 11 of the LPA is not exclusive, so that the reasonableness of legal costs can be ascertained by the District Court by means *other than* that costs assessment mechanism.<sup>1</sup> In particular, that can be done as an exercise of its 'ordinary jurisdiction... in dealing with contested claims', irrespective of no assessment having been sought within the s 351(3) time limit. Where a contract or *quantum meruit* claim is brought seeking payment of legal fees, but there has been no assessment of those costs, the reasonableness of those fees can be called into question by way of a defence of that action.<sup>2</sup>

The main judgment was delivered by Campbell JA, with Beazley JA and Barrett JA agreeing, and Barrett JA making some additional comments.

Campbell JA considered authorities identifying different sources of the courts' jurisdiction to quantify costs, in particular:<sup>3</sup>

- requiring taxation (now assessment) under the relevant statutory jurisdiction (now in the LPA) (which was not applicable in this case);
- under its 'general jurisdiction over officers of the court' (also not applicable in this case); and
- in the ordinary jurisdiction of the court dealing with contested claims.

Importantly, s 366 of the LPA provides that '[Division 11] does not limit the power of a court or a tribunal to determine in any particular case the amount of costs payable'. Campbell JA concluded that the ordinary meaning of those words leaves untouched:

- the District Court's power to make orders within the full scope of s 98 of the *Civil Procedure Act*;<sup>4</sup> and
- the District Court's 'ordinary jurisdiction' to deal with contested claims.

In reaching that conclusion, his Honour discussed the following earlier decisions in which the assessment mechanism provided for in the LPA had been treated as non-exclusive:

*In the Matter of Windy Dropdown Pty Ltd* [2010] NSWSC 1099, in which White J held that the Supreme Court had jurisdiction under s 98(4) of the *Civil Procedure Act 2005*<sup>5</sup> to make a lump sum costs order in relation to other earlier proceedings determined by different Judge, pursuant to an application by administrators for directions under s 447D of the *Corporations Act 2001*, in circumstances where there had been no assessment of the costs in those earlier proceedings; and

*Attard v James Legal Pty Ltd* [2010] NSWCA 311, in which a solicitor's cross-claim for his legal costs was challenged and the Court of Appeal referred the question of how much was due by the clients to the solicitor to a referee experienced in the assessment of legal costs. In that case Tobias J stated that it would be an error to conclude that the LPA costs assessment provisions '*provided a complete and exclusive code as to how legal costs were to be assessed.*' (The Appellant sought leave to challenge the correctness of aspects this decision, but leave was refused).

This means that if there has been no assessment of the legal costs (even where the time for seeking assessment has elapsed); the costs are recoverable under s 319 of the LPA; and proceedings are commenced seeking payment of those costs, then:

- if there is a contract (in the form of a costs agreement), the question of quantification of the costs still may be dealt with in any defence to the action in the same way as in any other contractual claim; and
- if there is no costs agreement, then the question of quantification of the costs still may be dealt with based on the statutory form of *quantum meruit* created by s 319(1)(c).<sup>6</sup>

### Endnotes

1. Affirming *Attard v James Legal Pty Ltd* [2010] NSWCA 311.
2. At [102]-[103] per Campbell JA, and at [131] per Barrett JA.
3. *In re Park; Cole v Park* (1888-1889) 41 ChD 326 (see [71]-[76] of Campbell JA's judgment); *Woolfe v Snipe* (1933) 48 CLR 677 (see [80]-[81] of Campbell JA's judgment).
4. Section 98 also applies to proceedings in the Supreme Court, but does not apply to civil proceedings under Part 3 of the *Local Court Act 2007* that are held before the Local Court sitting in its General Division or its Small Claims Division: see rule 1.6 and Schedule 1, Uniform Civil Procedure Rules.
5. Which section confers wide jurisdiction on the court to deal with costs and, relevantly, in sub-section (4) provides that '*In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to: ... (c) a specified gross sum instead of assessed costs.*'
6. Per Barrett JA at [129].

## Powers of the courts when parties have engaged in fraud or serious wrongdoing

Carmel Lee reports on *Toksoz v Westpac Banking Limited (No.2)* [2012] NSWCA 288

What role can the court play when it is discovered in the course of the proceedings that a party has engaged in serious misconduct? Recent decisions have considered the role of the court in deterring wrongdoing, whether in the conduct of the litigation or in the facts forming the basis of the action. In *Toksoz v Westpac Banking Limited (No 2)* [2012] NSWCA 288, the Court of Appeal confirmed that it was within the court's power and in the public interest for the court to forward a copy of judgment onto relevant government agencies where issues raised in the case merited further investigation. In *Fairclough Homes v Summers* [2012] UKSC 26, the Supreme Court of the United Kingdom found that the court had a variety of case management powers that could be effective in discouraging claims founded on fraud, although a cause of action would only be struck out in extreme circumstances.

### *Toksoz v Westpac Banking Limited (No 2)*

Westpac customers were defrauded of funds totalling more than \$1 million through a series of identity theft frauds between 2005 and 2007. Westpac reimbursed its customers for the funds taken and brought proceedings in the Supreme Court against Mr and Mrs Toksoz to recover the funds. Palmer J drew the inference, on

the evidence presented, that Mrs Toksoz had actual knowledge that funds received into her account were derived from her husband's acts of fraud on the bank and that in absence of an explanation otherwise, the funds in Mrs Toksoz's bank account were the product of her husband's fraud.

Mrs Toksoz appealed to the court of Appeal, challenging the primary Judge's reasons, and claimed that on the evidence it was not possible for the primary Judge to draw the inference that he did. The Court of Appeal substantially dismissed the appeal<sup>1</sup> finally that the inference made by the primary judge that Mrs Toksoz received money the product of fraud could and should be made. The court made several orders, including the following:

5. Subject to rescission or variation upon receipt of any submissions by the appellant to the Court (such submissions and any affidavit in support to be filed and served within seven days) and the subsequent reconsideration of the question by the Court, direct the Registrar of the Court of Appeal to forward this judgment and the judgment of the primary judge to the relevant Minister of the Commonwealth of Australia administering social service benefits for single parents, to the Australian Taxation Office and to the Crime Commissions of New South Wales and the Commonwealth.

The appellant filed submissions in relation to the matters raised by order 5. These were the subject of the judgment *Toksoz v Wetspac Banking Limited (No 2)* [2012] NSWCA 288.

**Did the court have power to forward a copy of judgments to agencies to deter wrongdoing?**

The findings in the original case concerned the source of large sums of money deposited into the appellant's account when she was in receipt of means-tested social security benefits. Although the court drew no further inference beyond what was proven, it noted that such actions raised questions whether the appellant was entitled to receive social security funds, if the funds should have been declared to the Australian Taxation Office, and whether any offence had been committed by receiving funds known to be the product of theft.

The appellant made several arguments. First, that the court had no power to make an order directing that the two previous decisions be sent to agencies of executive government as there was nothing in the *Supreme Court Act 1970* (NSW), *Civil Procedure Act 2005* (NSW) or the inherent jurisdiction of the court to permit such a direction to be made. Secondly, that order 5 was oppressive as it was not necessary to determine any matter between the parties and was in the nature of an executive act.

The Court of Appeal found that a court could bring the conduct of litigants to the attention of relevant agencies of the executive and that such an action did not deny a person their civil, human, or common law rights.<sup>2</sup> If a court could not direct matters of significant importance raised before it to appropriate authorities, then public confidence in the courts would falter.

The appellant said that specific offences had not been identified and that the order was based on speculation. The court clarified that the question concerned not questions of an identified offence but questions relating to large amounts of money being knowingly received and the receipt of otherwise large unexplained sums. The court stated that no finding of fact was made by the court apart from those arising in the dispute between the parties.

The appellant submitted that the order was inconsistent with the findings of the trial court. The court of Appeal

found that the order was not inconsistent. It was not an attempt to punish the appellant for a crime that she had not committed, and nor did the order raise an imposition by the court on Mrs Tokosz of an onus to disprove a prima facie case of fraud. Rather, the totality of the evidence raised serious questions for investigation by relevant authorities raised by the findings made in the exercise of judicial power by the primary judge and this court.

The Court of Appeal also found that, given the statutory purposes and functions of the *New South Wales Crime Commission Act 1985* (NSW) and the *Australian Crime Commission Act 2002* (Cth), it was not appropriate to direct that judgments be sent to those bodies. The order was amended accordingly.

**Dealing with proceedings commenced on a fraudulent foundation: *Fairclough Homes v Summers* [2012] UKSC 26**

The Supreme Court of the United Kingdom found that the court had a role in discouraging wrongdoing when asked to consider how best to respond to an increase in the number of cases brought before it on a fraudulent basis.

In a trial on liability for a workplace injury, the claimant gave evidence of his injuries that was not disputed. The Judge found for the claimant on liability with damages to be assessed.

In the period before the hearing on damages, the defendant had the complainant filmed in undercover surveillance. The footage demonstrated that the claims made by the plaintiff relating to the effect of his injuries were fraudulent. In fact, the plaintiff was fit for work and was able to go about his ordinary duties several months earlier he had claimed.

At the conclusion of the hearing an application was made to strike out the statement of case as it had been affected by fraud. The claimant accepted that the presentation of a dishonest case as to the extent of his injuries, supported by false evidence, represented a serious abuse of process.

The Supreme Court found that although it had the power to strike out proceedings under the *Civil Procedure Rules 1998* (UK) for abuse of process even after the trial of an action in circumstances where the court has been able to make a proper assessment of



both liability and quantum,<sup>3</sup> the power should be exercised only in exceptional circumstances. The strike out power was not an appropriate tool to deter parties from wrongdoing, it being not a power to punish but to protect the court's processes. A court it should only strike out a statement of claim where it is satisfied that the abuse of process was such as to cause the party to forfeit the right to have their claim determined. .

The court had regard to the need to comply with the right to a fair and public hearing enshrined in Article 6 of the European Convention on Human Rights, including the right of access to a Court.<sup>4</sup> In exercising the strike-out power consistently with Article 6, a court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly. The consequence of this was that an order striking out a claim should only be last resort, particularly where the court has determined that the claimant had been held to be entitled to a substantive right after a fair trial.

Finally, the Supreme Court found that a court had a wide range of case management powers. The action of striking out a claim should be a last resort as to do so would deprive the claimant of a right to a fair trial. The Supreme Court accepted the need to deter fraudulent claims being made, but found that a balance had to be struck. In most cases, deterrence could be achieved by demonstrating by findings on the evidence before the court that dishonesty does not increase the award of damages, the making of adverse costs orders (including costs on an indemnity basis), or limiting the interest awarded.

Contempt was another effective sanction, the Supreme Court observing that there was nothing preventing the trial judge hearing the contempt proceedings, subject to any questions of bias. Moreover, it was open to a Judge to refer a matter to the appropriate prosecuting agency.

In every case the test is what is just or appropriate in the circumstances. Often a combination of the above methods would prove an effective deterrent, especially when the risks were explained by a party's solicitor to them. Finally, nothing in the above decision would affect a case being struck out at an early stage in the proceedings, or where fraud or dishonesty affected the whole claim.

In the present case, the Supreme Court held that there was no error in the trial judge's determination that the proceedings should not be struck out, it being neither just nor proportionate to do so.

### Conclusion

In both the above cases the courts took the view that it was not only within the court's power to take action against wrongdoing it was in the public interest that courts deter or facilitate investigation of wrongdoing. However such involvement by the court could not compromise the rights of the parties to a fair determination of the dispute before the court.

### Endnotes

1. *Toksoz v Wetspac Banking Limited* [2012] NSWCA 199
2. In doing so the court distinguished the present situation from that presented in *Reid v Howard* [1995] HCA 40; 184 CLR 1.
3. Civil Procedure Rules (1998) (SI 1998/3132)
4. *Golder v United Kingdom* (1975) 1 EHRR 524

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# US Supreme Court upholds Obamacare

By Christopher Withers



## Introduction

The oral argument in *National Federation of Independent Business Et Al v Sebelius, Secretary of Health and Human Services, Et Al*, the challenge to President Obama's health care law, took place over three days in March 2012 and went, by most accounts, very poorly for the United States. The solicitor-general for the United States, Donald Verrilli (who took over from Elena Kagan when she was appointed to the Supreme Court in January 2011 and whose opponent in the case was former solicitor general, Paul Clement) was criticised for what some court commentators described as the 'train wreck' that the government's argument had become by the time the solicitor-general sat down. It was, therefore, a gigantic relief for the government and many millions of Americans when the Supreme Court, by a 5-4 decision, upheld the law on 28 June 2012. The outcome of the case certainly appeared to be finely balanced when the judgment was reserved but the result was something no-one appeared to have predicted. The legislation was found to be valid under Congress's taxing power (the government's secondary argument) and Chief Justice John Roberts joined the 'liberal' wing of the court to uphold the law.

## The Legislation

The Patient Protection and Affordable Care Act was passed in 2010, in order to increase the number of

Americans covered by health insurance and decrease the cost of health care. A central provision of the law was 'the individual mandate', which required most Americans to maintain 'minimum essential' health coverage by purchasing insurance from a private company. Beginning in 2014, those who do not comply with the mandate must make a 'shared responsibility payment' to the United States Government. The Act provided that this 'penalty' would be paid by the individual to the Internal Revenue Service and would be 'assessed and collected in the same manner' as tax penalties. The policy justification for the legislation is as follows. State and federal laws require hospitals to provide a certain degree of care to individuals without the ability to pay and the costs of providing that care is passed on by hospitals to insurers and by insurers to the insured. Many of the uninsured do not have insurance because of pre-existing conditions or other health issues. The legislation required insurance companies to provide insurance to individuals with pre-existing conditions, but compensated them by including within the 'insurance risk pool' more healthy individuals who were compelled by the legislation to purchase insurance and whose premiums on average would be higher than their health care expenses. That allowed insurers to subsidise the costs of covering the unhealthy individuals for whom the law required them to provide coverage.

The Act also expanded the scope of the Medicaid program, administered by the states since 1965, partially with federal funding. It required the states to increase the number of individuals for whom the states must provide coverage, or else lose potentially all federal funds for their Medicaid programs. On the day the president signed the Act into law, twenty-six states, several individuals and the National Federation of Independent Business brought suit in Federal District Court, challenging the constitutionality of the individual mandate and the Medicaid expansion. The Court of Appeals for the Eleventh Circuit upheld the Medicaid expansion as a valid exercise of Congress's spending power, but concluded that Congress lacked authority to enact the individual mandate.

### Constitutionality of the legislation

#### The government's arguments

In the Supreme Court, the government argued that Congress had the power to enact the individual mandate through the power granted to Congress under Article I, §8, cl. 3 of the United States Constitution, which gave Congress the power to 'regulate commerce with foreign nations, and among the several states, and with the Indian tribes'. That power has traditionally been interpreted as meaning that Congress could regulate the channels of interstate commerce and those activities that substantially affect interstate commerce.<sup>1</sup> The government argued that the failure to purchase insurance had a 'substantial and deleterious effect on interstate commerce' by shifting the cost of caring for the uninsured to hospitals, insurers and the insured.

The government's alternative argument was that the mandate was valid as within Congress's power under Art. I, §8, cl. 3 to 'lay and collect taxes...and to pay debts and provide for the common defence and general welfare of the United States' (the power to tax and spend) because it imposed a tax on those who failed to purchase health insurance. In other words, if the commerce power did not support the individual mandate, the government argued, the court should uphold the law as an exercise of the government's power to tax.

#### The majority's reasoning

During oral argument on 27 March 2012, Justice Anthony Kennedy cut straight to the heart of the debate about the validity of the individual mandate under the commerce clause: 'Can you create commerce in order to regulate it?'. The solicitor-general responded 'That's not what's going on here, Justice Kennedy, and we're not seeking to defend the law on that basis'.<sup>2</sup>

The answer failed to satisfy a majority of the court and Chief Justice Roberts wrote the majority opinion holding that the individual mandate could not be supported by the commerce clause. The reason was simple: the power to *regulate* commerce presupposes the existence of commercial activity to be regulated and the individual mandate did not regulate existing commercial activity. Instead, it compelled individuals to become active in commerce by purchasing a product, on the basis that their failure to do so affects interstate commerce. The chief justice held that '[c]onstruing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority' and would render many of the provisions in the Constitution superfluous (*Id.* at 18 and 20). Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation and would 'justify a mandatory purchase to solve almost any problem' (*Id.* at 21-22). The framers of the Constitution gave Congress the power to *regulate* commerce, not compel it, which the legislation sought to do because the individual mandate commanded individuals to purchase insurance. In other words, while the commerce power was broad and expansive, it was not broad enough to compel individuals not engaged in commerce to purchase an unwanted product (*Id.* at 18, 27 and 30).

The chief justice noted that 'every reasonable construction' of a statute 'must be resorted to, in order to save a statute from unconstitutionality' (*Id.* at 32). An Act of Congress could only be struck down if the lack of constitutional authority to pass the act in question was clearly demonstrated and the conclusion of unconstitutionality was 'unavoidable' (see *Id.* at 6 and 31). While the legislation described the payment to the IRS for failure to purchase health insurance as a

'penalty', the court held that it was necessary to look past the label at the substance and application of the law. The law did not attach negative legal consequences to the failure to purchase health insurance, beyond requiring a payment to the IRS and it did not seek to punish unlawful conduct.

The majority opinion accepted that the individual mandate could properly be characterised as a tax which fell within the scope of Congress's power to legislate taxes (at 44). That was because (even though it was described as a 'penalty') it lacked the usual characteristics of a penalty insofar as the IRS could not use its powers to enforce penalties to enforce payment of the tax (at 36). Further, it did not seek to punish unlawful conduct because individuals could choose to pay the penalty or purchase health insurance (at 37). The chief justice noted that it was estimated by the Congressional Budget Office that four million people each year will choose to pay the IRS rather than buy insurance, that Congress would be 'troubled by that prospect if such conduct were unlawful' and Congress's tolerance for that fact suggested that Congress 'did not think it was creating four million outlaws' (at 38).

As for the Medicaid expansion, Chief Justice Roberts was joined by Justice Breyer and Justice Kagan and the joint dissenting opinion, in concluding that the Medicaid expansion violated the Constitution by threatening states with the loss of their existing Medicaid funding if they declined to comply with the expansion. While the spending clause of the United States Constitution gave Congress the power to establish cooperative state-federal programs, it did not give Congress the power to threaten to terminate other grants as a means of pressuring the states to accept a spending clause program, i.e. it did not give Congress the power to order the states to regulate according to Congress's instructions (at 55, 58).

### Dissenting opinions

Justice Ginsburg disagreed with the majority opinion and held that the legislation was a valid exercise of Congress's power under the commerce clause (at 31) and that the Medicaid expansion was authorised by

the spending clause (at 61). Her Honour reasoned that the majority's interpretation of the commerce clause was 'stunningly retrogressive' (at 2) and that the chief justice's reading of the clause 'should not have staying power' (at 3). Her Honour cited the substantial impact that the uninsured had upon interstate commerce (at 16) and found that the decision to forgo insurance was not the equivalent of 'doing nothing' (*Id.*). Rather, according to her Honour, it should be characterised as an economic decision made by individuals to 'self-insure' that Congress had the authority to

address under the commerce clause (at 17, 28). The legislation did not mandate that individuals purchase an unwanted product, but merely defined 'the terms on which individuals pay for an interstate good they consume' (at 22). Her Honour described the chief justice's reasoning variously as 'specious', 'puzzling' and 'disserving' to future courts and a constraint upon Congress's authority to confront new problems arising in the modern economy (at 37).

Justices Scalia, Kennedy, Thomas and Alito wrote separately from the majority and concluded that the legislation was not authorised by either the commerce or taxation power. Their Honours held that the Act exceeded federal power both in mandating the purchase of health insurance and in denying non-consenting states all Medicaid funding (at 3). The dissent held that the individual mandate could only fairly be described as a penalty, rather than a tax (at 18), that the arguments to the contrary were 'feeble' (at 24) and that one had to 'rewrite' the law in order to conclude otherwise (*Id.*). Likewise, the joint dissent found that the Medicaid expansion was unconstitutional (at 48).

### Analysis

The court's decision was framed by the chief justice as a test of the limits of the government's power 'and our own limited role in policing those boundaries' (at 2). His Honour was careful to emphasise that in upholding the legislation, the court was not expressing a view as to 'whether the Act embodies sound policies' (at 2, 6, 44 and 59). That judgment, his Honour said, was entrusted to the nation's elected leaders 'who can be thrown out of office if the people disagree with

*Her Honour reasoned that the majority's interpretation of the commerce clause was 'stunningly retrogressive' ...*



them' (at 6). The decision was perhaps most surprising because the government had primarily defended the law on the basis of the commerce power.

The reasoning of the majority and the joint dissenting opinion as to the scope of the commerce power seems compelling. Notwithstanding the potential impact of uninsured Americans on interstate commerce, the fundamental premise that Congress can only regulate activities was consistent with historical precedent. No decision of the court had ever extended the commerce clause to enable Congress to regulate inactivity and Justice Ginsburg's thesis that the failure to acquire health insurance amounted to an 'economic decision' which Congress was entitled to regulate, did not appear to bridge the gap between the commerce clause and the absence of any regulated activity. As the chief justice observed, pointing to the substantial impact of the 'inactivity' in question (the failure to purchase health care) did not justify characterising the inactivity as interstate commerce.

Some commentators have suggested that the decision has far reaching implications and may have the effect of circumscribing the traditionally broad and expansive interpretation the Supreme Court has given to the commerce clause to regulate activities that 'substantially affect interstate commerce'<sup>3</sup>. That seems unlikely. The decision drew a line in the sand and preserves the power of Congress to regulate interstate commerce, so long as the regulation concerns an existing activity. The power does not authorise Congress to create commerce in order to regulate it. As the chief justice noted (at 18), Congress had never attempted to rely on the commerce clause to compel individuals not engaged in commerce to purchase an unwanted product (a 'legislative novelty') and it is unlikely to ever attempt to do so again. Future jurisprudence concerning the commerce clause is likely to remain concerned with the application of the commerce clause to existing activity and following the Supreme Court's decision, the broad parameters of that power remain intact.

Chief Justice Roberts has been subject to substantial criticism among conservative commentators for voting to uphold the law but in reality, his decision was a straightforward application of principle. His Honour held that if there was an interpretation of the law that was 'fairly possible' which preserved its Constitutional

validity, then the law should be upheld (at 32). His Honour and the majority held that it was reasonable to interpret the individual mandate as a tax and that the law should be upheld on that basis. The reasoning was perfectly sound.

It remains to be seen whether the decision represents a change in the balance and dynamic of the court. One wonders about the internal dynamics within the court and whether their Honours are affected by such a heated and high stakes debate resulting in a dissent from Justice Ginsburg which speaks of the majority opinion in terms that cannot be good for the public's perception of the court. Perhaps that is just par for the course.

*Chief Justice Roberts has been subject to substantial criticism among conservative commentators for voting to uphold the law but in reality, his decision was a straightforward application of principle.*

The next most significant battle on the Supreme Court's horizon may take place as soon as the October term next year. The United States Department of Justice has asked the Supreme Court to consider a legal challenge to section 3 of the Defence of Marriage Act, which defines marriage as a union between a man and a woman. The Ninth Circuit Court of Appeals is also hearing a challenge to California's Proposition 8, which prohibits same sex marriage. When the gay marriage debate is finally considered by the Supreme Court (as appears inevitable), the challenge to the Patient Protection and Affordable Care Act will seem like a petty quarrel by comparison.

### Endnotes

1. See *United States v Morrison*, 529 US 598, 618-619 (2000).
2. See oral argument transcript, [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-398-Tuesday.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf), p.4.
3. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)

# Lost services and vulnerability

Hilbert Chiu reports on *Barclay v Penberthy* [2012] HCA 40

The *actio per quod servitium amisit* and the rule in *Baker v Bolton*<sup>1</sup> are of considerable antiquity in the common law. Their precise origins are unclear and have been the subject of some debate.<sup>2</sup>

The idea behind the *per quod servitium* is that 'to cause loss to the master of a servant by rendering his servant incapable of performing the services for which the servant was engaged or hired is an actionable wrong, as long as the defendant either intentionally or negligently acted in such a way as to bring about the deprivation of the services.'<sup>3</sup> The action is in essence one for trespass upon the employer's proprietary right over those services.<sup>4</sup>

The rule in *Baker v Bolton* prohibits in general any recovery in tort for the death of another. Perhaps because of the restrictive nature of that broad rule, close family members of the deceased were given a statutory right of action under the *Fatal Accidents Act 1846* (in NSW now the *Compensation to Relatives Act 1897*) to recover for loss of expected economic benefit.<sup>5</sup>

Both the action *per quod servitium* and the rule in *Baker v Bolton* survived challenge in the High Court in *Barclay v Penberthy*.

The factual and procedural background of the case is complex, but facts relevant to the issues before the court were simple. Heydon J set them out as follows<sup>6</sup>:

A plane took off. It had been chartered by Nautronix from Fugro. The purpose of the flight was that Nautronix personnel should test technology and systems which Nautronix hoped to develop commercially. The plane crashed [due to the negligence of the defendants]. Two Nautronix personnel were killed. Three were badly injured.

Nautronix sought to recover damages for economic loss arising from the loss of services from its dead and injured personnel.

## The action per quod servitium amisit

The argument against survival of the action *per quod servitium* was that in light of modern social and economic relations, the old action has now been subsumed by the general principles applicable to the tort of negligence. In essence this was the same argument successfully deployed against retention of the old occupier duties in *Australian Safeway Stores v Zaluzna* (1986) 162 CLR 479, and of the *ignis suus* rule in *Burnie Port Authority v General Jones Pty Limited*

(1992) 179 CLR 520.

The plurality, and the separate reasons of Heydon J and Kiefel J respectively, rejected this argument because, unlike an action in negligence brought by an employer for economic loss arising from deprivation of the services of an employee, the action *per quod servitium* does not depend upon the existence of a duty of care owed by the tortfeasor to the employer. Rather, it is actionable upon any wrongful intrusion upon those services, intentional or negligent, whatever the relationship between the tortfeasor and the employer.<sup>7</sup>

As the plurality noted:

Once it is observed that the action per quod depends upon demonstration of a wrong having been done to the servant (as a result of which the master is deprived of the service of the servant) and that the wrongful injury to the servant may be either intentional or negligent, it is evident that the action per quod does not constitute any exception to or variation of the law of negligence. The action per quod will lie where the wrongdoer's conduct towards the servant was not negligent but was intentional. It does not depend on demonstrating any breach of a duty of care owed by the wrongdoer to the master.<sup>8</sup>

Heydon J and Kiefel J each noted that the action has been affirmed in previous High Court authority<sup>9</sup> and its existence has been assumed in legislation which modified its application without abolishing it.<sup>10</sup> It retains utility for plaintiffs in a variety of practical circumstances.<sup>11</sup>

## The rule in *Baker v Bolton*

The same enthusiasm did not accompany the retention of the rule in *Baker v Bolton*, which in effect, means that in so far as liability to employers goes, it is cheaper for a tortfeasor to kill than to maim.

Despite the uncertainty as to whether the rule as stated by Lord Ellenborough was correct at that time *Baker v Bolton* was decided, and the subsequent judicial and extra-judicial attacks on the rule<sup>12</sup>, the court unanimously held that the rule could only be abolished by legislative intervention.

## Action in negligence for pure economic loss

The court, and in particular Kiefel J, provided some comments on the role of reliance and vulnerability in founding a duty of care to avoid pure economic

loss, following on from the court's decisions in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

One particular issue of interest is the extent to which a party's inability to negotiate contractual protection against want of reasonable care gives rise to the requisite vulnerability. The court found that it was not, in the absence of evidence that it was possible for the plaintiff to have negotiated a term imposing liability for economic loss in the charter agreement, open to conclude that the plaintiff was not vulnerable. On the evidence before the court in *Barclay*, the plurality and Heydon J came to different conclusions about vulnerability. The plurality and Kiefel J held that an implied contractual duty to take reasonable care to avoid pure economic loss existed regardless of vulnerability, based on the defendant's knowledge of the commercial purposes for the charter flight and the importance of the employees to the achievement of those purposes.<sup>13</sup>

The concept of vulnerability seems to be in the process of considerable development, especially in light of two recent decisions of McDougall J in *Owners Corporation SP 72535 v Brookfield*<sup>14</sup> and *Owners Corporation SP 61288 v Brookfield Multiplex*<sup>15</sup>, both of which measure vulnerability against the availability of statutory protections.

