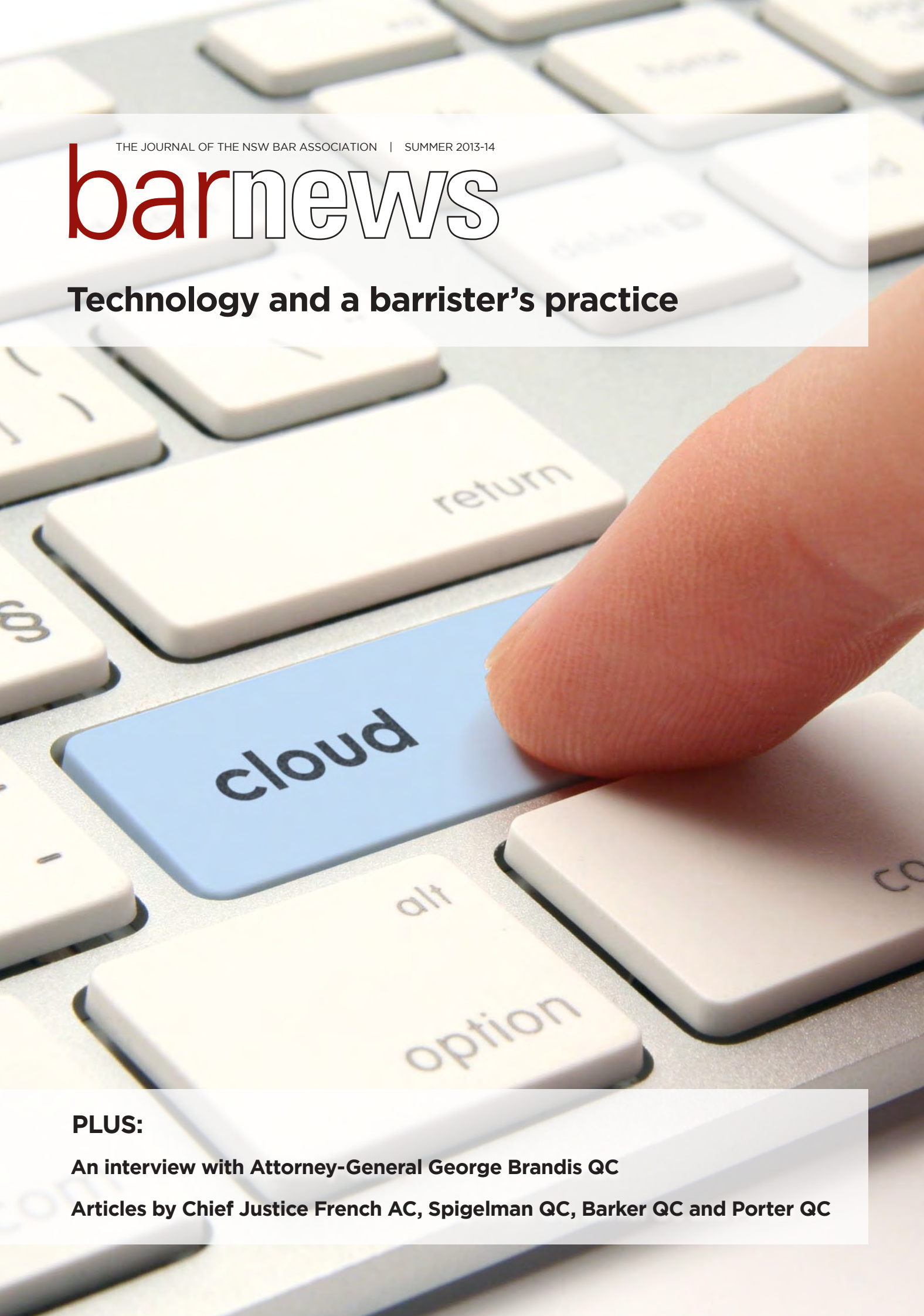
THE JOURNAL OF THE NSW BAR ASSOCIATION | SUMMER 2013-14

barnews

Technology and a barrister's practice



PLUS:

An interview with Attorney-General George Brandis QC

Articles by Chief Justice French AC, Spigelman QC, Barker QC and Porter QC

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Views expressed by contributors to Bar News are not necessarily those of the New South Wales Bar Association. Contributions are welcome and should be addressed to the editor, Jeremy Stoljar SC.

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Contributions may be subject to editing prior to publication, at the discretion of the editor.

This issue of *Bar News* looks at some of the new technologies that have so recently and so quickly become a feature of many barristers' practices.

Some of us can remember when email seemed new. Now there are all sorts of innovations. Social media, cloud storage, electronic discovery, iPads – the list seems to grow from day to day. It seems as if virtually every aspect of practice may be affected.

For example, do we really need to take trolleys of folders to court if everything fits in an iPad? Do we still need shelves of law reports in our chambers, or can research now all be done electronically? If solicitors today use Google to find counsel – or at least counsel's contact details – should we be advertising our services on our own websites or through social media?

The articles in this issue's technology feature look at how barristers can navigate and use the array of new technologies that are now on the market. No one wants technology for its own sake. The articles examine whether new technologies make practice better, cheaper or more efficient.

Of course, this issue includes much else besides technology.

Bar News is delighted that the attorney-general of the Commonwealth of Australia, the Hon George Brandis QC, agreed to be interviewed for this issue.

Among other things the attorney-general discusses the challenges which he envisages may be expected during his term, including access to justice and balancing free speech and human rights.

We are also delighted to publish in this issue the remarks of the chief justice of Australia at the launch of *Historical Foundations of Australian Law*, a recent publication of Federation Press.

Other contributors to this issue of *Bar News* include the Hon James Spigelman AC QC on Justice Pembroke's recent book on Arthur Phillip, Ian Barker QC on cross-examination and Chester Porter QC on the famous case of Frederick McDermott – the last of which follows up from an article in the last edition of *Bar News*.

And just to balance all the talk of new technologies, the Hon John Bryson QC has contributed a piece on how barristers' practices used to operate before computers came along.

Lastly, since this is the final issue for 2013, *Bar News* takes this opportunity to wish all our readers a peaceful and relaxing holiday and all the best for the new year.

Jeremy Stoljar SC

Standing up for first class justice

By Phillip Boulten SC

The Bar Association recently forwarded its submission to the Productivity Commission in response to the issues paper, *Access to Justice Arrangements.* The commission is conducting a wide-ranging inquiry into issues that touch upon the economic costs and benefits of the civil justice system. The association submission focussed on matters that related directly to barristers' practice and emphasised what good value barristers bring to the justice system.

Justice is not a commodity. Legal rights have inherent value. They do not always have a dollar value. An accessible and independent system of justice is essential in a civilised state.

The Bar Association argued that an independent bar adds value to, and subsidises, our system of justice. Barristers assist the courts and tribunals to handle complex legal and factual issues. We provide efficiencies to the court both in terms of time and process. Barristers shape court cases, identify issues and steer litigants towards an appropriate outcome. Without barristers, litigation would be a complete mess.

The association made it clear that we support and encourage moves to make the delivery of justice more efficient through the application of alternative dispute resolution processes in appropriate cases. But, it is necessary to ensure that efficiencies do not undermine legal rights.

It is to be hoped that economic rationalism does not dominate the Productivity Commission's report.

Our submission demonstrated the important role that barristers play in providing pro-bono work through formal pro-bono schemes and through barristers' own informal arrangements. We also pointed out that barristers' fees are very reasonable when compared to other legal practitioners.

The Bar Association will continue to engage with the Productivity Commission throughout its inquiry. It is to be hoped that economic rationalism does not dominate the Productivity Commission's report.

Meanwhile, I was extremely pleased to hear the new federal treasurer, Joe Hockey, announce that the government had abandoned plans to cap tax deductible education expenses for self-employed people at $2,000 per annum. The legal profession lobbied hard on this issue through the Law Council and the Australian Bar Association. The proposal threatened to cause significant problems for self-employed lawyers, especially barristers. I am very grateful the government abandoned this misguided proposal.

Regrettably, though, I recently received advice from the minister for immigration and border protection, Scott Morrison, that the government has discontinued the Refugee Review Tribunal Legal Advice Scheme. The Bar Association has been administering this scheme since 2000 which has provided legal advice to over 6000 people throughout that time. I wrote to the minister expressing regret about the decision. Denying unrepresented and vulnerable litigants access to specialised legal advice will inevitably lead to injustice and will create extra costs to the federal court system. It is to be hoped that the government soon identifies the benefits in providing reasonable advice to litigants appearing before the tribunal. The abolition of the scheme is a false economy.

In the wake of the frenzy of uninformed criticism and personal attacks upon Justice Stephen Campbell following his judgment in the Loveridge manslaughter case, I mounted a defence of the judge through the media. Whilst courts are not immune from criticism, it is necessary that critics should understand the proper role of

The media attacks went so far as to suggest that all our sentencing judges were out of touch and lacking in independence. Nothing can be further from the truth.

courts. The media attacks went so far as to suggest that all our sentencing judges were out of touch and lacking in independence. Nothing can be further from the truth.

There is a widespread misunderstanding of the sentencing process. It is helpful for barristers to explain it wherever possible. The association is one of the few voices providing any informed commentary on sentencing issues. Perhaps we need to find new and inventive ways to spread the message that our judges provide first class justice in a world where true justice is a rare commodity.

Finally, I was pleased to announce the appointment of two new life members. In October the Bar Council resolved to appoint Chief Justice James Allsop and her Honour Margaret Beazley, life members of the association. Both Allsop CJ and Beazley P have made and continue to make extremely valuable contributions to our jurisprudence. We are all proud of them. It is an honour that they accepted the association's offer of appointment.

Bar Practice Course 02/13

Back row: Oshie Fagir, James Stelllios, Michael Astill, Jeff Tunks, Geoff O'Shea, Robert Armitage, Anton Hughes, Ahmad Moutasallem, Malcolm Gibson, Peter Kondic. **Third row:** Sudarshan Kanagaratnam, Peter Riordan, Tom Hollo, Jason Hale, Claire Wasley, David Hume, David Randle, Tom Warr, Craig Moran, Tony Vernier. **Second row:** Rhys Graham, Tom Quilter, Nick Read, Mahmoud Mandoh, Janet McKelvey, Karl Pattenden, Emma Beechey, Jason Moffett, Ramesh Rajalingham, Scott Schaudin, Daniel Krochmalik. **Front row:** Rachel Dart, Ishita Sethi, Nicole Compton, Michael Sciglitano, Zoe Hillman, Sarah Carr, Olivia Dinkha, Oliver Jones, Ye Catherine Lin, Josie Walker, Karen Beck.

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'Artificial price' in the context of market manipulation

Justin Simpkins reports on *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30

The full bench of the High Court, in a joint judgment, recently clarified the meaning of 'artificial price' in s 1041A of the *Corporations Act 2001* (Cth). Section 1041A prohibits a person from taking part in or carrying out one or more transactions that have or are likely to have the effect of creating an artificial price, or maintaining at a level that is an artificial price, for trading in financial products on a financial market operated in this jurisdiction.

Background

JM had been charged with 39 counts of market manipulation contrary to s 1041A and two counts of conspiring with others to commit market manipulation. The CDPP had alleged that JM entered into an arrangement with family members whereby his daughter bought shares in a company ['X Ltd'] at a price and in circumstances that prevented the day's closing price for the shares falling below a point at which a lender to JM would make a margin call requiring JM to provide additional collateral for the loan.

The CDPP alleged that the purchase was made for the sole, or at least the dominant, purpose of ensuring that the price of the shares did not fall below the price at which the lender would be entitled to make a margin call on her father's loan, and the transaction had the effect of creating an artificial price for the shares or maintaining the price at a level that was artificial.

Before empanelling the jury the trial judge reserved three questions for determination by the Victorian Court of Appeal.[1] The three questions were:

1. For the purpose of s 1041A of the *Corporations Act 2001* (Cth), is the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining a particular price for that share on the ASX an 'artificial price'?
2. Was the closing price of shares in [X Ltd] on the ASX on 4 July 2006 an 'artificial price' within the meaning [of] s 1041A(c) of the Corporations Act 2001 (Cth)?
3. Was the price of shares in [X Ltd] on the ASX on 4 July 2006 maintained at a level that was 'artificial' within the meaning of s 1041A(d) of the Act?'

Victorian Court of Appeal

The Court of Appeal reformulated the questions so as to focus on whether the expression 'artificial price' in s 1041A had a particular technical legal meaning as opposed to its sense in ordinary English or some non-legal technical sense.[2]

The Court of Appeal held that the expression 'artificial price' in s 1041A 'is used in the sense of a term having legal signification (as opposed to its ordinary English or some non-legal technical sense) and its legal signification is of market manipulation by conduct of the kind typified by American jurisprudential conceptions of 'cornering' and 'squeezing''.[3]

High Court

The High Court held that the Court of Appeal erred in reformulating the reserved questions and reinstated the original questions. The High Court noted that the mere fact that a question reserved for determination by the Court of Appeal may be contingent on the prosecution establishing the relevant facts to the requisite standard of proof did not make the question hypothetical.[4]

The High Court held that the Court of Appeal was wrong to conclude that s 1041A should be construed as directed to 'market manipulation by conduct of the kind typified by American jurisprudential conceptions of 'cornering' and 'squeezing''.[5]

As to the operation of s 1041A, the High Court held that:

> Market manipulation is centrally concerned with conduct, intentionally engaged in, which has resulted in a price which does not reflect the forces of supply and demand.[6]

The references in s 1041A to a transaction which has, or is likely to have, the effect of creating an 'artificial price', or maintaining the price at a level which is 'artificial', should be construed as including a transaction where the on-market buyer or seller of listed shares undertook it for the sole or dominant purpose of setting or maintaining the price at a particular level.

The price that results from a transaction in which one party has the sole or dominant purpose of setting or maintaining the price at a particular level is not a price which reflects the forces of genuine supply or demand in an open, informed and efficient market. It is, within the meaning of s 1041A, an 'artificial price'.[7]

As s 1041A prohibits transactions which are likely to create an 'artificial price', it is not necessary to demonstrate that the impugned transactions did in fact create or maintain an artificial price.[8]

Proof of a dominant, as distinct from sole, purpose of setting or maintaining a price would establish that the relevant transaction established or maintained an artificial price.[9]

The High Court held that the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining a particular price for that share on the ASX was an 'artificial price' for the purpose of s 1041A of the Corporations Act, that the closing price of shares in [X Ltd] on the ASX on the relevant date was an 'artificial price' and that the price of shares in [X Ltd] on the ASX on 4 July 2006 was maintained at a level that was 'artificial'.

Endnotes

1. Pursuant to s 302 of the *Criminal Procedure Act 2009* (Vic)
2. *Director of Public Prosecutions (Cth) v JM* (2012) 267 FLR 238
3. At 316
4. At [30]–[31]
5. At [77]
6. At [70], referring to the fundamental point that should be taken from *Cargill Inc v Hardin* 452 F 2d 1154 (1971)
7. At [72]
8. At [73]
9. At [75]

Conduct of counsel at trial

Zoe Hillman reports on *Farooqi and Ors v R* [2013] EWCA Crim 1649

In his final judgment as lord chief justice of England and Wales, lord judge, together with Lord Justice Treacy and Mrs Justice Sharp, considered the duties and obligations of defence counsel in a criminal trial. Specifically, the English Court of Appeal considered whether a number of co-defendants had been deprived of a fair trial in circumstances where counsel for one of the co-defendants engaged in behaviour described by the court as constituting 'flagrant misconduct and alleged professional incompetence'[1].