### Endnotes

1. (1808) 1 Camp 493
2. The background is summarised in *Barclay* at [22]-[27], [30]-[39], [80]-[83], [99]-[105], [131]-[139]
3. Professor Fridman, *The Law of Torts in Canada* (2<sup>nd</sup> ed.) 2002 at 733; *Barclay* at [30]
4. *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 401 per Dixon CJ, referring to Blackstone, *Commentaries on the Laws of England* (5<sup>th</sup> ed.) 1773, bk 1 at 429; *Barclay* at [131]-[132]
5. On the origins of Lord Campbell's Act, see *De Sales v Ingrassia* (2002) 193 ALR 130 at [119]-[120] per Kirby J.
6. *Barclay* at [75].
7. Arguably the nature of the action per quod, in treating the services of an employee as a piece of property over which the employer enjoys rights as against the world, is analogous to the principle underling the action on the case for damages from pure economic loss, acknowledged to exist in *Northern Territory of Australia v Mengel* (1996) 185 CLR 307.
8. *Barclay* at [35], see also Kiefel J at [142]-[145].
9. *Barclay* at [102], citing *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392.
10. *Barclay* at [105], citing s 12 of *Civil Liability Act 2002* (NSW) and *Chaina v The Presbyterian Church (NSW) Property Trust* (2007) 69 NSWLR 533.
11. *Barclay* at [104], [146] and [151], citing *Sydney City Council v Bosnich* [1968] 3 NSWLR 725, *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571, and *GIO Australia Ltd v Robson* (1997) 42 NSWLR 439. That utility is subject to the narrow range of damages recoverable under the action, as explained by the plurality at [54]-[66] and by Kiefel J at [156]-[164].
12. Summarised in *Barclay* at [22]-[23], [80], [83] – especially Bramwell B in *Osborn v Gillett* (1873) LR 8 Ex 88 at 96.
13. *Barclay* at [42]-[44], [47]-[49], [176]-[177] (Heydon J dissenting at [87]-[88]).
14. [2012] NSWSC 712 – 29 June 2012.
15. [2012] NSWSC 1219 – 10 October 2012.

## Verbatim

*Fernandez v Perez* [2012] NSWSC 1242

Beech-Jones J

### Pitbull

There is no settled view of the precise origins of what is now known as rap or hip hop music. At least one of the originating locations was the exotic multicultural mix that is the Bronx area of New York. Amongst the music-rich groups within that area are the African American, West Indian and Latino communities. Reflecting its inner city origins, this form of music is also often referred to as 'urban' music.

Mr Perez commenced performing professionally using the stage name 'Pitbull' in 2000. I use that name and his real name interchangeably. He is based in Miami Florida. He writes and performs in a Latino rap style which draws on his Cuban heritage. He writes and records music in Spanish and English.

Pitbull's first successful commercial recording was an appearance as an album of another artist known as

'Luke' in 2000. In 2004 he released his first album entitled *M.I.A.M.I.* which achieved 'Gold' status in the USA. He released an album of re-mixes from that album entitled *M.I.A.M.I. Still* in 2005.

In 2007 Pitbull came to Australia as part of a touring music festival known as 'Roc Tha Block'. In 2007, Roc Tha Block toured Sydney, Melbourne, Adelaide, Perth and Auckland. The concerts were held in indoor arena style venues such as Sydney Entertainment Centre. There were a number of 'urban' music performers. Pitbull was in the 'fourth bill' position out of five. This meant that he was second to appear. The headlining act is usually last to appear.

In 2007 Pitbull released a further album. As I have stated he was scheduled to tour Australia late in 2008. Prior to then he toured venues in the USA on his 'House of Blues' tour and regularly filled venues with a capacity of between 1,000 and 2,500 patrons.

Since 2008 Pitbull's career has flourished. In 2009 he released the album *Rebolution* which included two USA top ten hits, 'I Know You Want Me' and 'Hotel Room Service'. By February 2011 this album and the singles had sold a combined 7.5million copies by means of digital downloads. He has released a further album and is paid to endorse some well known products.

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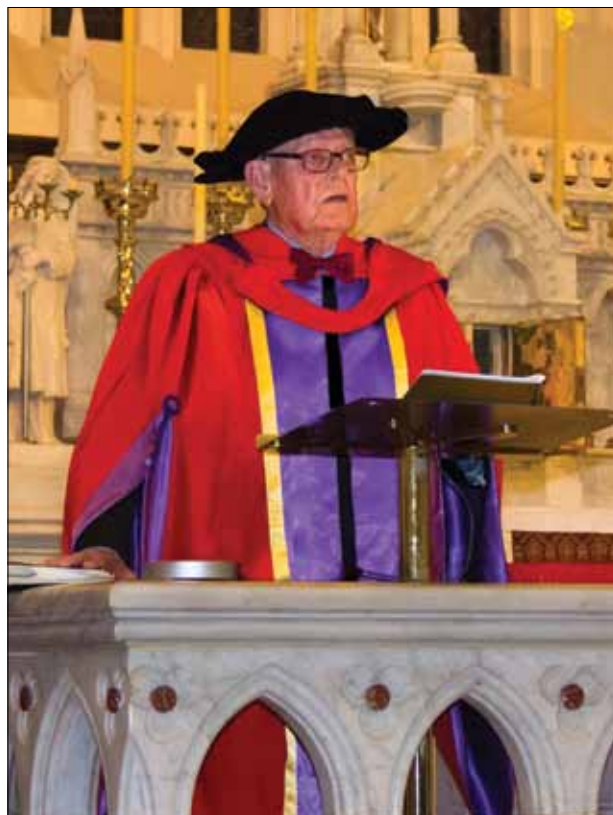
## The soul of the law

The O’Dea Oration was delivered by the Hon TEF Hughes AO QC in July 2012 on the occasion of the conferral of his Honorary Doctorate of Laws by the University of Notre Dame Australia.

Chancellor, members of the board of Notre Dame University and those who have graciously attended this ceremony, I am grateful for the altogether too kind words of the chancellor. This ceremony is a very moving occasion for me, my wife and my granddaughter. I am so pleased to see here tonight two former members of the High Court, including a chief justice in Sir Anthony Mason; former member, a great friend and my opponent many times, Michael McHugh; and a present incumbent of the High Court, the Honourable Dyson Heydon with whom I did much work when we were barristers together. There are also people who have honoured me with their presence tonight who worked for me in many cases, including the Honourable Henric Nicholas of the Supreme Court. I could go on with more names and you will acquit me if any of them I have not mentioned because the list is very long. It is a delight to see in this congregation my personal assistant of 40 years, Anne Sloan, who worked for me and with me. She worked with great devotion, enormous efficiency and put up in a saintly way with my idiosyncrasies. My association with Anne Sloan was a chapter in my life for which I’m deeply grateful.

You may not be surprised to hear, I propose to talk to you about advocacy, because that has been what I have done professionally for many, many years. I am now in the evening of that career, the late evening, and I am spending much time in my new career as a grazier. What I should say at the outset is to apologise to those who know more about the law than I do. What I have to say is directed to the young people who have embarked on, are about to embark on a career at the bar or who are in active practice. I recognise with grateful thanks the great honour that I scarce deserve, which this ceremony has conferred upon me. It is my hope that the debt that I have incurred by the conferment of this honour I shall be able to repay in a tangible way; perhaps by participating in university activities on the subject that has been the fascination and main concentration of my life professionally. It is of enormous pleasure to me that in December my granddaughter, Daisy, will be a graduate of this university with a Diploma of Education, embarking on a career in teaching.

Advocacy is a subject that spans party differences. That fact struck me in a very realistic way when in September



1971, after the High Court announced its decision in the *Concrete Pipes Case*. This put an end to the doctrine of reserved state power, which had bedevilled the development of the corporations’ power. On that occasion the Honourable Gough Whitlam, my political opponent, made a gracious speech in the house congratulating me on the effort. Well of course it was not my effort; I had a team of enormous talent working with me on the *Concrete Pipes*, including Robert Ellicott QC, William Deane QC, and as the one junior counsel on the case, Murray Gleeson, later chief justice of Australia. It was a great team effort.

Now, what are the qualities that are so important for an advocate at the bar to possess? I do not claim that I possess them in any full measure but they seem to include these: integrity, courage and competence. I would add resilience and the ability to react to fast moving situations in litigation. That is extremely important. I had the good fortune, even when I was a junior, to meet and have discussion about the law with Sir Owen Dixon, for whom I had a real reverence.

When on the occasion of my swearing in as a member of the Australian Parliament, I met Sir Owen - because he was there in his official capacity - he said to me, 'Well, Hughes, you can make a lawyer into a politician but reconversion is impossible'. I had to test that theory some years later when I was dismissed from my office by an incoming prime minister and replaced by another attorney general, a man for whom I had respect and who many think was unlucky not to be appointed to the High Court. His name was Nigel Bowen - he was my successor and immediate predecessor. So I had to put Sir Owen Dixon's proposition to the test. Singed as I was by the fires of politics, singed by the valedictory remarks of the prime minister who replaced John Gorton (McMahon said 'I've been under great pressure in the Party to get rid of you and I want you to go'). Well that was a challenge, and a challenge I have tried to meet. I carry my brief ministerial association with John Gorton as a badge of pride; Gorton, despite human faults - we all possess them - was a great prime minister in my view, with a vision for Australia which I was happy to share.

Now, Sir Owen put this challenge in the most charming way - I had not thought my ministerial career, if I were to have one, would be brief, but politics is full of unexpected surprises. I was able - which would not be possible today - to combine a degree of practice with my parliamentary duties and was able to get my hand in again. Journeys by car and train from Canberra to Yass to Sydney were involved to enable me to be in court the next morning. But that was feasible. And gradually the practice built up. My practice was never of the same planetary significance as that of my co-eval and great friend Sir Anthony Mason. He practised on the Elysian heights of equity; I was walking on the plains of the common law. But I have always valued my friendship and the ability to converse with Sir Anthony. Michael McHugh and I did many cases against each other, mostly very hard fought cases, but I look back with great pleasure on my relationship as a friend and opposing counsel with Michael McHugh, because in all the cases we ran against each other, we never had a personal difference or engaged in personal criticism. Everything was left or kept on a proper basis of forensic comradeship and as it turned out, friendship.

*Sir Owen Dixon described advocacy as the soul of the law and went on to say that good advocacy is tact in action.*

A great need for the advocate is objectivity. One must not get too embroiled in the sentimental tensions of the client. One must be objective - that is part of being competent. I well remember occasions when it became necessary to tell the client and sometimes the solicitor that I was in command of the case and that if they did not agree with what I thought about the running of the case, it might be necessary to part company. It never became so, I am glad to say, but detachment and objectivity are of the essence of advocacy at the bar. In the '80s and the '90s, times were very different. We now have a bar that is short of work, chambers are available for acquisition by newcomers. There are vacancies that are not taken up. There is and always will be a pressing need in our society for an independent bar, but the bar cannot be complacent, it must knuckle down and adjust to the times, maintaining a spirit of optimism and a spirit of determination to maintain proper standards.

Sir Owen Dixon described advocacy as the soul of the law and went on to say that good advocacy is tact in action. That is, if I may say so, an outstandingly correct statement of what advocacy is all about. Tact is based on discretion and understanding of how to deal with difficult situations and how to adjust one's language to the exigencies of litigation. Tact in advocates is a primary quality to be cherished and pursued. Courtesy is vital to the efficient practice of advocacy: courtesy to the judge and to one's opponents. Legal literature is replete with stories of abrasive encounters between the likes of Sir Patrick Hastings and F E Smith and judges. Smith seemed to delight in scoring points off judges; that is a hindrance to good advocacy. After all, we are in a profession to practice the art of persuasion. You are not likely to persuade by rudeness, and even toward a difficult judge, it is utterly necessary to practise courtesy.

Another piece of advice that I would venture to give to those in or about to practice at the bar, is when you have a problem with your argument it is better in general to bring it to the fore, rather than hide it below the surface. If you try to hide it you will be found out and it is much better to face a problem in advance and perhaps in an understated way enlist the judge's aid

to deal with it. Michael Helsham - who became chief judge in Equity - was very good with a difficult judge who had good qualities, and I am talking about the late Justice Myers. Helsham found that if you did not face up to a problem and disclose it, Myers (who was very astute) would ferret it out. So it was better to get it out first. Helsham was very successful - his success rate before Justice Myers was remarkable. He became later an efficient chief judge in Equity with a penchant in giving unreserved judgements, a practice often very beneficial to litigants. They can always be appealed.

A primary duty of the advocate is complete candour and complete honesty. The late Peter Clyne was a contemporary of mine at the law school of the University of Sydney. He gave his name to a case in the *Commonwealth Law Reports* about the duty of barristers. He was a man of ability, but he had a fatal weakness – he was given to making charges of misconduct against people on the other side, knowing that he could not prove them. That was his undoing. It is a primary task of the advocate never to make a criticism of another person in court unless you have evidence to prove it. If you make unfounded allegations of misconduct against people in court, you have the advantage of absolute privilege, but that can be of no advantage at all because the reach of the disciplinary jurisdiction of the court to deal with professional misconduct of that kind is very strong indeed. There was a similar case in England where leading counsel suffered suspension for three years (he was lucky not to be disbarred) because in concert with the client - a police officer formerly holding commissioned rank – he concealed from the court - in a case where the plaintiff was the only witness, claiming false imprisonment - that the defendant [the police officer] had been demoted from commissioned rank between the events, giving rise to the case and the hearing. In concert with the client, he gave aid to concealing that truth, which went to the credibility of the client on a matter vital to the proceedings. So the reach of the disciplinary jurisdiction to control misconduct by barristers is a very wide reach and calls for salutary exercise.

*In modern commercial litigation, allowance ought to be made for the fact that evidence in chief often takes the form of sworn verification of a written statement which is often lengthy, complex and drafted, or even crafted, by lawyers.*

Much is said today about efficacy or lack of efficacy in cross examination. There are judges who discount the significance of cross examination. The problem may be that cross examination is not as well practised an aspect of advocacy as it ought to be. There are ways in which improvement can be made, and I ask whether there are any precepts that may be of general utility in the task of persuading the court to make a correct assessment of the credibility and viability of oral evidence. There are a few and I shall try to state them. I do so with considerable diffidence, because there are no absolute rules and this difficult and delicate judicial task is best left to intuition based on experience, in particular the experience of evaluating oral evidence in the light of written material. These are a few tentative ideas that I put for consideration:

In modern commercial litigation, allowance ought to be made for the fact that evidence in chief often takes the form of sworn verification of a written statement which is often lengthy, complex and drafted, or even crafted, by lawyers. The system does not really save costs, it probably increases them. The justification, however, is the imperative need for the saving of court time. It does however tend to put the witness at a disadvantage in that the first significant questions he or she has to answer are those of the cross-examiner. The witness has not time to warm up, adjust to the often strange atmosphere of the courtroom before being confronted with what may be hostile cross-examination. Moreover, verified statements of evidence may sometimes contain ill-advised passages that may well have been avoided if the testimony in chief had been adduced orally.

So it will be necessary in fairness to make allowance in favour of the witness in weighing the effect of cross-examination. As to the overall persuasiveness of affidavit evidence, I recall the somewhat cynical remarks of Lord Dunedin, a Scots law lord, who sat in the Lords in the first third of last century – he said; ‘The truth sometimes leaks out of an affidavit like water from the bottom of a well’.

Second, allowance has to be made for performance of a

witness under cross-examination for any lack of grasp of any meaning of the questions put to them by the cross-examiner. That is why it is so important that questions be concise, self contained and phrased in good English. Is it perhaps because cross examination as an art is perceived to be withering on the vine these days that judges place less importance on it as a means of eliciting the truth.

Another factor is that the witness who ‘unnecessarily’ becomes argumentative may not be entitled to a great deal of credibility— here the emphasis is on the ‘unnecessarily’ because some cross examiners have a tendency to invite the witness to be argumentative. Yet another factor; while a non-responsive answer to a question in cross examination may be the product of nervousness, unfamiliarity with the courtroom environment, language difficulties, incomprehension or a combination of these factors, non responsive answers are often a giveaway sign of evasion by the witness who has something to hide. The cross-examiner should seek scope to insist on responsive answers. A preliminary question is of course whether the answer is truly non-responsive, and in this respect judicial and forensic perspectives may sometimes differ. One should be sure of one’s ground before suggesting a witness has not answered the question. Another clue to the possible unreliability of evidence is sometimes gained when the witness is seen to be thinking ahead to the next question. I have always told witnesses to take each question as it comes, as a separate entity and not to look around corners anticipating the line of cross examination. It is often the giveaway sign. Those observations are offered tentatively but perhaps worth consideration.

A characteristic of vital importance for advocacy, good advocacy, is the ability to make submissions in concise clear English.

These random thoughts, I offer tentatively. I have been very fortunate during my professional life as a leader in the quality of the assistance I have had from

colleagues. Dyson Heydon and I had a big decision to make in one case that sticks in my memory – *United States Surgical Corporation*. It was a case in which there had been findings of fraudulent conduct by the judge at first instance and the Court of Appeal. In those days there was an appeal to the High Court as of right, and the decision had to be made as to whether we would try (it would have been an enormously difficult task) to overcome findings of fraudulent conduct which were the basis of imposition of a remedial constructive trust. A decision of some importance had to be made how

best to conduct an appeal with not very propitious prospects of success. The decision was to confine the appeal to the one issue on which we thought there was some chance, albeit not very strong, of success and that was to confine the case on the appeal to the question whether all the circumstances gave rise to a fiduciary duty, because a constrictive trust was based, as it

had to be, on fiduciary duty. Well by a narrow margin it worked, despite a very powerful dissenting judgement by Sir Anthony Mason. I suspect that if the same facts arose today, Sir Anthony’s dissenting judgement would have been vindicated. Advocacy does call for judgement - judgement on the prospects, and making a decision not to pursue an argument which is probably doomed to failure.

I am very conscious of the honour that has been given to me by this University, the honour of delivering the Michael O’Dea Oration. I knew Michael’s father, who was a highly competent lawyer. I appeared in cases against him and I think on one occasion in a case for him. The O’Dea tradition in the law is a very fine one and I am conscious of the fact that Michael O’Dea has done so much good for this University. I am grateful to you for listening and conscious of the fact that in being very moved by this occasion, my remarks have been somewhat halting. Thank you.

*I have always told witnesses to take each question as it comes, as a separate entity and not to look around corners anticipating the line of cross examination.*



## Justice reinvestment

Therese Catanzariti interviewed Sarah Hopkins, Aboriginal Legal Service, one of the developers of the Justice Reinvestment for Aboriginal Young People campaign.

The government's budget for custodial services is significant – it costs around \$237,980 per year to imprison one juvenile offender. At the same time, effective community programs, and drug and alcohol residential treatment centres often wither through lack of consistent reasonable funding, and limited co-ordination with other support services. Magistrates are frustrated by the limited available non-custodial options, and drug and alcohol addiction is reinforced rather than addressed.

For example, Weave/Kool Kids in La Perouse operates on a shoestring budget and provides after school/ holiday activities including taking young people surfing and to training sessions with Souths Juniors. The program has had phenomenal results, but struggles to get funding.

Similarly, 'Clean Slate without prejudice' in Redfern offers/requires boxing training three mornings a week starting at 6.30am with an aboriginal mentor from Tribal Warrior. The project is co-ordinated by the local Redfern police superintendant and Shane Phillips from Tribal Warriors. The court can order an offender to attend the program as part of bail.

The Justice Reinvestment campaign aims to divert government funds from custodial services to effective local community programs, education and services - smarter spending rather than more spending. The twist is that the campaign aims to influence government funding through financial cost-benefit analysis rather than feel-good anecdotes. Justice Reinvestment is methodical number-crunching – evaluating programs to determine which programs are most effective in reducing recidivism and crime generally, and demographic mapping to determine which suburbs and regions have a high concentration of young offenders, and will benefit the most from investment in early intervention and prevention programs. It provides a framework for justice policy and fiscal policy, allowing treasury to find opportunities for savings.

The campaign draws on justice reinvestment programs in the US and UK. For example, a US justice reinvestment project analysed offenders who were subject to community orders such as remand, probation or community service orders. The project analysed the effect of reducing the order by five days for every month the person the offender performed well. The result was the offender performed better, and the costs were reduced because of the shorter period

under active supervision.

The focus on data has parallels with evidence-based medicine, and effective giving / high impact philanthropy. The campaign contemplates an independent centralised body for ongoing data mining and research. For example, the data mapping identifies high risk communities by analysing the offenders – where do they come from, where are they going back to, who has most contact with criminal justice system. The campaign contemplates that any savings should be ploughed back into the relevant community rather than forming part of consolidated revenue, in the same way that road tolls are invested back into roads. The data mapping can determine the costs of incarceration attributable to the particular suburb or region, as well as what costs were 'saved' by effective local programs.

The focus on local has parallels with the NSW Department of Education 'Connected Communities' project that aims to co-ordinate education, health, welfare, early childhood education and care, and vocational education and training in vulnerable communities, and the European Union subsidiarity principle.

The campaign contemplates a local co-ordinating group that would include representatives from the courts, the police, health, juvenile justice / probation and parole, as well as community leaders from the local aboriginal community. The local team will identify what the problems are, where the problems are, what is working, and what is not working. The centralised body can assist and offer suggestions, but the local community has to step up.

The campaign has an impressive group of champions including NSW Governor Marie Bashir, Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda, Dr Tom Calma, former NSW director of public prosecutions, Nick Cowdery, former prime minister, Malcolm Fraser, and chair of La Perouse Local Aboriginal Lands Council Marcia Ella Duncan.

On 17 October 2012, Mick Gooda, Tom Calma, and Marcia Ella-Duncan met with the NSW Attorney-General Greg Smith SC MP and the Minister for Aboriginal Affairs Victor Dominello MP to discuss the policy. Watch this space.

Further information is available at <http://justicereinvestmentnow.net.au/>

# Suppression and non-party access

This two-part article by Sandy Dawson and Fiona Roughley is concerned with questions that frequently arise in court proceedings but which equally often come into play in circumstances where there is little time for counsel to prepare. The questions are twofold:

- First, when, how and why can parties apply for a non-publication or suppression order over material relevant to proceedings. Common examples relate to the identity of a party, sensitivity over particular evidence, and in rare cases, the fact of the proceeding itself.
- Second, what information relevant to court proceedings may be accessed by non-parties, and how and when can that be effected.

A number of significant developments have occurred in the past two years. For example, the *Court Suppression and Non-Publication Orders Act 2010* (NSW) (CSPO Act) has altered the landscape applicable to applications for suppression or non-publication orders in proceedings; the CSPO Act 'provides a different emphasis, as well as different linguistic structure to the factors required to be considered by the court'.<sup>1</sup>

This article is intended to draw together the relevant threads and provide a practical guide for practitioners.

Part I is concerned with suppression and non-publication orders.

Part II, to be published in the next issue of *Bar News* is concerned with non-party access to information used in, or to be used in, proceedings.

## Part I: Keeping it quiet

### SUPPRESSION AND NON-PUBLICATION

As an incident of inherent or implied jurisdiction,<sup>2</sup> and by virtue of various statutory provisions,<sup>3</sup> state and federal courts have had power to order that certain information in proceedings be suppressed or the subject of non-publication orders. Those powers have given rise to various inconsistencies between jurisdictions and uncertainty over the scope and effect of orders made, for example, in so far as breach of an order is punishable as contempt, and the extent to which such an order might bind non-parties not present in the body of the court.<sup>4</sup>

Over a number of years, state and federal lawmakers, individually and in concert, have given attention to the creation of comprehensive and uniform statutory provisions concerning suppression and non-publication orders.<sup>5</sup> In May 2010, the Standing Committee of Attorneys-General endorsed a model law to address the issue: *Court Suppression and Non-publication Orders Bill 2010* (the model law).

With the enactment of the CSPO Act, New South Wales became the first jurisdiction to adopt the model law. It commenced on 1 July 2011. Its provisions apply to the Supreme Court, Land and Environment Court, Industrial Court, District Court, Local Court and Children's Court.<sup>6</sup>

Materially similar legislation relating to federal courts is proposed in Schedule 2 to the *Access to Justice (Federal Jurisdiction) Amendment Bill 2011*. If enacted, the Bill will implement the model law (subject to one exception described below) in respect of the High Court, Federal Court, Family Court, Federal Magistrates Court and any other courts exercising jurisdiction under the *Family Law Act 1975* (Cth). The Bill is currently before the Senate.

No other jurisdiction has adopted or sought to introduce the model law.

### THE MODEL LAW OF NON-PUBLICATION AND SUPPRESSION

The model law expressly does not limit or otherwise affect any inherent jurisdiction or powers that a court otherwise has to regulate its proceedings or to deal with a contempt of the court.<sup>7</sup> Further, pursuant to s 5, the model law does not limit or otherwise affect the operation of provisions concerning non-publication or suppression orders in other statutes. However, the ongoing role of other repositories of the power to make non-publication or suppression orders warrants closer examination.

First, in terms of design and intent, it was envisaged that each jurisdiction would, with the enactment of the model law, consolidate the statutory powers. Existing

provisions that, like the model law, give courts *discretion* to impose suppression or non-publication orders were to be repealed.<sup>8</sup> On the other hand, provisions providing a *direct prohibition or presumption against* publication or disclosure of information in connection with certain proceedings,<sup>9</sup> would remain.

In line with the drafters' intention, both the CSPO Act and the Commonwealth Bill both effect a measure of consolidation so as to cut down what would otherwise have been the duplicative effect of s 5. Schedule 2 to the CSPO Act repealed, for example, s 292 and 302 (1) (c)(d) and (3) of the *Criminal Procedure Act 1986* (NSW). Those provisions had provided for the making of non-publication orders in proceedings against a person for prescribed sexual offences or in relation to counselling communications made by an alleged victim of a sexual assault.

Provisions in the Commonwealth's *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* also provide for the repeal of specific, existing powers to exercise a discretion to make non-publication or suppression orders.<sup>10</sup> However, at the federal level courts have sometimes also relied upon a general statutory power (to make orders of such kinds as they consider appropriate)<sup>11</sup> as the repository of a power to make suppression and non-publication orders. The cognates of s 5 of the model law<sup>12</sup> do not expressly determine the continued operation of those general powers in so far as suppression and non-publication orders are concerned. That is because those provisions provide for the continued operation of provisions in *other Acts*, and the model law is, under the Bill, to take effect not as a standalone Act (as in New South Wales with the CSPO Act), but as a new part inserted into the relevant Act for each court. The explanatory memorandum to the Bill states that it is parliament's intention that those general powers should no longer be used as the repository of the power to make non-publication or suppression orders.<sup>13</sup> It remains to be seen whether, bearing in mind cardinal principles of statutory construction of provisions conferring jurisdictions or granting powers to a court,<sup>14</sup> 'should not' is also 'cannot'. It may be that parliament's intention properly goes to practice not power.

## POWER AND GROUNDS FOR AN ORDER PURSUANT TO THE MODEL LAW

The statutory power to make the relevant orders is

contained in section 7, entitling the court to restrict the disclosure of: (a) information tending to reveal the identity of, or otherwise concerning, any party, witness, or person related to such persons; or (b) information comprising evidence or other information about evidence given in proceedings before the court.

Section 8 provides the grounds for making the order.

### Grounds for making an order

- (1) A court may make a suppression order or non-publication order on one or more of the following grounds:
  - (a) the order is necessary to prevent prejudice to the proper administration of justice,
  - (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,
  - (c) the order is necessary to protect the safety of any person,
  - (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency),
  - (e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

Significantly, the Commonwealth's *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* does not replicate provision for the ground identified in (e).

Section 6 provides an overriding obligation that, in deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

Three decisions of the New South Wales Court of Appeal on the CSPO Act provide helpful guidance on the operation of the model law provisions. The first, *Rinehart v Welker* [2011] NSWCA 403 involved a non-publication order sought over information disclosed in civil proceedings. The second, *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCA 125 involved criminal proceedings in which 'take down' and non-publication orders were made concerning

information having no direct connection with the proceedings except in its capacity to affect the fairness of the current and future trials of the three accused. The third, *New South Wales v Plaintiff A (by his tutor 'Salin')* [2012] NSWCA 248 concerned civil proceedings relating to alleged sexual assaults in which applications were made for orders suppressing the plaintiff's name as well as those of medical and legal practitioners involved in the state's defence.

### *Rinehart v Welker*

The procedural background to the decision in *Rinehart v Welker* was somewhat complicated. Proceedings had been commenced in the Supreme Court of New South Wales by the children of the first defendant (Mrs Gina Rinehart). The children were beneficiaries of a trust of which their mother was trustee. Three of the four children sought orders pursuant to the *Trustees Act 1962* (WA), and by later amendment, in the court's inherent equitable jurisdiction, to the effect that their mother be removed as trustee. The trustee sought a stay of the proceedings and a suppression order on the basis that the proceedings were an abuse of process, having been commenced without prior compliance with mediation and arbitration procedures for which the relevant trust deed provided, and which provided that 'the decision of the mediation and/or arbitration shall be kept confidential'.<sup>15</sup> Brereton J originally granted the suppression order, but following his Honour's decision to refuse the stay application, the first suppression order ceased and an interim suppression order was made pending determination of an application for leave to appeal to the Court of Appeal.<sup>16</sup> Notices of motion filed in the proceedings for leave to appeal sought a fresh suppression order on the ground referred to in s 8(1) (a) of the CSPO Act (necessary to prevent prejudice to the proper administration of justice). That order was made by Tobias AJA.<sup>17</sup> Certain media organisations who had intervened, sought a review of the decision of Tobias AJA pursuant to s 46 of the *Supreme Court Act 1970* (NSW). That was the procedural background by which the CSPO Act first came before a full bench of the Court of Appeal.