Counsel's conduct of the trial

The Court of Appeal examined the reliability of verdicts delivered in a trial in which charges had been brought against four defendants – Muir Farooqi ('Farooqi'), Matthew Newton, Hussain Malik and Harris Farooqi. The charges arose out of allegations that each of the four defendants, who had been associated with a Da'wah stall in Manchester, engaged in conduct designed to radicalise individuals to commit violent jihad in Afghanistan and Pakistan. The prosecution's evidence had been obtained by undercover officers who, as part of a covert operation, had recorded conversations with each of the defendants between November 2008 and November 2009. There was no dispute as to what was said by the defendants in the course of those conversations.

Each of the defendants had been separately represented at trial.

The following aspects of the conduct of Farooqi's defence by Farooqi's lead counsel had attracted criticism during the course of the trial:

- two undercover officers, who were called by the prosecution as witnesses, were subjected to 14 days of cross-examination by Farooqi's counsel. The cross-examination was described in the course of the appeal as 'prolix, extensive and irrelevant, and, on occasions, offensive'[2];
- on the evening prior to the close of the Crown's case, Farooqi's counsel served the prosecution with a skeleton outline of an application to stay the proceedings on the grounds of entrapment. No such application had been foreshadowed at any time during the case management of the proceedings or during the course of the prosecution presenting its case. The application was brought in breach of the English Criminal Procedure Rules and *Criminal Procedure and Investigations Act 1996*. The application shone new light on the purpose of Farooqi's counsel's cross-examination of the undercover officers. Had it been properly notified, it would have affected the approach of the trial judge and prosecution counsel to those cross-examinations;
- a further application, again brought late and without notice to the Crown, was made that Farooqi had no case to answer as the Crown had failed to negative self defence; and
- two further late applications to alter Farooqi's defence were brought without notice, prompting the trial judge to note that the prosecution and the court had been ambushed[3].

The final provocation came in the form of Farooqi's counsel's closing submissions, in which he:

- alluded to the jury that they ought to treat the trial judge as a salesman of worthless goods;
- attacked the motives of the Crown and trial judge, depicting them as the agents of a repressive state;
- suggested that the reason counsel for the other co-defendants had not advanced the arguments he had put was because those counsel were 'sucking up' to the court;
- attempted to give evidence on behalf of Farooqi (Farooqi having elected not to give evidence in the case); and
- made significant allegations that should have been, but were not, put to the Crown's witnesses in cross-examination.

At the conclusion of Farooqi's counsel's closing submissions counsel for one of the co-defendants applied to discharge the jury on the basis that the errors in Farooqi's counsel's submissions could not be adequately corrected in summing up. The other co-defendants reserved their position. In determining whether the jury ought to be discharged, the trial judge held that, despite having been put in a very difficult position, he would attempt the task of summing up with a view to correcting the position

in a manner that would not disadvantage any defendant or the Crown. The judge went on to give a summing up that including a distinct 'Corrections' section, criticising Farooqi's counsel's conduct of the case but emphasising to the jury that they must bear in mind that there was no evidence to suggest that Farooqi himself was the author of anything said by his counsel which required correction.

Three of the four defendants (including Farooqi) were found guilty of the charges brought against them.

The Court of Appeal's consideration of counsel's conduct at trial

On appeal, Farooqi (now represented by another counsel) and two of his co-defendants argued that, although the conduct of the trial judge was impeccably fair, the defendants could not have had a fair trial as a result of the misconduct of Farooqi's counsel .

In considering the role and expectations of counsel, the Court of Appeal noted that the question of whether Farooqi's counsel had acted on his client's instructions was irrelevant, stating:

> Something of a myth about the meaning of the client's 'instructions' has developed. As we have said, the client does not conduct the case. The advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the client, or when the advocate is a barrister, the solicitor 'instructs' him… the advocate, and the advocate alone remains responsible for the forensic decisions and strategy. That is the foundation for the right to appear as an advocate, with the privileges and responsibilities of advocates and as an advocate, burdened with the twin responsibilities, both to the client and to the court.[4]

The Court of Appeal went on to refer to five rules governing counsels' conduct, which it considered had been infringed by Farooqi's counsel's behaviour[5]:

- The advocate cannot give evidence or, in the guise of a submission, make assertions about facts which have not been adduced in evidence – a rule described as 'particularly stark whenever the defendant elects not to give evidence in his own defence';
- Critical comments about a witness must not be advanced without the witness being given a fair opportunity to answer those criticisms in cross-examination;
- In that context, the court cautioned against the 'somewhat dated formulaic use of the word 'put' as integral to the process' of giving a witness an opportunity to answer any criticism. That is because assertion is not 'true cross-examination' and blurs the line, from a jury's perspective, between evidence from a witness and impermissible comment from an advocate;
- The advocate must abide procedural requirements, practice directions and court orders; and
- Personal attacks of the sort made by Farooqi's counsel on the judge, the prosecution and counsel for the co-defendants did not constitute 'fearless advocacy', but rather have the effect of destroying a system of administration of justice which depends on a sensible, respectful working relationship between the judge and independent-minded advocates.

Outcome

Ultimately, the Court of Appeal held that, despite the 'melancholy circumstances' of the case, on this occasion the trial judge's summing up had overcome the hurdles to a fair trial which Farooqi's counsel's conduct had created. The trial judge had managed to confine the effects of Farooqi's counsel's conduct such that Farooqi and each co-defendant had the benefit of having their case fairly put to the jury for consideration. Consequently each of the appeals failed.

A complaint made by the attorney general to the Bar Standards Board with respect to Farooqi's counsel's conduct awaits resolution. A disciplinary hearing has been set down for January 2014.

Endnotes

1. *Farooqi and Ors v R* [2013] EWCA Crim 1649 at 1.
2. Ibid at 42.
3. Ibid at 70.
4. Ibid at 108.
5. Ibid at 111 to 115.

Offers of compromise under the UCPR and Calderbank offers

Radhika Withana reports on *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188

Before 7 June 2013 when amendments to the rules relating to offers of compromise became effective, r 20.26(2) of the Uniform Civil Procedure Rules (UCPR) required that an offer of compromise made under the UCPR (an offer) 'must be exclusive of costs'. Rules 42.13A, 42.14, 42.15 and 42.15A set out the cost consequences that would flow from an offer of compromise. Each of rr 42.14, 42.15 and 42.15A preserved the discretion of the court to order costs otherwise than as set out therein.

The pre-amendment requirement in r 20.26(2) that an offer 'must be exclusive of costs' has proved a problematic formulation productive of much case law, some of it conflicting, as to whether a purported offer referring to costs as being payable 'as agreed or assessed' is a valid offer under r 20.26. In *Old v McInnes and Hodgkinson* [2011] NSWCA 410 (*Old*), Meagher JA (with whom Beazley P and Giles JA agreed) held that offers containing a term that the offeree pay the offeror's costs 'as agreed or assessed' were not offers validly made under (pre-amendment) r 20.26 because they were not exclusive of costs.[1]

In *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188[2] a five member bench of the Court of Appeal had occasion to revisit *Old* in view of a number of single instance decisions that had cast doubt on the correctness of *Old.* These contrary first instance decisions[3] emphasised a purposive construction in view of the purpose of the rules on offers of compromise to facilitate compromise, such that the words 'exclusive of costs' in the rules should be taken only to prohibit offers where the monetary sum offered was inclusive of costs. Thus a letter purporting to be an offer of compromise[4] would not be invalid by virtue of an offer amount that also referred to 'costs as agreed or assessed'.[5]

Whatever the practical utility of the position adopted by those first instance decisions departing from the position in *Old*, *Dream Developments* makes clear that as a matter of principle, *Old* is correct. The court held that an offer providing for the payment of costs would remove the court's residual discretion to make a contrary costs order and compromise the regime provided by the UCPR.[6]

The case also re-affirms the principles relating to whether an offer that is not compliant with r 20.26 can take effect as a *Calderbank* offer (pursuant to *Calderbank v Calderbank* [1975] 3 WLR 586]) for the purpose of considering whether a special order as to costs should be made.

Background

The offers of compromise examined in *Dream Developments* were made in relation to Local Court proceedings commenced by the respondent for monies due under a building contract and in which the appellant cross claimed for a lesser amount for repairs and rectification arising from alleged breaches of the same building contract. Prior to the Local Court hearing, the respondent's solicitor purported to make an offer including, relevantly, to pay the appellant's 'costs as agreed or assessed'. A further and final offer in similar terms (with a higher settlement sum) was made some months later. Neither offer was accepted. Ultimately the respondent was successful in its claim, however, the appellant was successful in its cross-claim. As the net amount received by the respondent was more than the amount for which it offered to settle in its first offer, the respondent sought an order for indemnity costs pursuant to Division 3 of Pt 42 of the UCPR. The magistrate held that the respondent's offer did not comply with r 20.26 because of the reference to 'costs as agreed or assessed' nor did it operate as a *Calderbank* offer and no special costs order was made.

Adams J reversed the magistrate's decision in relation to costs holding that 'the offer was markedly different to that which was made [in *Old*]'[7]and the appellant sought and was granted leave to appeal this. As the respondent sought to argue that *Old* was incorrectly decided and should be overruled, the Court of Appeal constituted a bench of five to decide the matter.

The correctness of *Old*

The offer of compromise in question in *Dream Developments* was in identical terms to the one considered in *Old* and the Court of Appeal held that there was no basis for the distinction drawn by the primary judge.[8] As Barrett JA stated, the terms of the offer in this case did not merely introduce a 'harmless contractual qualification' that reflected the usual order as to costs made in the event the offeror obtaining judgment in its favour as it cut across the

residual discretion preserved to the court by the scheme under the UCPR[9].

Bathurst CJ (with whom Beazley P, McColl and Emmett JJA agreed) and Barrett JA in separate reasons held that *Old* was correctly decided. Bathurst CJ had regard to the scheme for the making of offers and its costs consequences set out in the UCPR. That an offer under the UCPR should be stated as exclusive of costs is, as Barrett JA stated, an 'essential characteristic' of an offer under the rules.[10] By this regime, the phrase 'exclusive of costs' in r 20.26(2) suggested that a compliant offer will not deal with costs at all, since the costs consequences (whether following acceptance or non-acceptance) of such an offer are dealt with by the rules in division 3 of part 42.[11] Importantly, each of the reasons of Bathurst CJ, Barrett and Emmett JJA noted that whilst 42.13A(2) provided[12] for an order for costs in favour of the plaintiff after the time the offer is accepted, the court retains a discretionary power to make a contrary order and an offer providing for payments of costs removes that residual discretionary power, which is inconsistent with the scheme under the UCPR'[13] There were no inconsistent decisions of the court conflicting with *Old*.[14] The first instance cases that reached a result contrary to *Old* were incorrectly decided.[15]

Whether an offer of compromise is effective as a Calderbank offer[16]

In *Dream Developments*, Bathurst CJ (with whom Beazley P and McColl JA agreed) held, consistent with the approach of the majority in *Old*[17], that nothing in the terms of the letters in which the offers of compromise were made or their surrounding circumstances indicated that the offers were intended to have effect other than as offers under r 20.26.[18] Fundamentally, nothing in the letters or the surrounding circumstances of the offers indicated that they would be relied on in relation to the question of costs should a verdict more favourable than the offer be achieved, such an indication being, 'the essence of a *Calderbank* offer'[19].

Importantly, for an offer to be a *Calderbank* offer there must be evident the intention of the offeror that the offer has a 'secondary or alternative significance'[20] as a *Calderbank* offer in addition to being an offer under r 20.26, from the terms of the offer or surrounding circumstances, whether expressly or by implication[21].

Amendments to the UCPR

On 7 June 2013, the *Uniform Civil Procedure Rules (Amendment No 59) 2013* came into effect. A compliant offer under r 20.26(2)(c) '...must not include an amount for costs and must not be expressed to be inclusive of costs'. New rule 42.13A provides for the circumstance where the offer is accepted and it makes no provision for costs.

Schedule 12 has also been inserted into the rules, which sets out the applicable rule before and after the date of amendment. Rules 20.25-20.26 and rr 42.13–42.15A as in force immediately before the commencement of the amended rules will continue to apply to an offer made before the date of commencement. Accordingly, *Dream Developments* (and *Old*) will remain relevant for offers of compromise made before 7 June 2013.

A valid offer must not be expressed to be inclusive of costs or include an amount for costs.[22] Where costs are to be paid out of a particular fund or estate, that provision may also be contained in the offer, with a reference to the ordinary or indemnity basis on which the costs are to be paid (r 20.26(3)(c)).

A valid offer may propose that the offeror will pay 'the costs as agreed or assessed' up to the time of the offer was made (r 20.26(3)(b) but cannot otherwise be made on terms that deal with the costs of the proceedings or restrict the operation of the special costs rules in UCPR rr 42.13–42.15A.

Endnotes

1. *Old v McInnes and Hodgkinson* [2011] NSWCA 410 at [105] per Meagher JA. See also [18] per Beazley P, [42] per Giles J. *Cf.* the use of the phrase 'plus costs', which has been regarded as a complying offer. See for example *Uniting Church v Takacs (No 2)* [2008] NSWCA 172.
2. Handed down on 25 June 2013.
3. See, in particular *Rail Corporation NSW v Vero Insurance Ltd (No 2)* [2012] NSWSC 926, which the other first instance decisions referred to: see *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [39].

4. An offer referring generally to 'the rules' without specifying the particular rule under which the offer is being made is not an offer to which r 20.26 applies: *Kain v Mobbs (No 2)* [2008] NSWSC 599 at [7].
5. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [39].
6. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [25].
7. *Dream Developments Pty Ltd v Whitney (No 2)* [2012] NSWSC 339 at [4]. Justice Adams delivered an earlier judgment in this matter: *Dream Developments Pty Limited v Samuel Whitney* [2012] NSWSC 108 ('*Whitney No 1*'). The judgment in *Old* was handed down after the hearing of the appeal in *Whitney No 1* but before the delivery of his Honour's first judgment on 23 February 2012. However, that judgment only dealt with *Old* in respect of the issue of whether an offer of compromise made under the UCPR could also operate as a *Calderbank* offer. *Dream Developments Pty Ltd v Whitney (No 2)* arose upon an application by the appellant to set aside the primary judge's orders and it was in the second judgment (*Whitney (No 2)*) by Adams J that his Honour distinguished the terms of the offer of compromise made in *Old* as compared to in the case before his Honour and from which the appellant appealed to the Court of Appeal.
8. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [20] per Bathurst CJ, [49] per Barrett JA, [75] per Emmett JA.
9. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [53] per Barrett JA.
10. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [52].
11. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [25] per Bathurst CJ.
12. Although this rule has been amended and *Dream Developments* deals with the version of r 42.13A before the recent amendment, the amended rule is not materially different in this respect.
13. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [25] per Bathurst CJ, [49]-[53] per Barrett JA, [75] per Emmett JA.
14. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [26] per Bathurst CJ, [54] per Barrett JA.
15. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [39] per Bathurst CJ (obiter).
16. This issue arose by the respondent's Notice of Contention seeking to uphold the judgment of the primary judge on that basis.
17. *Old v McInnes and Hodgkinson* [2011] NSWCA 410 at [106] per Meagher JA (Giles JA concurring at [42]). Beazley P dissented at [21]-[41].
18. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [44].
19. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [42].
20. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [59] per Barrett JA, [77] per Emmett JA.
21. *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 at [60] per Barrett JA.
22. There is one exception in the case of an offer under r 20.26(3)(a) for judgment in favour of the defendant with a term of the offer that the defendant will pay to the plaintiff a sum in respect of the plaintiff's costs.

Barristers and the Fidelity Fund

Emma Beechey reports on *Legal Services Board v Gillespie-Jones* [2013] HCA 35

The High Court overturned a decision of the Victorian Court of Appeal which had upheld a barrister's right to claim against a solicitors' fidelity fund for unpaid fees. The High Court held unanimously that the barrister could not claim against the fidelity fund for his unpaid fees in circumstances where the solicitor had misappropriated to himself trust funds that were provided by the client on account of the client's legal costs including the barrister's fees. However, the 7-judge bench split 4:3 as to reasoning for the decision. Four judges found that the critical fact was the absence of a finding that the client had instructed the solicitor to use the trust money specifically to pay the barrister. The other three judges found that the barrister did not have a beneficial interest in the trust money and so was not entitled to claim against the fidelity fund.

The case concerned the Victorian Legal Practitioners Fidelity Fund ('Fidelity Fund') but its reasoning is equally applicable in New South Wales as both states have introduced relevantly uniform legislation governing the legal profession generally and trust money and fidelity funds in particular.[1] This note refers to the relevant Victorian provisions as considered by the High Court. The corresponding New South Wales provisions can be found in the footnotes.

The facts

The client retained Mr Michael Gray, a solicitor, to act for him in relation to criminal proceedings. Mr Gray briefed Mr Simon Gillespie-Jones to appear in those proceedings. No costs agreement was entered into between the barrister and the solicitor, nor was there a costs agreement between the client and either the solicitor or the barrister. The client paid in excess of $55,000 to the solicitor on account of the client's various legal costs, including the barrister's fees. The solicitor misappropriated the majority of the funds paid by the client. The barrister periodically submitted memoranda of his fees to the solicitor but the client did not see them. The barrister's total fees were $53,610 of which $31,540 was never paid. By the time the matter reached the High Court, there was no dispute that the barrister's fees were fair and reasonable. Had the solicitor not misappropriated the funds, it appeared that there would have been sufficient funds available to pay the barrister in full.

The barrister made a claim on the Fidelity Fund for $31,540. The Legal Services Board, which maintains the Fidelity Fund, rejected the claim. The County Court of Victoria allowed the claim on appeal and the Supreme Court of Victoria dismissed an appeal from the County Court decision.

Trust money and the Fidelity Fund

Part 3.3 of the LPA deals with trust money and trust accounts.[2] Section 3.3.1(a)[3] provides that one of the purposes of Pt 3.3 is 'to ensure that trust money is held by law practices … in a way that protects the interests of persons for or on whose behalf money is held'. There was no dispute in this case that the money was trust money. Section 3.3.14(1)(b)[4] requires a law practice to disburse trust money only in accordance with a direction given by the person on whose behalf the trust money is received.

Part 3.6 of the LPA deals with fidelity cover.[5] Section 3.6.1[6] contains a purpose provision which states:

> The purpose of this Part is to compensate clients for loss arising out of defaults by law practices arising from acts or omissions of associates.[7]

Section 3.6.7(1)[8] provides:

> A person who suffers pecuniary loss because of a default to which this Part applies may make a claim against the Fidelity Fund to the Board about the default.

'Default' is defined in s 3.6.2[9] as including 'a failure of the practice to pay or deliver trust money'.

First instance

At first instance, Kennedy J found that the barrister was entitled to claim against the Fidelity Fund because he was a person who had suffered pecuniary loss because of the solicitor's default, being the failure to pay or deliver trust money.[10] The default was the solicitor's breach of s 3.3.14(1)(b) in failing to pay the trust money in accordance with the client's direction to pay the client's legal costs and instead using the money for himself.[11] Her Honour found that it was not necessary for the barrister to have a legal or equitable interest in the moneys entrusted to the solicitor such that he was a person 'on whose behalf' the trust monies were held. It was sufficient in this regard that there was a failure to pay or deliver the trust money to the barrister.[12]

Her Honour also rejected an argument by the Board that there was no failure to pay because the procedural steps required by the Act and the Regulations for the withdrawal of trust money[13] had not yet been complied with such that the barrister did not have an immediate right to receive the money. Her Honour found that it could hardly be supposed that there could only be a failure to pay where a solicitor had properly taken steps to render a bill before misappropriating trust money.

Court of Appeal

The Court of Appeal interpreted Pt 3.6 in light of Pt 3.3 and, applying the language of s 3.3.1 in particular, found that a person entitled to claim against the Fidelity Fund in respect of a default in relation to trust money must be a person 'for or on whose behalf' the trust money was held.[14] Accordingly, it was necessary for the person to have some interest in the trust money, although the interest did not necessarily need to be a legal or equitable beneficial interest.[15] The Court found that the circumstances in which the client paid the money to the solicitor gave rise to a Quistclose trust which gave the barrister a contingent interest in the fund.[16] This contingent interest made the barrister a person for or on whose behalf the trust money was held and therefore a person entitled to bring a claim against the Fidelity Fund.

As to whether there was no failure to pay because the procedural requirements for withdrawal of trust money had not been met, the Court of Appeal found that those procedural requirements cited by the Board were not relevant in the circumstances.

High Court

French CJ, Hayne, Crennan and Kiefel JJ

French CJ, Hayne, Crennan and Kiefel JJ rejected the Board's argument that compliance with the procedures for dealing with trust money in Pt 3.3 was a condition of compensation under Pt 3.6. Their Honours found that the Board was seeking 'to impute to the legislature an intention which is neither reasonable nor rational' and that Pt 3.6 could 'reasonably be taken to be founded upon that assumption that, where there has been a dishonest dealing with trust money, procedures are unlikely to have been complied with'.[17]

Turning to the question of who was entitled to claim compensation from the Fidelity Fund, their Honours focused their attention on the provisions of Pt 3.6. Their Honours stated that, as the purpose of Pt 3.6 was remedial and beneficial, the relevant provisions should receive as generous a construction as the actual language of the provisions permits. Their Honours continued:

> 'What Pts 3.3 and 3.6 have in common, it will be seen, is that they identify a person who has an interest in the money in the sense that the person may suffer loss if it is dealt with other than according to instructions. However, the class of persons identified is not limited to persons beneficially entitled to trust money and s 3.3.1 should not be read as limited in this way'.[18]

Thus, not only Pt 3.6 but also Pt 3.3 should now be understood as applying to all those persons who may suffer loss if trust money is dealt with other than according to instructions. This broad scope given to the protections in both Pts 3.3 and 3.6 is markedly different from the confined approach applied by Bell, Gageler and Keane JJ.

Accordingly, French CJ, Hayne, Crennan and Kiefel JJ found that neither a proprietorial interest nor any entitlement to the trust money or trust property was required to support a claim against the Fidelity Fund.[19] The question of whether the barrister had an interest in the trust money, such as that of a beneficiary of a Quistclose trust, was therefore not to the point.[20]

However, their Honours ultimately found that in the circumstances of this case the barrister did not have an entitlement to claim against the Fidelity Fund because the client had not given a direction to the solicitor to pay the barrister.[21] Such a direction, their Honours found, must be a direction to pay the trust money to an identifiable person.[22] It was said to be a feature of the primary judge's findings that her Honour did not find that such an instruction to pay the barrister was given.[23] The descriptions placed on the electronic transfers by the client such as 'Grey & SG Jones', 'Grey & Simon' or 'SGJ via M Grey' and the evidence given by the client before the primary judge that he had provided the money for the engagement of 'everybody that come and help me' and 'to pay whoever that has been engaged' were insufficient

to constitute such a direction because they directed payment to both the solicitor and the barrister and perhaps others.

Accordingly, the result was that the money was intended to be held by the solicitor and disbursed according to the client's further directions yet to be provided.[24] Their Honours noted that the findings made by the primary judge as to the client's instructions were not challenged in the Court of Appeal, nor before the High Court and could not be revisited.[25]

Importantly, their Honours added that it was 'neither necessary nor appropriate' to decide whether a barrister would have a claim against the Fidelity Fund if the client had paid the solicitor an amount on account of counsel's fees (or disbursements generally) and the solicitor had misapplied those monies, with their Honours concluding that variation of the facts 'may, we do not say must, yield a different application of the LPA'.[26]

Bell, Gageler and Keane JJ

In contrast to the leading judgment, Bell, Gageler and Keane JJ found that the Court of Appeal was correct to find that the entitlement to compensation was limited to those 'for or on whose behalf' trust money was held. Their Honours found that the compensatory purpose of Pt 3.6 was encompassed within the protective purpose in Pt 3.3 and that the compensatory purpose of Pt 3.6 was:[27]

> '... advanced by construing the requisite causal connection between a default and the suffering of pecuniary loss as conferring an entitlement on persons 'for or on whose behalf' trust money is held to claim against the Fidelity Fund'.

Further, their Honours held that such persons were those who had a beneficial interest in the trust money.[28]

However, their Honours found that the Court of Appeal had been incorrect to characterise the circumstances of the case as giving rise to a Quistclose trust. To infer such a trust relationship would have been inconsistent with the rights and obligations conferred or imposed by the LPA.[29] Their Honours concluded that the barrister had no interest, present or contingent, in the trust money.[30] Instead, the solicitor held the money on trust exclusively for the benefit of the client and the barrister suffered only the non-payment of a debt owed by the solicitor.[31] Their Honours concluded:[32]

> 'Mr Gillespie-Jones never had any entitlement to, or expectation of, payment of trust money. He did not suffer any loss because of the failure by Mr Grey to pay trust money; he suffered a loss because of Mr Grey's failure to pay his debts.'

Conclusion

Although the barrister in this case was ultimately unsuccessful in his claim against the Fidelity Fund, the judgment of French CJ, Hayne, Crennan and Kiefel JJ has left the door ajar to barristers' claims in future, in appropriate factual circumstances. Their Honours have also established a broad and generous test for determining the scope of the protective provisions of both Pts 3.3 and 3.6.

Endnotes

1. *Legal Profession Act 2004* (Vic) ('LPA'); *Legal Profession Act 2004* (NSW) ('LPA (NSW)').
2. 2 LPA (NSW), Pt 3.1.
3. LPA (NSW), s 242.
4. LPA (NSW), s 255(1)(b).
5. LPA (NSW), Pt 3.4.
6. LPA (NSW), s 418 is expressed slightly differently: 'to establish and maintain a fund to provide a source of compensation for defaults by law practices arising from acts or omissions of associates'.
7. At first instance and in the Court of Appeal, the Board was unsuccessful in arguing that the barrister was not eligible for compensation because he was not a 'client' so he did not come within the purpose of the part. This issue was not appealed to the High Court.
8. LPA (NSW), s 436.
9. LPA (NSW), s 419.
10. *Gillespie-Jones v Legal Services Board* [2011] VCC 223.
11. At [97].
12. At [99].
13. LPA, s 3.3.20; *Legal Profession Regulation 2005* (Vic), r 3.3.34; LPA (NSW), s 261; *Legal Profession Regulation 2005* (NSW), r 88.
14. *Legal Services Board v Gillespie-Jones* [2012] VSCA 68 at [51].
15. At [53].
16. At [55], [59].
17. *Legal Services Board v Gillespie-Jones* [2013] HCA 35 at [48], [45].
18. A [51].
19. At [55].
20. At [52].
21. At [61].
22. At [56].
23. At [31].
24. At [61].
25. At [64].
26. At [66].
27. At [141].
28. At [142].
29. At [119]–[120], [126].
30. At [127].
31. At [143].
32. At [145].

Background factors and sentencing

Juliet Curtin reports on *Bugmy v The Queen* [2013] HCA 37

Should sentencing courts be required to take into account the unique systemic or background factors which have been instrumental in bringing Aboriginal offenders before the courts and into custody? This was one of the questions before the High Court in *Bugmy v The Queen*,[1] an appeal brought by Mr Bugmy against the decision of the New South Wales Court of Criminal Appeal (CCA) to impose a more severe sentence than that which he had received from the District Court of New South Wales.

Background

The appellant was a 31 year old Aboriginal man from Wilcannia. He had been separated from his family aged 12, left school aged 13, and was unable to read or write. The greater part of the appellant's childhood was spent in foster care, boys' homes and juvenile justice facilities and he had been in custody for most of his adult life. As a child, the appellant had been exposed to extreme episodes of domestic violence, as well as drug and alcohol abuse. He had a history of mental health issues, and had made five previous suicide attempts whilst in custody. It was against these background factors that the appellant invited the High Court to adopt the approach taken by the Canadian Supreme Court, which requires Canadian sentencing courts to take into account the unique circumstances of all Aboriginal offenders as relevant to the moral culpability of an individual Aboriginal offender.[2]

The appellant had pleaded guilty to two counts of assaulting a correctional officer (contrary to s 60A(1) of the *Crimes Act 1900* (NSW) (Crimes Act)) and one count of causing grievous bodily harm with intent to cause harm of that kind (contrary to s 33(1)(v) of the Crimes Act). He had committed the offences, aged 29, whilst he was in remand at the Broken Hill Correctional Centre. The appellant had asked one of the correctional officers, Mr Gould, to see if his visiting hours could be extended as he was concerned his visitors might arrive after visiting hours were over and would be refused entry. Unsatisfied with Mr Gould's response to his enquiry, the appellant threatened Mr Gould and proceeded to throw pool balls at him, as well as two additional correctional officers. One of the pool balls struck Mr Gould in the left eye. Mr Gould suffered serious eye injury as a result, and ultimately suffered a complete and permanent loss of vision in his left eye as well as significant psychological damage.

The appellant was committed for sentence to the District Court at Dubbo. Acting District Court Judge Lerve sentenced the appellant to a non-parole period of four years and three months and a balance of term of two years, for all of the offences.[3]

The maximum penalty for an offence under s 60A(1) of the Crimes Act is imprisonment for five years; the maximum penalty for an offence under s 33(1)(b) of the Crimes Act is imprisonment for 25 years. His Honour discounted each sentence by 25 per cent to reflect the utilitarian value of the appellant's early guilty pleas. In mitigation, Lerve ADCJ also allowed 'some moderation to the weight to be given to general deterrence' because of medical evidence that the appellant suffered from a mental condition, although there was no link between that condition and the offences. Finally, his Honour found that *Fernando/Kennedy* issues were present,[4] namely, that the appellant's childhood had been one of violence, deprivation, alcohol and drug abuse, and accordingly, that these issues would need to be considered in determining his sentence. Pursuant to s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), Lerve ADCJ took into account as aggravating factors Mr Gould's position as a correctional services officer, Mr Gould's consequential post-traumatic stress, the use of a pool ball as a weapon, and the appellant's criminal history.