As identified by Young JA, the 'basal propositions' of those attacking the order made by Tobias AJA were that, pursuant to section 6, the CSPO Act makes it clear that open justice is the primary aspect of the administration

of justice on which the Act is focused and that the orders made by Tobias AJA 'effectively allow a private agreement as to confidentiality to outflank the purpose of the Act'.<sup>18</sup> Those defending the decision of Tobias AJA submitted, consistent with their position before Tobias AJA, that publication of the material filed in the proceedings would render any appeal nugatory, negate the purpose of the confidentiality provisions in the trust deed, and circumvent the rights of the applicants to have such disputes resolved by confidential mediation or arbitration in the event that any appeal succeeded.<sup>19</sup>

The Court of Appeal unanimously discharged the suppression orders made by Tobias AJA. The proper course in proceedings brought by a party in breach of an arbitration or mediation agreement was to stay proceedings.<sup>20</sup> The fact that parties had covenanted for the confidential resolution of disputes, or that embarrassment and damage to reputation might be caused by proceedings taking place in open court, did not in this case make it 'necessary' to suppress information in the proceedings.

In their joint judgment, Bathurst CJ and McColl JA outlined the proper approach to construing the CSPO Act. Their honours observed:

The principle of legality favours a construction of legislation such as the CSPO Act which, consistently with the statutory scheme, has the least adverse impact upon the open justice principle and common law freedom of speech and, where constructional choices are open, so as to minimise its intrusion upon that principle.<sup>21</sup>

All members of the court understood the content of 'open justice' in s 6 of the CSPO Act as referable to its justification at common law.<sup>22</sup> Citing *Scott v Scott* [1913] AC 417 at 463, Bathurst CJ and McColl JA explained that it is a concept based on the premise that 'in public trial is [to be] found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect'.<sup>23</sup> The entitlement to the media to report on court proceedings is a corollary of the right of access to the court by members of the public.<sup>24</sup>

Open justice is a means for ensuring the proper administration of justice. However, as noted by Young JA, 'the means of achieving the purpose must not be elevated above the purpose'.<sup>25</sup> Numerous exceptions to open justice exist where the openness of court



proceedings would destroy the attainment of justice.<sup>26</sup> Protection of blackmail victims or informers who might not otherwise come forward, or the commercial value of a trade-secret, are obvious and well-known examples.

The real question is what is the appropriate weight to give to competing interests and how is an assessment for or against open justice in any particular case to be made. The decision in *Rinehart v Welker* confirmed that the threshold test for departure from open justice is that it be 'necessary' to do so.

Necessity is the operative condition expressly provided for in all of the s 8(1) grounds in the CSPO Act. *Rinehart v Welker* confirms that the same considerations which underlie the test of necessity under s 50 of the *Federal Court Act 1976* (Cth), which were explained by the High Court in *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [30], and which prevailed at common law, apply directly to the meaning and application of the test of necessity pursuant to s 8(1) of the CSPO Act. Thus CSPO Act orders 'should only be made in exceptional circumstances'.<sup>27</sup>

The practical consequence of the decision is that, consistent with *Hogan v Australian Crime Commission*, an order is not 'necessary' if it appears to the court only

to be convenient, reasonable or sensible, or to serve some notion of the public interest, still less that, as the result of some 'balancing exercise', the order appears to have one or more of those characteristics.<sup>28</sup>

Nor is it sufficient that the information is 'inherently confidential' or would result in 'embarrassing publicity' as distinct from personal or commercial information the value of which as an asset would be seriously compromised by disclosure.<sup>29</sup> What is required is that disclosure will prejudice the proper exercise of the court's adjudicative function.<sup>30</sup> Those are the unacceptable consequences with which the exercise of a power to order non-publication or suppression is concerned.

Special leave to appeal to the High Court from the decision in *Rinehart v Welker* was refused. It was said by French CJ and Gummow J that the approach of the Court of Appeal to construing and applying the CSPO Act gives appropriate weight to the principle of open justice.<sup>31</sup>

## *Fairfax v Ibrahim*

During the course of a criminal trial of three accused in the New South Wales District Court, an order was made that:

Until further order, within the Commonwealth of Australia, there is to be no disclosure, dissemination, or provision of access, to the public, by any means, including by publication in a book, newspaper, magazine or other written publication, or broadcast by radio or television, or public exhibition, or broadcast or publication by means of the Internet of any:

- (a) Material containing any reference to any other criminal proceedings in which [the three accused] are or were parties or witnesses; or
- (b) Material containing any reference to any other alleged unlawful conduct in which [the three accused] are or were suspected to be complicit or of which they are or were suspected to have knowledge.

Eight news media organisations sought leave to appeal to the Court of Criminal Appeal pursuant to s 14 of the CSPO Act.<sup>32</sup> The court unanimously set aside the order made by the trial judge. Three helpful matters arise from that decision concerning the exercise of the power to make suppression and non-publication orders pursuant to the CSPO Act.

First, that 'necessary' can have shades of meaning and, in its application, will depend significantly upon the particular grounds in s 8 relied upon and the factual circumstances. 'Necessary' should not be given a narrow construction.<sup>33</sup> However whether an order is 'necessary' has regard to its form, jurisdictional application, effectiveness (or futility), and whether it is reasonably adapted to its purpose.<sup>34</sup> Thus:

- An order which, by its form, is not directed to any person, is no more than a general statement of principle in relation to specific material, and which could apply to a whole range of persons and businesses, is not appropriately adapted as to be 'necessary'.
- Jurisdictional overreach will also deny a finding that the order is necessary. Thus, with respect to a trial to take place in the District Court at Sydney, an order preventing residents of Perth, Kununurra or Darwin from having access to material could not conceivably be justified. Further, there is a real question as to whether a judge of the District Court

has power to control the access to information of parties and residents in other states.

- An order which is futile is not necessary. However, the mere fact that an order targets specific material and not others (for example the most prominent or readily accessible information amongst thousands of potential 'hits' produced by a search engine) does not necessarily mean an order will be futile. The guiding principle is whether the order is appropriately adapted to its purpose, in the case of *Fairfax v Ibrahim* being to prevent access by jurors to the prejudicial material.
- An order which is ineffective cannot be said to be 'necessary'. It must be possible to identify all relevant parties bound by the order (whether or not before the court) and, secondly, to enforce the order against such persons in the event of contravention. Impossibility of enforcement against any party not resident in or operating from the jurisdiction would render the order impracticable, if not impossible, and most certainly not necessary.

Second, that it is critical to distinguish between circumstances where a proposed order impacts upon the open justice principle (because it would, for example, prevent publication of material read in open court) as opposed to where it does not prevent or restrict publication of court proceedings. In the latter, the open justice principle which is affirmed in s 6 of the CSPO Act has more limited application and indeed does not constrain the making of an order under s 7.<sup>35</sup> Similarly, the 'common law freedom of speech' provides a lesser obstacle to an order directed to pre-trial publicity and which is designed to prevent prejudice to the proper administration of justice.<sup>36</sup> The reasoning of the Court of Appeal in *Reinhart* is not determinative in this latter type of case. Thus where an order does not impinge upon the principle of open justice, if designed to protect the proper administration of justice and reasonably appropriate and adapted to achieve that purpose, it may well be considered 'necessary'.<sup>37</sup>

Third, that s 7 extends to allow a court to make orders preventing threatened interference with a trial, but it does not have a greater scope than the *sub judice* rule under the general law concerning the powers of a superior court to prevent and punish contempt.<sup>38</sup>

The *sub judice* rule is concerned with the effects of pre-

trial publicity on whether the accused will be able to obtain a fair trial. A prominent example was the order made by the Victorian Court of Appeal that a television corporation not publish in Victoria certain episodes of the first season of the series *Underbelly* until after the completion of the trial for murder of one of the persons depicted in the series.<sup>39</sup>

The court in *Fairfax v Ibrahim* indicated that the power granted by s 7 of the CSPO Act, and indeed the general law powers of a superior court, includes power to make orders preventing public access to existing material until the conclusion of a trial. That extends to preventing access to a publication on a web site.<sup>40</sup> However, the power is not at large. Basten JA, with whom Bathurst CJ and Whealy JA agreed, explained that:

It does not follow that the trial judge, in exercising powers with respect to the conduct of the trial, can make preemptory orders requiring private individuals or other entities unconnected with the administration of justice to take steps to remove material from potential access by a juror.<sup>41</sup>

The restriction on the power, and the explanation for why some orders requiring material to be removed from the internet will be within power and others will not, appears to be that while the CSPO Act gives power to make such an order, it does not expand the powers of a superior court to prevent sub judice contempt. In other words, if publication of the material in respect of which a suppression or non-publication order is sought would not amount to a sub judice contempt, such an order is beyond power under the CSPO Act.

Finally, by reason of s 109 of the *Constitution* and Schedule 1, cl 90 and 91 of the *Broadcasting Services Act 1992* (Cth), the power under the CSPO Act, even if it did extend beyond the common law principles with respect to *sub judice* contempt, could not validly support an order addressed to the world at large and which might cover material on internet sites of which the hosts were unaware at the time the order was made.<sup>42</sup> Clause 91 specifically provides that a law of a state has no effect to the extent to which it subjects, or would have the effect (whether direct or indirect) of (a) subjecting an internet content host to liability (whether criminal or civil) in respect of hosting particular content in a case where the host was not aware of the nature of the content; or (b) requiring an internet host to monitor, make inquiries about or keep

records of content hosted by the host. Thus the CSPO Act, even if the Court of Criminal Appeal had given it a more expansive operation, could not support an order imposing an obligation on an internet content host to remove, or otherwise restrict access to, content, of the nature of which it was not aware. Similarly, it could not support an order requiring such a host to inquire of or monitor the content hosted on its web sites, of the nature of which it was not otherwise aware.

## *New South Wales v Plaintiff A*

In the District Court of New South Wales Plaintiff A asserted that the State of New South Wales was liable to him for sexual assaults on him by, first, fellow students at Glenfield Park Special School when he was a minor, and second, an inmate at Long Bay Gaol when he was an adult. In the District Court proceedings, non-publication orders were made in respect of the names and identifying details of the plaintiff, his tutor, three solicitors for the state, the solicitor for the plaintiff and four doctors. On appeal to the Court of Appeal, there was no challenge to the making of the non-publication orders below; rather, the state applied for an extension of the non-publication orders to the appellate proceedings, including so as to apply to the state's current solicitors and counsel in the appellate proceedings. Counsel for the plaintiff also sought suppression of the plaintiff's name, submitting it was a 'common practice' where the plaintiff was a minor at the time of the commission of the alleged torts.

The Court of Appeal declined to make the orders sought.

In response to the submissions of the plaintiff's counsel deriving from a so-called 'common practice' of suppression in similar circumstances, the court noted that any such practice 'has not been universally adopted' in civil proceedings, and more importantly, cautioned that 'care must be taken in placing undue weight upon practices which preceded the commencement of the [CSPO] Act'.<sup>43</sup>

As to the balance of the state's application, it was, in the words of Basten JA who delivered the principal judgment, 'unique'.<sup>44</sup> However it was not the unusualness of the application that founded its rejection. Indeed Beazley JA, who substantially concurred with the reasons of Basten JA, expressly rejected the idea that the application was, on its face, unreasonable.<sup>45</sup>

The point made by the court was that the insufficiency of evidence was determinative: the material before the court did not establish the 'necessity' of the order.<sup>46</sup>

## PRACTICAL CONSIDERATIONS

For parties seeking a non-publication or suppression order, the real advantage of proceeding pursuant to the CSPO Act (or its cognates in other jurisdictions if and when enacted) is certainty as to the scope, source and effect of a non-publication or suppression order. Indeed, the avoidance of complex jurisdictional questions was one of the chief motivations behind the legislation.<sup>47</sup>

For the same reasons, it would appear likely that parties will favour proceeding under the CSPO Act as opposed to (or perhaps in addition to) other repositories of the power. The remaining parts of this section consider the practical considerations that apply to parties – both those seeking and resisting – orders pursuant to the CSPO Act.

## Which order?

The model law distinguishes between 'non-publication' orders (orders that prohibit or restrict the publication of information but not otherwise its disclosure), and 'suppression' orders (which prohibit or restrict the disclosure of information by publication or otherwise).<sup>48</sup> Those definitions make plain that suppression orders will have additional ramifications for both parties and non-parties. Even putting aside the 'necessity' threshold required to obtain an order, from a practical perspective, parties seeking to restrain the disclosure of information should closely consider whether the additional complexity and administrative difficulties caused by a suppression order (limiting disclosure generally as opposed to mere publication) are warranted in the circumstances.

## Procedure for making an order

A court may make a suppression or non-publication order of its own initiative or on the application of a party or any other person 'considered by the court to have a sufficient interest in the making of the order'.<sup>49</sup> Where an application is made, the court may, without determining the merits of it, make the order as an interim order pending determination of the application.<sup>50</sup> However, if an interim order is made, the

court must determine the application as a matter of urgency.<sup>51</sup>

The distinction noted in *Fairfax v Ibrahim* as to suppression or non-publication orders in respect to, on the one hand, material disclosed in court and, on the other, material already published but said to be prejudicial to the administration of justice, has further significance for the preparation of an application. For constitutional reasons, state law cannot validly support an order addressed to the world at large and which relates to material already published.<sup>52</sup> The court doubted that properly construed the model law would support such an order in any event.<sup>53</sup> For a party seeking an order over material already published, a number of additional antecedent requirements will ordinarily need to have been taken in order to establish that the test of necessity can – at a threshold level – be satisfied. Those are that:

- the specific material said to be prejudicial to the administration of justice must be identified (ie the particular websites, or articles, or otherwise published material);
- the person in possession of that material must be identified (or, in the case of publication on the internet, the particular internet content host identified); and
- the person responsible for access to the content has been contacted and asked to remove, or otherwise restrict access to the content and also given a reasonable period of time in which to do so.

In criminal trials, the usual process will be for the Director of Public Prosecutions to identify web sites containing the material that might tend to prejudice the forthcoming trial.

In framing the orders sought, applicants ought to consider the place where the proposed order is to apply and the duration to be specified. Both are matters which the court will need to address specifically if it decides to grant an order pursuant to the statutory power.<sup>54</sup> Orders may apply anywhere in the Commonwealth, however, if it is proposed that an order operate outside the jurisdiction, it will also need to be established why that is necessary for achieving the purpose for which the order is made.<sup>55</sup> Additionally, it should be kept in mind that pursuant to s 12(2), the court is obligated

to ensure that the 'order operates for no longer than is reasonably necessary to achieve the purpose for which it is made'.

The evidence appropriate on an application for a non-publication or suppression order will vary with the exigencies of the case. Where the ground identified in s 8(1)(c) is relied upon ('necessary to protect the safety of any person'), it will usually be the case that evidence demonstrative of imminent threat of danger from publication of the subject material is required.<sup>56</sup> Outside of established categories such as blackmail victims or informers, it may be necessary to support the application by expert evidence, for example in a case where the imminent threat is psychological harm.<sup>57</sup>

### **Publication of orders made**

The advance made by the model law is to give all specified courts statutory power to bind the world at large with a suppression or non-publication order. The advance is more technical than revolutionary: the commission of an offence for contravention of an order, as with the law of contempt, requires knowledge of the order or, at a minimum, recklessness as to whether the conduct constitutes a contravention.<sup>58</sup> (A contravention may be punished as a contempt of court even though it could be punished as an offence. The converse applies, though the same contravention cannot be punished as both an offence and a contempt of court.<sup>59</sup>)

The point for parties is that, having obtained an order, its practical effect may depend on the taking of subsequent steps to bring it to the attention of relevant third parties.

The working party of the Standing Committee of Attorneys General which drafted the model law has given consideration to a related proposal for a national register of suppression and non-publication orders.<sup>60</sup> That register has not taken effect. The best option available currently is that the orders (whether made by the Supreme Court or by lower courts) be sent to the Public Information Office of the Supreme Court of New South Wales for dissemination. For reasons of pragmatism and efficiency, it is advisable that a party seeking a suppression order build that consequence into the proposed orders.<sup>61</sup>



## Procedure for review of orders

The court that makes a suppression or non-publication order may review the order on its own initiative or on the application of a person entitled to apply for the review. Those entitled to apply for and to appear and be heard by the court on the review are the original applicant for the order, any party to the proceedings, the government of the Commonwealth or of a state or territory, a news media organisation, and any other person who has a sufficient interest in the question. The court may confirm, vary or revoke the order.<sup>62</sup>

The model law provisions governing review of, or appeal from, a decision of a court to make or refuse a suppression or non-publication order are somewhat confusing.

### 14 Appeals

- (1) With leave of the appellate court, an appeal lies against:
  - (a) a decision of a court (the original court) to make or not to make a suppression order or non-publication order, or
  - (b) a decision by the original court on the review of, or a decision by the original court not to review, a suppression order or non-publication order made by the court.
- (2) The appellate court for an appeal under this section is the court to which appeals lie against final judgments or orders of the original court or, if there is no such court, the Supreme Court.
- ...
- (6) If judgments or orders of the original court are subject to review by another court (rather than appeal to another court), this section provides for a review of the original court's decisions instead of an appeal and in such a case references in this section to an appeal are to be read as references to a review.

The Court of Appeal in *Fairfax v Ibrahim* identified the awkwardness of any construction of s 14, specifically that it is difficult to give meaning to s 14 without making s 14(6) otiose.<sup>63</sup> The court determined that the word 'review' in s 14(6) refers to an alternative to a statutory appeal and not to the exercise by the Supreme Court of its supervisory jurisdiction. The upshot for practical purposes is that, accepting that suppression and non-publication orders are interlocutory in nature,

in most courts or tribunals in which the model law will apply, the appropriate appellate court is that to which an appeal would lie against a final judgment of the original court.<sup>64</sup>

Notably, an appeal pursuant to s 14 is by way of rehearing and, pursuant to s 14(5) fresh evidence or evidence in addition to, or in substitution for, the evidence given on the original application may be given on the appeal. From a case-load perspective, and given the urgency usually associated with these kinds of matters, the prospect of an appeal with volumes of new evidence poses particular challenges to appellate courts. The court in *Fairfax v Ibrahim* identified the answer to these 'very real practical issues' as being found in s 14(1): an appeal lies only with leave and the court has power to grant that leave conditionally, including with respect of the evidence which may be led on the appeal.<sup>65</sup>

## Costs

In criminal proceedings, costs against the parties to the proceedings in which an application for a non-publication or suppression order is made, are not appropriate, including on an appeal from the determination of the application below.<sup>66</sup>

In civil proceedings, costs may be awarded on determination of the application in accordance with the general discretion to award costs. However, it is important to note that confidentiality regimes generally, and non-publication and suppression orders more specifically, are interlocutory in nature<sup>67</sup> and that this may have consequences for the time at which any adverse costs order is payable absent specific provision by the court.

For example, in New South Wales, r 42.7(2) of the *Uniform Civil Procedure rules 2005* provides that the costs of any application in proceedings are not payable until the conclusion of the proceedings unless the court otherwise orders. Where an application relates to a discrete and separately identifiable aspect of proceedings an order may be made, on application by the relevant party, that costs be payable forthwith.<sup>68</sup> Successful parties would be well advised to seek such an order.

## Future revocations and the need for forensic decisions

From a tactical perspective, the stakes can be high. As noted above, confidentiality regimes generally, and non-publication and suppression orders more specifically, are interlocutory in nature. They may be set aside on appeal or review, but they also may be revoked or altered when circumstances change or the continuation of the regime or order is otherwise no longer considered to be appropriate. Whether to place material in evidence, even on the faith of what for the time being may be a restriction imposed on its further disclosure, is a forensic decision.<sup>69</sup>

The result in *Hogan v Australian Crime Commission* is instructive: an exhibit to an affidavit which was adduced and admitted into evidence during the currency of a confidentiality regime, was, after the revocation of that regime, subject to access and inspection by non parties pursuant to access properly granted under the then Federal Court Rules. There is always the risk that the price of the decision to have otherwise confidential material admitted into evidence may be its subsequent disclosure.

## CONCLUSION

Part I of this article has focussed on the current law of suppression and non-publication orders in New South Wales, a position likely to be replicated at the federal level if the *Access to Justice Bill 2011* passes the Senate. Although no person has yet been prosecuted under the CSPO Act, the increasing frequency with which it is being invoked by parties and non-parties is indicative of both the extent to which it has altered the landscape of this aspect of practice, and of its importance.

In Part II of this article, to be published in the next edition of *Bar News*, we will consider the converse situation to non-publication and suppression regimes: the means by which non-parties can access information relevant to court proceedings.

## Endnotes

1. See *New South Wales v Plaintiff A (by his tutor 'Salin')* [2012] NSWCA 248 at [94] (Basten JA, Beazley and Hoeben JJA agreeing).
2. For discussion of the source and scope of the power at common law, see: *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 477 (McHugh JA); *John Fairfax Group Pty Ltd v Local Court of NSW* (1992) 26 NSWLR 131 at 160; *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 345 (Mahoney

- JA); *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 at [24]–[37]; *DJL v The Central Authority* (2000) 201 CLR 226 at 240–241; *Central Equity Ltd v Chua* [1999] FCA 1067. For detail of the difficulties consequent upon the reliance on the common law power, see: *Cameron v Cole* (1944) 68 CLR 571 at 590; *Re Macks; Ex p Saint* (2000) 204 CLR 158 at [20]–[23]; *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 332–333.
3. For example, *Federal Court of Australia Act 1976* (Cth), s 50; *Federal Magistrates Act 1999* (Cth), ss 15, 61; *Family Law Act 1975* (Cth), s 34; *Civil Procedure Act 2005* (NSW), s 72 (now repealed); *Criminal Procedure Act 1986* (NSW), ss 292, 302(1)(c), (d) and (3) (now repealed); *Supreme Court Act 1986* (Vic) s 18(1)(c); *County Court Act 1958* (Vic), s 80.
4. See, for example: *Hogan v Hinch* (2011) 243 CLR 506 at [23]–[27], [46] (French CJ); *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344; *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465.
5. For a summary, see: *Court Suppression and Non-Publication Orders Act 2010* (NSW), Second Reading Speech by the Hon. Michael Veitch (Parliamentary Secretary) on behalf of the Hon. John Hatzistergos, New South Wales Legislative Council, *Hansard*, 23 November 2010.
6. CSPO Act, s 3 ('court').
7. Section 4.
8. Court Suppression and Non-publication Orders Bill 2010, drafting note 2.2 (at 2).
9. For example s 121 of the *Family Law Act 1975* (Cth).
10. *Federal Court Act 1976* (Cth), s 50; *Federal Magistrates Act 1999* (Cth), s 61.
11. For example: *Federal Court Act 1976* (Cth), s 23; *Family Law Act 1975* (Cth), s 34; *Federal Magistrates Act 1999* (Cth), s 15.
12. Access to Justice (Federal Jurisdiction) Amendment Bill 2011, Schedule 2, item 1, s 102PB (in respect of the *Family Law Act 1975* (Cth); Schedule 2, item 4, s 37AC (in respect of the *Federal Court Act 1976* (Cth); Schedule 2, item 7, s 88C (in respect of the *Federal Magistrates Act 1999* (Cth)), Schedule 2, item 8, s 77RC (in respect of the *Judiciary Act 1903* (Cth)).
13. Access to Justice (Federal Jurisdiction) Amendment Bill 2011, explanatory memorandum at p 9.
14. *Owners of 'Shin Kobe Maru' v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
15. *Rinehart v Welker* [2011] NSWCA 403 at [7]–[9] (Bathurst CJ and McColl JA).
16. *Welker & Ors v Rinehart* [2011] NSWSC 1094; *Welker & Ors v Rinehart & Anor (No 2)* [2011] NSWSC 1238.
17. *Rinehart v Welker and Ors* [2011] NSWCA 345.
18. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [78].
19. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [15]; *Rinehart v Welker and Ors* [2011] NSWCA 345 at [25]–[26] (Tobias AJA).
20. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [51] (Bathurst CJ and McColl JA); [119] (Young JA). The Court of Appeal subsequently held, that, in any event, Brereton J had correctly refused to grant a stay of the primary proceedings: *Rinehart v Welker* [2012] NSWCA 95 (Bathurst CJ, McColl and Young JJA).
21. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [26].
22. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [32]–[33] (Bathurst CJ and McColl JA) and [79] (Young JA).
23. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [32] (Bathurst CJ and McColl JA).
24. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [33] (Bathurst CJ and McColl JA), quoting *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 at [20].

25. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [87] (Young JA).
26. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [34]-[37] (Bathurst CJ) and McColl JA; [85]-[89] (Young JA).
27. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [27] (Bathurst CJ) and McColl JA).
28. *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [31].
29. *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [38] and [43]; *Rinehart v Welker and Ors* [2011] NSWCA 403 at [31] (Bathurst CJ) and McColl JA).
30. *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [42].
31. *Rinehart v Welker* [2012] HCATrans 57.
32. Proceedings were originally commenced in the Court of Appeal, not the Court of Criminal Appeal. The chief justice constituted the same bench as the Court of Criminal Appeal under s 3 of the *Criminal Appeal Act 1912* (NSW) against the possibility that the latter was the appropriate court, and the former had no jurisdiction. It was conceded at the hearing that the Court of Criminal Appeal was the appropriate appellate court, and the decision of the Court of Criminal Appeal confirms the correctness of this position: *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [15] – [17].
33. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [8] (Bathurst CJ); [47]-[48] (Basten JA).
34. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [72] – [79].
35. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [49], [51].
36. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [49].
37. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [51].
38. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [63].
39. *General Television Corporation Pty Ltd v Director of Public Prosecutions* (2008) 19 VR 68; [2008] VSCA 49 (Warren CJ, Vincent and Kellam JJA). The decision varied more expansive orders made by the trial judge that prohibited transmission, publication, broadcasting or exhibiting of the production in the State of Victoria until after the trial and directed that the series not be published on the internet in Victoria and the specified website until after the trial: *R v A* [2008] VSC 73 (King J).
40. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [61].
41. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [63].
42. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [95]-[96].
43. *State of New South Wales v Plaintiff A (by his tutor 'Salin')* [2012] NSWCA 248 at [94].
44. *State of New South Wales v Plaintiff A (by his tutor 'Salin')* [2012] NSWCA 248 at [101].
45. *State of New South Wales v Plaintiff A (by his tutor 'Salin')* [2012] NSWCA 248 at [4].
46. *State of New South Wales v Plaintiff A (by his tutor 'Salin')* [2012] NSWCA 248 at [4] (Beazley JA), [96], [99], [107] (Basten JA).
47. *Court Suppression and Non-Publication Orders Act 2010* (NSW), Second Reading Speech by the Hon. Michael Veitch (Parliamentary Secretary) on behalf of the Hon. John Hatzistergos, New South Wales Legislative Council, *Hansard*, 23 November 2010.
48. Section 3, ('non-publication order'; 'suppression order').
49. Section 9.
50. Section 10.
51. Section 10(2).
52. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [95].
53. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [95].
54. Sections 11, 12.
55. Section 11(3).
56. *X v Sydney Children's Hospitals Specialty Network & Anor* [2011] NSWSC 1272 (Adamson J); *State of New South Wales v Plaintiff A (by his tutor 'Salin')* [2012] NSWCA 248; *Welker & Ors v Rinehart & Anor* (No 6) [2012] NSWSC 160 at [55]-[56].
57. *X v Sydney Children's Hospitals Specialty Network & Anor* [2011] NSWSC 1272 (Adamson J).
58. Section 16. The maximum penalty for an individual is \$100,000 (\$110,000 under the CSPO Act) or 12 months' imprisonment or both. For a body corporate, the maximum penalty is \$500,000 (\$550,000 under the CSPO Act).
59. Section 16(2)-(4).
60. See: *Court Suppression and Non-Publication Orders Act 2010* (NSW), Second Reading Speech by the Hon. Michael Veitch (Parliamentary Secretary) on behalf of the Hon. John Hatzistergos, New South Wales Legislative Council, *Hansard*, 23 November 2010.
61. Although the orders were set aside on appeal, the orders made by the trial judge in the *Ibrahim* proceedings are an example (extracted in the judgment of the Court of Appeal at [11]): 'Orders are to be sent to the Public Information Office at the Supreme Court of New South Wales for dissemination'.
62. Section 13.
63. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [18] – [20].
64. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [17].
65. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [24].
66. See *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [104].
67. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [17].
68. See *Rinehart v Welker* (No 3) [2012] NSWCA 228 at [21] and the cases there cited (Bathurst CJ, Beazley and McColl JJA).
69. *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [43].

## Verbatim

The following is an extract from a speech given by the Hon Justice Kiefel on 3 March 2012 at the Bar Association of Queensland's annual conference.

The appointment of silks is in question again. On this subject it may also be timely for the bars in Australia to consider what the appointment means – not for the individual – but for the bar. This may be especially important if the bar is to continue to seek a role for the judiciary in the process of appointment.

The appointment of senior counsel is not just an acknowledgement of a person's ability. It is an acknowledgement by the bar and judiciary that a person has qualities of leadership. A senior counsel is intended to lead others in court, and to be a leader by example at the bar – by participation in matters affecting the bar, and by their encouragement and advice to the very junior at the bar.

The two counsel rule was useful to define the role of a senior counsel as a leader. It was accepted that a person appointed as senior counsel would ordinarily only appear in matters which warranted two counsel. The abolition of the rule permitted a senior counsel to appear alone, in a case where a senior counsel was, but a junior counsel was not, essential. But this could not alter the expectation, arising from the history of the institution of senior counsel, that they would not appear alone. To do so regularly would diminish the perception of that person as a leader.

There is emerging in Australia, but I believe less so in

Queensland, a practice of senior counsel appearing together. This may present a contradiction, at least for the one who is being 'led' by another, usually more senior, senior counsel.

It must of course be acknowledged that there have always been cases which are so large and complex as to require more than one senior counsel. In such cases labours are often divided by reference to discrete issues. There may be occasions where a newly appointed senior counsel may feel obliged to conclude a matter which he or she commenced as a junior. But I am not talking here of such cases. The current practice extends well beyond these. The practice would seem to diminish the basis for appointments to a mere recognition of a level of ability. If that be so, the question is, whether that is sufficient for its retention.

The role which senior counsel can have for junior members of the bar was evident when so many women senior counsel were lost to the bar on their appointment to the Bench soon after they took silk. The acceptance of an appointment is not the issue. It is difficult to decline such an appointment. Those appointing do not, however, have the welfare of the bar in mind. The result was to deny to younger women and men at the bar the benefit of the presence and models of senior women barristers





## Can counsel settle expert reports?

By Garth Blake SC and Philippe Doyle Gray

### Introduction

A straw poll in chambers for answers to the question Can counsel settle expert reports? produced two clear responses: about half our colleagues replied *Of course!* and the other half replied *Of course not!* This clash of strongly held views has been noted before.<sup>1</sup>

This article identifies, collates and analyses relevant English and Australian case law, academic literature, professional commentary, textbooks, professional practice rules, legislation, and the rules of court, in an attempt to provide a comprehensive, coherent and firm foundation to guide counsel when asked to settle an expert report. In doing so, we pragmatically focus on specific conduct arising in practice, in preference to academic musings revolving around the abstract concept: 'to settle an expert report.' In doing so, we consider the distinctions between: expert witnesses and lay witnesses; preliminary opinions and final opinions; and draft reports and final reports.

### Summary

For the reasons set out in detail below, there are two distinct lines of authority which we will refer to as 'the Whitehouse Line' and 'the Federal Line.' At the risk of over-simplification, the Whitehouse Line *discourages* the involvement of lawyers in the settling of expert reports, whereas the Federal Line *encourages* lawyers' participation.

No authorities that we have been able to identify in the Whitehouse Line consider any of the authorities making up the Federal Line. The reverse is not true, but as will be seen, there have been few attempts to consider the Whitehouse Line. As a result of this most unusual state of the law, we have spent time considering various academic journals and textbooks to see if the lines of authority can be reconciled.

It is our opinion, having regard to the totality of the material that we have reviewed, that it is both permissible, proper and appropriate that solicitors and counsel be involved in the settling of expert reports. Further, it is our opinion that the following principles state the current position in New South Wales on the question of counsel's role in settling expert evidence:

(a) Counsel may *and should* identify and direct the expert witness to the real issues.

(b) Counsel may *and should* suggest to the expert witness that an opinion does not address the real issues when counsel holds that view.

(c) Counsel may *and should*, when counsel holds the view, suggest to the expert witness that an opinion does not adequately:

(1) illuminate the reasoning leading to the opinion arrived at, or

(2) distinguish between the assumed facts on which an opinion is based and the opinion itself, or

(3) explain how the opinion proffered is one substantially based on his specialised knowledge.

(d) Counsel may suggest to the witness that his opinion is either wrong or deficient in some way, with a view to the witness changing his opinion, provided that such suggestion stems from counsel's view after an analysis of the facts and law and is in furtherance of counsel's duty to the proper administration of justice, and not merely a desire to change an unfavourable opinion into a favourable opinion.

(e) Counsel may alter the format of an expert report so as to make it comprehensible, legible, and so as to comply with UCPR 4.3 and 4.7.

### The Whitehouse Line of authority

*Whitehouse v Jordan* was a case conducted in the United Kingdom in 1979 about the birth of a child that went wrong. The child's mother, Mrs Whitehouse, alleged professional negligence against her obstetrician, Mr Jordan.

A point highlighted by the Victorian Court of Appeal in a decision that we will consider below, that is often overlooked in the other authorities that we consider, is that there are two different reports of this case. Those reports address the litigation at different stages. The first report is *Whitehouse v Jordan* [1980] 1 All ER 650. This was a decision of the Court of Appeal. We will refer to this decision as *Whitehouse No. 1*. The second report is *Whitehouse v Jordan* [1981] 1 WLR 246. That report is of the appeal from the decision of the Court of Appeal in *Whitehouse No. 1*, to the House of Lords. We will refer to this case as *Whitehouse No. 2*. The most often cited decision is *Whitehouse No. 2*. However, the Victorian Court of Appeal has acknowledged that an understanding of *Whitehouse No. 1* is relevant to



understanding *Whitehouse No. 2*. This is a sentiment with which we agree.

In *Whitehouse No. 1*, the relevant passage appears in the reasons for judgment of Lord Denning MR at 655e:

In addition, I may say that Professor Sir John Stallworthy (Oxford, now retired) at first made a report saying that Mr Jordan was not negligent. He said that he had dealt with the case 'with courage and skill'. But afterwards Sir John Stallworthy joined with Sir John Peel (also Oxford, retired) in holding that Mr Jordan was negligent. Their joint report was the justification for the continuance of this action to trial. But their joint report has been subjected to severe criticism and has been shown to be mistaken on some very important points.

In the first place, the joint report suffers to my mind from the way it was prepared. It was the result of long conferences between the 2 professors and counsel in London and it was actually 'settled' by counsel. In short, it wears the colour of special pleading rather than an impartial report. Whenever counsel 'settle' a document, we know how it goes. 'We had better put this in', 'We had better leave this out', and so forth. A striking instance is the way in which Professor Tizard's report was 'doctored'. The lawyers blacked out a couple of lines in which he agreed with Professor Strang that there was no negligence.

Other than these two paragraphs, there is no exposition of precisely how lawyers were involved, what changes were made, or what was the effect of their involvement.

In *Whitehouse No. 2*, the relevant and famous passage is taken from the reasons for judgment of Lord Wilberforce at 256H:

One final word. I have to say I feel some concern as to the manner in which part of the expert evidence called for the Plaintiff came to be organised. This matter was discussed in the Court of Appeal and commented on by Lord Denning MR. While some degree of consultation between experts and legal advisers is entirely proper, it [is] necessary that expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self-defeating.

Lord Fraser of Tullybelton concurred on this point with Lord Wilberforce at 268B. The remaining three law lords, Lord Edmund-Davies, Lord Russell of Killowen and Lord Bridge of Harwich did not address this issue one way or another.

*Kelly v London Transport Executive* [1982] 2 All ER 842 was again a decision of the Court of Appeal, in which Lord Denning MR presided, and which referred to *Whitehouse No.2*. It was a case brought by Mr Kelly against his employer for injuries that Mr Kelly allegedly sustained in the course of his employment. Mr Kelly's employer, London Transport, asserted that Mr Kelly's disabilities were caused by his chronic alcoholism. At trial, Mr Kelly ultimately succeeded, but he received only £75 by way of compensation. The relevant passages again appear from the reasons for judgment of Lord Denning MR at 847c, 847j, and 851c:

#### Medical Reports

The solicitors for London Transport sent copies of their medical reports to the solicitors for Mr Kelly. One in February 1980, and the others as soon as they were received in July 1980. But Mr Kelly's solicitors did not reciprocate. They only sent at one stage the 'doctored' report of Dr Denham ...

#### The Judge's Ruling

The hearing lasted 3 days. On 30 October 1980, Caulfield J gave judgment. In picturesque language, he exposed the bogus claim. He found the Plaintiff a wholly unacceptable witness. He rejected completely the evidence of Dr Denham. He said that he was 'over-obliging in his quest for the Plaintiff'. He condemned him for changing his report at the request of the Plaintiff. He said, 'I do not think the solicitor should have asked him anyway to have changed his report and, secondly, if a consultant was asked, knowing that he is delivering a forensic report, one that is going to be used in the courts, he should not have obliged and therefore he falls down in my estimation. '

Counsel for the Law Society has told us today that it was not really the solicitor who was responsible for the changing the report. The matter had been put to counsel. Counsel had advised the obliteration of references to previous medical reports. But, whoever it was, it is quite plain to my mind that the specialist's report should not have been changed at the request either of the solicitor or counsel ...

...

These then are the duties of solicitors who act for legally aided clients ... They must not ask a medical expert to change his report, at their own instance, so as to favour their own legally aided client or conceal things that may be against him. They must not 'settle' the evidence of the medical reports as they did in *Whitehouse v Jordan*, which received the condemnation of this Court and the House of Lords. As Lord Wilberforce said:

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

All this is not only in regard to solicitors but also to counsel as well. ... If these precepts are observed, I hope we shall in future have no more disgraces such as have attended this case.

The other members of the Court of Appeal, Ackner and O'Connor LJ, concurred.

It is striking that the quote from Lord Wilberforce has been selective in that it omitted the words: ‘While some degree of consultation between experts and legal advisers is entirely proper...’

We attempted to identify any subsequent decisions in the United Kingdom that address these issues. Whilst we have found a number of subsequent decisions that refer to *Whitehouse No. 1* and/or *Whitehouse No. 2*, those cases are concerned with issues of professional negligence and not the involvement of lawyers in the settling of expert reports. We have been unable to identify any English decision after *Kelly v London Transport Executive* that relies on either *Whitehouse No. 1* or *Whitehouse No. 2*. However, we have been able to identify one English decision after *Kelly v London Transport Executive* that, while not relying upon either *Whitehouse No. 1* or *Whitehouse No. 2*, does comment on the same issues as in those decisions. That authority is *Vernon v Bosley (No.2)* [1999] QB 18 discussed below. Whilst there is a real possibility that, as in the Australian cases we canvass below, English courts have made observations about the involvement of lawyers in the drafting of expert reports, those cases do not refer to either *Whitehouse No. 1* or *Whitehouse No. 2*.

We now turn our consideration to the Australian authorities and *Vernon v Bosley (No.2)*.

*Phosphate Co-operative Co of Australia Pty Ltd v Shears* [1989] VR 665 concerned an application for the approval of a scheme of arrangement between a company and its shareholders, and a related application for the reduction of share capital. In support of the application, the plaintiff relied upon a report initially written by one Mr Williams, accountant of the Arthur Andersen firm of accountants. From an early stage in the obtaining of Mr Williams’ expert opinion, and even before a formal letter of instruction was sent to

Mr Williams, there were interactions, dealings and discussions between the company, Mr Williams, and the company’s other advisers who included solicitors, and junior and senior counsel briefed to advise the company. In the course of hearing, it came to light that the version of Mr Williams’ report that had been tendered in evidence had been the last in a series. Furthermore, it became apparent that both the company, and its advisers, including its solicitors and counsel, were actively involved in the drafting of Mr Williams’ report. Some of the revisions were said to make the report more understandable, however, other revisions tended to give the impression that the report contained a valuation when it did not. Furthermore, the series of meetings between Mr Williams and the company’s solicitors and counsel were often in the presence of officers of the company, and other partisan advisers. In other important respects, the opinion that Mr Williams had expressed earlier had changed. But that was not all; after this extensive consultation, Mr Williams produced a final report, which was delivered signed by him. As the result of further discussions, that signed report was withheld and a further final signed report was issued in its place.

The trial judge Brooking J, found that Mr Williams was influenced to change his opinion by one of the company’s solicitors. In considering all this material, the trial judge was satisfied that pressure exerted by or on behalf of the company did affect to a significant extent the contents of Mr Williams’ final report. In dismissing the plaintiff’s application for approval, Brooking J held at [1989] VR 665 at 683:30:

It is impossible to lay down specific rules dealing with communications between the expert, on the one hand, and the company and those representing it, on the other: everything depends on the circumstances. The guiding principle must be that care should be taken to avoid any communication which may undermine, or appear to undermine, the independence of the expert. What happened here was quite unsatisfactory. ... I think the present case should serve as a model of what ought not to be done. The sooner experts and their clients realise this, the better. The interests of [the company’s] shareholders would have been better served if, instead of their money being spent on the procuring of the Arthur Andersen report, that report had never been placed before them.

*Vernon v Bosley (No.2)* [1999] QB 18 was an application to the Court of Appeal for rehearing of an appeal

following the discovery of fresh evidence. Mr Vernon claimed damages for nervous shock from Ms Bosley following a motor vehicle accident. Contemporaneously with his action for personal injury, Mr Vernon was a party to proceedings concerning his children in which he was opposed by his wife. Expert opinion evidence was relevant to both actions: in the personal injuries action to prove compensable loss, and in the children's action to prove that Mr Vernon was capable of caring for his children. The same psychiatrist and psychologist gave evidence for Mr Vernon in both actions. In both actions, these experts expressed an opinion about Mr Vernon's mental state, however their opinions materially and significantly differed between the actions. Mr Vernon retained the same firm of solicitors to act for him in both actions, and his solicitors were aware of these different opinions, as was counsel retained for Mr Vernon in the personal injury action. However Ms Bosley's legal representatives only became aware of those differences after hearing of the appeal when an anonymous package arrived at chambers of counsel for Ms Bosley containing the judgment in the children's action which revealed the different opinions. That package precipitated the application.

Thorpe LJ considered the role of Mr Vernon's solicitors in procuring those expert opinions, and considered the terms of the letters of instruction, before holding at 58D:

The recipient [of the letter of instruction] does not have to read between the lines to discern that his instructions are to walk the tightrope leading to the grant of his application, dependent upon a clean bill of health, and the refusal of her [i.e. Mrs Vernon's] application on the ground that his psychiatric state would be too frail to withstand the reaction to an ouster order. This sort of attempt to influence the expression of expert opinion is to be deplored for the simple reason that it colludes in a partisan approach and ignores the expert's duty in Children Act proceedings to write every report as though his instructions came from the guardian ad litem.

Thorpe LJ otherwise agreed with Stuart-Smith LJ to the effect that counsel for Mr Vernon should have advised Mr Vernon to disclose the prior inconsistent opinions to the court in the personal injury action pursuant to an ongoing obligation to give discovery: 31Cff.

The third member of the Court of Appeal, Evans LJ, dissented. He held at 40D:

This is not a case where the Plaintiff or expert witnesses called on his behalf gave evidence which was incorrect or expressed opinions which were unjustified at the time when their evidence was given. To suggest that he or they have 'changed their evidence' is not accurate.

Evans LJ held at 41B-C that counsel for Mr Vernon should *not* have advised Mr Vernon to disclose the prior inconsistent opinions to the court, and counsel acted in no way improperly. The sending of the anonymous package was a breach of statutory confidence and a contempt of court.

By majority, the application was successful, and the award of damages in Mr Vernon's favour reduced.

*Collins Thomson v Clayton* [2002] NSWSC 366 addressed whether the independence of an expert is a prerequisite to admissibility. To this question, Austin J commenced his analysis by reciting with approval the well-known judgment in *The Ikarian Reefer*<sup>2</sup> that laid down a number of principles, including the famous passage from Lord Wilberforce in *Whitehouse No. 2*. In considering these principles, Austin J concluded that each of these elements were very weighty considerations which may lead the court to exercise its discretion to exclude evidence that would otherwise be admissible: [22]. Austin J opined that this conclusion was consistent with the famous decision of *Makita (Australia) Pty Limited v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705: [23].

*FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33 was an appeal to the Court of Appeal in Victoria, and concerned the admissibility of expert valuation evidence given on behalf of the plaintiff by a valuer who was the plaintiff's brother-in-law. It was asserted, that the nature of the relationship between the expert and the plaintiff was such that the expert's opinion lacked the independence said to be a necessary characteristic of expert evidence, relying upon the passage quoted above in *Whitehouse (No. 2)*: [3]. In an illuminating analysis of both *Whitehouse No. 1* and *Whitehouse No. 2*, Ormiston JA (with whom Chernov and Eames JJA agreed) observed that Lord Wilberforce's dictum 'was provoked largely by a comment made by Lord Denning' which was directed to criticising the way in which counsel had settled a joint report by 2 professors which showed that it was more the product of 'special pleading rather than an impartial report': [16]. His Honour identified a number of practical realities at

[19], [20] and [21] ending with:

[21] ...If cynicism is properly to be expressed, then it might more fairly be directed to an (unspecified) proportion of expert witnesses who find themselves obliged to earn their living by giving that kind of evidence, and who mistakenly think their own best interests are advanced by 'gilding the lily'.

*Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Pty Ltd & Ors* (2005) 220 ALR 1 concerned the operation of the Kazaa internet peer to peer file sharing system. The applicants included companies associated with the world's major distributors of sound recordings, mostly in the form of compact discs. The applicants claimed that the sharing of so-called 'blue files' between users of the Kazaa service constituted an infringement of their copyright. There were numerous issues in dispute, but relevantly for present purposes, there was a consideration of the evidence given by an American expert called on behalf of the defendant by the name of Professor Ross. Wilcox J held at [227]ff:

[227] Professor Ross ... was obviously well qualified to give expert evidence in this case. However, my confidence in him was shaken during the course of his cross-examination.

[228] Mr Bannon showed Professor Ross a draft of his report that contained a passage dealing with the relationship between Joltid's PeerEnabler software (used in FastTrack) and Altnet's TopSearch technology. The draft shows exchanges between Professor Ross and a solicitor at Clayton Utz, acting for the Sharman respondents. Professor Ross initially wrote the words: 'The Altnet TopSearch Index works in conjunction with the Joltid PeerEnabler to search for Gold Files.' The solicitor crossed out this sentence on the draft and suggested a substitute sentence: 'TopSearch searches its own Index file of available Altnet content and PeerEnabler is not needed or used for this, other than to assist in the periodic downloading of these indexes of available content.' Professor Ross replied: 'I was not aware of this, even after our testing. But if you say it is so, then fine by me.' He left the solicitor's words in the draft.

[229] When Mr Bannon asked about this, Professor Ross responded:

'Unfortunately, I don't have the report memorised. But it is my recollection that I was not comfortable with this and I took it out in the end. But I would like to see my report to confirm that.'

[230] Mr Bannon then showed Professor Ross the email

showing the solicitor's response to his 'fine by me' reaction. The solicitor said: 'Keith, we want to try to avoid you being exposed to criticism so how about...' The solicitor then suggested the sentence that appears in Professor Ross' final report.

Wilcox J concluded that Professor Ross was prepared to seriously compromise his independence and intellectual integrity, and that it might be unsafe to rely upon Professor Ross in relation to any controversial matter, following revelation of email exchanges between Professor Ross and a solicitor at Clayton Utz about the wording of a draft report.

*Fortson Pty Ltd v Commonwealth Bank of Australia* [2008] SASC 49; (2008) 100 SASR 162 was an appeal to the full court of the Supreme Court of South Australia. The leading judgment was delivered by DeBelle J, with whom Doyle CJ and Bleby J agreed. The issue in the case was the admissibility of expert valuation evidence in relation to certain premises that arose in unusual circumstances. At a certain point in time, the valuer in question, Mr Burton, was in private practice. He was retained to provide an opinion about the value of the property in question to the plaintiff as at that certain point in time. Some years later, after the parties came to be in dispute, Mr Burton had changed his employment, and was now an employee of one of the parties, the Commonwealth Bank, who was the defendant. He was asked to provide a written opinion as to the value of the same property as at the same certain point in time (i.e. at the same time as his earlier opinion). Mr Burton did not have access to his previous opinion, or the notes supporting his conclusions. Mr Burton acceded to the request by his employer, and expressed an opinion as to the property's value. That opinion was significantly different to the opinion that he had expressed some years ago. At the time of trial, the plaintiff did not know that Mr Burton was currently an employee of the defendant. On learning that he was, taken in conjunction with the history outlined here, the plaintiff objected and complained about the failure to disclose the fact that Mr Burton was an employee of the bank. DeBelle J considered Lord Wilberforce's comments in *Whitehouse No. 2*, as well as the reasons of Ormiston JA in *FGT Custodians*. His Honour agreed with Ormiston JA, and held that the defendant should have disclosed to the plaintiff that Mr Burton was currently its employee, and that this fact went to the weight to be afforded to his opinion, but the failure

to do so, in all the circumstances of this case, did not justify setting aside the judgment at first instance. In New South Wales s 56(4) of the Civil Procedure Act 2005 (discussed below) would normally require that disclosure emanate from counsel or solicitors for the party concerned.

*Kulikovsky v Police* [2010] SASC 58 was an appeal against conviction to the Supreme Court of South Australia. Mr Kulikovsky had been charged with driving beyond the speed limit and evidence had been led as to Mr Kulikovsky's speed by the use by police of a laser. Coincidentally, Mr Kulikovsky had expertise in the use of that particular laser to measure speed, and he gave expert opinion evidence in his defence. A matter that arose for consideration on appeal, was the bearing that Mr Kulikovsky's obvious lack of independence should have had on the outcome of the trial. In referring to Lord Wilberforce's words in *Whitehouse No. 2*, Gray J observed that the question of independence was a matter going to weight, not admissibility. He also made this observation at [37]:

The approach to the limits of the role of an expert witness in England is in some ways distinct from the approach in Australia. However, the following are settled: an expert should provide independent assistance to the court by way of unbiased opinion, and an expert witness should never assume the role of an advocate.

*Farley-Smith v Repatriation Commission* [2010] AATA 637 was an appeal to the Administrative Appeals Tribunal from a decision made by the Veterans Review Board. The matter was heard by Senior Member Fice and Member Shanahan. The appeal was in relation to the death of a veteran who had been exposed to petrol while cleaning weapons and machinery, which exposure may have contributed to his death. In addressing that question, the commission had received evidence from Professor Parkin, which was the subject of criticism and attack on the grounds of perceived bias and lack of independence. At least one reason for that attack was the revelation that Professor Parkin had communicated with the applicant for compensation before being commissioned to author his report, in which he expressed a view contrary to that expressed in his report; Professor Parkin's initial view was unfavourable to the applicant for compensation, but after the applicant commissioned him to provide a report, his contrary opinion was favourable. Furthermore, it

appears, though it is by no means immediately clear from the reasons for judgment, that the tribunal found that Professor Parkin's report had been changed at the suggestion of the Applicant or her legal advisers. The Tribunal reviewed, amongst other things, the decisions of *Makita v Sprowles*, *The Ikarian Reefer*, *Whitehouse No. 2*, and *Phosphate Co-operative of Australia*. The tribunal held that Professor Parkin had not brought any independent assistance to the tribunal by way of objective, unbiased opinion, and that 'he had clearly crossed the line into advocacy'.

*Secretary to the Department of Business and Innovation v Murdesk Investments* [2011] VSC 581 was a dispute about the value of land that had been compulsorily acquired. Emerton J was considering the question of the admissibility of expert evidence in circumstances where there was a suggestion that the relevant valuer was not entirely independent. Her Honour considered at [103] and [104] *Phosphate Co-operative Co of Australia*. Ultimately, Emerton J found that the circumstances were sufficiently different as to reach a different conclusion, ending:

110 In this case, there was no evidence of the legal representatives attempting to invite the expert to distort or misstate facts or give other than honest opinions. Nor was there evidence that the legal representatives suggested a particular method of valuation might be more likely to appeal to the Court. Although the legal representatives made suggestions as to form and style, even to the extent of redrafting parts of one of the reports, this does not amount to the kind of conduct...cautioned against.

The principles to be derived from this line of authority include the following:

- (a) Some degree of consultation between experts and legal advisers is entirely proper: *Whitehouse No. 2*, *Phosphate Co-operative*, *Secretary to the Department of Business and Innovation*.
- (b) It is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert: *Whitehouse No. 2*, *Phosphate Co-operative*, *Vernon v Bosley (No.2)*, *Universal Music Australia v Sharman*, *Kulikovsky*, *Farley-Smith*, *Secretary to the Department of Business and Innovation*.
- (c) The settling of an expert report by counsel, such that it wears the colour of a special pleading rather



than an impartial report is improper: *Whitehouse No. 1*.

- (d) Alterations to expert reports that alter or disguise the expert witness' genuinely held opinion are improper: *Whitehouse No. 1*, *Kelly v London Transport*, *Vernon v Bosley (No.2)*, *Universal Music Australia v Sharman, Farley-Smith*.

### The Federal Line of authority

All these cases occurred in federal courts – hence 'Federal Line of authority'.

*Boland v Yates Property Corporation* [1999] HCA 64; (1999) 167 ALR 575 was an action against solicitors for professional negligence in which Callinan J commented at [276] – [277] upon the relationship between the experts called in this case and the lawyers, concluding:

[278] In *Kelly v London Transport Executive*, Lord Denning MR said that solicitors and counsel must not 'settle' the evidence of medical experts as they did in *Whitehouse v Jordan*. In the latter case Lord Wilberforce said:

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

[279] What the Master of the Rolls categorically said in *Kelly*, in my opinion, goes too far. But in any event the passage from *Whitehouse v Jordan* quoted does not support as far-reaching a proposition as that propounded by Lord Denning. For the legal advisors to make suggestions is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt. I do not doubt that counsel and solicitors have a proper role to perform in advising or suggesting, not only which legal principles apply, but also that a different form of expression might appropriately or more accurately state the propositions that the expert would advance, and which particular method of valuation might be more likely to appeal to a tribunal or Court, so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions. However it is the valuer who has to give the evidence and who must make the final decision as to the form that his or her valuation will take. It will be the valuer and not the legal advisors who is under oath in the witness box and bound to state his or her opinions honestly and the facts accurately. The lawyers are not a valuer's or indeed any experts' keepers.

We should like to emphasise that the only reference to that passage in any of the authorities in the Whitehouse Line is that contained in *Secretary to the Department of Business and Innovation v Murdesk Investments*. A similar failure is evident in the balance of the authorities considered below: none of them are considered in any of the authorities in the Whitehouse Line.

*Harrington-Smith on behalf of the Wongatha People v Western Australia (No.7)* [2003] FCA 893; (2003) 130 FCR 424 was a claim for native title supported and defended by numerous voluminous reports of expert witnesses, which in turn generated numerous evidentiary objections and exposed deficiencies in those reports. This decision came about in the course of case management, after the parties had exchanged their objections to expert reports. In summary, there were 30 expert reports, written by 15 different authors, spread over 35 volumes of documents, to which 1426 objections were taken. One category of objections was whether the opinions expressed in the reports were properly admissible under the *Evidence Act 1995* as opinion based on a person's training, study or experience. None of the reports had had any input from any legal advisers before trial. Lindgren J analysed the material in light of the objections at [18] – [28], which most relevantly includes (emphasis in original):

[19] Lawyers *should* be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is *not* the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. ...

[27] ...My impression is that in some cases, beyond the writing of an initial letter of instructions to the expert, lawyers have left the task of writing the reports entirely to the expert, even though he or she cannot reasonably be expected to understand the applicable evidentiary requirements. Such a course may have been followed because of a commendable desire to avoid any possibility of suggestion of improper influence on the author. But I suggest that the distinction between permissible guidance as to form and as to the requirements of ss.56 and 79 of the Evidence Act, on the one hand, and impermissible influence as to the content of a report on the other hand, is not too difficult to observe. It does not serve the interests of anyone, including those of the expert witness, to deny him or her the benefit of guidance of the kind mentioned.

*Jango v Northern Territory of Australia (No.2)* [2004] FCA 1004 was another native title claim. At an interlocutory stage, Sackville J was called to give rulings on evidence in relation to expert reports. Again, there were voluminous reports advanced on behalf of the applicants, to which the respondents had made at least 1100 separate objections. Sackville J made a list of complaints about the expert reports similar to that in *Harrington-Smith*. After referring to and quoting the judgment in *Harrington-Smith*, Sackville J added his own concurring thoughts at [10] – [18].