The Court of Criminal Appeal

The director of public prosecutions appealed to the CCA on the ground that the sentences imposed by Lerve ADCJ were manifestly inadequate. The director subsequently filed three additional grounds of appeal arguing that Lerve ADCJ had failed to properly determine the objective seriousness of the offence, had failed to properly acknowledge that Mr Gould was performing his duties as a correctional services officer when he was assaulted, and that in giving weight to the appellant's subjective case, had impermissibly ameliorated the appropriate sentence. The CCA, constituted by Hoeben JA, Johnson and Schmidt JJ, allowed the appeal with respect to the sentence for the s 33(1)(b) offence, upholding the director's additional grounds of appeal, but making

no finding as to whether the sentence was manifestly inadequate.[5] The CCA held that Lerve ADCJ had erred in his assessment of the seriousness of the offence against Mr Gould, had failed to take into account the appellant's lack of remorse, had given insufficient weight to the appellant's criminal record, and had erred in taking into account the evidence of the appellant's mental illness. Accordingly, the CCA quashed the sentence imposed by Lerve ADCJ and imposed a non-parole period of five years, with a balance of term of two years and six months. Importantly, the CCA did not consider whether or not, in the exercise of its jurisdiction under s 5D of the *Criminal Appeal Act 1912* (NSW), it should invoke its 'residual discretion' to decline to interfere with the sentence, notwithstanding the demonstration of error or manifest inadequacy.

His Honour Justice Hoeben gave the principal judgment (Johnson and Schmidt JJ agreeing). In relation to the director's submission that the appellant's age and criminal record lessened the relevance of the *Fernando* principles, and that accordingly Lerve ADCJ erred in taking into account the social deprivation in the appellant's youth and background, Hoeben JA stated that 'with the passage of time, the extent to which social deprivation in a person's youth and background can be taken into account, must diminish. This is particularly so when the passage of time has included substantial offending.'[6] With respect to the director's submission that Lerve ADCJ had erred by reducing the weight to be given to general deterrence by taking into account the appellant's mental illness, Hoeben JA found that Lerve ADCJ's error was in taking into account evidence of the appellant's mental condition because the diagnosis given in the medical evidence was too general in its terms to be a factor relevant to sentencing.[7]

The High Court

On appeal, the High Court[8] found that the CCA's power to substitute a sentence for that imposed by Lerve ADCJ was not enlivened by its view that it would have given greater weight to deterrence and less weight to the appellant's subjective case.[9] The CCA could only vary the sentence if first satisfied that Lerve ADCJ's discretion miscarried because the sentence imposed was below the range of sentences that could be justly imposed for the offence consistently with sentencing standards. Accordingly, the appeal was allowed, and the director's appeal was remitted to the CCA. As the appeal was to be remitted to the CCA for determination, the High Court refrained from considering the consequences of the CCA's failure to consider the exercise of its residual discretion.

Although the CCA's failure to determine whether the sentence imposed by Lerve ADCJ was manifestly inadequate was determinative of the appeal to the High Court, the High Court also addressed two other issues put before it, namely, the correctness of Hoeben JA's statements as to the relevance of the appellant's background and mental illness to his sentencing. Before the High Court, the appellant challenged Hoeben JA's statement that the extent to which social deprivation in an offender's youth and background can be taken into account diminishes over time, particularly when the offender has a record of substantial offending. The appellant also submitted that sentencing courts should take into account the unique systemic or background factors of all Aboriginal offenders as relevant to the moral culpability of an individual Aboriginal offender, as well as the high rate of incarceration of Aboriginal Australians. In making these submissions, the appellant relied on two decisions of the Supreme Court of Canada: *R v Gladue*,[10] and *R v Ipeelee.*[11]

...the High Court observed that evidence of an offender's deprived background will not have the same mitigatory relevance for all the purposes of punishment.

The High Court observed that the Canadian Supreme Court decisions relied upon by the appellant needed to be understood in the context of the provisions of the Canadian *Criminal Code*, specifically, s 718.2(e), which requires a court that imposes a sentence to take into consideration the principle that 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.'[12] The

appellant submitted that s 718.2(e) of the Canadian Criminal Code was similar to s 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which prohibits a court from sentencing an offender to imprisonment unless satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

In declining to adopt the approach taken by the Canadian Supreme Court, the High Court observed that s 5(1) of the Crimes (Sentencing Procedure) Act does not require courts to give particular attention to the circumstances of Aboriginal offenders.[13] Further, the High Court considered that to require courts to take judicial notice of the systemic background of deprivation of Aboriginal offenders would be 'antithetical to individualised justice'.[14] Accordingly, the High Court held that:

> Aboriginal Australians as a group are subject to social and economic disadvantage across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background.[15]

In relation to the weight to be given, in sentencing, to evidence of social deprivation, the High Court accepted that a background of profound social deprivation such as the appellant's remains relevant to the sentencing process, regardless of the offender's criminal history. However, the High Court observed that evidence of an offender's deprived background will not have the same mitigatory relevance for all the purposes of punishment.[16]

In his separate reasons for judgment, Gageler J stated that whether there will be a diminution in the extent to which it is appropriate for a sentencing judge to take into account the effects of social deprivation in an offender's youth and background must be determined on a case by case basis. His Honour stated that the weight to be given to the effects of social deprivation in an offender's background is a matter for individual assessment. [17]

Endnotes

1. (2013) 302 ALR 192; (2013) 87 ALJR 1022; [2013] HCA 37.
2. In *R v Gladue* [1999] 1 SCR 688 at [69], the Canadian Supreme Court held that: 'the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts.' And in *R v Ipeelee* [2012] 1 SCR 433 at [60], the Canadian Supreme Court held that: 'courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters…provide the necessary context for understanding and evaluating the case-specific information presented by counsel.'
3. *R v William David Bugmy* (NSWSC, 16 February 2012, unreported).
4. Lerve ADCJ was here referring to the sentencing principles relevant to the sentencing of Aboriginals which were set out by Wood J in *R v Fernando* (1992) 76 A Crim R 52 at 62-63, and the decision of the New South Wales Court of Criminal Appeal in *Kennedy v R* [2010] NSWCCA 260 at [50]–[58].
5. *R v Bugmy* [2012] NSWCCA 223.
6. Id., at [50].
7. Id., at [47].
8. French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, Gageler J delivering a separate judgment.
9. At [24], per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, at [55], per Gageler J.
10. [1999] 1 SCR 688.
11. [2012] 1 SCR 433.
12. *Bugmy v R*, at [29].
13. Id., at [36].
14. Id., at [41].
15. Id.
16. Id., at [44].
17. Id., at [56].

Compulsory examinations and the right to a fair trial

Marcus Hassall reports on *X7 v Australian Crime Commission* [2013] HCA 29 and *Lee v New South Wales Crime Commission* [2013] HCA 39.

The proposition that a person with a pending criminal charge may be compulsorily examined pursuant to a parallel inquisitorial process, including about the subject-matter of the charge, is controversial. It has resulted in differing decisions of the High Court in the past.[1] Two recent decisions of the High Court, involving similar facts, again indicate divergent approaches to the question.

X7 v Australian Crime Commission

Legislation

Division 2 of Pt II of the *Australian Crime Commission Act 2002* (Cth) (the ACC Act) provides for examiners appointed under the Act to conduct compulsory examinations for the purposes of what the board of the ACC has designated as 'special' operations or investigations. Section 30 of the ACC Act provides that an examinee in such an examination may not refuse to answer questions on the basis of the privilege against self-incrimination, but that where the privilege is claimed prior to answering, the answer then given is not admissible in any criminal proceedings against the examinee (save for proceedings for giving false evidence). Further, s 25A(9) provides that an examiner 'must' give a direction prohibiting or limiting publication of evidence given in an examination 'if the failure to do so might … prejudice the fair trial of a person who has been, or may be, charged with an offence'.

Background

X7 was arrested and charged with drug trafficking and money-laundering offences. Whilst in custody, X7 was summonsed to attend an examination before the ACC. Initially, X7 was asked, and answered, questions relating to the subject matter of his pending charges. When the examination resumed after an adjournment, however, X7 declined to answer any further such questions. The examiner informed X7 that he would, in due course, be charged with the offence of failing to answer questions. The examiner made a direction pursuant to s 25A(9) of the ACC Act restricting publication of X7's evidence, and in particular prohibiting any provision of X7's evidence to officers of the Commonwealth director of public prosecutions or police officers associated with the prosecution of the offences with which X7 had been charged.

X7 commenced proceedings in the original jurisdiction of the High Court seeking injunctive relief against the ACC and its officers, and in particular restraining any further compulsory examination in respect of the matters the subject of the charged offences. The parties agreed to state two questions of law for consideration of the court:

> Does Division 2 of Part II of the ACC Act empower an examiner appointed under s 46B(1) of the ACC Act to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence so charged?

If the answer to Question 1 is 'Yes', is Division 2 of Part II of the ACC Act invalid to that extent as contrary to Ch III of the Constitution?

The decision

By majority (Hayne, Bell and Kiefel JJ, French CJ & Crennan J dissenting), the High Court held that the first question stated should be answered 'No', and that the second question therefore did not arise.

Hayne and Bell JJ were of the view that, in considering the first stated question, it was critical to bear in mind that an affirmative answer would 'fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom'.[2] Their Honours considered that:

> Permitting the Executive to ask, and requiring an accused person to answer, questions about the subject matter of pending charge would alter the process of criminal justice to a marked degree, whether or not the answers given by the accused are admissible at trial or kept secret from those investigating or prosecuting the pending charge.[3]

More particularly, Hayne and Bell JJ were of the view that merely requiring an accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence of the pending charge 'whatever answer is given', and whether or not the answer can be used 'in *any* way' at the trial, because any admission made 'will hinder, even prevent, the accused from challenging at trial that aspect of the prosecution case'.[4] Instead

of being in the position of an ordinary accused, the particular accused 'would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination.'[5]

Hayne and Bell J held that the mooted 'fundamental alteration to the accusatorial criminal justice process' could only be made 'clearly by express words or by necessary intendment'.[6] Their honours held that the relevant provisions of the ACC Act were not sufficiently clear. In respect of a submission that the words of s 25A(9) of the ACC Act specifically contemplated the use of the examination provisions after charges being laid, their Honours held that whilst the words used 'were sufficiently general to *include* that case, … they do not deal directly or expressly with it.'[7]

In respect of three previous High Court decisions holding that compulsory examinations under bankruptcy and company liquidation legislation were permitted where the subject faced a criminal charge,[8] Kiefel J articulated the view of the majority in stating:

> … [that] trilogy of cases… [is] to be understood as the result of an historical anomaly, commencing with the divergent view taken by the Chancery Court from that of the common law and continuing through the series of legislation which preceded that dealt with in those cases.[9]

Lee v New South Wales Crime Commission

Legislation

Section 31D(1)(a) of the *Criminal Assets Recovery Act 1990* (NSW) (the CAR Act) provides that, if an application is made for a confiscation order under the Act, the Supreme Court may make an order for the examination on oath of 'the affected person' or another person 'concerning the affairs of the affected person, including the nature and location of any property in which the affected person has an interest'. Such an examination is to take place 'before the court'. As with the provisions of the ACC Act considered by the court in *X7*, the CAR Act provides direct use immunity on an examinee in respect of any answer given in an examination, provided the privilege against self-incrimination is claimed. The CAR Act at the relevant time[10] also conferred on the Supreme Court power to make non-publication orders for the purpose of preventing or minimising prejudice to an examinee facing criminal charges.[11]

Unlike the ACC Act, the CAR Act also contained provisions that expressly permitted derivative use to be made of answers given in an examination;[12] and stated that the fact criminal proceedings have been instituted is not a ground on which the Supreme Court could stay proceedings under the Act.[13]

Factual background

Jason Lee and Wok Seong Lee (the appellants) were charged with drug and money-laundering offences. The New South Wales Crime Commission (NSWCC) applied for confiscation orders in respect of property of the first appellant, and later applied for an order for the examination of both appellants.

At first instance Hulme J declined to make examination orders on the basis that the appellants were awaiting trial and the proposed examination would expose them to questioning about matters relevant to the charges against them. The NSWCC appealed to the NSW Court of Appeal, which unanimously (Beazley, McColl, Basten, Macfarlan and Meagher JJA) reversed the decision of Hulme J and ordered that the appellants each be examined on oath before a registrar of the Supreme Court.

The decision

By majority (French CJ, Crennan, Gageler and Keane JJ, Hayne, Bell and Kiefel JJ dissenting), the High Court dismissed the appeal.

The majority comprised separate judgments of French CJ and Crennan J and a joint judgment of Gageler and Keane JJ. Each of the majority judgments disavowed the proposition that the 'principle of legality' (relied on in effect, though not in terms, by the majority in *X7*) inhibits a legislature's ability to override the protections usually afforded to those accused of criminal offences. Similarly, the majority held that the bankruptcy and corporate insolvency cases were not a mere 'historical anomaly' in elevating the public interest over the common law's consideration for the individual.[14] Gageler and

Keane J observed:

> The principle [of legality] ought not … be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.[15]

It was significant to the reasoning of the majority that the proposed examination under consideration in *Lee* was to be conducted before an officer of the NSW Supreme Court, rather than before an executive body.[16] This provided greater assurance that the relevant examination could be conducted in such a way as to avoid a real (as opposed to merely possible) risk to the administration of justice.[17]

Hayne J, in a vigorous dissenting judgment, expressed the view that the questions for determination by the court were indistinguishable from those which had been determined by the majority in *X7*, and that, unless *X7* was to be overruled, the doctrine of precedent required that it be applied.[18] His Honour observed succinctly:

> All that has changed between the decision in *X7* and the decision in this case is the composition of the Bench. A change in composition in the Bench is not, and never has been, reason enough to overrule a previous decision of this Court.[19]

Conclusion

It will remain a matter for debate whether *Lee* was in fact on all fours with *X7*, and whether the majority in *Lee*, in reaching a different conclusion to the majority in *X7*, sidestepped the doctrine of precedent. In either case, it appears likely that further litigation will be required before there is complete clarity as to the limits of the legislature's ability to provide for the compulsory examination, in parallel inquisitorial proceedings, of persons with pending criminal charges.

Endnotes

1. See *Hammond v The Commonwealth* (1982) 152 CLR 188 and *Hamilton v Oades* (1989) 166 CLR 486.
2. At [124].
3. At [70].
4. At [71]. Emphasis contained in the original.
5. At [124].
6. At [125].
7. At [83], Keifel J agreeing at [157].
8. *Rees v Kratzmann* (1965) 114 CLR 63; *Mortimer v Brown* (1970) 122 CLR 493; *Hamilton v Oades* (1989) 166 CLR 486; [1989] HCA 21.
9. At [161].
10. And later the *court Suppression and Non-publication Orders Act 2010* (NSW).
11. Section 62 of the CAR Act, later repealed and replaced by the *Court Suppression and Non-publication Orders Act 2010* (NSW) – see especially s 8(1)(a) and (e).
12. Section 13A(3) of the CAR Act.
13. Section 63.
14. See French CJ at [38], Crennan J at [126], and Gageler and Keane JJ at [313]-[317].
15. At [313]
16. See for example French CJ at [19], [55]–[56], and Gageler and Keane JJ at [340].
17. See in particular Gageler and Keane JJ at [340].
18. At [62].
19. At [70].

A member of the bar spotted this street sign on a recent trip to Brisbane.

Who said you could say 'waiver'? Inadvertent disclosure of privileged communications

Fiona Roughley and Anya Poukchanski reports on *Expense Reduction Analysis Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46

The High Court has unanimously, and emphatically, ruled on the consequences for practitioners and litigants where one party has, inadvertently and without intention, disclosed a document to another party that records a communication otherwise amenable to a claim for legal privilege.

Facts

The issue arose in the context of discovery processes. The appellants had given their lawyers, Norton Rose (as that firm was then called), instructions to claim client legal privilege in respect of all communications to which it attached. There were, however, tens of thousands of documents. Electronic databases were being used. Junior lawyers coded thirteen documents otherwise amenable to a claim for privilege by the client as 'non-privileged'. Random checks by a more senior solicitor did not pick up the incorrect coding. The appellants' verified List of Documents was provided together with disks of the material.

A month later solicitors for the respondents wrote to Norton Rose identifying an apparent inconsistency in some of the appellants' claims for privilege. Some of the thirteen documents were duplicates of documents over which a claim for privilege had been made. Norton Rose asserted the disclosure had been inadvertent and sought return of the documents. Solicitors for the respondents replied refusing to return the documents and asserting that any privilege had been waived. Importantly, the respondents did not dispute the assertion of inadvertence.[1]

The appellants filed a motion for injunctive and other relief in the Equity Division of the NSW Supreme Court.

The decision in a nutshell

The short point of the High Court's decision is that an unintentional and inadvertent mistake ought be treated as such: the mistake should be promptly corrected by the parties without concerning a court.

It is only appropriate to concern the court where, at a minimum: (a) there is a genuine dispute about whether the mistake was in fact unintentional and inadvertent; and/or (b) there is a dispute about whether it is appropriate that the relevant material be returned because, for example, the conduct of the party claiming privilege was dilatory or there would be some unfairness in ordering the return of the privileged documents. We say 'at a minimum' because the Court was excoriating of parties and practitioners who bring 'unduly technical and costly disputes about non-essential issues',[2] including 'unnecessary and costly interlocutory applications'[3] that turn on 'legal, technical argument tangential to the main proceedings'.[4] More on that later.

Proving intention and inadvertence

At first instance,[5] Bergin CJ in Eq had considered that, to establish an inadvertent mistake, it was necessary for the appellants to establish that the reviewers had actually, at the time of review of each document, intended to claim privilege over the specific document and had made a mistake in not doing so. The reviewers, understandably, gave evidence that they could not now recall forming a view, at the time of review of each specific document, about whether to claim privilege with respect to the documents in question. They did, however, give evidence that they believed that they would not have made an error in deciding whether the documents were privileged and that the only possible cause of the failure to claim privilege over the documents was their failure properly to manipulate the electronic system. Although her Honour accepted that evidence, it was insufficient to meet the test set by her Honour as the threshold for establishing an inadvertent mistake.

The High Court has now set a more lenient standard, holding that it is not necessary to prove that a reviewer who failed to assert a claim for privilege in fact formed an intention to claim privilege with respect to each document at the time it was reviewed. Rather, it is sufficient to prove that the relevant party intended to maintain its claim to privilege and that the reviewer was carrying out the client's instructions. If those two facts are established, the fact of mistake in failing to list the documents as privileged can be inferred, and the finding ought be that the subsequent disclosure was inadvertent and unintentional.[6]

Curial power to grant relief

The proceedings below left some doubt as to the basis upon which a court may make orders for the amendment of a verified list and return of documents inadvertently disclosed. The High Court's decision has resolved that doubt.

The power to grant such relief exists by reason *both* of the implied power of a court to supervise its own processes (in this case, those of discovery), and in express powers given by s 64 of the *Civil Procedure Act 2005* (NSW) and its cognate provisions in other jurisdictions.[7] Section 64 provides that, subject to s 58 (the dictates of justice):

> all necessary amendments are to be made for the purpose of determining the real questions … correcting any defect or error in the proceedings and avoiding multiplicity of proceedings.

Where disclosure is inadvertent and there is a dispute as to whether the documents ought be returned, absent a compelling reason, a court will now ordinarily make orders correcting the mistake and providing for the return of the relevant material.[8] The ordinary case is one in which the party claiming privilege has acted promptly and the party to whom the documents have been disclosed has not been placed, as a result of the disclosure, in a position which would make an order to return the privileged documents unfair.[9] 'Unfairness' is not a low threshold in these circumstances, the High Court indicating that the discretionary considerations that might weigh against the grant of relief are 'analogous to equitable considerations' and 'no narrow view is likely to be taken of the ability of a party, or the party's lawyers, to put any knowledge gained to one side'. That is especially so 'in the conduct of complex litigation unless the documents assume particular importance'.[10]

What, then, of questions of waiver?

The High Court was emphatic that, on the facts of the present case, 'the issue of waiver should never have been raised'.[11] That sentence should be read in context. The language of 'should' refers to the lack of prospects of that claim in this case. The High Court held that this 'was not a case where the fact of mistake was disputed'.[12] The disclosure itself was thus not 'an intentional act done with knowledge whereby a person abandons a right (or privilege) by acting in a manner inconsistent with that right (or privilege)'.[13] Nor did subsequent conduct on the part of Norton Rose or its clients constitute inconsistent conduct such as to found a waiver. Indeed, to the contrary, evidence disclosing that Norton Rose acted promptly once aware that mistakes had been made to notify its counterparts of the correct position spoke against Norton Rose having behaved in a manner inconsistent with retaining its clients' privilege.[14]

At the level of principle, the necessary import of the decision is that, in cases of unintentional and inadvertent disclosure, if the parties agree to the return of the relevant material, or a court grants relief to that effect, then the privilege in the communication(s) remains intact. In such cases there will have been no express or implied waiver of the privilege because, in the case of inadvertent disclosure, the disclosure is not by itself an 'intentional act done with knowledge whereby a person abandons a right (or privilege) by acting in a manner inconsistent with that right (or privilege)'.[15] Nor will there be an imputed waiver. That is because there will be no conduct by the party claiming privilege that could be said to be 'plainly inconsistent' with the maintenance of the confidentiality which the privilege is intended to protect.[16]

But that does not mean in *every* case questions of waiver can have no role to play. In cases where the documents are not returned – for example, because a court refuses to grant such relief because of dilatory conduct by the party claiming privilege – questions of waiver may still arise where the party in receipt of the documents seeks to rely on that material. An obvious case would be by tender at trial. In such circumstances, the question of waiver is to be determined by application of s 122(2) of the *Evidence Act* and conventional principles as articulated in *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326 and *Mann v Carnell* (1999) 201 CLR 1 at 13 [29]. Specifically, the question would be whether the acts of the party claiming privilege

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An interview with George Brandis QC

On 16 October 2013 Arthur Moses SC and Victoria Brigden interviewed the Hon George Brandis QC, the recently appointed attorney-general of the Commonwealth of Australia

Bar News: Many former attorneys general have been barristers, more so than solicitors. How has your career at the bar prepared you for this role?

Attorney-General: It's a very appropriate preparation for the role. The attorney is the first law officer and I can't think of a more appropriate background. I was practising as a barrister for approximately 14 years and before that a litigation solicitor for two years. It is a natural preparation for the role. I also tended to concentrate on law and justice issues in my career in the Senate. I recently delivered a lecture on the role of the attorney-general to the University of Queensland.

Bar News: In that lecture (the annual Minter Ellison Sir Harry Gibbs lecture at the TC Beirne School of Law at the University of Queensland), you informed the audience that you viewed your role as more than a politician, and more than a senior cabinet minister, and you would undertake the role with a view to defending the judiciary.

Photo: Newspix / Sam Mooy

An attorney- general may come into circumstances where political actions of the government may come into conflict with the role of his office.

Attorney-General: I did take that view. The attorney-general is not above politics, but there are aspects that are beyond politics. I do think the attorney-general should be a senior cabinet minister. I am a member of the inner cabinet group, which in the Coalition is called the leadership group. There are certain aspects of the role of attorney-general that go with the role of being a senior cabinet minister. There are certain dimensions of the role that go beyond politics. There are certain dimensions of the role which have to be exercised in a non-political manner, for example, under the national security legislation, the issue of search warrants. The attorney-general has to stand apart from politics on occasion in order to uphold the rule of law. I was very critical of my predecessor, Mark Dreyfus, for diminishing the caretaker conventions during the recent federal election. The attorney-general ought to be the custodian of the conventions, and Mr Dreyfus said that they were 'nothing more than political practice'. It was an advertent and deleterious devaluation of an important set of constitutional principles. Under the Fraser government, Bob Ellicott resigned over the funding of the *Sankey v Whitlam* litigation because he did not consider it appropriate. An attorney-general may come into circumstances where political actions of the government may come into conflict with the role of his office. It's an office in its own right carrying its own obligations, unlike, say the relationship between the health minister and politics.

Bar News: We note that Sir Anthony Mason once said:

> No-one expects an attorney to respond to every criticism of the judges. Indeed, he may have justification for voicing criticism himself. But an attorney has a responsibility to uphold the rule of law as administered by an independent judiciary. That means that there will be occasions when he should respond to irresponsible criticisms which threaten to undermine public confidence in the judiciary .... my belief is that nothing short of a defence by the attorney will attract prominent media attention and counter-balance the adverse publicity.

Do you agree with this view? If so, do you accept that from time to time you may need to remind members of your own government of this?

AG: I agree with the quote, I have quoted it myself in

my speech and in the book *Justice Under the Law*. I don't anticipate needing to remind Cabinet of that. It must be remembered that this prime minister is a constitutional conservative, and he has a strong innate sense of what is proper and what is not. This issue shows why the attorney-general as office-holder versus attorney-general as politician is a false dichotomy, because the more senior he is, the more able he is to ensure his colleagues understand the limits with the judiciary and uphold the rule of law.

Bar News: What do you envisage as the key challenges for you as attorney-general in your term?

Attorney-General: In Australia, the role is much more extensive than in the United Kingdom, the United States or even than in Australia in the past. The role is similar to the home secretary in the United Kingdom or secretary of homeland security in the United States. Phillip Ruddock said that the attorney-general is the minister for national security. I think that's right in terms of functionality. The attorney-general is the first legal officer, but in terms of functionality, national security is the biggest part of the job. The three biggest agencies in the portfolio are in intelligence or law enforcement. I have direct responsibility for ASIO, and indirect responsibility for the others.

In terms of the federal judicial system, the largest volume of work is in family law which will need to be carefully managed. For every government, there are one or more areas of black-letter law reform that stand out. Presently, that is intellectual property law. A review of the Copyright Act has been undertaken, and that is a very big area for law reform. In that respect, there is some synergy for me between being attorney-general and minister for the arts.

Access to justice is always important. A referendum for the constitutional recognition of Indigenous people is something that this government and this prime minister is very committed to, intellectually and emotionally. This prime minister is the best leader to carry that out because the people who need most assurance about it are conservative people. Alan Tudge, the prime minister's parliamentary secretary for Indigenous affairs and myself have been tasked to carry that out.

There is also the freedom agenda. It has been

suggested that the human rights debate has been distorted in a way that diminishes freedoms- speech, intellectual freedoms and the like by a number of leftist forms. Section 18C of the Racial Discrimination Act may be an embodiment of that problem. It may well have been well-intentioned. I have a strong commitment to freedom of speech. That freedom comes under attack from different places at different times. Often it comes from the right of politics, but at the moment, most of it comes from the left. This is something that we will need to examine to strike a right balance.

The role is similar to the home secretary in the United Kingdom or secretary of homeland security in the United States.

Bar News: Do you intend to maintain the current selection committee process for candidates for appointment to the Federal Court or restore the appointments as part of the attorney general's fiat?

Attorney-General: I am sceptical of the arrangements implemented by former Attorney General McClelland in 2008 which will need to be examined. It has been suggested that at the time the system has been used as a mask rather than based on a meritocratic approach. The attorney-general needs to take responsibility for every appointment. The attorney-general's reputation and the government's reputation is on the line with each appointment. When recommendations are made, I am of the view

States are becoming more and more different from one another than even twenty years ago, with the development of local state economies. I think the Whitlam-esque view of a unitary Australia is now obsolete.

that the person who ought mostly be consulted is the head of that jurisdiction.

Bar News: Are there particular qualities or types of experience that you would consider mandatory or desirable in recommending particular candidates for judicial office? For example, judges have traditionally been appointed from the bar, but more recently solicitors are being appointed at a greater rate. Do you think judges should generally come from the ranks of the bar, or is it something to be assessed on a case by case basis?

Attorney-General: I think it's a case by case question. In the first instance, the bar is the most obvious place from which to source appointees. For the High Court, the Federal Court or state courts of appeal are additional places. That is not to say that solicitors or indeed academics or others should be ruled out. When Phillip Ruddock was attorney-general, I thought that Andrew Greenwood, a partner of Minter Ellison in Brisbane would be a very good candidate for the Federal Court, and he was appointed and has been an excellent appointment. At Justice Greenwood's swearing in ceremony, I stated that judges should not just be drawn from the bar, but I am of the view that the bar should be the first port of call.

Bar News: You have announced that the Commonwealth will be challenging the ACT's same sex marriage laws, and you've said and the Assistant Treasurer Senator Sinodinos repeated on Q&A on Monday night that the rationale for the challenge was a determination to have national consistency on these laws, regardless of desirability or otherwise of the legislation. Do you have a personal position on it?

Attorney-General: I support the Abbott government's current position, but I stress that the reason for the High Court challenge is national consistency on marriage law rather than taking a position on same sex marriage. I have previously argued that all forms of discrimination ought to be removed from Commonwealth law. Dr Nelson when he was leader of the Opposition agreed with me. I collaborated with him in removing all remaining discrimination from Commonwealth law for same-sex couples. It was a significant moment in the development of the Liberal Party's attitudes. Marriage is not easily accommodated into a simplistic anti-discriminator frame of reference.

Bar News: How important is national consistency of legislation generally? Are there other policy areas in particular in which you'd like to see national consistency?

Attorney-General: Legal profession reform is one example. A model of consistent and harmonious laws implemented at a state level. That's the model I've advocated for since I took office. States are becoming more and more different from one another than even twenty years ago, with the development of local state economies. I think the Whitlam-esque view of a unitary Australia is now obsolete.

Bar News: The Productivity Commission issues paper, *Access to Justice Arrangements,* was prepared following terms of reference prepared by David Bradbury, the then assistant treasurer, requesting the commission to undertake an inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law. Do you or the government seek to amend the terms of reference of that present referral to the Productivity Commission?

Attorney-General: I am not proposing to do so.

Bar News: The issues paper raised the concern of litigation funding regulation in Australia in relation to conflict of interest issues, consumer protection in the event of default or misconduct, and whether litigation funders should hold Australian financial services licences. Do you share these concerns? Will you ask your department to examine legislative intervention in this matter?

Attorney-General: I have not made a decision to do that yet, although one of the basic themes of the

Abbott government is to reduce red tape. There are real issues of moral hazard and conflicts of interest associated with litigation funding and I will look at that very carefully.