*R v Doogan* [2005] ACTSC 74; (2005) 158 ACTR 1 was an appeal to the full court of the Supreme Court of the ACT comprised of Higgins CJ, Crispin and Bennett JJ, about irregularities in the conduct of a coronial inquiry. One of the matters complained of revolved around the fact that counsel assisting the coroner had himself assisted in the preparation of expert reports relied upon at the hearing. In a unanimous judgment, the court considered what had occurred, and quoted part of the dicta from *Harrington-Smith*, before concluding:

[119] Accordingly, the mere fact that some editing of the reports of Mr Roche and Mr Cheney occurred does not demonstrate any impropriety on the part of the lawyers in question or provide any valid ground for concern. It is true that the rules of evidence did not strictly bind the first respondent and that some latitude might have been permitted to statements in the reports that strayed to some extent beyond the bounds of admissibility. However, that consideration did not relieve those assisting the first respondent of their duty to ensure that the reports conveyed the author's opinions in a comprehensible manner, that the basis for those opinions was properly disclosed and that irrelevant matters were excluded. It has not been established that any of the lawyers assisting the first respondent sought to change passages in the reports conveying relevant opinions or information, so the prosecutors' complaints seem to have been based upon the editing of passages that were, at best, of marginal relevance.

*Risk v Northern Territory of Australia* [2006] FCA 404 was a decision of Mansfield J about another claim to native title. Again, expert evidence was sought to be tendered, and it was the subject of similar criticism to that made in *Harrington-Smith*. Mansfield J referred to *Harrington-Smith* and adopted the analysis contained there: 450. Mansfield J observed that *Jango* addressed

the same issues: [458]. Mansfield J concluded:

[469] ... The important thing in any expert's report, in my view, is that the intellectual processes of the expert can be readily exposed. That involves identifying in a transparent way what are the primary facts assumed or understood. It also involves making the process of reasoning transparent, and where there are premises upon which the reasoning depends, identifying them. An understanding of the nature of the judicial process in addressing expert evidence would readily recognise the need for the expert's report to communicate those matters to the court.

From this line of authority, the following principles emerge:

- (a) For the legal advisors to make suggestions is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt: *Boland, Harrington-Smith, Jango, R v Doogan, Risk*.
- (b) Counsel and solicitors have a proper role to perform in advising or suggesting, not only which legal principles apply, but also that a different form of expression might appropriately or more accurately state the propositions that the expert would advance, and which particular method might be more likely to appeal to a tribunal or court, so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions: *Boland, Harrington-Smith, Jango, R v Doogan, Risk*.

## Cross on Evidence

Heydon J in his capacity as author of *Cross on Evidence* says very little about the issues central to this article:

[29080] What is the role of the legal practitioner in preparing the expert's report? Since an independent expert is expected to be non-partisan, the consultation with the parties' legal advisers which may be proffered to ensure that the report is directed to the issues before the court, must not be permitted to distort the substance of the witness's opinion so that it loses its essential character as an independent report unaffected as to form or content by the exigencies of litigation.

He cites *Whitehouse No. 1* and *Whitehouse No. 2*. He then quotes from *Harrington-Smith* at [19] quoted above at [36] without expressing approval or disapproval.

## Freckelton & Selby

Messrs Freckelton & Selby in their loose leaf service *Expert Evidence* say a little more:

[5.0.150] Lawyers settling expert reports

It is unacceptable for a lawyer to 'settle' an expert's report if that involves making any significant contribution to the content of the report (and a fortiori to tamper with the expert's opinions). However, there are advantages to lawyers reviewing expert reports as early as possible by contributing to presentational clarity and identifying issues of admissibility that may arise from how they are framed...

There are occasions when the report produced by an expert does not focus upon the issues upon which the commissioning lawyers wish to concentrate. For example, a psychiatrist may be commissioned to provide a report for use in an application that a prosecution not proceed (a nolle prosequi) on the basis of the mental state of a person who has committed a serious assault. If the report were to canvass issues relating to insanity or insane automatism, it might run contrary to what the accused person's solicitors and barristers believe to be in the best interests of their client. There is nothing wrong with their requesting that the report be rewritten to deal exclusively with the capacity of the person to have formed the requisite intent to commit the act, thus removing from potential consideration issues which might lead the prosecution to raise the question of insanity, thereby creating the possibility of the accused person being consigned to detention at the Governor's pleasure or under the supervision of the sentencing Court.

They quote *Whitehouse No. 1* and *Whitehouse No. 2* before concluding that 'another, more modern formulation of the issue is that of Lindgren J in Harrington-Smith.'

## Academic literature

We have identified four articles and one book that, to varying degrees, address the central issues:

- (a) Stowe, *Preparing Expert Witnesses*, *Bar News*, Summer 2006/2007, page 44, NSW Bar Association.
- (b) Hall SC, 'Expert Reports – The Role of Lawyers' (2006) 33(4) *Brief* 19, page 19, WA Bar Association.
- (c) Moujalli, *Expert Opinion Evidence in Civil Litigation*, August 2011, unpublished seminar paper.
- (d) Ipp J (as he then was), *Lawyers' Duties to the Court*

(1998) 114 LQR 63, particularly at pages 91-92 and pages 105-106.

- (e) PW Young, *Civil Litigation: A Practice Guide for Advocates*, 1986, Butterworths, Chapters 4 and 18.

While these learned authors do not entirely agree with one another, nor do they entirely agree with either the Whitehouse Line of authority or the Federal Line of authority, the matters raised by them in these articles, to the extent that they have not already been commented upon in this advice, usefully include the following observations:

- (a) The drafting of an expert report is but one small component of the entire process of lawyers interacting with expert witnesses, and the courts receiving that evidence. Consequently, in determining the acceptable limits for counsel to settle expert reports, the relevant question is not merely 'What can counsel do?' but also 'How may counsel do it?' Whilst reasonable minds may agree as to what a lawyer may do, there is ample scope for disagreement about how it may be done.<sup>3</sup>
- (b) The word 'settled' bears a variety of meanings. Apparent differences in judicial attitudes towards the settling of expert reports by counsel may evaporate after attention is paid to the precise acts, and the manner in which those acts are performed, in the course of counsel settling an expert report.<sup>4</sup>
- (c) Contrary to the practice in England and Wales, in New South Wales it has always been considered part of counsel's function to interview witnesses, and in all cases in which there is to be oral evidence in a contested action, it is imperative that counsel does so. After the witness has told his story, counsel needs to test him on it. This extends to what the witness is saying when it is contrary to some document; counsel cannot let this pass, but must put the matter to the witness.<sup>5</sup>
- (d) Counsel should give instructions to a witness about giving evidence that include the following matters:<sup>6</sup> If you don't understand the question, say so; If the question can be answered yes or no, answer it yes or no; Answer questions as briefly as possible; Never volunteer information; Don't be smart; Avoid exaggeration; Tell the truth.
- (e) It is far more likely, that counsel will win a borderline

case by the way he presents his evidence in chief, rather than by cross-examination. Accordingly, attention should be paid to the evidence in chief.<sup>7</sup>

- (f) It is not improper to refer witnesses to the pleadings, affidavits, and other sources, including, during the conduct of the hearing, the oral evidence of other witnesses, in order to ascertain what they will say about that material. Counsel with experience will not put a witness on the stand without knowing in advance what that witness will say in answer to vital questions. Such preparation is regarded as the mark of a good trial lawyer, and is to be commended because it promotes a more efficient administration of justice and saves time. However, there can be a fine line between refreshing memory or explaining what is relevant on the one hand and assisting perjury on the other. Witnesses may not be placed under pressure to provide other than a truthful account of their evidence nor may witnesses be rehearsed, practised or coached in relation to their evidence or in the way in which it should be given. It is particularly important that an expert's report is in its content the product of the expert. An expert witness should not be asked to change a report so as to favour the client or conceal prejudicial material.<sup>8</sup>

### **Professional practice rules, legislation, and the rules of court**

The (new) New South Wales Barristers' Rules dated 8 August 2011 include two rules relevant to the case of counsel settling expert reports: 68 and 69.

The *Civil Procedure Act 2005* introduced novel legislative obligations on counsel: ss 56 & 57.

The *Uniform Civil Procedure Rules 2005* contain rules about the formalities of documents: see UCPR 4.3 that descends into considerable detail, and likewise UCPR 4.7. The UCPR also contain rules about expert evidence and expert reports, most relevantly: UCPR 31.23 and 31.27.

### **Reconciling the lines of authority with each other and the other material**

In New South Wales, the Federal Line of authority should be preferred over the Whitehouse Line of authority for the following reasons:

- (a) The *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules 2005* impose obligations on parties,

solicitors and counsel that relate directly to the preparation and use of expert opinion evidence. Authorities pre-dating these obligations need to be reconsidered in light of the current legislative scheme. To the extent that authorities pre-dating the legislative scheme are now inconsistent or incompatible, then they should be disregarded as no longer stating the law.

- (b) The *Evidence Act 1995* imposes restrictions on the admissibility and use of expert opinion evidence. The High Court has repeatedly expressed the importance of expert opinion evidence being tendered in a form that allows proper application of the *Evidence Act 1995*. In doing so, the High Court has directly addressed the question of the involvement of solicitors and counsel in the preparation and use of expert opinion evidence. That has not been subsequently distinguished or disapproved by the court. Authorities pre-dating the *Evidence Act 1995* need to be reconsidered in light of the *Evidence Act 1995* and its construction. To the extent that authorities pre-dating the *Evidence Act 1995* are now inconsistent or incompatible, then they should be disregarded as no longer stating the law.

- (c) The Federal Line of authority is an internally consistent, cross-referenced and coherent body of legal reasoning, expressed after the introduction of the *Evidence Act 1995*, and at a time soon before or after the introduction of the *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules 2005*. It takes into account, to some degree, competing views expressed in the Whitehouse Line of authority. The same cannot be said for the Whitehouse Line of authority, which does not even engage with the reasoning process underlying the Federal Line of authority.

- (d) There is no relevant and binding decision of either the New South Wales Court of Appeal or the Supreme Court. *R v Doogan* is a decision of an intermediate Court of Appeal. Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is

a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89; (2007) 236 ALR 209; (2007) 81 ALJR 1107 at [135]. Authorities pre-dating *R v Doogan* need to be reconsidered in light of that decision. To the extent that authorities pre-dating *R v Doogan* are now inconsistent or incompatible, then they should be disregarded as no longer stating the law.

- (e) The New South Wales Barristers' Rules are consistent with the Federal Line of authority but inconsistent with the Whitehouse Line of authority, at least to the extent that the rules draw no distinction between expert and lay witnesses. Authorities pre-dating these obligations need to be reconsidered in light of the current rules. To the extent that authorities pre-dating the rules are now inconsistent or incompatible, then they should be disregarded as no longer stating the law.
- (f) The Federal Line of authority is more consistent with views articulated in professional and academic literature than the Whitehouse Line of authority.
- (g) Lord Denning's reasoning in *Whitehouse No.1* has been expressly disapproved, albeit in *obita dicta*.

### Conclusion

Insofar as expert *witnesses* are concerned, other than the fact that they are entitled to give evidence of an opinion instead of merely evidence of observation, there is no reason why counsel should fall under different obligations when conferring with an expert witness as when conferring with a lay witness.

Insofar as expert witness *opinions* are concerned, it is difficult to identify any meaningful difference between *preliminary* and *final* opinions. The authorities, and the code of conduct, recognise that an expert opinion *may change*. We have had experience of so-called final opinions, changing in the witness box. One might reasonably submit that, irrespective of the label assigned to it, there are simply *initial* opinions first in time, that may be followed by *more recent* opinions later. There is no reason why counsel should fall under different obligations when dealing with opinions formed earlier in time, as when formed later.

Insofar as expert witness *reports* are concerned, it is

difficult to identify any meaningful difference between *draft* and *final* versions, for the same reasons. There is no reason why counsel should fall under different obligations when settling a draft expert report as when advising upon a final report.

Accordingly, there is no reason why counsel should fall under different obligations when settling an expert report as when settling a lay affidavit. Having regard to the totality of all this material, in our opinion the following principles state the current position in New South Wales on the question of counsel's role in settling expert evidence:

- (a) Counsel may *and should* identify and direct the expert witness to the real issues.
- (b) Counsel may *and should* suggest to the expert witness that an opinion does not address the real issues when counsel holds that view.
- (c) Counsel may *and should*, when counsel holds the view, suggest to the expert witness that an opinion does not adequately:
  - (1) illuminate the reasoning leading to the opinion arrived at, or
  - (2) distinguish between the assumed facts on which an opinion is based and the opinion itself, or
  - (3) explain how the opinion proffered is one substantially based on his specialised knowledge.
- (d) Counsel may suggest to the witness that his opinion is either wrong or deficient in some way, with a view to the witness changing his opinion, provided that such suggestion stems from counsel's view after an analysis of the facts and law and is in furtherance of counsel's duty to the proper administration of justice, and not merely a desire to change an unfavourable opinion into a favourable opinion.
- (e) Counsel may alter the format of an expert report so as to make it comprehensible, legible, and so as to comply with UCPR 4.3 and 4.7.

### Endnotes

1. Stowe, 'Preparing expert witnesses: A search for ethical boundaries', *Bar News*, Summer 2006/2007 at page 44.
2. *National Justice v Prudential Insurance (The 'Ikarian Reefer')* [1993] 2 Lloyd's Reports 68
3. Stowe, *Preparing Expert Witnesses*
4. Stowe, *Preparing Expert Witnesses*
5. P W Young, *Civil Litigation*
6. P W Young, *Civil Litigation*
7. P W Young, *Civil Litigation*
8. Ipp J, *Lawyers' Duties to the Court*



## 2012 Tutors & Readers Dinner

The annual Tutors and Readers Dinner was held at the Establishment Ballroom on Friday, 27 July 2012. After dinner speakers were the Hon Justice James Stevenson and Callan O'Neill. MC for the evening was Anne Healey.



Above: Elizabeth Cheeseman SC, Callan O'Neill, the Hon Justice James Stevenson, Anne Healey

Above right, L to R: Mark Anderson, Lorna Sproston, Grant Brady

Right, L to R: Jane Seymour, Kate Eastman SC, Lee-Ann Walsh

Below, left, L to R: Craig Tanner and Sanday Dawson

Below, centre, L to R: Felicity Maher and Amy Munro

Below, right, L to R: Andrew Oag, John Catsanos, Hugh Somerville



# The contribution of Irish-Australian lawyers

On 11 September 2012 Attorney General Greg Smith SC delivered the inaugural JH Plunkett Lecture

### Introduction

There is a strong tradition of Irish contribution to the Australian legal system. This is particularly true in relation to the role played by Irish lawyers in the nineteenth century to the Australian colonies. These contributions helped develop the laws of those colonies and, in some cases, underpin the development of a legal system that could be said to be identifiably 'Australian'.

Today, I wish to consider this contribution - both in general terms, but also by examining the specific contributions of a few notable Irish lawyers. While the men I will focus on today would likely have characterised themselves as purely 'Irish', due to the fact that they were all Irish-born and educated, they all spent substantial parts of their lives in Australia. As such I feel it is justifiable to describe them not just as 'Irish', but 'Irish-Australian'.

In any survey of the development of Australian law it is impossible to miss the large number of Irish lawyers prominent in the colonies in the nineteenth century. The first question that arises, therefore, is why did so many legally-trained Irish men (and it must be admitted that they were all men) travel half way around the world to work? Alex Castles explains that the Irish domestic situation was not particularly stable, and that work for lawyers in Ireland was scarce:

Even before the great famine of the 1840s Ireland was in a perilous situation. In Dublin and other places there were large numbers of barristers and attorneys who were unable to make a reasonable living in their profession... With the additional lure of gold and the wealth it engendered, Victoria became a major centre for emigrating Irish lawyers. With others who had arrived earlier, many were amongst the most outstanding of several generations of their compatriots. They brought a store of intellectual energy, forensic abilities of a high order and reformist zeal, which could find far better opportunities for expression in the colonial milieu.<sup>1</sup>

In addition to the prospect of gaining wealth in the colonies, for some Irish lawyers making the long journey to Australia, provided the opportunity for appointment to positions that simply would not have been available to them had they remained in Ireland or England.

Former Chief Justice of the High Court Gerard Brennan has argued that the Australian colonies of the nineteenth century were governed by and under English law. He

points out that:

colonial modification of, or abrogation of, English laws that were applicable to the colonies were valid only to the extent authorised by English law.

It follows, of course, that Irish lawyers in the Australian colonies had but a limited opportunity to contribute to the development of a peculiarly Australian legal system. They were necessarily priests of an established oracle, and it was an oracle with which they were familiar.<sup>2</sup>

While it is undoubtedly true that this situation constrained the outcomes that could be achieved through the law, it is also true that the significantly different social conditions that faced the inhabitants of the colonies meant that the process of legal divergence was inevitable. Many Irish lawyers were well placed to contribute to these developments. Indeed, through the nineteenth century Irish lawyers could be found in parliaments, as judges, working as lawyers and as holders of other public offices in each of the Australian colonies. As Alex Castles describes:

In politics, legal education and the working of the law, Irish barristers and attorneys, many with Trinity degrees, were often the mainspring of important social and other developments; sometimes without parallel elsewhere in Australia or Britain.<sup>3</sup>

Chief Justice Brennan has characterised the contribution of the Irish to the Australian legal system as both 'significant and indefinable'.<sup>4</sup> He notes that the significance of this contribution 'can be charted in part by reference to some of the great lawyers who came from Ireland to this country, and who were distinguished practitioners, judges and legislators in the infant colonies'.<sup>5</sup> In this respect, men such as Roger Therry, John Hubert Plunkett and Sir Robert Molesworth were highly significant in the early development of a distinct Australian legal system.

It is worth noting Patrick O'Farrell's observations about the effect of the Irish contribution to Australia:

The direct Irish contribution to Australian liberties is very great, in terms of effective protest against religious and political monopolies, refusal to accept discriminatory laws, and demands for social equality. Perhaps even more vital is the impact of their energetic activities and independent opinions in liberalizing and humanizing the climate of Australian life, on freeing the atmosphere of authoritarianism, pretence and cultural tyranny. The Irish had no philosophic notion of an open pluralistic society. It

might be argued their pretences were ideally the opposite. Yet an open society in Australia was the effect of their determination to prise apart a society which threatened to become closed.<sup>6</sup>

Tony Earls states that this is a 'bold and controversial' claim. Nevertheless, it can help to put the contributions of Plunkett and other Irish-Australian lawyers to the nascent Australian legal system into a broader context. Earls argues that although the Irish did not come from an 'open pluralistic society' they were 'not without philosophical notions favourable to such a society'. He suggests that Plunkett provides an illustrative case study of someone whose formative experiences in Ireland, resulted in strongly egalitarian beliefs.

### **Sir John Hubert Plunkett**

Plunkett was, like many other Irish lawyers who came to Australia, educated at Trinity College Dublin. He practiced as a barrister in Ireland for several years. This work brought Plunkett distinction and the respect of his fellows at the bar.

In Plunkett's case in particular, the campaign for Catholic emancipation in Ireland spearheaded by Daniel O'Connell and his Catholic Association, had a significant effect on the young Plunkett.

O'Connell founded the Catholic Association to promote the Catholic cause in Ireland. It is likely that the Association's methods and philosophy had a great effect on Irish Catholic emigrants. O'Connell was committed to several principles relating to the pursuit of political change:

- that violence in pursuit of political objectives was counterproductive;
- that any political objective could eventually be achieved by marshalling public opinion;
- civil liberties were universal, irrespective of class, colour or creed.<sup>2</sup>

The association's activities in Ireland resulted in the Catholic emancipation and the elimination of barriers to participation in public life faced by Catholics. Tony Earls explains the impact of this:

The successes of the Catholic Association in Ireland in the 1820s can be seen as a factor which encouraged the Irish to actively participate in the developing legal and political institutions through the 1830s, 1840s and

1850s in New South Wales. The context of that political engagement is apparent when one compares the New South Wales and Irish newspapers of the period. The similarity in sectarian rhetoric points strongly to a conclusion that the gradual extension of the franchise and civil rights in Australia involved not only a contest between emancipists and exclusives, but religious and ethnic debates that had been well rehearsed in the homelands.<sup>3</sup>

Tony Earls, in his extensive analysis of Plunkett's life and work, *Plunkett's Legacy*, calls the Catholic Emancipation the 'single most significant event in Plunkett's life' for two reasons. First, his participation in the Association's political campaign made his subsequent career possible. Secondly, the campaign leading up to Catholic emancipation 'inculcated values and methods that he carried with him throughout his life.' In particular, Earls notes, expansion of the fundamental principle of the Catholic Association 'civil rights through just law', would be the 'touchstone' of Plunkett's career. I will return to some of the ways in which he sought to put this into effect in his work in Australia.

As a result of the success of supporters of O'Connell in the Irish general election of 1830, Daniel O'Connell won substantial bargaining power with the newly installed government. He was responsible for lobbying to have Plunkett appointed as solicitor general for the Colony of NSW in 1831. As Earls explains, the opportunity the position offered was one that Plunkett was unlikely to come by if he remained in Ireland. Further, the salary – £800 a year – would have been a consideration, and the position provided a young man of his talents significant prospects for advancement. Finally, 'as someone who had dedicated himself to the cause of Catholic emancipation, he cannot have been unaware of the fact that, by virtue of the appointment, he would become the first Catholic appointed to high office in Australia.'<sup>4</sup>

Plunkett accepted the position, and travelled with his new bride to Sydney on the *Southworth* in 1832.

On his arrival, Plunkett took up his duties as solicitor general for the colony. However, the colony's attorney general at that time, John Kinchela, was partially deaf. As a result Plunkett was forced to take over the attorney's court duties. This meant that he was effectively simultaneously the colony's de facto attorney general and its solicitor general. In this capacity, between



August and November 1833, Plunkett appeared for the attorney general in the criminal session in 91 cases. He obtained convictions in 64 of those cases.<sup>5</sup>

T L Sutor, writing in the *Australian Dictionary of Biography* has said that some people believed that he was given a double load (that is, the work of both solicitor general and attorney general) in the hope that he would resign. However, he did not and when Kinchela retired in 1836, Plunkett was officially appointed as attorney general.

In considering, and acknowledging Plunkett's contribution to the law in New South Wales, I wish to discuss several of his more notable achievements. I will discuss his prosecution of the perpetrators of the Myall Creek massacre in 1838 and his contribution to Australian legal scholarship and practice.

In his recent work, *Plunkett's Legacy*, Tony Earls, considers the prosecution by Plunkett of those alleged to have carried out what has become known as the Myall Creek Massacre. He holds that it 'was, and remains, unique in Australian annals'.<sup>6</sup> Certainly we are unlikely to see anything like it again, even if just because we would hope that such an atrocity would never again be committed in Australia.

The prosecution followed the killing of a group of about 30 Aboriginal people at a site known as Myall Creek by a group of 12 stockmen. The group of people killed included around 10 to 12 children and a similar number of women. The bodies were burnt by the killers. The fact that the incident was reported was extremely uncommon, and the overseer who brought the incident to the attention of authorities lost his job and never worked as an overseer again.<sup>12</sup> Additionally, the new governor of the colony, George Gipps, had been issued instructions from the Colonial Office to ensure the protection of Aboriginal people in the colony. As a result he was keen that all Aboriginal deaths linked with conflict with white people would be investigated.

Investigations following the Myall Creek killings identified 12 alleged perpetrators, 11 of whom were caught and returned to Sydney for prosecution. Plunkett prepared the case against the accused men carefully. However, he faced a problem. In particular, a lack of evidence about the identity of the victims, as well as a lack of any eye witnesses who could give evidence meant that Plunkett had no proof of what any

of the accused had done, nor to whom. Nevertheless, they were all charged with aiding and abetting the murders. Plunkett was very careful to only prosecute the deaths of two of 28 possible victims.

In the end, the evidence was insufficient to establish the prosecution's case and the jury acquitted all of the accused.

However, as Earls explains: 'Plunkett saw this case as a rare opportunity to set an important example'. By only prosecuting two of the deaths, Plunkett had left open the possibility of prosecuting some of the other deaths separately, which he now proceeded to do. In order to improve the chances of a successful prosecution, only seven of the original 11 defendants were charged.

Unsurprisingly, the seven defendants entered a plea of *autrefois acquit*. A jury determined that the trial could go ahead. Although, much of the same evidence was presented to the new jury, Plunkett also managed to expose the 'tactics of the powerful landowners who sanctioned the extermination of the native peoples; and secured a guilty verdict'.<sup>7</sup>

Public opinion, heavily influenced by financially powerful and influential interests in the colony, had been strongly against Plunkett's prosecution of the case. As Earls explains, 'squatting was a profitable business, and those who benefited from squatting did not want to see their ways of solving the problem with Aborigines hindered by the law'.<sup>8</sup> The controversy surrounding the case followed Plunkett. Earls notes that:

even to the end of his career, Plunkett suffered the open enmity of those who disagreed with his prosecution of the cases, to which his standard reply was that he would have been ashamed had he acted otherwise.<sup>9</sup>

A key reason for Plunkett's attitude was that he held to the principle of 'one law for all'. That is, he believed that all people should be subject to equal application of the law. This principle underpinned Plunkett's view that emancipated convicts should be given the right to sit on juries and that convicts should be assigned as labour to private individuals.<sup>10</sup> It also drove Plunkett's campaign to change the law in NSW to allow Indigenous people to give evidence in court. A central reason that Plunkett pursued the Myall Creek prosecutions was that he had access to eye witness accounts of the events. However, as the witness was Aboriginal, the evidence was inadmissible. Earls notes that Plunkett campaigned

unsuccessfully for 12 years to change the law, arguing that he was unable to prosecute the mass killings of Aboriginal people which continued to occur, without their evidence. In Earls' view 'that he failed is one of the saddest stains on the history of New South Wales'.<sup>11</sup>

In 1835 Plunkett authored Australia's first published legal text, *An Australian Magistrate*. The book was intended to instruct the Australian magistracy. It was an A-Z compilation (or as Tony Earls points out 'Abduction' to 'Wrecks'), of all the issues a magistrate might come across in the course of his work.<sup>12</sup> Plunkett's book used the equivalent book for English magistrates *Justice of the Peace and Parish Officer* as a model, compressing, updating and amending the six volumes of that work, to a single volume which addressed local circumstances. For example, Plunkett had to add sections on 'Aboriginal natives', 'Bushrangers' and 'Tickets of Leave'.<sup>13</sup>

What is perhaps most impressive about this book is the conditions under which it was prepared. Undertaken between 1833 and 1835, Plunkett was also undertaking two jobs at the same time - the roles of attorney and solicitor general. The preface to the book explains how he approached the task:

I commenced the following pages in the midst of public business, which left me little time even for ordinary recreation; but having once embarked on the work, so great was my anxiety to complete it, (without interfering with my official duties) that the greater portion of it was compiled and arranged after the hour of twelve o'clock at night.<sup>14</sup>

This brief summary overlooks some of the other significant contributions Plunkett made to the developing colony of NSW such as his role in the introduction of the Church Act in 1836, which paved the way for a separation between church and state; his support for non-denominational public schooling; and his contribution to the drafting of the New South Wales Constitution. Nevertheless, I do not want to neglect other significant Irish lawyers and their contributions.

### **Some other significant Irish lawyers: Sir Roger Therry**

Therry was born in Cork, and was educated at Trinity College, Dublin. He was a member of both the English and Irish bars. In 1829 he was appointed commissioner of the Court of Requests in Sydney. This appointment is significant as it was enabled by the Catholic Relief Act of 1829 which removed barriers to Catholics holding office, and Therry was one of the first Irish Catholic lawyers to benefit from the Catholic emancipation in Australia.

Therry acted as attorney general of New South Wales from March 1841 to August 1843, while Plunkett was absent in England, and sat in the Legislative Council because of this. He was appointed resident judge of Port Philip in 1844 and held this role until 1846 when he took up a position in the Supreme Court of NSW. Therry was primary judge in equity in the Supreme Court and C H Curry points out that 'no decree of his in that jurisdiction was reversed'.<sup>15</sup>

Therry's appointment as commissioner allowed him to engage in private practice so prior to his elevation to the bench, Therry practised as a barrister. Therry appeared as Plunkett's junior in the Myall Creek prosecution. Governor Gipps praised Therry and Plunkett as 'the two most distinguished barristers of New South Wales'.<sup>16</sup>

### **Sir Robert Molesworth**

Another Trinity College Dublin graduate, Sir Robert Molesworth served as a judge of the Victorian Supreme Court for 30 years from 1856 to 1886. Reginald Scholl notes that 'he was noted for his industry, courtesy, learning and expedition; very few of his decisions were successfully challenged'.<sup>17</sup>

His most significant contribution, however, was as chairman of the Court of Mines. He presided over this jurisdiction at a time when mining activity in Victoria was widespread. Molesworth's obituary in the *Argus* recognises the impact of his administration of the mining jurisdiction in Victoria:

[H]e was for 20 or 23 years chief judge of the Court of Mines, and he practically settled the mining law of the country, the number of mining cases which now come before the Supreme Court being very few indeed. Indeed, he may be said to have created the mining law as now administered in this colony.<sup>18</sup>



Reginald Sholl notes that the body of precedent developed by Molesworth 'gave much satisfaction to the legal profession and the mining industry and became a guide in other Australian colonies and overseas'.<sup>19</sup>

### Sir Robert Torrens

Robert Torrens was not a lawyer. However, he was Irish-born and, like many of his contemporaries, educated at Trinity College Dublin. His reforms to the South Australian property law system, were adopted in the other Australian colonies, as well as elsewhere (notably in New Zealand). The reforms can be seen to have established a uniquely 'Australian' system of property law, created in response to the state of land law in South Australia in the mid-1850s. As Douglas Whalen explains, land titles in the colony at that time were in an unsatisfactory state. As Torrens explained it 'land was no longer the 'luxury of the few', therefore 'thorough land reform...[was] essentially the people's question'.<sup>20</sup>

Torrens arrived in South Australia in 1840. He took up a position as collector of customs. His performance in this position was not without its controversies. For example, he was sued by the crew members of the ship *Hanseat* for false imprisonment.<sup>21</sup> He assaulted journalist George Stevens in the street after Stevenson had satirised the outcome of complaints to the English authorities against Torrens by Torrens' own chief clerk.<sup>22</sup> Nevertheless, he was a nominated member of the South Australian Legislative Council from 1851 to 1857 and in 1855 became a member of the Executive Council.