Bar News: The legal profession has from time to time been criticised for adding to the cost of litigation. Is that a view you hold? If not, is it the government's intention of seeking to make justice accessible to promote greater efficiency?

Attorney-General: I do not share these views concerning the profession. I should note that everything the government does is affected by the fact that the government is in deeper debt than ever before. That affects what otherwise socially desirable policy can be engaged in. I would like to see access to justice focussed on case work. I have an unambiguous view on the debate between case work and advocacy. Where resources are constrained, and the need is greater than the resources available, the claims of needy persons should always outweigh the need for policy advocacy. Resources need to be invested so that needy people get as much investment in their case as they can have rather than organisations using that money for lobbyists or policy advocates.

Appropriately governed, direct briefing by government legal departments is an attractive way to contain Commonwealth legal costs.

Bar News: There has been a concern raised by courts from time to time that unrepresented litigants do lead to more court time leading to increased court costs. Do you agree? What do you see as being the answer, apart from relying upon law professionals to provide greater amounts of pro bono assistance? Would the government consider increasing funding for legal aid in order to promote accessibility to the justice system for individuals?

Attorney-General: Undoubtedly unrepresented litigants lead to increased court costs, especially in family law. The Productivity Commission is looking at this. No system is incapable of improvement. There are three main avenues at present: funding, pro bono assistance and courts' own devices to assist the public. There is no perfect model and we are working in a constrained environment. I am very grateful to the profession for being so much more involved in pro bono work than 20 to 30 years ago. Big firms take a lot of pride in their pro bono work, and it is a wonderful thing, to be concerned with it. The Bar Associations also carry a heavy workload. It must be considered that this is a profession. A profession is not an industry. A profession is not a sector of the economy. It is a walk of life in which those educated and trained in its skills, serve the public. If they do that well, they can look forward to a healthy financial reward. But it is a dimension which takes you beyond selling a product in a marketplace.

Bar News: *The Australian* published an opinion piece on 4 October that proposed privatising the Australian Government Solicitor. Is that a proposal that the Abbott government is considering?

Attorney-General: Not at the present time.

Bar News: You have in the past expressed a view that barristers be retained directly by government legal departments similar to the retention of barristers by in-house counsel of private corporations. Is that something you would be seeking to implement by way of a legal services directive? Do you see it as a means of reducing the cost of litigation?

Attorney-General: The government's legal spending is approaching $1 billion a year, and we are looking at ways to rein that in. Appropriately governed, direct briefing by government legal departments is an attractive way to contain Commonwealth legal costs.

Bar News: Attorney-general thank you for your time. The NSW Bar Association wishes you well in your new role, although there will be occasions that we may not agree with your position on certain issues.

Attorney-General: Thank you. There are a number of challenges ahead. There will be days when some will suggest that I have got it wrong – but I will always do my best to get it right. I look forward to working with the New South Wales Bar Association.

The dangerous art of cross-examination

By Ian Barker QC

The nature of cross-examination

One of my earliest acquisitions as a solicitor was a book published in England in 1937 called Harris's Hints on Advocacy. A bit read:

> Next to examination-in-chief nothing is more important, or difficult in advocacy than cross-examination. It is infinitely the most dangerous branch, inasmuch as its errors are almost always irremediable. It is in advocacy very like what cutting out is in naval warfare, and you require a good many of the same qualities; courage with caution, boldness with dexterity, as well as judgment and discrimination. You must not go too steadily and with too direct a course, lest the enemy should measure your distance, and taking advantage of your simplicity, sink you with a single shot. Nor must you remain too long in one position. You must circumvent a good deal, firing a shot here and a shot there, until, maybe, you shall catch your adversary unawares and leap on board. Cross-examination has been likened to a two-edged sword, but it is infinitely more dangerous than that. It is more like some terrible piece of machinery – a threshing machine for instance - into which an unskilful advocate is more likely to throw his own case than his opponent's.

He talks at length about cross-examination and purports to lay down rules entirely impossible to follow in the twenty-first century. One such rule is never ask a question the answer to which may be adverse to your case. It is a variation on the so-called rule that you should never ask a question unless you know what the answer will be.

No doubt such notions are counsels of perfection and philosophically sound but not entirely practicable. How can you ever be certain of a favourable response to any question?

Much more has been written about the art of cross-examination., e.g. the late David Ross QC in his book *Advocacy* said this:

> Cross-examination is the questioning of an opponent's witness. Some learned judges have described cross-examination as a potent weapon for probing the credibility and reliability of accuser's version of events and a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. Another judge said: Cross-examination is an art, and the means used to cut down the effect of the evidence of a witness... are multifarious.
>
> Planning will show whether it is necessary to cross-examine a witness at all. You will not cross-examine if the witness does your case no harm, and if you cannot get some advantage to your whole case or disadvantage to your opponent's case.
>
> . . . in cross-examination, every question that does not advance your case injures it. If you do not have a definite object to attain, dismiss the witness without a word. There are no harmless questions here; the most apparently unimportant may bring destruction or victory.

Sometimes you must cross-examine when it is the last thing you want to do. If the witness gives devastating evidence-in-chief you must do your best to limit the damage. A cross-examination that simply repeats evidence-in-chief is a serious misjudgment.

Evidence Act

The Evidence (National Uniform Legislation) Act has quite a lot to say about cross-examination which I will come to. But the essential principles are largely preserved. The dictionary part 2, 2(2) tell us that reference in the Act to cross-examination of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence.

Unlike examination in chief, a witness can be asked leading questions (although in some circumstances at the court's discretion): s.42.

So, usually, it will consist of the questioning of your opponent's witness.

So much for the philosophy.

Practice

If I have learnt anything about advocacy the principal rule of cross-examination is that you should approach it with terror. Successfully done it will lead you to heights of exultation. At the same time it has the potential to lead you to the very brink of suicide.

It is a dangerous pastime which on any view must be approached with the greatest care.

After all, what is the object of cross-examination? As we have seen, it all boils down, I think, to two:

- obtaining evidence to support your client's case;
- obtaining evidence to erode your opponent's case.

Cross-examination must be focussed. Don't cross-examine for its own sake or to show how clever you are.

Don't embark on a cross-examination unless your journey is very carefully charted and you know, as near as can be, where you are going. The question is, is it going to be worth powder and shot?

A cautionary principle emerges from The Horses Mouth, an entertaining novel, by Joyce Carey. It has nothing to do with advocacy, but does prescribe a valuable wider principle, in the context of modern art and its limitations. In a dissertation about various paintings the artist Gully Jimson put it this way:

> Some of it is like farting Annie Laurie through a key hole. It's very clever but is it worth the trouble?

Preparation for cross-examination requires meticulous care. For example, your opponent might have a witness whose evidence, on its face value, has the potential to destroy your client's case. So you must find out all you can about the witness: is there some undisclosed objective fact upon which you can build a destructive cross-examination?

A good example of what I am talking about was a defamation case brought some years ago by John Marsden the former president of the NSW Law Society, against Channel 7. Channel 7 had publicly accused Marsden of having sexual relations with a number of young men all of whom were under 18. In support of the defendant's plea of justification, Channel 7 rounded up a number of witnesses, some of whom made detailed statements to the police attesting to having had sex with Marsden when they were considerably younger than 18.

A close examination of the police statements proved invaluable to the plaintiff because in many cases some outside objective evidence proved their falsity. Marsden's case came down to two principle issues:

- he didn't know the person and denied ever meeting him;
- he did have sexual relations with some accusers, not at a time when the witness was a juvenile, but when he was over 18.

One witness said he was 14 when he went to John Marsden's house. He said he remembered a woman bringing a donkey to the house in a horse trailer. That was true – the donkey was a birthday present for Marsden, delivered at a time when the witness, as it happens, was 18 years old. Marsden's solicitor was able to find the receipt from an organisation called Good Samaritan Donkeys or some such name when the animal was bought.

Another who claimed under age sex with Marsden identified a Chinese restaurant where Marsden bought takeaway food on the way to his house. But it wasn't built for some time after the alleged takeaway purchase.

One witness said he was about 15 at the material time and remembered seeing Sydney's Centre Point Tower from a window in Marsden's house. But the tower was not built then.

One said when aged around 15 he watched a pornographic movie with Marsden at his house. Research showed the movie had not then been made.

One said he stole a bottle of Johnny Walker Blue Label whiskey when he was leaving Marsden's house, then aged under 18. But Blue Label was not then available in Australia.

This is not just entertaining. The evidence demonstrated the critical importance of searching for objective material in preparing to cross-examine important witnesses.

Sometimes you will by good fortune come upon a witness who is by nature a cross-examiner's dream, who will choose to lie just on principle, for the hell of it, and you can afford to be a bit reckless. It doesn't often happen.

One such witness I once struck was a psychopathic criminal called Jim Anderson. He gave evidence for the Crown in the trial of Abe Saffron tried for tax fraud. He was an accomplice. His stock answer to almost every accusation put to him was not that I can remember at this point in time. So repetitive was this answer that I felt compelled to ask should I put the question again in 20 minutes. He said I could try. But things did not change. For example:

> Q: Mr Anderson, in 1970 did you shoot a man dead in the Venus Room at Kings Cross?

A: Not that I can remember at this point in time.

His evidence was incapable of belief. Unfortunately it was of lesser importance than a second, false set of books of account.

The unhelpful answer

The unexpected answer will be given sooner or later. The problem is to know when to stop.

Sometimes the unexpected answer may be damaging. Sometimes it will not matter. Sometimes it may even be helpful.

But the one question too far can be avoided by not asking it. It usually happens in the context of a cross-examination proceeding successfully until the roof falls in because the cross-examiner becomes greedy for more. Let me give you an actual example.

In Alice Springs once I acted for the petitioner in a defended divorce, in the good old days before the *Family Law Act,* when divorce required proof of misconduct. The issue was whether my client's wife had committed adultery with a doctor from Mt Isa. The allegation was she cleaned for him, and one day he drove her to Alice Springs in his red Austin Healy, where they took a flight to Adelaide to attend a conference and formal dinner.

On the way back from Alice to Mt Isa, so our allegation went, they called in at the Barrow Creek Hotel and paid for a room for the day, in which they drank champagne and did other things. Our main witness was the publican at Barrow Creek who said he remembered the two people spending the day in a room at the hotel.

Well, counsel for the wife cross-examined the publican in a cautious conventional way. All this happened a year or so ago, it was June, the height of the tourist season, lots of people called into the Barrow Creek Hotel on their way north along the Stuart Highway and it would usually be difficult to remember two particular people amongst all the others, and so on. To all such questions the witness agreed. But counsel went just a step too far, asking, well how is it then that from all those customers you can remember this particular man and this particular woman?

Well, the publican replied, it's just that it was unusual at Barrow Creek for a man in a dinner suit accompanied by a woman in what looked like a ball gown and some sort of tiara to turn up in a red open Austin Healy convertible, and stay for the day.

There is a principle which applies here. Regrettably it is now a cliché, but it is worth remembering. If you succeed in escaping from the lion's cage it is better not to go back for your hat.

Sexual cases

Advocates should always be polite. Witnesses are entitled to be treated with respect and courtesy. And it usually won't help to treat them otherwise.

Cross-examination does not *have* to consist of leading questions. Obviously, as a technique, if you can get the right answers without suggesting what they should be, the evidence will have a greater impact. Scandalous and offensive questions have always been forbidden.

The *Evidence (NUL) Act* forbids improper questions (s 41). Part 3 of the *Evidence Act (NT)* takes the matter much further in making specific provisions for evidence given by vulnerable people. In my opinion they go too far in protecting witnesses to the detriment of accused persons: see ss.21B, 21E and 26E.

But there is no doubt that cross-examination of those claiming to be victims of sexual assaults is probably, in criminal cases, the most difficult exercise of all. Its very special nature calls for the greatest delicacy of approach and inquiry. For example, one must explore:

- The antiquity of the allegation.
- The venue.
- The time of day.
- The opportunity for secrecy.
- The likely presence of others.
- The possibility of invention and collusion.

Cross-examination closely directed to the act complained of and perceived inconsistencies in the story, can be very damaging because of the sympathy it may well attract for a person struggling to deal with unpleasant accusations whether or not they are factually true.

Experts

Expert evidence is a problem partly because some witnesses claiming expertise are not expert at all.

Section 76(1) of the *Evidence (NUL) Act* provides that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. However, s.79 permits such evidence if the opinion derives from specialised knowledge based on the person's training, study or experience.

A great deal has been written about this. The courts seem to have adopted the view of Heydon J when sitting in the NSW Court of Appeal in *Makita v Sprowles* (2001) 52 NSWLR 705 at 743.

You must carefully consider whether the witness's evidence is admissible at all. This is part of what Heydon J said:

> In short, if the evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of specialised knowledge; there must be an identified aspect of that field in which the witness has become an expert; the opinion proffered must be wholly or substantially based on the witness's expert knowledge; so far as the opinion is based on facts observed by the expert, they must be identified and admissibly proved by the expert; and so far as the opinion is based on assumed or accepted, facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of specialised knowledge in which the witness is expert by reason of training, study or experience, and on which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v The Queen* (at 428 [41], on a combination of speculations inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise.

A good example of a witness who claimed expertise without having it, gave evidence for the Crown in the trial of Bradley Murdoch. The witness, Dr Sutisno, obtained a PhD in forensic anatomy which, she said, gave her the skills to identify people from their anatomical parts, looking at the whole anatomy in terms of identification. She claimed she could rely on face and body mapping as a means of identification. She offered the opinion that images of a man taken from a security video at a service station were identical with other images proved to be those of Murdoch. The trial judge let the evidence in, over protest. At the trial it was not argued that facial mapping was not a recognised field of specialised knowledge, but the point was raised on appeal. The CCA were taken to a NSW decision of *Tang* (2006) 65 NSWLR 681 where the NSW CCA held that such evidence was inadmissible. In *Murdoch* the NT court held that contrary to the conclusion of Martin CJ at the trial, the prosecution had not established a sufficient scientific base to render results arrived at by that means a proper subject of expert evidence.

The evidence was clearly inadmissible as having no sufficient scientific foundation to support it. The subject was discussed at length in the NT judgment (2007) 167 ACrimR 329 at [246] to [306]. The CCA applied the proviso so in the end it did not matter.

The *Murdoch* trial was before the introduction of the *Evidence (NUL) Act.* It is difficult to see it getting in under s 79 and it certainly ran foul of *Makita v Sprowles.*

I offer you some suggestions if your opponent intends to call expert evidence:

1. You must call for production of his or her instructions and all his or her working papers and records.
2. You should enquire into the witness's history, in particular his or her evidence in other cases, and academic writings.
3. You should carefully consider the witness's expertise.
4. You should master the matters the subject of the evidence.

Prior inconsistend statements and documents

Prior inconsistent statements and cross-examination on documents can conveniently be considered together. The *Queen's case* governed the common law provision for proving a witness's inconsistent written statements. Before cross-examination could proceed, the document had to be read in its entirety upon proof of its authenticity as the witness's document.

It deprived the cross-examiner of the tactical advantage of cross-examining about the contents of the document before the witness was reminded of its contents. Also, the whole document, some of which might have been unfavourable had to go into evidence.