He took up the issue of land law reform in 1856 and his bill passed through both houses and was assented to on 27 January 1858.<sup>23</sup> The system provided for the transfer of land through the register of title on a public register, rather than by the execution of deeds.

Although as Douglas Whalen notes, Torrens 'claimed authorship' of the system, 'it is clear that many people and influences helped considerably'. For example, the system drew on registration schemes operating elsewhere, such as in Germany. Nevertheless, Torrens' campaigning on the issue of land titles reform led to both his electoral success and the ultimate passing of his bill, bringing the 'Torrens title' system into existence.

### George Higinbotham

I wish to finish my brief survey of Irish lawyers and their contributions to Australian law by discussing George Higinbotham. Higinbotham was nominated by H V (Doc) Evatt as one of Australia's great judges, alongside notable American judges such as Justice Holmes and Justice Cardozo.<sup>24</sup>

Higinbotham was born in Dublin and educated at Trinity College. He was called to the bar in 1853, having been enrolled as a student at Lincoln's Inn. In the same year he travelled to Melbourne where he worked as a journalist for the *Melbourne Herald*, while also practising successfully at the bar. In 1861 he was elected to the Victorian Legislative Assembly where he became attorney-general in 1863. As attorney-general, Higinbotham promoted secularism in the government of the colony. He was also strongly committed to responsible government and was opposed to imperial interference in the government of the colony. As Gwyneth Dow explains, he 'seized on any challenge to responsible government and any ambiguities in the Constitution Act to establish precedents in the development of colonial democracy', although she points out that 'whether or not he was always legally sound is not settled by constitutional historians'.<sup>25</sup>

Higinbotham was invited to become a Supreme Court judge in 1880, and in 1886 on the retirement of Sir William Stawell, he was promoted to the position of chief justice.

As Chief Justice Higinbotham continued to promote his views about the importance of responsible government. These views – put particularly in the judgment in *Toy v Musgrove* in 1888 – were that the Victorian Constitution conferred on the Victorian colonial government 'very large and almost plenary powers of self government'.<sup>26</sup>

Commenting on the effect of Higinbotham and other who held similar views, Alex Castles argues that:

Irish-born radicals like Higinbotham were not the only ones who espoused such causes [such as responsible government, and freedom from interference of the Colonial Office in local affairs]. But some like him were prominent among those who supported the evolution of far more effective autonomy in the Australian colonies which successive British governments did not wish to concede. Those with legal training were often especially important in these processes, giving technical strength to

constitutional debate which could not readily be ignored, with influences on the nature of government in Australia flowing down to the present day.<sup>27</sup>

## Conclusion

At this point, I would like to return to Chief Justice Brennan's identification of the contribution of Irish lawyers to Australian law as 'significant and indefinable'. Indeed, it is clear that there has been significant contribution, and while it may be indefinable, it is clear that some general themes do appear to run through these contributions. I have developed some of these to a greater extent than others today. In particular, I might identify the idea espoused by men such as Plunkett and Higinbotham that law should provide equal protection, and that it should seek to protect the underprivileged or marginalised.

Additionally, we can see the idea the promotion of a secular society, with a clear separation between church and state. Such views were held by both Catholics and Protestants. Chief Justice Brennan identifies that Irish lawyers in Australia, both Catholic and Protestant, were 'genuinely tolerant and open men'.<sup>28</sup> Tied up with these efforts was the promotion of concepts of democracy and responsible government.

Finally, where particular individuals sought to reform specific areas of the law, or to bring coherence to the jurisprudence of a particular body of law, in the way that Torrens or Molesworth did, these efforts helped bring the laws of the Australian colonies closer together.

1. A Castles, 'Now and Then: Irish connections with Australian law' (1992) 66 *Australian Law Journal* 532, 536.
2. G Brennan, 'The Irish and law in Australia' (1986) *The Irish Jurist* 95, 95.
3. A Castles, 'Now and Then: Irish connections with Australian law' (1992) 66 *Australian Law Journal* 532, 536.
4. G Brennan, 'The Irish and law in Australia' (1986) *The Irish Jurist* 95, 95.
5. Ibid.
6. P O'Farrell, *The Irish in Australia* (1987) 11 quoted in T Earls, 'The opportunity of being useful': Daniel O'Connell's influence on John Hubert Plunkett' in L M Geary and A J McCarthy (eds) *Ireland, Australia and New Zealand: History, Politics and Culture* (2008) 170, 170.
7. T Earls, 'The opportunity of being useful': Daniel O'Connell's influence on John Hubert Plunkett' in L M Geary and A J McCarthy (eds) *Ireland, Australia and New Zealand: History, Politics and Culture* (2008) 170, 171.
8. T Earls, 'The opportunity of being useful': Daniel O'Connell's influence on John Hubert Plunkett' in L M Geary and A J McCarthy (eds) *Ireland, Australia and New Zealand: History, Politics and Culture* (2008) 170, 170.
9. Ibid 173.
10. T L Suttor, 'Plunkett, John Hubert (1802-1869)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/plunkett-john-hubert-2556/text3483>.
11. T Earls, *Plunkett's Legacy: An Irishman's Contribution to the Rule of Law in New South Wales* (2009) 91.
12. Ibid.
13. T Earls, 'The opportunity of being useful': Daniel O'Connell's influence on John Hubert Plunkett' in L M Geary and A J McCarthy (eds) *Ireland, Australia and New Zealand: History, Politics and Culture* (2008) 170, 175.
14. T Earls, *Plunkett's Legacy: An Irishman's Contribution to the Rule of Law in New South Wales* (2009) 95.
15. T Earls, 'The opportunity of being useful': Daniel O'Connell's influence on John Hubert Plunkett' in L M Geary and A J McCarthy (eds) *Ireland, Australia and New Zealand: History, Politics and Culture* (2008) 170, 175.
16. Ibid., 170, 174.
17. Ibid., 175.
18. T Earls, *Plunkett's Legacy: An Irishman's Contribution to the Rule of Law in New South Wales* (2009) 64.
19. Ibid. 65.
20. Quoted in ibid. 65.
21. Currey, C. H., 'Therry, Sir Roger (1800-1874)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/therry-sir-roger-2723/text3837>.
22. Quoted in G Brennan, 'The Irish and law in Australia' (1986) *The Irish Jurist* 95, 97.
23. R Sholl, 'Molesworth, Sir Robert (1806-1890)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/molesworth-sir-robert-4217/text6795>.
24. 'Death of Sir Robert Molesworth', *The Argus*, Melbourne, 20 October 1890, 5.
25. R Sholl, 'Molesworth, Sir Robert (1806-1890)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/molesworth-sir-robert-4217/text6795>.
26. Torrens quoted in D Whalan, 'Torrens, Sir Robert Richard (1814-1884)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/torrens-sir-robert-richard-4739/text7869>.
27. D Whalan, 'Torrens, Sir Robert Richard (1814-1884)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/torrens-sir-robert-richard-4739/text7869>.
28. Ibid.
29. Ibid.
30. H V Evatt, 'Mr Justice Cardozo' (1938-39) 52 *Harvard Law Review* 357, 359.
31. G Dow, 'Higinbotham, George (1826-1892)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/higinbotham-george-3766/text5939>.
32. *Tor v Musgrove*, quoted in G Brennan, 'The Irish and law in Australia' (1986) *The Irish Jurist* 95, 101.
33. A Castles, 'Now and Then: Irish connections with Australian law' (1992) 66 *Australian Law Journal* 532, 536.
34. G Brennan, 'The Irish and law in Australia' (1986) *The Irish Jurist* 95, 105.

### Old Phillip Street

C J Bannon QC adds to John Bryson's interesting article in the Autumn 2012 issue of Bar News.

Coming up from Circular Quay in the morning before the lower part of Phillip St was diverted into Elizabeth Street, one could see the sun shining on the spire of St James. Bryson mentions the violin maker, Smith, whose shop had a stone step jutting into the footpath. His instruments were highly regarded by the musical profession (see article SMH 5/5/12 p.9). Passing the beautiful Chief Secretary's building which later housed the office of the governor and also the Industrial Court one came to Chalfont Chambers and Diggers Inn, which housed Reg Marr, Des Healy and others, Chalfont was the home of distinguished barristers. The fifth floor housed Sir Garfield Barwick, Cyril Walsh, later Sir Cyril, a man of penetrating knowledge and wisdom, Hugh Maguire, Colin Bowie, Eric Clegg, known as the tired lion, Des Ward, John McKeon, H. Reimer ('Chippy') and William Sheehan. It was alleged that when Sheehan became attorney general he offered judicial appointments to all members of his old floor except 'Chippy', too old, and Des Ward, too young. Des later had an important career on the District Court and became chairman of the Parole Board. There was also the huge bulk of Ron Austin who squeezed himself into the clerk's box. On the sixth floor was Alan Taylor, later Sir Alan of the mellifluous voice. He later flourished as a High Court judge as well as being an excellent tennis player at the net.

The old Selborne Chambers was the home of Jack Shand QC on the ground floor, together with Tony Larkins QC, and John Evans, a sound equity counsel who died prematurely, Morton Brewster, my old colleague Jim Linton, and Clifford Collins who was the editor of the Law Book Company's *Land Laws Service*, were also on the floor. Cliff's chambers were stuffed full of piles of file and papers. When I wanted a copy of an unreported decision of Roper J. I went to Cliff. To my astonishment he went straight to one such pile and immediately produced it from the middle.

On the first floor of Selbourne, resided Jack Cassidy QC Charles (Gerry) McLelland QC and Martin Hardie QC.

Passing Dr Fiaschi's place with the statue of the pig, (if my memory serves me correctly) one came to Denman Chambers where I found my lot. In the basement were Chester Porter, Cal Callaway and John Lincoln enjoying a damp environment. Chester Porter became a leader of the criminal law bar. His wise words on the criminal law are expressed in his book *Walking on Water*. Ted

Jones (the angry penguin) and Jack Hiatt were also in the building. On the ground floor were Clive Teece QC, the doyen of the bar who gazed from a large window monitoring the barristers passing by. In his lectures on ethics, Clive impressed us with the duty to refer to each other by our surnames only. As Clive was old enough to be my grandfather, I felt unable to call him Teece. Instead I smiled at him and called him nothing.

He played a leading role in the Red Book Case concerning Anglican ritual and liturgy. Those chambers were later occupied by Bruce Macfarlan QC. Conferring with him on a Sunday afternoon as was his wont, led to an invitation later to a drink at the gracious old Union Club, sadly demolished. Bruce had a key to the club's wicket gate.

Also fronting Phillip St were the chambers of Vernon Treatt, but as he was away in politics, the chambers were occupied by Frank Treatt.

The next room fronting Phillip St was Canaway's. Canaway was the author of a book on crown lands. He was well on into his 90s and lived at the Australian Club, but visited chambers every day to make tea and to occupy the only toilet on the floor, just before barristers left for court. Behind these gentlemen on the ground floor were Victor Windeyer QC later on the High Court, a man of great learning who could always be seen assiduously noting up his law reports. If my memory serves me right, Ted St John, Hawdon Wilson, Trevor Martin and Lenny Badham QC were also on the ground floor. Len Badham sported a white homburg hat and could be seen any day walking up Martin Place in the morning and conducting a spirited conversation with himself.

Ted St John was the son of an Anglican clergyman and brother-in-law to the head of The Kings School. When the headmaster was dismissed, Ted acted for him in proceedings for wrongful dismissal and I think, successfully. Ted later entered the federal parliament as the Liberal member for Warringah. He went close to overturning a Coalition government with his speech on the *Voyager* inquiry which had been conducted by Mr Justice Spicer. Ted forced a further inquiry into the sinking of the *Voyager* and the eventual vindication of the commander of the aircraft carrier HMAS *Melbourne*. Ted was a bright barrister who fought his cases like a knight on a white charger. Cromwell would have

welcomed him as a Roundhead. Later Ted joined the Supreme Court but resigned and returned to the bar.

On the first floor, Dr HV Evatt had his chambers, but as he was away in politics, his chambers were occupied by his brother Clive. Next to Clive was Gordon Wallace QC whose law reports resembled the American Case Book by Day. One note would say Aye and another Nay. Opposite Gordon was Alan Bridge. Eric Miller, Ted Lusher, Harold Mason, Ken Aspry, Tony Mason and Wally South were also at various times members of the first floor. As we all know, Tony Mason - now Sir Anthony, became Chief Justice. Apart from his judicial eminence, Mason possesses a sharp wit characterised in the story of another member of the bar being blown up over a gas porthole, the allegedly potable Mortein Spray, and other accounts which may keep for another day. Wally South possessed a spittoon in his chambers and was understood to be engaged in selling cemetery plots. Ken Aspry was an imposing and rambunctious performer in the equity bar, and later became a model judge on the Court of Appeal.

Eric Miller QC was a powerfully built man of considerable intellect and an exponent of long-winded cases before juries. He overcame all the antipathetical utterances of the trial judges, coming in victorious in spite of the summings up. Eric was a leading Catholic. A photograph of himself with Cardinal Gilroy sat on his mantelpiece. When political issues arose Clive Evatt would enter Miller's chambers and point to the photo asking what were the views of the cardinal. When the chief justiceship fell vacant, Eric was a strong contender but the appointment went to Les Herron. On the floor at one time was Harold Mason QC, known as the bishop because of his halo of white hair and rubicund appearance. Harold commanded the Equity Court along with his opponent, Claude Weston QC. Presiding over the first floor was the clerk Jack Craig - a peppery redhead. Jack had the ability to make some female articulated clerks cry.

On the second floor was found Alroy Maitland Cohen, a member of Royal Sydney Golf Club, and editor of the *Local Government Reports*. It was a long time since Alroy had appeared in a court. He was a small man and a devout orthodox Jew. It was hard to believe that in the First World War he had been a messenger with the Australian Forces in France ducking from one bomb crater to another. By his will he bequeathed his set

of local government reports to the Jewish University in Haifa. Alroy loved art. On one occasion he took me to the Art Gallery to gaze upon a plaster replica of the Gates of the Baptistery of Florence Cathedral. These featured bas reliefs of Old Testament Prophets.

Bob Ellicott shared chambers with Alroy. Opposite Alroy was Trevor Ziems. Trevor successfully lent his name to a High Court decision on the duties of prosecutors. Ziems suffered matrimonial difficulties. When a current wife rang the floor clerk, Dorothy Slater, and said 'is the bastard in?' Dot consulted the floor chairman who said 'answer yes or no'.

Alan Lloyd who had been adjutant general was on the floor and shared his chambers with Russell Le Gay Brereton who later went on the Supreme Court. Opposite him was Andy Watt. His chambers were later occupied by Bob Smith, author of a standard work on Stamp and other duties and then by my brother-in-law Bill Perignon who went on the District Court and then on the Industrial Court. Next to him was Laurie Regan who went to Kenya as a British judge imposing heavy sentences on members of the Mau Mau uprising. They were all released after six months. The adjoining room was occupied by Nigel Bowen. There is no need for me to recount his illustrious career. Nigel went into politics for a while but fortunately for the law, was defeated by one vote for the leadership of the Liberal Party. Returning to chambers after the vote, he looked rather wan, but I was able to lift his spirits with a large tumbler of Johnny Walker Black. Nigel was one of the most able counsel of his day. Born in Canada, he attended The Kings School and was proficient in Latin. He had the advantage of a warm and constructive personality.

The oblong room next to Nigel's was the home of Fred Myers. He was most helpful to junior barristers on the floor but was somewhat like dynamite on the bench. Michael Helsham could handle him with an attitude of great humility. Frank Hutley could not. Amongst others I suffered under Freddie who was referred to by some counsel as 'funnelweb'. It has to be remembered that as a colonel in the army, he crossed the Kokoda Trail dragging his club foot. When Myers went on the bench the next occupiers of the room were John Kerr and Hal Wootten. Wootten went on the bench but retired in 1983 to become dean of the Faculty of Law at the University of NSW. My friend Ken Pawley shared chambers on the Floor with one Gough Whitlam, but

Gough was lured away by the phantom light on the hill.

Kerr and Wootten left Denman for the tenth Floor of the new Wentworth when it was completed, and I came to occupy their room. Together with Gough Whitlam they joined Paul Toose, Bill Cantor, Herman Jenkins, Alan Bagot, Marcel Pile, and Bert Wright to form the new Tenth Floor of Wentworth. I failed to mention that Ken Handley, Paul Nash, and Michael Grove were also on the Tenth floor of Wentworth.

John Kerr became chief Justice in 1972, and was later appointed as governor-general at the instigation of his friend Gough Whitlam. In 1975, he dismissed Gough's government. The Senate adjourned the question of supply and the then treasurer announced that supply would run out on 11th November 1975, the date of the Dismissal. The Dismissal broke up many friendships in the Labor Party. When the new Selborne was completed, Nigel Bowen as head of the floor, moved with Russell Fox, Brian Beaumont, Brian Rayment, Tom Jucovic, Ken Pawley, Bob Lord, Roger Gyles, Michael Robinson, Cal Callaway, Kep Enderby, Bob Ellicott, Stephen Austin and myself to form the new Selborne, Tenth floor.

Later we were joined by George Rummery, Trevor Morling, Peter Hall, and Larry King. Fox and Beaumont joined Nigel on the new Federal Court. Bob Lord became a crown prosecutor and was replaced by David Officer who sadly died as a young man. Morling also went on the Federal Court and was replaced by Brian Tamberlin who joined them on that court as did Roger Gyles. Carl Shannon later came on the floor and later joined the District Court. Ken Pawley was the last appointment of the Whitlam government as a senior judge of the Family Court. Ken was an able barrister who applied the maxim that a good barrister knows

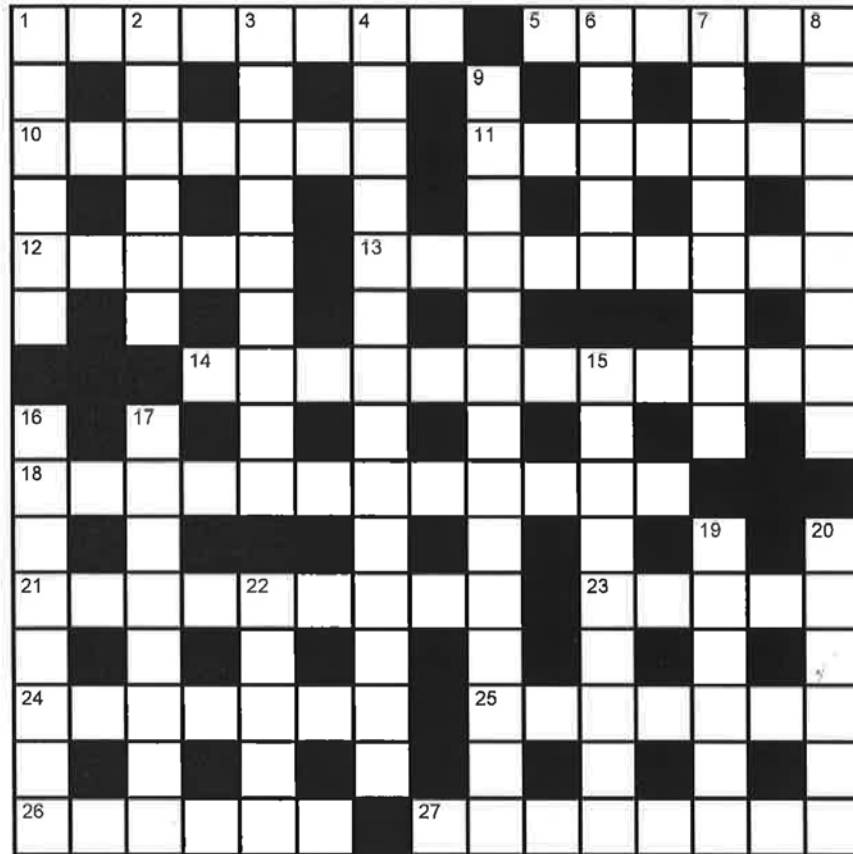
when to sit down. His first wife was Judith Halse Rogers who died in a road accident. He then married Yvonne Swift who was a senior nurse. Ken was an able thespian and radio personality.

Coming to the third floor, there were Phil Addison, Bernie Seletto, John Nolan - a crown prosecutor - J Cordell, Frank McClemens, Russell Fox who shared with David Godfrey Smith, John Todd, John Leaver, and Ray Hamilton. John Leaver a former school teacher enjoyed a practice as junior to Gordon Wallace in liquor cases. Apart from that he had an extensive library of paperbacks on history and other topics. On the third floor I shared with Ray Hamilton, who was in politics. Having shared on the second and third floors I later acquired shares in Denman with the help of an uncle. I had the good fortune to acquire Hamilton's chambers and to share those chambers with my good friend Brian Cohen. Coming to the bar, I read with Dr Frank Louat, an expert in administrative law, and a wine buff. The *Telegraph* alleged that he was a constitutional expert. Louat was in the old University Chambers together with Frank Kitto who later graced the High Court. Merlin Loxton and Sam Redshaw were also there. They enjoyed the services of Tom Ozard, a gentleman and a person of wisdom for whom I had great respect. Oxford Chambers at the corner housed John Holmes and Rae Else Mitchell. Much more could be written about the old Phillip Street and its Denizens, but to paraphrase St John, if all were written the world would be pressed to hold all the stories and future generations may lose interest in those admitted to practice in the days of Sir Frederick Jordan and his successor Sir Kenneth Street.



# Crossword

By Rapunzel



## Across

- 1** I am SG. I was SG. I worked for an ex-SG who sat where I now sit. I am? (7,1)
- 5** Tory leader? A bible book by Old Testament Tory leader? (6)
- 10** US horse? US car? US to Bond boss taste. (7)
- 11** One Labor leader cordial; two labour leaders around shortly. (7)
- 12** AG herald around it. (5)
- 13** She sells legal 'sirs' straight. (9)
- 14** Upend! Berate badly... Spineless! (12)
- 18** Reformed rafters snarl conveyances. (12)
- 21** 'Perverse! Pray, poach these dubious books!' (9)
- 23** Royal Navy takes stock of AG. (5)
- 24** Three of the French amplifiers. (7)
- 25** No rider mixed up in WA river? Doubt right makeup. (2,5)
- 26** Gutless shout 'ouch'? (6)
- 27** Messenger mix-up? Say 'miser'. (8)

## Down

- 1** Bravest senior counsel a saint? (6)
- 2** ICAC head heard behind old Qld premier... cackle? (6)
- 3** 'Hates!' Hidden hit slogan. (9)
- 4** Greediest ports give rise to safe mail. (10,4)
- 6** Dances graduates around law learner. (5)
- 7** Wind instruments in a piccolo car in a sedan? (8)
- 8** Even smaller row around doctors' little Iota. (8)
- 9** Australian streak in Italians' 'mirage wobbly'? (14)
- 15** Room in 6 down to lob morals dance. (9)
- 16** Shy latte surprisingly furtive. (8)
- 17** Another (law) in 'mixed mail' medieval system. (8)
- 19** Place for vexed rationalising found within vexed rationalising? (6)
- 20** Greeny convert to save this? (6)
- 22** Video killed its star (so the Buggles say) (5)

**Solution on page 81**

## The Hon Justice Stephen Gageler

Justice Stephen Gageler grew up on a property in Sandy Hollow in the Hunter Valley, and attended Muswellbrook High School.

In 1980, Gageler J graduated from ANU with a Bachelor of Economics degree. He has used economics analysis in competition, anti-dumping and commercial cases, including competition and market impact analysis in *Betfair v Western Australia*.

In 1982, he graduated from ANU with a Bachelor of Law, and worked in the Commonwealth Attorney General's Department. In 1983, he became associate to Justice Anthony Mason in the High Court at the time of the *Franklin Dams* case.

In 1987, his Honour graduated with a Master of Laws degree from Harvard University, partly through a dissertation on the foundations of Australian federalism. He also became principal legal officer and assistant to the Commonwealth solicitor-general, Gavan Griffith QC.

In 1990, he was called to the NSW Bar and read on Ground Floor Wentworth Chambers and in 1992, moved to the Eleventh Floor. In 2000, he took silk. He had a thriving constitutional and commercial law practice, as well as some cases in litigation funding, native title and anti-dumping. He was also involved in public interest litigation highlighting the killing and interference with whales in the Australian Antarctic Territory in contraventions of Commonwealth environmental protection legislation.



Photo: Andrew Meares / Fairfax Syndication

In 2008 his Honour was appointed solicitor-general. His cases included the defence of the Commonwealth's fiscal stimulus package, the defence of the government's Malaysian people-swap deal, as well as the Commonwealth's success in the plain cigarette packaging.

Justice Gageler has a deep knowledge and understanding of constitutional law and Australian federalism. In 2009, he gave the Maurice Byers Lecture, a vision of the structure and function of the constitution. He said that the constitution exists within the collecting imaginations of those who practice and administer it, they are the custodians for the present of a constitutional tradition.

His Honour has vast experience appearing as an advocate in the High Court. At his swearing in he

remarked that he had presented oral argument in the court on close to 100 occasions, adding:

I have appeared before four Chief Justices and before 17 of the High Court's previous total of 48 Justices. Never were those appearances easy. More than occasionally, they were gruelling. Once, now some years ago, after a particularly testing day on my feet and in anticipation of backing up for another case the next day, I was quietly taken aside by a court attendant for a sympathetic, but frank, assessment of my performance. 'If you were a boxer', he said 'you wouldn't come back'

He may also be the first High Court judge with a black belt in taekwondo.

## The Hon Justice Geoff Lindsay

Justice Lindsay grew up in Bankstown, went to Bankstown Boys High School and is a proud Bankstown boy – he had a ceramic bulldog on his chambers desk.

He studied economics/law at ANU and graduated with honours, with a prize in income tax revenue law.

In 1977, Lindsay J started at Freehills and shortly after was called to the NSW Bar. He started on 13 Selborne, and after 3 years moved to 8 Wentworth at the invitation of Peter Young QC. He specialized in equity, commercial and administrative law. He was involved in a number of professional conduct matters, appearing for the Law Society and the Bar Association, often led by Rob Stitt QC. In 1994 he took silk.

Justice Lindsay had a complex technique for highlighting submissions and briefs which led to a nickname 'Rainbow Warrior'. His chambers was crammed full of files, folders, texts, and many many books including legal history books



He had an early interest in law reporting, editorial work and legal publishing, and he has strong views on the vital importance of law reporting to the development of Australian law. His first experience of law reporting and editorial work was as the case note editor on the ANU's *Federal Law Review*. As a young barrister, he cold-called

Peter Young asking how he could become involved in law reporting. He is the chairman of Council of Law Reporting.

Lindsay J also has a passion for legal history. He is a member of the NSW Bar Association Legal History Committee. In 2002, he helped establish Francis Forbes Society for Australian Legal History. He is the prolific author of many of its papers, and is the society's secretary. He was also the co-editor of NSW Bar Association Centenary Essays *No Mere Mouthpiece*, and initiated the Australian Legal History Essays Competition

His Honour has a long association with NSW Bar Association Council. He was Bar Association's nominee to the Uniform Rules Committee and Supreme Court Rules Committee as well as the nominee to the NSW Legal Aid Commission and Public Interest Clearing House.

## His Honour Judge Ian McClintock SC

His Honour Judge Ian McClintock SC studied arts/law at the University of NSW and showed an early interest and aptitude in criminal law – he received a high distinction for his thesis on the Law of Criminal Conspiracy, and helped establish and was a student volunteer at the Redfern Legal Centre.

McClintock DCJ worked for the Redfern Legal Centre after graduation, and then joined Legal Aid. He worked in both criminal practice as well as policy at Legal Aid and then at the Attorney General's

Department, including a research mission to USA, Canada, England and Scotland to research electronic recording of police interviews. He continued his association with Legal Aid whilst at the bar as the Bar Association's representative on the Legal Aid Board and Chairperson of the Bar Association's Legal Aid Committee, as well as a member of the Criminal Law Committee.