Walker v Walker (1937) 57 CLR 630, a High Court decision required that if a party called for a document the opponent might insist on its tender, which made such calls very risky unless one was sure what the document contained. These rules have been supplanted by the *Evidence (NUL) Act*, ss 35, 43, 44 and 45:

> Under s 35, a party is not to be required to tender a document only because it was called for or inspected, and permits cross-examination on a prior inconsistent statement without showing the document to the witness.

But by s 45 if a witness is questioned about a prior inconsistent statement recorded in a document, the court may order the document to be produced to the court and may give directions as to its tender or otherwise.

Section 44 forbids cross-examination of a witness about a previous representation by another person unless:

1. evidence of the representation has been admitted or will be admitted, or
2. if the representation is in a document not admitted it must be produced to the witness who must then be asked whether he or she stands by his or her evidence;

and the document must not be identified or its contents disclosed.

Hostile witnesses

At common law if a witness in chief manifested an unwillingness to testify truthfully, the party calling the witness could by leave cross-examine the witness about the truth of the evidence.

The *Evidence (NUL) Act* now describes such witnesses as unfavourable (s 38) and permits questions as though the party were cross-examining the party's own witness. The Act provides a lower threshold than the common law before one can cross-examine one's own witness.

Brevity

Be brief. Do not ask ten questions where one will do. Apart from irritating the judge, it could be clearly dangerous. Do not get into long debates about the propriety of questions unless it is really necessary.

When I hear some barristers banging on about nothing much I am reminded of Abraham Lincoln's address at Gettysburg on 19 November 1863. One of the most significant speeches in modern history, it involved 270 words and took three minutes to deliver.

Just as a matter of technique, another American lawyer worth close examination is the late Clarence Darrow who, unlike many contemporary American lawyers, knew how to cross-examine with a minimum of words.

You will know about the trial of Thomas Scopes at Dayton Tennessee in 1925. The General Assembly of Tennessee had made a law whereby it became unlawful for any teacher in a public school to teach any theory that denied the story of the divine creation of man as taught in the bible, instead that man has descended from a lower order of animals. Scopes, a schoolteacher, put the law to the test by teaching evolution and was duly prosecuted. The law was passed largely at the urging of the famous evangelist and lawyer William Jennings Bryan.

Darrow led for the defence. He could see the danger to a free society in what has now emerged in the USA and to a lesser extent Australia, that is the activities of the fundamental evangelical religious right and their effect on the decisions of politicians.

The Tennessee Act has only to be read to see its childish absurdity. At all events there was much argument about the admissibility of expert witnesses. The judge refused to admit evidence

from defence experts about evolution. But Bryan decided he should give expert evidence abut biblical writings and was permitted to do so. He seems to have been treated as a defence witness. It was an unusual course of events because what by our rules would have been examination in chief was in fact a highly damaging cross-examination.

Bryan maintained modern civilisation dated from the flood which occurred exactly 4,262 years before 1928.

This is some of Darrow's long cross-examination of Bryan:

B: According to the Bible, there was a civilization before that, destroyed by the flood.

D: Let me make this definite. You believe that every civilization on the earth and every living thing, except possibly fishes, that came out of the ark were wiped out by the flood?

B: At that time.

D: At that time. And then, whatever human beings, including all the tribes, that inhabited the world, and have inhabited the world, and who run their pedigree straight back, and all the animals, have come onto the earth since the flood?

B: Yes.

D: Within 4,200 years. Do you know a scientific man on the face of the earth that believes any such thing?

B: I cannot say, but I know some scientific men who dispute entirely the antiquity of man as testified to by other scientific men.

D: Oh, that does not answer the question. Do you know of a single scientific man on the face of the earth that believes any such thing as you stated, about the antiquity of man?

B: I don't think I have ever asked one the direct question.

D: Mr. Bryan, do you believe that the first woman was Eve?

B: Yes.

D: Do you believe she was literally made out of Adam's rib?

B: I do.

D: Did you ever discover where Cain got his wife?

B: No sir; I leave the agnostics to hunt for her.

D: You have never found out?

B: I have never tried to find out.

D: Do you believe the story of the temptation of Eve by the serpent?

B: I do.

D: Do you believe that after Eve ate the apple, or gave it to Adam, whichever way it was, that God cursed Eve, and at that time decreed that all womankind thenceforth and forever should suffer the pains of childbirth in the reproduction of the earth?

B: I believe that it says, and I believe the fact as fully-

D: That is what it says, doesn't it?

B: Yes.

D: And for that reason, every woman born of woman, who has to carry on the race, has childbirth pains because Eve tempted Adam in the Garden of Eden?

B: I will believe just what the Bible says. I ask to put that in the language of the Bible, for I prefer that to your language. Read the Bible and I will answer.

D: All right, I will do that: And I will put enmity between thee and the woman: - that is referring to the serpent?

B: The serpent?

D: (Reading) . . . and between thy seed and her seed; it shall bruise thy head, and thou shalt bruise his heel. Unto the woman he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee. That is right, is it?

B: I accept it as it is.

D: And you believe that came about because Eve tempted Adam to eat the fruit?

B: Just as it says.

D: And you believe that is the reason that God made the serpent to go on his belly after he tempted Eve?

B: I believe the Bible as it is, and I do not permit you to put your language in the place of the language of the Almighty. You read the Bible and ask me questions, and I will answer them. I will not answer your questions in your language.

D: I will read it to you from the Bible – in your language. And the Lord God said unto the serpent, because thou hast done this, thou art cursed above all cattle, and above every beast of the fired; upon they belly shalt thou go and dust shalt thou eat all the days of thy life.

B: I believe that.

D: Have you any idea how the snake went before that time.

B: No sir.

D: Do you know whether he walked on his tail or not?

B: No sir. I have no way to know. (Laughter)

The trial judge himself a religious man finally ordered the evidence to be stricken from the record. Scopes was convicted and fined $100.

The conviction was overturned by the Supreme Court of Tennessee on the ground that the judge and not the jury had imposed the fine. I include part of the evidence here merely as an example of good cross-examination. It is recounted in *Attorney for the Damned* (Weinberg).

Credibility

The *Evidence (NUL) Act* says a lot about evidence as to credibility:

s 102: evidence relevant only to a witness's credibility is not admissible.

But s 103 provides an exception: s 102 doesn't apply if the evidence has substantial probative value. So the question is whether the evidence could rationally affect the credit of a witness where testimony is important to the outcome of the proceedings.

Always bear in mind that the Act defines *probative value* as the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (dictionary Part 1).

Before the *Evidence (NUL) Act*, there were in practice very few restrictions on what could be asked of a witness as going to his or her credit, even if the matters questioned about had little or no bearing on the issues before the court. The questions could be destructive of the witness's reputation without adding anything material to the facts in issue.

The cross-examiner in some criminal cases must be careful of *Evidence (NUL) Act* s.108(3)(b) which excludes the credibility rule from evidence adduced in re-examination and also excludes it from evidence of a prior consistent statement if:

1. evidence of a prior inconsistent statement has been led; or
2. it is suggested that evidence given by the witness has been fabricated;

and the court gives leave.

The section therefore has the capacity to let in evidence which would be otherwise inadmissible if the cross-examiner unwittingly lays the ground.

Section 108(3) in practice has replaced the old law of recent invention, which held that it was sufficient to render admissible in re-examination a prior statement consistent with the witness's testimony, if the cross-examination suggested recent invention by the witness.

I was once led into a trap, I suspect by a police officer who took a statement from a witness and deleted part in the copy given to me. Relying on the statement as accurate, I lurched into dangerous territory by cross-examining on a subject unknown to me but potentially dangerous to my client. I should have checked with the prosecutor that I had the whole of the statement. The missing bit emerged in the prosecutor's re-examination. It was about a previous complaint. Fortunately the judge took pity on me and disallowed the evidence. But you cannot take anything for granted.

Section 108(3)(b) has narrowed the grounds upon which a witness may be asked about a prior consistent statement, but it remains a land mine. Although leave is required under s 104(2) to cross-examine an accused as to credibility, leave is not required if the accused has given evidence impugning the credibility of a prosecution witness: s 104(4). The evidence must still have substantial probative value (s 103) but s 104(4) remains a danger to an accused who gives evidence. It may sometimes be tactically sound to ask the prosecutor if there is any matter known to the prosecution which could adversely affect the accused's credit. Certainly, you would ask that question anyway, if you were contemplating calling the accused.

In spite of all this, the practise of law can sometimes be fun. But not as much now as it once was.

Introduction

By Jeremy Stoljar SC

Photo: istockphoto.com

Barristers have always faced changes in technology.

When Sir Garfield Barwick first came to the Sydney Bar in 1927 opinions were delivered in handwriting, usually on the back of the brief. The brief was contained on large sheets of paper, twice the size of A4. Barwick said of the oversized paper:

> This was a device which ensured that the solicitor or client could not use the original opinion apart from the facts and instructions on which it had been given. But the business of secretaries, typewriters and dictating machines was soon to alter all that.[1]

In 1932 Barwick moved to larger chambers. As was typical at the time, a telephone was mounted on the wall of his room. Barwick took it down and put it on his desk. This was regarded as remarkable. Barwick didn't stop there. His biographer, David Marr says:

> Later, when he [Barwick] hired a stenographer, his business arrangements were the talk of Phillip Street. Barwick and Percy Spender, who worked on the same floor of Chancery, were the first men at the Sydney Bar to organise their practices on a business basis and set up chambers on the lines of a modern office. They rejected the leisurely, almost academic, ethos by which their colleagues worked. They planned their time, gave appointments and delivered typed opinions.[2]

Barristers today face equally significant changes. We don't just type opinions any more – we research them electronically, transmit them on devices, access them remotely and store them on clouds. We seem to be moving away from paper and into an age of electronic practice.

Not everyone embraces this change. Lawyers tend to be conservative. Many of us instinctively tend to the view that a lot of electronic gadgetry is unnecessary and superfluous. We didn't need it before, so we don't need it now. If it ain't broke, etc.

But this approach can only take us so far. Changes are taking place, whether we like it or not. Solicitors and their clients are using the new technologies. They expect us to as well – or they soon will.

And sometimes the times just march on and we have to go with it. The fax machine wasn't broke. Nor was the postal service.

It all comes down to this: do these new technologies actually make the practice of law more efficient? What's in it for barristers? More to the point, what's in it for our clients?

In the following feature Nicolas Kirby discusses all the ways in which an iPad can revolutionise a barrister's practice – as it has his. Kylie Day and Carolyn Dobraszczyk look at the storage of documents in clouds, and at electronic briefing. Susan Cirillo examines electronic discovery. Kathryn Millist-Spendlove talks about websites and social media. Catherine Gleeson discusses social media and the courts. And Danny Moujalli looks at how to conduct legal research in this new electronic age.

Endnotes

1. Sir Garfield Barwick, *A Radical Tory*, Federation Press, 1995 at 29-30.
2. David Marr, *Barwick*, George Allen & Unwin, 1980 at 27.

Technology in practice

By Nicolas Kirby

Technology is inescapable. It permeates our lives. Barristers' practices are not exempt from this rule.

Everyone uses technology in different ways. In this article, I will share some of the ways I use technology in the hope that you, the reader, may discover something which will assist in your practice.

I should say up front, lest it be thought that I am some kind of technological zealot, that I love paper. I yearn for its tactility. I do not strive for paperlessness. I find that I only really absorb information as my highlighter glides over it. I like to scribble my thoughts over the documents that provoked them.

> It is questionable if all the mechanical inventions yet made have lightened the day's toil of any human being.
>
> John Stuart Mill

It is difficult to say whether technology has made my life any easier: late nights in chambers argue against that proposition. I have, however, found ways to make my bag lighter, my desk cleaner and my work more efficient.

My devices

I am an Apple user. I have an iMac in chambers, an iPad, an iPhone and a MacBook Pro at home. This does not, however, make my experience irrelevant for those using other platforms. Most programs are designed for multiple operating systems and devices.

Cast off the heavy burden of books

It is no exaggeration to say that the iPad has revolutionised my practice. I no longer take *Ritchies* to court because I have an eBook containing Thomson Reuters' *NSW Civil Procedure Handbook* which has 2000 pages of annotated legislation and rules. And it's searchable. I purchased the hardcopy and eBook bundle. The bundle costs about 30% more than buying the hardcopy alone.

Thomson Reuters have their own iPad app called 'ProView'. It acts as a library for all the eBooks they publish. In addition to the Civil Procedure Handbook, I also have Odgers' *Uniform Evidence Law*, various annotated acts including Corporations Legislation, and Miller's 35th edition of *Competition and Consumer Law*. The practical effect of having so much information on my iPad is that I seldom take any textbooks to court.

LexisNexis has its own app called Red, on which you can subscribe to many of its loose leaf services – with no manual updating required. LexisNexis also sells its textbooks with eBook bundles, but they do not have a proprietary app for their textbooks. Rather, you can download a generally-available app (I have Bluefire Reader) upon which to read them. I have often found it very convenient to have a searchable *Cheshire & Fifoot's Law of Contract* available to me in the luncheon adjournment.

Cloud computing

Another giant leap forward has been the relatively recent advent of cloud storage. Apps (short for 'applications', meaning 'programs') like Dropbox have meant that you can store large amounts of data 'in the cloud' and access it from anywhere you have an internet connection (including on your phone or tablet). In Dropbox's case, 'the cloud' is a series of physical servers run by Amazon in various locations in the United States.

Dropbox stores your documents simultaneously on your computer and in the cloud. That means that you can work on documents even when you don't have an internet connection. It also means that once you do come back online, amended documents will be 'synced' (short for 'synchronised') with the old versions in the cloud and can be accessed from any of your devices.

I don't know about you, but I get many – if not most – documents these days via email. I print small documents myself and add them to my brief. I ask for large documents to be sent in hard (as well as soft) copy. Document organisation is paramount. Folders are the key. Within my Dropbox folder, I have separate folders for each brief. Each brief has sub-folders for pleadings, correspondence, interlocutory matters, research, advices, etc. Information is only useful if it can be readily accessed. It can only be readily accessed if it is organised.

Having all my documents accessible means that I can be more discriminating about what to take home to work on. I no longer bother taking documents on the off chance I might need to refer to them: they're all already there waiting for me on my computer at home. When I work on documents at home, I do not need to email the amended version to myself. My computer in chambers updates the document instantly so it's waiting for me upon my return.

About a month ago, I was appearing before Justice Lindsay of the Supreme Court. The Court file did not have an appearance from my client. His Honour asked me if I had one. I did not have a hard copy in my brief. I did have one, however, in my Dropbox. I accessed it from my iPad and said: 'I hand up my iPad.' His Honour rejoined: 'You're altogether too modern, Mr Kirby.' I, of course, did not dare disagree.

My Dropbox contains over 13,000 documents. I can pull up any one of them as I sit on the train on the way to Parramatta District Court. I pay $100 per year for 100Gb of storage (plenty more than I need).