In 1986, his Honour was called to the New South Wales Bar, starting as a reader on 6 Selborne, licensee at 4<sup>th</sup> Floor Wentworth Chambers,

member of Frederick Jordan Chambers, and then founding member of Forbes Chambers where he practiced for many years.

McClintock DCJ appeared as both defence counsel and prosecutor, and his practice also included appearances in the Industrial Court and Land and Environment Court, as well as counsel assisting the Coroner, appeared before the Independent Commission Against Corruption and before various crime investigatory bodies.

## His Honour Judge Chris Craigie SC



His Honour Judge Chris Craigie SC initially studied history before transferring to law. He is known to say that the law is law as 'history made manifest' and that his passion for history helped him contextualise

the nature of his work. He then transferred to law and became one of the first law students to graduate from University of NSW.

After a short stint in private practice, he started working at the criminal indictable section of the Public Solicitor's Office (the forerunner of Legal Aid).

In 1980, his Honour was called to the New South Wales Bar and in 1994 he was appointed a public defender.

In 2001 he was appointed as Deputy senior public defender and senior counsel, and made the switch from trial-focused practice to appellate work. He did both defence and prosecution work.

In 2007, while acting as senior public defender, his Honour

was appointed Commonwealth Director of Public Prosecutions. As Commonwealth Director of Public Prosecutions, he was responsible for prosecuting the full range of offences under Commonwealth law, taking referrals from over forty Commonwealth agencies, in areas ranging from people smuggling, people trafficking, terrorism and drug importation to corporate fraud, fraud against the Commonwealth and regulatory offences. Craigie DCJ successfully prosecuted a number of complex matters including terrorism, money laundering, drug trafficking and people smuggling.

## Her Honour Judge Sarah Huggett

Her Honour Judge Sarah Huggett was born in Moree, and comes from a large and close family, with seven siblings. Her late father was a police officer who became a Detective Chief Superintendent.

Huggett DCJ originally studied arts at Macquarie University and volunteered at Macquarie Psychiatric Hospital at the beginning of her degree. She then studied law as a graduate student at Sydney University and graduated with honours. She volunteered for the Women's Legal Centre, and started working in family law at Phillips Fox.

In 1993, her Honour joined the

Office of the Director of Public Prosecutions, and in 1995 graduated with a Masters of Law specialising in criminal law. Whilst at the ODPP, she was the sole instructing solicitor in the prosecution of the backpacker killer Ivan Milat, and did an exchange to the Crown Prosecution Service in the UK.

In 2000, her Honour was appointed as trial advocate in Bathurst at a time when Bathurst did not have a permanent Crown Prosecutor, so she was responsible for the prosecution of trials at both Bathurst and Orange District Courts.

In 2001, her Honour was called

to the New South Wales Bar. She was involved in a number of sexual assault cases, including the Golossian and Mason trials. Huggett DCJ was the NSW Crown Prosecutors member of the NSW Sexual Assault Review Committee and served on the NSW Bar Association Criminal Law Committee.

In 2009, her Honour lived in Los Angeles for a time when her husband was transferred there, and lectured as an Adjunct Professor at the Loyola Law School in Comparative Criminal Law.

## Crossword solution





# NSW Bar FC goes from strength to strength

By Anthonoy Lo Surdo SC

### Introduction

The NSW Bar Football Club (NSW Bar FC) has grown in strength, popularity and skill since its inception in 2008. NSW Bar FC is open to barristers, members of the judiciary, clerks and employees of the Bar Association regardless of level of ability or fitness but who are united in a passion for the World Game and a determination to free themselves, if only temporarily, of the shackles of professional life.

This year, NSW Bar FC competed in the Domain Soccer League, in the annual 'State of Origin' tournament against teams from the Victoria and Queensland Bars and in the Law Firm Champions Cup.

### New members

In 2012, we welcomed new members Evan Walker, Martin Smith, Faraz Maghami, Pouyan Mazandara, Ben Phillips, Darren Covell and Matthew Vickers.

### Domain Lunchtime Competition

NSW Bar FC competed for the fourth successive year in the Domain Soccer League (DSL) Competition. If success is measured by fun, fitness and collegiality then NSW Bar FC enjoyed yet another enormously successful and productive year in the DSL even if it that success may not have been reflected in the competition table.

### Sports Law Conference and Bar Football 'State of Origin'

On 20 October 2012, over 60 barristers convened in Melbourne to attend the 2<sup>nd</sup> annual Sports Law Conference, the 5th annual Suncorp NSW Bar v Victoria Bar Annual

Challenge Cup and the 3rd annual Suncorp NSW Bar v Victoria Bar v Queensland Bar Annual Football Challenge Cup.

The NSW Bar FC touring party consisted of Houda Younan, David Patch, Rohan de Meyrick, Graham Turnbull SC, Anthony Lo Surdo SC, Vahan Bedrossian, Daniel Tynan, Gillian Mahony, Hon Justice Geoff Lindsay, David Stanton, Craig Bolger, Pouyan Mazandara, Greg Watkins, Simon Philips, Cameron Jackson, Faraz Maghami, Michael Fordham SC, Adrian Canceri and Alex Kuklik.

With the generous support of the Victorian Bar Association and especially its chair, Melanie Sloss SC, the Sports Law Conference was held in the Neil McPhee Room in Owen Dixon Chambers. The conference, chaired by Anthony Lo Surdo SC was attended by in excess of 50 barristers from the NSW, Victoria and Queensland bars.

Participants were informed and entertained by Ian Pendergast, general manager player relations of the AFL Players Association, who spoke about the often conflicting interests of the player, the club and the AFL arising from players' off-field conduct, Stephen Lee of the Queensland Bar whose presentation covered the circumstances in which a court will intervene in the affairs of a club, including the potential causes of action available to an aggrieved member, Chris Nikou from Middletons, also a director of the Asian Cup 2015 local organising committee addressed the legal, political and commercial issues faced by Australia as the host nation for the Asian Cup in 2015 and Graham Turnbull SC of the NSW

Bar provided an ever entertaining insight into the circumstances in which non-contact sport such as feigning injury, sledging and racial abuse can constitute a crime.

Following lunch, the action moved from the intellectual arena of Owen Dixon Chambers to the more familiar synthetic pitch of the Darebin International Sports Centre for the Bar Football 'State of Origin'. The skies above Darebin were mostly sunny with a slight breeze from the south-east and with temperatures hovering in the early to mid-20s made for perfect football conditions!

### Game 1 – NSW v Victoria

Victoria had amassed a huge home squad in an effort to wrest the coveted title from an all-conquering NSW team which had successfully defended the prize on both home turf and away since the tournament's inception in 2008.

Tension was high in the NSW camp as Captain Simon Philips gave necessary instructions to his charges for some of whom this was their first interstate encounter. Victorian Captain Warwick Rothnie similarly sought to settle his troops for the challenge.

The teams were competitive for most of the first half as each made foray after foray into each other's half. Patch continued his run of bad luck with an opportunity that went begging. The Victorian advances were repelled by an impressive defence led by Philips, Mahony, de Meyrick, Younan and Fordham SC for the Blues. Persistence paid off minutes before the end of the first term with Bedrossian snaring one after good lead up passing through Watkins, Maghami and Mazandara.

The score at half-time was 1-0.

NSW continued its late first half dominance with Bedrossian aided by an impressive attacking mid-field slotting another about half way through the last term. A late rally by the Victorians caught a complacent, if not napping, defence with Adrian Bates scoring from a beautifully placed corner just seconds from the final whistle.

NSW won the game 2-1 and retained for the fifth successive year the Suncorp NSW Bar v Victoria Bar Annual Challenge Cup. Best and Fairest honours for NSW went to Bedrossian and Adrian Bates took the goal for Victoria.

The match was refereed by Anthony Lo Surdo SC.

### **Game 2 – Victoria v Queensland**

The Victorians, strangely, opted to play again rather than take what some may have considered to have been a tactical redeployment (rest) of forces. The explanation appears to be that the Victorians were so buoyed by numbers that they engaged a fresh team, led by Chris Archibald, for this encounter.

The ever competitive Queenslanders captained by Johnny Selfridge were dressed to impress in traditional maroon and white and impress they did. Right from the first whistle, the Queenslanders played disciplined positional football which made up for a (not uncommon given age and other debilitating factors) lack of agility and speed. The Maroons were more than a little assisted by the Sonn brothers (not barristers) who were co-opted by Selfridge to play for the Queenslanders when two of their star players were struck down by injury.



The Queensland tactics paid enormous dividends with the tourists slamming home 4 unanswered goals.

Best and fairest for Victoria went to Lionel Wirth and for Queensland to Lee Clark.

The match was refereed by Alex Kuklik.

### **Game 3 – NSW v Queensland**

With such an enormous lead in goal difference, the Queenslanders only needed to draw against New South Wales to take home the State of Origin silverware, a fact which they used to advantage in the psychological stakes in the final match of the 2012 series.

In what was undoubtedly the best game in the history of the 'State of Origin', first blood went to Bedrossian from NSW. Despite heroic defending by a stalwart backline consisting of Philips, Younan, Fordham SC and Mahony, the Queenslanders struck back with the score at half-time level at one apiece.

The second half saw plenty of scoring opportunities go begging for both sides and which each failed to convert.

With the score tied at one all at full-time and with the 'State of Origin' series also tied at one win and one draw a piece to NSW and Queensland, the Suncorp NSW Bar v Victoria Bar v Queensland Bar Annual Football Challenge Cup went to a deserving Queensland.

The match was refereed by Anthony Lo Surdo SC.

### **Thanks**

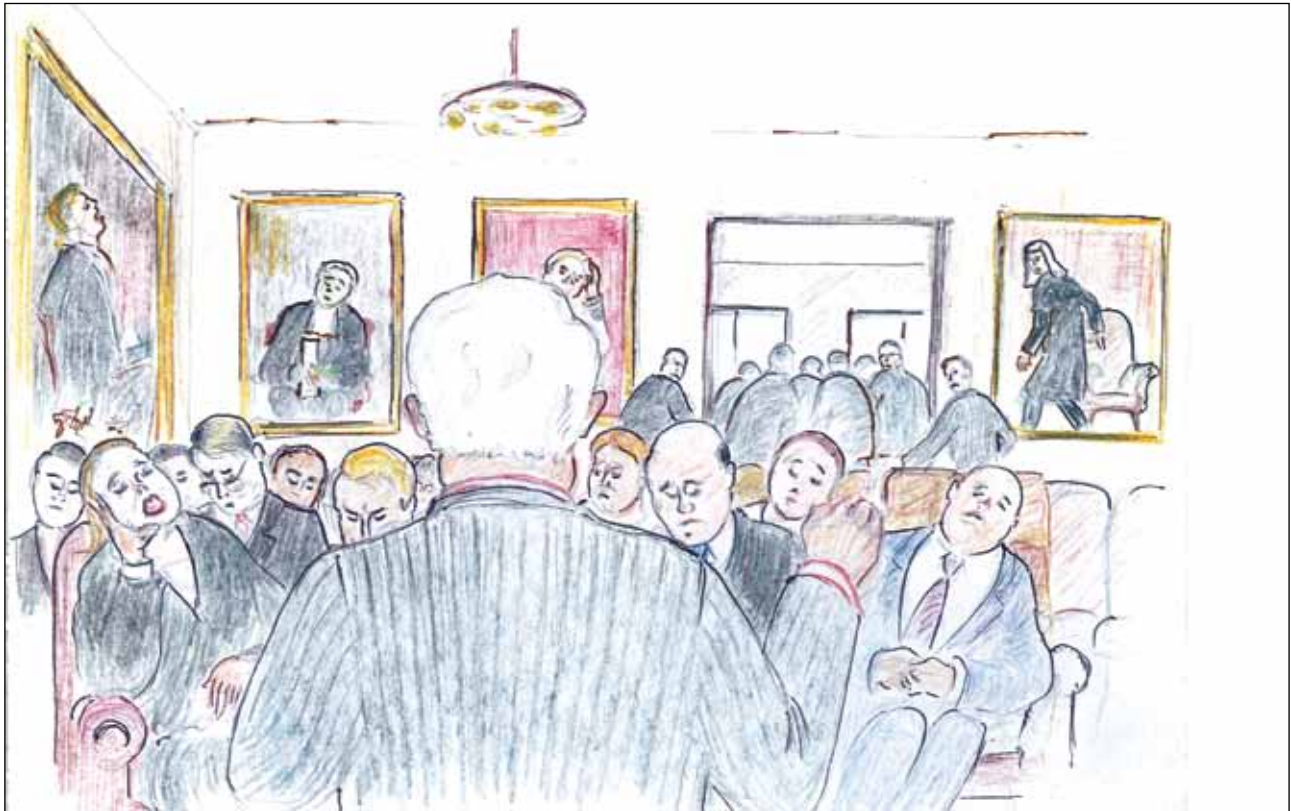
The organisers wish to thank all those whose support made the day a great success and especially the conference speakers for devoting their considerable time and expertise. Special mention should be made of Peter Agardy of the Victoria Bar, John Selfridge of the Queensland Bar and Anthony Lo Surdo SC of the NSW Bar for organising the day.

Thanks also to Alex Kuklik and Anthony Lo Surdo SC who officiated.

NSW Bar FC acknowledges Suncorp, MLIG and Peter Steele for their continuing support. The Sports Law Conference and Bar Football 'State of Origin' heads to Sydney next year.

## Bullfry on the mysteries of jurisprudence

By Lee Aitken (illustrated by Poulos QC)



*'Perhaps it is not too late for me to begin lecturing – A select and illustrated seminar series by Jack Bullfry'.*

'I was a 'top down' man early on, as every young man must be', said Bullfry in a lascivious, confessional tone.

'Metaphysically, I could not resist feasting on the sustenance represented by the writing of the savants – Austin, Hohfeld, Pound – more lately Dworkin and Posner – the constant search for a system, and a lodestar, by which all might be explained – I have been searching still, but now find my solace in more earthly and less ethereal pleasures'.

'Ezra or Roscoe?' asked Ms Blatly, under-clad in an outfit that gave more than a hint of summer decolletage.

'There is no need to be facetious' said Bullfry, as he refilled his

glass. He was in an expansive post-prandial mood – the sun was shining in, and giving a halo effect to the skull to which he now addressed his remarks, as to an attentive and devoted listener.

'Of course, when you are young you are entranced by the theory – for many years prior to his untimely death the great Professor Birks had almost convinced me on the verity of 'subtractive interception'. But then he underwent his own Damascene conversion – he recanted and completely changed the focus of his attack – still there is nothing more pleasant than watching a man attempting forlornly to schematize the entire common law – indeed, has not the federal attorney proposed just such a thing in relation to the entire

law of contract – she already has the Indian Act as her guide – but sadly we no longer have Frederick Pollock, or McKenzie Chalmers to transmute 2,500 cases into 75 salacious sections for eighty five pounds by way of payment – they don't make them like that anymore – I put it down to the fact that ancient Greek is now only taught to a handful of students, and then mainly by way of some ersatz translation.'

'But then the needs of practice intervene – you move irresistibly from the benefice of a 'top down' theorist to a relationship with the facts – you have to get down and dirty – get to the bottom of things – read all the documents – scrutinize the witnesses and their proofs – scrabble about in the mire

and often for days on end in terms of cross-examination and the like. If you are to succeed at the Sydney Bar, being 'top down' will provide you with endless opportunities for CLE, but real success depends in the end on being entirely 'bottom up'.

'What do you mean by that?'

'I mean quite simply that virtually no case is won at nisi prius by your invocation of some refined notion of *assumpsit*, or an appeal to Equity's auxiliary jurisdiction. You win by grappling with the facts in a Gradgrindian sense and demonstrating that the theory of the case propounded by the other side is completely flawed – then you catch their chief witness in two or three lies in his affidavit – a good District Court judge will put any judgment beyond hope of appeal by damning their witness on credit in the first six paragraphs of the judgment – 'I heard Ms X in the witness box for two days; I observed her demeanour; I regret to say that I cannot accept any statement which she made unless it is corroborated by an independent contemporaneous document'. The game is over'.

'It is for that very reason that one of the most famous silks, when leading me in my youth, used to say, 'Bullfry, never forget that you can know too much about a case before it commences'. At first I wondered what he meant – surely that could not be true – but of course it is – the turn of events, the change in evidence – all require a fluid appreciation so that unexpected events may be assimilated into the general discourse – a little like General Model when in charge of Army Group Centre during Germany's last unsuccessful global tour on the Eastern Front'.

'But surely the whole of the legal Academy is in the thrall of the 'top down' approach?'

'Indeed it is – and that is its great failing. Have you ever wondered why until very recently law was not taught as an academic subject at all? Rather, one learnt on the job under the tutelage of an expert instructor, in much the same way as any other journeyman apprentice learning his trade – indeed, our Victorian brothers take that process to its logical conclusion – down south, where they do things differently (the bar owns much of chambers; there is room for any newcomer to begin at a modest cost) you must perforce sit with your pupil-master in his room and accompany him everywhere for at least six months. In the very old days the members in training to the Utter Bar sat in a 'crib' and listened to and argued the cases in court – Brian CJ on one celebrated occasion remonstrates with them for interrupting proceedings'.

'The modern Academy, on the other hand, is all 'top down'! Every one strives to make up her own theory on something – and it doesn't really matter what. Very little of the Priestley Eleven is examined in any detail – you might pretend to cover the entire law of real property in ten short weeks – you may never reach mortgages – this has to be the case so that more relevant areas of jurisprudential interest can have full play and the 'insiders' can get access to government funding which contributes to the institution's prestige – and to their own sabbatical leave – yet most of it involves answering questions my mother could resolve in a monosyllable – Should you be permitted to line up fellow countrymen who differ from you in ethnicity, or headgear, and shoot them with a machine gun? Should countries settle their differences amicably? If things were better ordered, would everyone have enough to eat, and drink? No, yes,

and yes!

I suppose (which God forbid) that I suffer a terrible knife wound while out carousing at the end of the Bench and Bar dinner – whom do I want to operate? I want the top surgeon in vascular surgery at a large public teaching hospital who is the associate professor in veins et al at the university – I want theoretical expertise and an expert hand with the scalpel – if on the other hand I need an urgent injunction, is there any point in ringing the law faculty? Need I say more?

'And yet, of course, the 'bottom up' requirements take a terrible toll – the endless sunny weekends wasted in chambers reading 2,000 pages of a bank file to find the cross-examining gold – the endless fights over discovery and privilege – there is no end to facts – as Lord Alverstone once said, "you must have a mind that can remember and a mind that can forget". Without the latter attribute you will quickly go mad – that is why there is a big temptation at a certain age to seek the calm and solitude of the bench.

'Perhaps it is not too late for me to begin lecturing – *A Select and Illustrated Seminar Series by Jack Bullfry* – topics drawn from his sacred and profane memories of jurists past and present'.

'Well, I would certainly come to hear that – indeed, it is an area in which I think a PhD might be appropriate'.

'You must be careful on that last point – we have a lot of spurious 'doctors' floating around these days – in olden times the only 'Drs' were 'Evatt' and 'Louatt' and 'Coppel' – it is time perhaps that the old criterion for that nomenclature was reintroduced'.



### Bar Book Club

By David Ash

The Bar Association's book club lurches from one siren to the other in its relentless quest for critical unanimity. 'Readers of all, precious of none' is this Argo's motto.

Fitting, then, that we directed ourselves to *Golden Bowl* over the Christmas break. For many – males to a tee – the task was too much. Henry James had written elsewhere that deep experience is never peaceful, and so it proved. The first paragraph contains six sentences (an average of just over 60 words each, or a year's worth). Few made it to the end.

With the antidote of misplaced optimism, we tried Russian comic writers. After all, Mikhail Bulgakov had included in our choice (*The Master and Margarita*) a very guide in times of trouble:

Follow me, reader! Who told you that there is no true, faithful, eternal love in this world! May the liar's vile tongue be cut out! Follow me, my reader, and me alone, and I will show you such a love!

Unfortunately, this man goes on to disrupt the advocate's comfort, shouting:

The tongue can conceal the truth, but the eyes never! You're asked an unexpected question, you don't even flinch, it takes just a second to get yourself under control, you know just what you have to say to hide the truth, and you speak very convincingly, and nothing in your face twitches to give you away. But the truth, alas, has been disturbed by the question, and it rises up from the depths of your soul to flicker in your eyes and all is lost.

For all this, there was unanimity, or at least equanimity, in three legal texts. A re-read of *Measure*

for *Measure* reminded us that the bard's best law book does not need Portia's febrile advocacy or Shylock's great plea. The law hath not been dead, though it hath slept. Perhaps this theme of our choice keeps the play in its uncertain category as Comedy.

Far more certain therein was Littlemore's (now first) Harry Curry venture, *Counsel of Choice*. He deserves yet more success with the follow up, *The Murder Book*. The final in the trilogy was Jane Gardam's *Old Filth* (Failed in London; Try Hong Kong). Gardam came to writing quite late but has been prolific and a critical success, at least in the UK. Much of our discussion was about the verisimilitude of the central character, a silk, Gardam being married to one. The consensus was 'almost'. If you do read it, go on to read *The Man in the Wooden Hat*, a later work on the same subject written from the wife's perspective. She does a better job here.

Other reads included *The White Devil*, where old Harrovian Justin Evans works out his youth by laying Lord Byron and a ghost story upon the school of the modern day, and *Blood Meridian*, Cormac McCarthy's mid-career masterpiece. In his pastorate *All the Pretty Horses*, McCarthy had written:

He imagined the pain of the world to be like some formless parasitic being seeking out the warmth of human souls wherein to incubate and he thought he knew what made one liable to its visitations.

*Blood Meridian* with the still-later *The Road* is the reader's incubation. Whether there is a point to any gothic exploration of evil when

... the club's Argonauts thank Kalfas, our Jason, Lisa Allen, our Orpheus, and the Bar Association, our underworld.

there are surely more pleasant things, was the stuff of heated discussion.

The other three works for this year have been *Moby-Duck: The True Story of 28,800 Bath Toys Lost at Sea and of the Beachcombers, Oceanographers, Environmentalists, and Fools, Including the Author, Who Went in Search of Them*, a title which forms an accurate preamble, and Sybille Bedford's superb autobiographical tragicomedy *The Legacy*, where Jewish money and German aristocracy are pitted against the barren militarism of the Junker class, or those who aspired to it, and Michael Frayn's farce *Skios*.

The last is to be discussed tonight. Who knows what will happen? And later, there is to be a dinner. We shall try to be pleasant. As James also said:

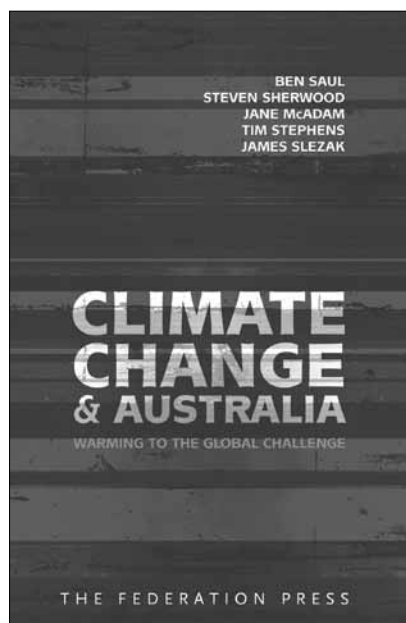
Three things in human life are important. The first is to be kind. The second is to be kind. And the third is to be kind.

Advocacy and repetition. Woe to it. Meanwhile, the club's Argonauts thank Kalfas, our Jason, Lisa Allen, our Orpheus, and the Bar Association, our underworld. Without their generosity, there would be no ship. All members are welcome to enlist in the new year, dates being regularly announced in *In Brief*.



# Climate Change and Australia: Warming to the Global Challenge

By Saul, Sherwood, McAdam, Stephens and Slezak | Federation Press | 2011



This is an engaging and well-written book. A stated aim is to:

... provide a clear, readable account of what climate change means for the future of Australia, its region and the world.

It largely achieves the aim and does provide a clear and readable account of the authors' analysis of several important issues relating to the complex topic of climate change. It is refreshingly honest in explaining to the reader its predominant point of view from the outset:

[t]his book acknowledges where there are indeed scientific uncertainties in the science, but pays no attention to 'sceptics' who deny that global warming is real, or that it is caused by humans.

Notwithstanding this early disavowal, the book does engage with the scientific debate as to the extent of likely climate change due to anthropogenic global warming.

This adds to the interest of the work.

Interestingly, the qualifications of the authors are not recorded anywhere in the book. The average lay reader may have expected and appreciated the inclusion of such a record. However, the authors are well known and respected legal and scientific experts, and the discussion in the book does benefit from the multidisciplinary approach that this mix of scientific and legal expertise has allowed. For example, it enables the book to address the issue of climate change by reference to the geological record, to touch briefly on the various geo-engineering options that may be available to mitigate greenhouse gas caused climate change, at a global scale, as well as to discuss aspects of the international legal framework.

The book commences with an interesting historical summary of the discovery of the greenhouse gas and global warming relationship, and moves onto a discussion of the current and generally accepted position of the scientific community, and to the synthesis of these predictions by the Intergovernmental Panel on Climate Change (IPCC). It is consistent with the work's overall argument that the authors observe that the proportion of climate change scientists that agree that humans are largely responsible for observed global warming has been measured at 97 per cent.

*Inter alia*, the book discusses some possible impacts of climate change on Australia. Most of the predictions are sourced and the footnotes to the chapters form a useful research aid. The chapter on this topic takes

care to present its scenarios by reference to whether they are more or less likely having regard to various possible degrees of warming.

The recent history of international climate change treaty and policy discussions from the 1992 UN Framework Convention on Climate Change, to its Kyoto Protocol to Copenhagen and Cancun is digested, and the key principles adopted at an international level for allocating emissions reductions among nations are discussed. There is a well-informed discussion of the surrounding international environmental law. The important role of the precautionary principle is discussed, it being observed that while there is no doubt about the greenhouse effect and that it is having an impact on climate, 'there are uncertainties as to when and by how much the climate will change and how resilient natural and social systems will be'. The discussion of the operation of the Kyoto Protocol is informative.

*It is refreshingly honest in explaining to the reader its predominant point of view from the outset ...*

There is generally balanced summary of the Australian legislative and political response to the climate change issue, with both the former CPRS and the present carbon pricing approach under the *Clean Energy Act 2011* (Cth) being analysed, as well as the direct action plan of the federal opposition.

The book does argue strongly for particular policy positions on a number of issues. This is no doubt

## BOOK REVIEWS

difficult to avoid in a general popular work on this topic. However, the book does also make a real effort to include relevant data and contrary positions to facilitate critical analysis of its principal argument. Its analysis of the possibility of issuing free permits to export exposed Australian industries to meet the carbon leakage problem – the possibility that polluting industries will simply move offshore – is a good case in point.

There is an interesting discussion of the extent and limitations of international refugee and human

*The book does argue strongly for particular policy positions on a number of issues.*

rights law in addressing the plight of persons who may be displaced by climate change in future years. The real difficulties, in any attribution of legal responsibility (to a particular country) for the displacement of persons by climate change, are discussed in a forensically precise and worthwhile manner. The book concludes with a thought-provoking chapter on the potential global security implications of climate

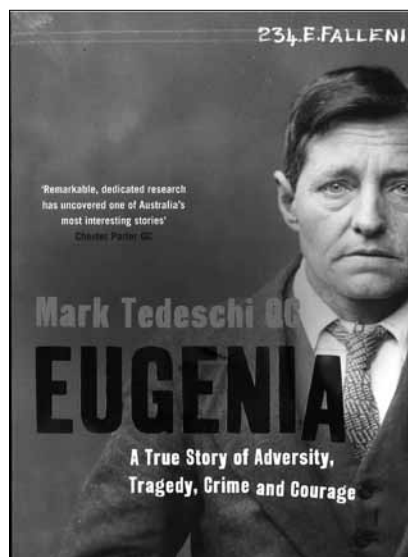
change, in the context of other global problems such as food scarcity related to population.

For anyone interested in climate change and the debate surrounding it, this eclectic and wide ranging work is definitely worth reading, as a well referenced general introduction to many recent issues surrounding anthropogenic global warming and the international and domestic policy and legal response to it.

**Reviewed by Clifford Ireland**

## Eugenia

By Mark Tedeschi QC | Simon and Schuster | 2012



Hilary Mantel has spoken of the revulsion inspired in her when writers play around with facts, distorting something just to make it more convenient or dramatic. The non-fiction work *Eugenia* by Senior Crown Prosecutor Mark Tedeschi QC is written by an author

with similar concern for historical truth. With an historian's skill and a prosecutor's search for proof, Tedeschi QC has brought once again to the public and legal gaze the tragic story of Eugenia Falleni.

Falleni, believing she was a man trapped in the body of a woman, lived for 22 years as a man. Born into an Italian family that immigrated to New Zealand, Falleni took to the high seas and found herself dumped by the Captain in Newcastle, New South Wales. She spent the next twenty-two years passing as a Scotsman and general useful, Harry Crawford. She married twice. Charged with the murder of her first wife, the trial in October 1920 was one of the largest public sensations of the time.

*Eugenia* is dedicated to the late Dorothy Porter, daughter of Chester Porter QC and, as Tedeschi QC describes, one of his oldest friends.

Friendship is not the only matter which connects Tedeschi QC with Porter. Both have produced works which interrogate the seismic consequences the sexuality of their protagonists can have on the development of the criminal story. (Porter's brilliant fictional verse novel *The Monkey's Mask* caused its own sensation in 1994 when published and was awarded the Age Book of the Year for poetry and the National Book Council Award amongst others.)

Where Porter's *The Monkey's Mask* revelled in what has been described as poetry facing profanity on the streets of a harsh modern city, Tedeschi QC's *Eugenia* is the story of a woman who, to her contemporaries, was the profanity on the harsh working-class streets of Sydney. Tedeschi QC's treatment of Eugenia is one of enduring sympathy for someone serially misunderstood in her time and failed

by a justice system presided over by one of its greats (Sir William Cullen, chief justice of New South Wales).

Tedeschi QC's story of Eugenia begins on a note of promise:

From a completely misunderstood childhood and adolescence, Eugenia boldly strode out in adulthood in an attempt to establish what she saw as her true self as a man.

The hope proves false. A labyrinth of dead ends in life would have been kinder compared to the brutality and tragedy with which her adult life passed. There were times in which the potential for future happiness seemed realisable; times in hindsight cruel for their brevity and betrayal.

In her time, as Tedeschi QC's research has uncovered, much was written by the press about the life of Mrs Harry Crawford and especially about her trial. There was perhaps more kindness in later years, but to the press and the public Eugenia was largely sensation not victim. That was both the prism and societal prison through which Eugenia Falleni was judged and in which she lived.

Describing and analysing the trial of Eugenia (Parts II and III of the book) is where Tedeschi QC obviously relishes his task. The tone is empathetic but his criticisms of the trial and its conduct bear the

*Anachronism is never an easy charge avoided where the crevices of failures etched in the past are seen to run more deeply with the benefit of eyes conditioned by the scientific and societal progresses of the intervening period. Yet Tedeschi QC largely avoids the problem.*

weight of a writer who understands the ideals of a profession in which he practices. As a critique of a trial, act by act and almost question by question, it is – even aside from the story in which it appears – a fascinating forensic dissection of how a case ought be run by competent counsel.

Anachronism is never an easy charge avoided where the crevices of failures etched in the past are seen to run more deeply with the benefit of eyes conditioned by the scientific and societal progresses of the intervening period. Yet Tedeschi QC largely avoids the problem. In fact, the analysis Tedeschi QC gives of what ought to have been achieved by defence counsel for Eugenia even in that context is one of the highlights of the book. His critique

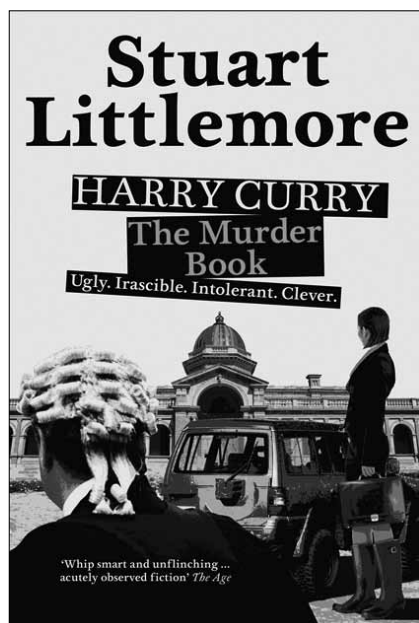
of the failures of a system which ought – even by its then standards and capabilities – to have done better is the work of an historian of life and the law who can continually segregate what was, what could have been, and what is now.

In its style, structure and content, this book could only have been written by a lawyer who has spent decades preparing and running criminal trials. Yet it is not a book only for lawyers. Tedeschi QC has gone to great lengths to treat the reader as you would think he probably approaches any given jury. It is an approach that works well; it also does greater justice to the story itself. It is not the most eloquent of questions, but Tedeschi QC's point is to drive to the right one: was there sufficient evidence to justify her conviction. As with Eugenia's sexuality and plight, the proper question is one which few of Eugenia's contemporaries had the knowledge or inclination to get right.

**Reviewed by Fiona Roughley**

## Harry Curry: The Murder Book

By Stuart Littlemore QC | HarperCollins | 2012



*Harry Curry, The Murder Book* (Harper Collins, 2012) is the second book of short stories in the Harry Curry series written by Stuart Littlemore QC.

*Harry Curry, Counsel of Choice*, was published last year. It's funny and well written, and the hugely enjoyable *The Murder Book* is better still.

As with *Counsel of Choice*, *The Murder Book* contains a series of five stories featuring criminal barrister Harry Curry, his girlfriend (and barrister) Arabella Engineer, and loyal instructing solicitor David Surrey. Harry is called upon to defend a highly co-operative serial killer, an ex-tennis professional charged with killing a child in a 'shaken-baby' case, and a young man from a wealthy family who has killed (perhaps) a man who molested him as a young boy. What links these and the other stories is the friendship between Curry and his unflappable instructing solicitor, but most of all his love affair with his beautiful and brilliant colleague.

Possibly what is most important in a book of this type is the likeability of the central character. Writing a second series of stories has enabled Littlemore to develop his characters further, and *The Murder Book* is stronger for it.

Not all lawyers, and certainly not all members of the New South Wales Bar will like Harry Curry. If you were to come across him, you would be subjected to his 'Dry Cleaner Test'. If you look like the sort of person that might own a small chain of dry cleaning stores, perhaps four or five – that is, if you look like a 'self satisfied petty bourgeois' – it would be unlikely that Harry would be polite to you. How many lawyers would fail the 'dry cleaner' test (or the dry cleaners' wives test) is unknown, but both Bob Hawke and John Howard did in Harry's view. And if he didn't pick you as the proprietor of dry cleaner stores, he's just as likely to view you, should you attend the bench and bar dinner, as the 'arriviste offspring of country publicans and suburban solicitors'. And heaven help any barrister that might come across Harry should they admit to participation in the Great Bar Boat Race.

*If you look like the sort of person that might own a small chain of dry cleaning stores, perhaps four or five – that is, if you look like a 'self satisfied petty bourgeois' – it would be unlikely that Harry would be polite to you.*

Whether barristers and other lawyers would like Harry Curry is not the point though. These stories are written for a wider audience, and I suspect that wider audience would like Harry rather a lot. He might

see himself as a '[b]ig ugly bloke in a suit and tie', but there's more to Harry than that. For a start, he's clever. Most likely his intelligence comes from his mother, who not only read Faulkner and Patrick White, but understood them. His father, on the other hand, was a tax silk, although a rather pleasant one.

Harry's also an exceptional barrister. He specialised in crime, perhaps largely because he generally likes jurors considerably more than most judges. And there are no pleadings in crime, no 'largely pointless conflicts over arcane interlocutory processes'. Not many counsel could achieve a murder acquittal for a client who admitted to shooting their landlord, at close range, no less than nine times. Harry can be very persuasive with a jury. When he's on form, not even the best that the Crown has, not even its 'tall, rat faced misanthrope'<sup>1</sup>, is a match for him.

He's also a romantic. Other than the criminal trial theme, there are two things that link the five stories together, and which give the book the feel of a novel. The first is Harry's fluctuating relationship with Arabella, which runs as a common

thread through each trial. She's a strong character, and a great foil for Harry. Then there's Harry's other great love. That of the bush, and his home 'outside the hamlet of Burragate', a small town near the



Victorian border. While he might have a fondness for *grolles* and Burgundian wine, this is the modest sanctuary Harry retreats to, whether in triumph or when he simply wants solace. It's here, even when a storm has deprived him of companionship and the usual comforts, that Harry can find peace:

Back on the verandah, Harry pulled a leech off his ankle and squashed it with a loose river stone from the

garden. He hung up his wet-weather gear and went inside to try the television, but the signal wasn't penetrating the downpour. Nor would the radio work. He put on his Magic Flute CD and looked for a suitable book to read, but could find nothing, so he lay on the sofa and listened to the Queen of the Night competing with the wind and the sound of the rain on his tin roof. The quince tree was banging its branches against the guttering.

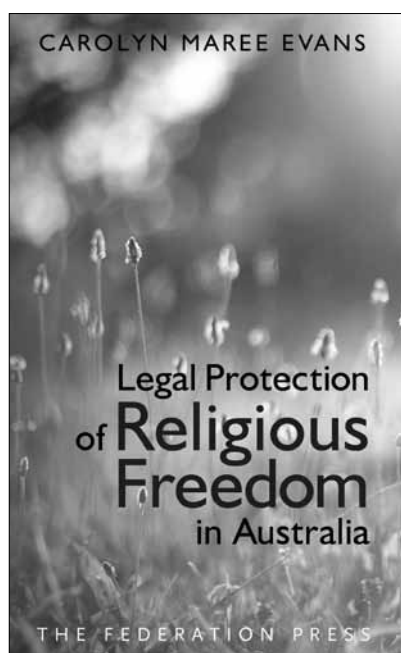
Harry Curry is a great character, and Littlemore's fiction deserves a wide audience. His next series of stories – *Harry Curry, Rats and Mice* – will be published in 2013.

**Reviewed by Richard Beasley SC**

### Endnotes

1. The usual disclaimer about any resemblance to persons living or dead being purely coincidental does not appear to have been printed in *The Murder Book*, but no doubt applies.

## Legal Protection of Religious Freedom in Australia



By Carolyn Maree Evans | Federation Press | 2012

Ms Evans book is therefore very important and it is important for the following reasons: the topic is obviously very topical; it contains recent case law, legislation and international issues; it is clearly written for lawyers with detailed attention to case law and legislation yet it is easy to read and written in a style that non lawyers would still find interesting; and it deals with a wide range of issues associated with the legal protection of religious freedom in Australia.

Some of the issues she deals with are: how the importance of religions has changed in Australia over the years; the relevance of International law to this topic generally and to case law in Australia; how the Constitution deals with the protection of religious freedom; specific case law and legislation (including cases dealing with the running of particular religious schools in certain communities, building religious temples and churches, teachers not getting employment in religious schools because of

their sexual orientation, and cases dealing with Jehovah Witnesses who refuse blood transfusions); how the anti discrimination laws deal with religious freedom; religious vilification laws and cases and how Australian courts deal with the concept of religious freedom eg can she wear her burqa or niqab when giving evidence in an Australian court?

Ms Evans writes at pages 21-22 that 'Demographic trends indicate that Australia is likely to become more religiously diverse over the next two decades....These trends will open up new possibilities for greater understanding and cultural richness, but will also require rethinking of some of the traditional relationships between the state, the legal system and religious groups....this book will hopefully increase understanding of some of the key debates around law and religion currently taking place in Australia.'

I found this book very topical and very interesting.

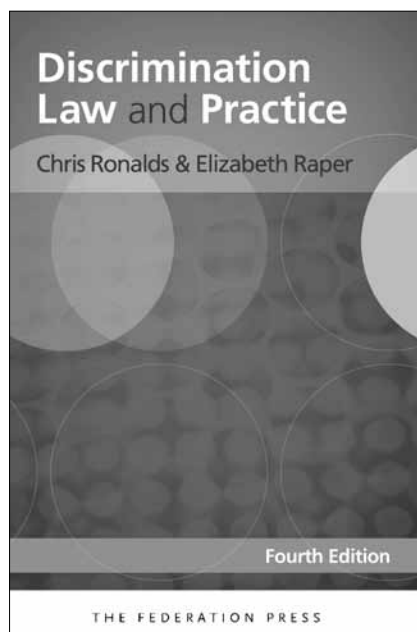
**Reviewed by Caroline Dobraszczyk**

I finished reading this book on the day NSW Police were gearing up to increase their patrol of the streets of Sydney's CBD, over the weekend, as a result of that horrific demonstration that none of us will forget, on a sunny Saturday afternoon. I, too, had my afternoon rudely interrupted by that demonstration – I was lunching and shopping – a demonstration in the name of religion.



## Discrimination Law and Practice (4<sup>th</sup> ed)

By Chris Ronalds and Elizabeth Raper | Federation Press | 2012



This slim volume provides an excellent overview of the developing field of Australian discrimination law and practice, and would make a valuable addition to any barrister's library. The book is both comprehensive and concise (246 pages). Clearly, it was written for lawyers and non-lawyers alike, and is accessible to all. It is well organised, and easy to read.

*The authors are to be congratulated for giving us such an excellent and helpful guide to an important area of law and practice.*

This book would be particularly helpful for barristers who do not specialise in discrimination law, but who need a handbook on the area for general reference or because of a specific brief. For barristers who do specialise in discrimination law, the book is likely to be helpful for its coverage of significant recent developments. The fourth edition

incorporates recent judicial decisions of importance, as well as statutory amendments. Notably, it gives specific attention to the impact of the *Fair Work Act 2009* (Cth) and the new Federal Court Rules. It also includes a new chapter on the topical issue of bullying, including cyber-bullying (Chapter 18).

The authors begin with a discussion of the historical background and international context of Australia's discrimination laws (Chapter 1). I found this very helpful in understanding the broad scheme of the legislation, the way in which it has evolved to encompass various types of discrimination and the institutions which handle complaints. Against that background, the authors go on to discuss: grounds or attributes of discrimination (Chapter 2); definitions of discrimination, direct and indirect (Chapter 3); discrimination by area of practice, such as employment and education (chapters 4–8); victimisation and other unlawful acts and offences (Chapter 9); liability, vicarious

liability and defences (Chapter 10); general exemptions (Chapter 11); complaint-handling processes (Chapter 12); conducting a hearing (Chapter 13); remedies (Chapter 14); industrial laws (Chapter 15); and bullying (Chapter 16).

Although the main focus of the

book is on the federal laws, a series of helpful appendices identify equivalent state and territory provisions (after the authors have also explained the general relationship between the federal and state/territory laws in Chapter 1).

In many circumstances there will be both a federal and a state discrimination law in operation, so a person will have to decide which to use before lodging a complaint (with possible detriment to later action), as the authors have noted (p.9). I would have liked them to expand on matters relevant to choice of jurisdiction (and potential detriment). It is such an important issue in practice and one on which legal advice is likely to be sought. There is a helpful discussion of choice of discrimination law or industrial law in Chapter 15 (pp. 233–237). However, any future edition of the book may benefit from greater discussion of choice of jurisdiction as between federal and state discrimination regimes more generally, perhaps in a separate chapter.

The authors are to be congratulated for giving us such an excellent and helpful guide to an important area of law and practice. It will assist practitioners a great deal. One suspects that the book will be popular, as it deserves to be.

**Reviewed by Kylie Day**

## The seven ages of woman

Rosalind F Croucher<sup>1</sup>

All the world's a stage,  
And all the men and women merely players;  
They have their exits and their entrances;  
And each in her time plays many parts,  
Her acts being seven ages.

### Act I—*Leggiero*

At first, the infant,  
Mewling and puking in her mother's arms  
(Not much she can do about this one—  
For all her charms).

### Act II—*Allegretto giocoso*

Then the schoolgirl—  
Never whining; always with satchel—  
With shining face and morning pigtails,  
Skipping trippingly to school.

### Act III—*Allegro appassionato e con fuoco*

And then the scholar—  
Lectures, lovers and all—  
Dreaming and preening.  
'Will he call? No—will I call?'  
She couldn't care less—they're all in her thrall.

### Act IV—*Andante moderato e tranquillamente*

Now a mother—or not;  
All life in her handbag:  
Books, briefs, lippie—the lot!  
Calm, even-tempered,  
Never quick to a quarrel.  
Let the boys fuddle and bubble—  
She remains unruffled, upright and moral.

### Act V—*Largamente maestoso, ma non troppo*

And then the justice,  
In fair round belly—waistline lost;  
Her wardrobe in three sizes: present, past, and past-  
past;  
Full of wise words and timely inferences;  
And so she plays her part.

### Act VI—*A piacere*

The sixth age shifts—'Hooray!'  
Lean and slippered pantaloons? 'No way!'  
Spectacles—unavoidable, but elegant;  
Her voice—still contralto, more resonant  
Than before; her delivery—well-paced;  
Ne'er a giggle, but a guffaw.

### Act VII—*Tempo comodo, ma con brio*

Last scene of all,  
That ends this proud, eventful history:  
His second childishness and, yes, oblivion;  
Her triumph, release, her very liberation:  
Super, secure—post husband, or three;  
New teeth; new eyes; new tastes, new everything!

### Shakespeare's original

*As You Like It*

Jaques: [Act II Scene VII]

All the world's a stage,  
And all the men and women merely players;  
They have their exits and their entrances;  
And one man in his time plays many parts,  
His acts being seven ages. At first the infant,  
Mewling and puking in the nurse's arms;  
Then the whining school-boy, with his satchel  
And shining morning face, creeping like snail  
Unwillingly to school. And then the lover,  
Sighing like furnace, with a woeful ballad  
Made to his mistress' eyebrow. Then a soldier,  
Full of strange oaths and bearded like the pard,  
Jealous in honour, sudden and quick in quarrel,  
Seeking the bubble reputation.  
Even in the cannon's mouth. And then the justice,  
In fair round belly with good capon lin'd,  
With eyes severe and beard of formal cut,  
Full of wise saws and modern instances;  
And so he plays his part. The sixth age shifts  
Into the lean and slipper'd pantaloons,  
With spectacles on nose and pouch on side;  
His youthful hose, well sav'd, a world too wide  
For his shrunk shank; and his big manly voice,  
Turning again toward childish treble, pipes  
And whistles in his sound. Last scene of all,  
That ends this strange eventful history,  
Is second childishness and mere oblivion;  
Sans teeth, sans eyes, sans taste, sans everything.

### Endnotes

1. President, Australian Law Reform Commission and Professor of Law, Macquarie University (on leave for the duration of the appointment at the ALRC). This adaptation of William Shakespeare's 'Seven Ages of Man' from Jaques's speech in *As You Like It*, Act II Scene VII, was presented as part of the keynote speech at the function held by the NSW Women Lawyer's Association, 'Celebrating Women in the Judiciary', on 29 July 2010 at the Union, University & Schools Club, Sydney. This contribution does not reflect the views of either the ALRC or Macquarie University.

# The Last Word

By Julian Burnside

## Pods

It is not possible to escape from the Pod these days. This is not a lament for unsociable cetaceans, but for those who noticed that Steve Jobs, recently dead, changed our world.

We talk unselfconsciously of *iPods* and *podcasts*. This near-universal usage has spawned facetious variants: *podgram* (a programme later available for downloading); *pod-people* (the people who download the podgram) and *vodcast* (Greg Proops' variant – he drinks a lot of vodka while podcasting). These variants may not seem surprising, until you recognise that the iPod has only been with us for a decade. For the name of any device to sink such deep roots in the language so fast is a remarkable feat.

The iPod is, as everyone on the planet knows, an electronic device which stores and plays audio files in various formats including, especially the mp3 format. It is one of the class of devices known as *mp3 players*. The first mp3 player was devised by Kane Kramer in 1979; the first mp3 device marketed was released in 1996 by Audio Highway. So far as I am aware, mp3 has not made any significant mark on the language, and their devices remain unnoticed.

Apple approached the matter differently, and the iPod was an instant success. They have about 90 per cent of the mp3 player market. In their first decade, about 300 million iPods were sold.

But why the name *iPod*? The word *pod* dates from the 17<sup>th</sup> century. Originally it was a vessel which contains seeds: the commonest is a pea pod, seen in every greengrocer and supermarket. From that origin, the focus was on autonomy and shape. The OED gives this history:

- 1688: A seed-vessel of a long form, usually dry and dehiscent; properly of leguminous and cruciferous plants; a legume or siliqua; but often extended to other long fruits.
- 1753: The cocoon of the silk-worm; the case or envelope of the eggs of a locust.
- 1883: The blade of a cricket-bat
- 1882: A purse-net with a narrow neck for catching eels.
- 1942: A body of ore or rock whose length greatly exceeds its other dimensions.

But *pod* had another meaning: in 1832 Massachusetts Senator Daniel Webster used it as meaning a small herd or school of seals or whales.

*Pod* as a reference to a social unit of whales or seals bears a natural relationship to the core sense of a distinct unit separate from the thing to which it is ancillary. The idea of an elongated shape is subordinated to the notion of semi-autonomous existence.

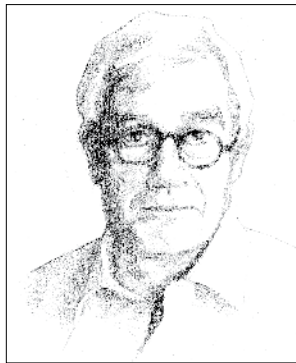
The name *iPod* was devised by Vinnie Chieco, a freelance copywriter working for Apple. It was inspired by a line in *2001: A Space Odyssey*: 'Open the pod bay door, HAL'. It is an interesting coincidence that the name was inspired by that film, as the iPod was launched in November 2001.

*Pod* also exists as a verb. Nowadays, to pod is the act of downloading a podcast. But it has been around a lot longer than that. Since 1734 it has meant 'To bear or produce pods'.

The unhappy practice of killing baby fur seals for their skins gave rise to another use of the verb: to pod is 'to drive (seals, etc.) into a 'pod' or bunch for the purpose of clubbing them' (1887).

*Clubbing* is not as sociable as it seems in other settings. To club a person originally referred to the archaic practice of beating them, probably to death, with a club; but more recently it refers to the act of introducing a person (generally male) into a group of like-minded people (all male) where they sit in comfortable armchairs and rule ever-diminishing stretches of Collins St or Philip St. A person thought fit to become a member is traditionally described as clubbable (1783), which may be truer than the speaker intends.

The traditional view of clubs comes, of course, from London where gentlemen's clubs are a feature of the cultural landscape. The received view of London clubs is that they are pleasant havens of quiet, exclusive camaraderie. This is not necessarily accurate. In *Leather Armchairs* by Charles Graves there is a delightful story of one London club which included a



particularly querulous old member. He steamed up to the club secretary one day and said:

Do you know what that new member just did?  
No, Sir. What did he do?  
He just said 'Good Morning' to me!  
Oh. What did you do, Sir?  
Well, I didn't want to be rude, so I just turned on my heel and walked off.

The other salient (if imaginary) feature of clubs is that the members are old duffers who sit about all day smoking cigars and drinking port. (It should be truer than it is, because port is a drink vastly underestimated, and at its Portuguese vintage best it is sublime.) *Duffer* has various meanings. Originally, it was a person who sold trashy goods as valuable, on false pretences (1756). Markets in Third World countries are full of duffers in this sense. In addition it is a person who 'fakes up' sham articles. In Australia it is a person who 'duffs' cattle: that is, steals them, especially by altering the branding.

This original connotation of dishonesty has been displaced. The other meaning of duffer, presumably the one more fitted to lounging club habitués, is: 'A person who proves to be without practical ability or capacity; one who is incapable, inefficient, or useless in his business or occupation; the reverse of an adept or competent person. Also more generally, a stupid or foolish person' (1842). In Australia this sense is extended to include a claim or mine which proves unproductive (1861). These senses are scarcely more flattering than the original.

These days, *duffer* is generally used with a softened meaning. It is used, not unkindly, for a person who is neither harmful nor useful; it has no connotation of dishonesty and neither does it suggest utter stupidity: it is more fitted to Wilkins Micawber than to Homer Simpson. This is possibly due to the influence of *buffer* which in Scottish and dialectal use refers to 'a foolish fellow'.

However that may be, it would be incongruous to see a duffer use an iPod. Incidentally, Homer Simpson does use an iPod, but he is a youthful 60 years old, by my reckoning. 'The Simpsons' was first aired on the *Tracey Ullman Show* in 1987. Homer was then a parent with three children. Inferentially, he must have been about

35 years old when the series began. Now, 25 years later, he must be about 60, although he has not aged at all. And Maggie is still on an infant's bottle at age 26 or so.

I notice how it goes against the grain to say *The Simpsons* was first aired... And yet we regularly see, without noticing, that Windows is shutting down. This prompted Clive James to write, a few years ago:

Windows is shutting down, and grammar are  
On their last leg. So what am we to do?  
A letter of complaint go just so far,  
Proving the only one in step are you.  
Better, perhaps, to simply let it goes.  
A sentence have to be screwed pretty bad  
Before they gets to where you doesnt knows  
The meaning what it must of meant to had.

## POETRY

By Trevor Bailey

### Careering

Fire in my belly called me to the bar  
What great wonders the law did portend!  
Now flames have died to a glow and some char,  
But my belly has prospered no end.

### With Respect

(A Love Sonnet)

When women wail and counsel quail  
The judge congratulates himself;  
Encouraged now, he'll cancel bail,  
And take a book down from the shelf  
To throw at some poor bastard's head  
- Then fault his subs to dry his lips -  
To reinforce the role of dread  
(Since parliament had outlawed whips).  
But do we see a dinosaur  
Inside that motley horsehair rug?  
Will ways of bull and matador  
Embrace some kindness and a hug?  
*Pigs, at least, agree to be fair -  
As we watch them flying in air.*

# Mason's miscellany

## Wife sales in Australia

Keith Mason's *Lawyers Then and Now: An Australian Legal Miscellany* was published by Federation Press in November 2012. This extract will appear in a companion volume intended for publication next year.

Thomas Hardy's novel, *The Mayor of Casterbridge*, features a wife sale. This was a common practice in England in the late eighteenth and early nineteenth centuries and some scholars view it as a customary form of divorce even if not recognised by law.<sup>1</sup> It often involved the wife being led by a halter into a pub or other public place where an auction took place, sometimes with the wife's current lover bidding.

*R v Malkin*<sup>2</sup> shows that there were also wife sales in Australia and that the authorities here were determined to stamp out the practice. A Bench of Magistrates caused the following account to be published in the *Sydney Gazette* in September 1811:

By a letter from Windsor...we have been favoured with an account of a most disgraceful transaction which has lately taken place there, and we feel it a duty owing to society to give it public notoriety, as well for the purpose of exposing the parties themselves to the contempt and disgrace which they have so highly incurred, as also to put the ignorant and abandoned on their guard against the commission of a crime which in every sense of manhood should revolt from with detestation.

A person (for a man I cannot call him) of the name of Ralph Malkins led his lawful wife into our streets on the 28<sup>th</sup> ultimo, with a rope around her neck, and publicly exposed her for sale, and, shameful to be told, another fellow equally contemptible, called Thomas Quire, actually purchased and paid for her on the spot, £16 in money and some yards of cloth. I am sorry to add that the woman herself was so devoid of those feelings which are justly deemed the most valuable in her sex, agreed to the base traffic, and went off with the purchaser, significantly hinting that she had no doubt her new possessor would make her a better husband than the wretch then departed from. This business was conducted in so public a manner, and so far outraged all laws human or divine, that a bench of magistrates, consisting of Mr Cox, the Rev Mr Cartwright, and Mr Mileham, had it publicly investigated on Saturday last, and all the odious circumstances having been clearly proved, and even admitted by the base wretches themselves, the bench sentenced this no-man to receive 50 lashes, and put to hard labour in irons on the gaol gang at Sydney for the space of three calendar months, and the woman to be transported to the Coal River [Newcastle] for an indefinite time.

The public indignation at so gross a violation of decency was most unequivocally expressed by the acclamations with which the sentence was received by a numerous concourse of people who assembled to know the event of so extraordinary and unprecedented a business. Their feelings were

worthy of men, and judging from them, I trust with confidence that the recurrence of such a crime will not take place here at least for the present generation. The laudable promptitude with which our magistrates took up the business, and the quantum of punishment (still less than they deserve) which they pronounced, will, I have no doubt, produce the most salutary effect throughout the colony, and check the progress of a crime, which if persevered in, would degrade the inhabitants, and entail perpetual disgrace on their children and families.'

There were also wife sales in other colonies. James Fenton's *History of Tasmania*<sup>3</sup> states that sales of wives were common during the early days of Van Diemen's Land. 'One wife was sold for 50 ewes; another for £5 and a gallon of rum; a third for 20 ewes and a gallon of rum. The latter must have been a public sale, for the local paper remarks:- 'From the variety of bidders, had there been any more in the market, the sale would have been pretty brisk.'

The *Adelaide Register* reported in 1847 that 'a smart comely dame of the age of five and twenty' was taken to a back room of the Land of Promise hostelry on the Port road not far from Adelaide. She was led by a halter and sold to the highest bidder for £2.7.6. The transaction was 'authenticated' by the signing of duplicate papers by the purchaser and the woman's husband. A similar incident was reported in a Naracoorte newspaper as late as 1881.<sup>4</sup>

### Endnotes

1. See E P Thompson, *Customs in Common*, Penguin Books, 1993, chapter 7.
2. [1811] NSWKR 8.
3. 1884, p 50.
4. See Castles and Harris, *Lawmakers and Wayward Whigs*, pp 185-6.