Lawyers, being a cautious (I didn't say paranoid) bunch, are, well… cautious of the risk cloud storage may pose. We are holders of our clients' secrets. Whilst Dropbox encrypts all the data they hold, it is conceivable that it could be the victim of successful cyber-attacks. It is also conceivable that being the subject of legislation such as the *Patriot Act* may increase the likelihood of another person being able to access clients' documents. I try to console myself with the belief that this is a little far-fetched. If I, like some members on my floor, was involved in high-stakes technology warfare (i.e. *Apple v Samsung*), I might choose not to store confidential intellectual property on Dropbox. But the fact is, I am not involved in that litigation, nor any against the US Government generally or the CIA in particular. Still, I have introduced a disclosure on my costs agreement in which I say that I will store documents on Dropbox unless the client objects.

Creating documents on the iPad

While the iPad (or other tablet) is a valuable tool in court and for working remotely, it does have its limitations. It is great as a repository of large texts and finding cases and legislation, but is more limited when it comes to creating documents.

For starters, there is no separate keyboard. The touchscreen keyboard on the iPad is fairly good – particularly in landscape mode (i.e. when the iPad screen is orientated on its side) – but it is slower to type on and less accurate than a physical keyboard. Many people have cases for their iPad with built-in keyboards. I have one made by Belkin. These are useful as the cases can be folded in such a way as to prop up the iPad as if it were a laptop screen. Apple's own wireless keyboards also connect to your iPad via Bluetooth.

Most of us use Microsoft Word to draft our documents. There is no app for Word on the iPad. There is, however, a decent workaround. CloudOn is an app which links to your documents in the cloud (e.g. Dropbox, Google Drive, Skydrive, etc) and from which you can create new Word documents. Now, I

like to format my documents in a particular way by applying particular styles. Word in CloudOn is more limited than the full version on my iMac. So, if I am drafting a document whilst having a coffee, I use CloudOn to create my document but then I wait till I am back at my desk to format it.

Manipulating PDFs

Many of the documents we receive are in pdf format. You can view pdf's on the operating systems of most smartphones and tablets. But, as I mentioned before, I like to mark documents up as I read them. There are apps which allow you to do this digitally. GoodReader is the one I use.

Let's say that I have been sent an email with an affidavit attached as a pdf. You can open and view that document simply by tapping the attachment. If, however, you hold your finger down on the attachment, a dialogue box will appear asking whether you want to open the document in various other apps (e.g. iBooks, GoodReader, CloudOn, Dropbox, Bluefire, etc). Once you open the document in GoodReader, you can annotate the document by, for example, typing on it, underlining it or highlighting. You can save these mark-ups onto the original file or make a new, annotated version which you can then save in one of your Dropbox folders.

For example, last week, I downloaded or emailed various cases (in pdf format) from Jade, LexisNexis and Westlaw. I opened them in GoodReader. I highlighted them as I read them and saved the judgments in their annotated form. This way, when I print them out, I can print out an annotated copy for me and unannotated copies to hand up.

Other useful applications

Occasionally, I still dictate documents. I don't have a dictaphone, though. Rather, I use an app called Dictamus which turns my iphone into a dictaphone. It has plenty of functionality: you can record over mistakes or insert lines at any point in the dictation. It also has a built-in workflow. In this way, once I have finished a dictation, it automatically sends the file (in mp3) via email to a person who provides a (very reasonably priced) remote typing service. After

sending such a file, I usually have a document in my inbox within an hour or two.

For legal research, Austlii has an app which is good for finding a case or finding the judicial treatment of a particular section of an Act (you can do this by finding the Act, clicking on the section and then clicking 'Noteup' at the top of the page).

Of course, you can use your internet browser to access any online subscriptions you have, including LexisNexis, Thomson Reuters Westlaw and Jade.

Jade is particularly useful because you can mark-up cases as you read them by adding 'Jademarks'. You can also add cases to your reading list and arrange cases by topics. The search functionality is Google-like in its intuitiveness and the cross-referencing between cases is very useful. References within cases are hyperlinked and, when you click on them, a small box opens on the page allowing you to read the cited paragraph of the judgment or the relevant section of the legislation. I subscribe to Jade Professional which offers certain enhanced features.

Don't forget about your phone camera. Use it like a scanner/ photocopier. Rather than write out your consent orders thrice, just take a photo of the copy you're about to hand up.

Syncing

One of the easiest and most useful ways of digitalising your practice is keeping your diary in order. Because I operate in the Apple environment, I work with my

iMac's native diary application, iCal. I subscribe to iCloud (Apple's cloud service) which means that my iPhone, iPad and computers are all kept in sync. As soon as I add an appointment in one of my devices, it immediately appears in all of them. My wonderful clerk, Trish Hoff, subscribes to my calendar from her computer too. This allows Trish to see my diary, and, because she has 'write' permission, she can also add new appointments directly into my calendar from her computer from which they'll be immediately transmitted to all my devices.

iCloud keeps my other apps such as Email, Reminders and Address Book in sync on all my devices.

Virtual private networks

Virtual private networks (known by their acronym, VPNs) are something I have begun using relatively recently. They essentially turn your iPad into a portal to your computer. I use one called 'Parallels Access'. It allows me to access anything on either of my computers. Once I launch the app, I am asked to choose which computer I want to access (my iMac or my MacBook Pro). Once I have chosen the computer, I can work on any program within my computer. I find this particularly useful if I want to find a document which is not in my Dropbox, or an email which I have stored in an archive folder. It also allows me to use the full version of Word so that I am able to format documents the way I like them. The one drawback with this application is that computer needs to be on (and not in sleep mode) in order to access it.

Only use it if it helps

> Men have become the tools of their tools.
>
> Henry David Thoreau

It is important not to adopt technology for technology's sake. For me, having a physical folder of key documents at the bar table is much more useful than having to find them on my laptop or iPad. I still prefer to make hard-copy affidavits my own by scrawling all over them and plying them with colourful stickies. But there are benefits to be found in readily available technology. There are new and

efficient ways of doing things. Some of them are even fun.

I want to make two last points. First, don't be daunted. To some readers everything I said will be old hat; to others, it will seem so beyond them that it seems far less trouble to just ignore it and keep doing things the old way. The point I wish to make is that it is not necessary to take an 'all or nothing' approach to the technology I have discussed in this article. This technology represents a snap-shot of what I am currently using in an incremental process of technological evolution. Just try one – perhaps purchase an eBook bundle the next time you're in co-op bookshop – and see how you like it.

The second point is that this is not expensive. Dropbox is $100 per year. iCloud is about $30 per year. Most of the apps are free. Dictamus cost me $12 four years ago. Parallels Access is about $80 per year.

People often remark that it is almost impossible to imagine practice without email. The fact, however, is that email has only been with us for a relatively short time and many of us *do* remember practice without it. I don't know which, if any, of the technologies discussed above will – like email – become part of our daily furniture. Technology moves rapidly. Its course is impossible to predict. Luckily, you don't need to predict it. Rather, you should simply ask yourself: 'What might be useful to me?'

Cloud services

By Kylie Day and Caroline Dobraszczyk

Cloud computing services are a relatively new development, which some members of the Bar are finding helpful in the management of their practices. What do we mean by 'cloud'? Basically, we mean someone else's computer servers. At its most simplistic, cloud services involve being able to store and/or share selected electronic files on remote servers owned or operated by others, so that you can access those files via the internet from multiple electronic devices, and share them with others if you wish. Without going into the technical detail here, different cloud services do have different technical and processing attributes.[1] They exist in many variations, including data storage sites, video sites, tax preparation sites, personal health record websites, photography websites, social networking websites and many more.[2] There are numerous providers of cloud computing services, such as Dropbox, ZipCloud, SugarSync, Microsoft SkyDrive, and Google Drive. Information is readily available about them on the internet, including their Terms of Service and policies. There are also websites which review and compare various cloud computing services and provide tips and buying guides (see eg http://www.thetop10bestonlinebackup.com/), although these may not be focussed on aspects of the services which are of most concern to barristers (such as security issues).

Benefits

There seem to be two main benefits for a barrister of using a cloud computing service. First, it enables one to access one's electronic documents from different computers, devices and locations, avoiding the need to email documents from one computer to another computer or take hard copies with you (if you want to work on a document in chambers and also at home, for example). If a document is stored in a cloud, you should be able to access it from any computer or device with an internet connection. Secondly, using a cloud computing service can make collaborating on documents easier. If you store a document (say, submissions) in a cloud, you should be able to grant access to others to work on it and then store the revised version. In other words, the use of a cloud computing service should enable documents to be accessed, worked upon, and stored in a manner which is more like that with which many barristers will be familiar from time spent working as solicitors within firms.

Risks

However, storing and sharing documents in a 'cloud' raises legitimate questions and concerns as to the effect that this may have on the ownership, security, confidentiality and privilege of documents. A cloud provider's terms of service, policies, and location may significantly affect these matters. It is impossible

to deal with these matters comprehensively in an article of this kind. However, one of the best things that you can do, if you are contemplating use of a cloud service, is to read and compare the Terms of Service of some of the providers. These generally deal with matters of ownership, security and privacy, among other things that you will be interested in. The way in which the provider manages the risks to your documents, or creates additional risks, will vary, and some Terms of Service will be more attractive to you than others. Of course, no method of electronic storage is 100% secure. While the risks of cloud storage (as opposed to other methods of electronic storage) should not be overstated, paying particular attention to your choice of service provider and its Terms of Service will be one of the most important ways in which you can deal with the risks that storage poses for the security, confidentiality and privilege of your documents.

Ownership

The first issue is that of ownership, that is, who owns the documents stored with the 'internet company' which is providing you with the cloud storage service? The short answer is that it depends on the Terms of Service that you agree to. The standard Terms of Service for cloud storage services vary as to what effect, if any, the use of the service has on the ownership of and rights in the documents. The following are some of the current standard terms from Dropbox, Microsoft SkyDrive and Google Drive:[3]

From Dropbox -

> Your stuff and Your Privacy: By using our Services you provide us with information, files, and folders that you submit to Dropbox (together, 'your stuff'). You retain full ownership to your stuff. We don't claim any ownership to any of it. These Terms do not grant us any rights to your stuff or intellectual property except for the limited rights that are needed to run the Services …

From Microsoft's SkyDrive -

> 3. Content. … Except for material that we license to you that may be incorporated into your own content (such as clip art), we don't claim ownership of the content you provide on the services. Your content remains your content, and you are responsible for it. We don't control, verify, pay for or endorse or otherwise assume any responsibility for the content that you and others make available on the services.

From Google Drive:

> Your Content in our Services. Some of our Services allow you to submit content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours.
>
> When you upload or otherwise submit content to our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works (such as those resulting from translations, adaptations or other changes we make so that your content works better with our Services), communicate, publish, publicly perform, publicly display and distribute such content. The rights you grant in this license are for the limited purpose of operating, promoting, and improving our Services, and to develop new ones. This license continues even if you stop using our Services …

So, although you may retain the ownership of documents and files that you put in a cloud, you are likely to be granting to the provider of the cloud service the right to use that material:

- at the very least, to the extent that that is necessary to run the service (eg, by reproducing your files where they are to be stored); and
- in some instances, for the purpose of the cloud service storage provider promoting and improving their services and developing new ones.

Clearly, the control that you have over your documents will be affected when you place them in a cloud. And particularly where the Terms of Service are of the kind imposed by Google Drive, there is uncertainty as to what use may ultimately be made of your material.

As one observer has noted (at a time when concerns were being expressed about Google Drive's introduction of the Terms of Service set out above):[4]

> If you look at the Terms for all sorts of online services you'll find similar language explaining that you're granting non-exclusive, royalty free rights to distribute your photos, words, or other data.
>
> But that doesn't mean the whole outcry is much ado about nothing. It's good to be reminded every now and again that even if a cloud service isn't directly asserting ownership of the files you upload-you *are* giving up a certain level of control over those files when you decide to share them. That's true whether you are posting on a public site such as

> Flickr or a more private service such as Dropbox where your files can only be seen by the people you share them with.
>
> If you want to make absolutely certain that nobody will ever see your content, turn it over to the feds when subpoenaed, or otherwise breach your privacy, the best thing to do is probably to horde all of your data on a local hard drive. But you lose the benefits of a cloud-based service such as the ability to easily share files, publish them for the world to see, or protect your important data which might be lost if your local hard drive happens to fail.

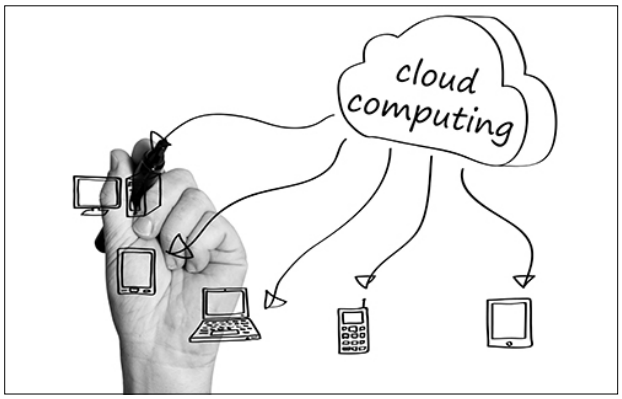
That last paragraph brings us squarely to the important issues of security and confidentiality, and as to whether a middle path exists whereby barristers can use cloud services, with all their attendant benefits, while taking sufficient precautions to manage the risks to the security, confidentiality and privilege of their documents.

Security, confidentiality and privilege

As the authors of a recent report on cloud storage have noted, it is easy to exaggerate the difference a cloud makes. Although it is a new development, in many ways it is just an extension of existing practices and technologies. Most documents are now digital and networked, and they are already easily copied and moved between locations or jurisdictions.[5]

Traditional hosting or server hire contracts involve the use of someone else's storage or computers. However, it would normally be clear who you are dealing with, and where your rented resources are. Those arrangements are unlikely to be established on a casual or informal basis. That is true at least for barristers' own computer servers – but as soon as documents are emailed to a solicitor, for example, it is unlikely that a barrister will have knowledge or control of those matters. Similarly, with cloud storage the ultimate location(s) of your documents (and the jurisdiction(s) to which they are subject) may be unclear, possibly even unidentifiable. Also with cloud storage, it is much easier to set up (and change) those arrangements, and documents may be stored in multiple locations and multiple jurisdictions.[6]

Cloud services are often based in data centres in places like the USA, central Europe or Singapore, which offer cost and other benefits. Differences



between the regulatory frameworks that exist where the data is hosted, where the hosting companies are based, and where the data subjects or users are based, can create complex legal and compliance issues. Some of this risk cannot be fully offset by contracts or technology alone.[7] The legal and technical support for adequate online security, confidentiality, privacy and data protection varies widely between countries. International agreements such as the *Convention on Cybercrime* from the Council of Europe (CETS 185, in force in Australia from March 2013) arose to address this in some areas. However, many countries are not a party to relevant agreements and some of them have quite underdeveloped legal coverage of online issues generally. In addition, those countries which are parties to a Convention may have varying implementations of its model laws. For example, the USA and Italy have exposed their citizens to less of the effects of the Convention than Australia has. In other words, rights and obligations may not be reciprocal. Clearly, the practical implementation of security and confidentiality, and the degree of protection of Australian – owned documents and data from third party access, will vary according to these and other local factors.

In 2009 the World Privacy Forum reported on issues surrounding privacy and confidentiality in the cloud computing environment in its 'White Paper: Privacy in the Clouds'. A summary of its findings included the following, which succinctly capture the risks associated with the use of cloud storage services:[8]

- A user's privacy and confidentiality risks vary significantly with the terms of service and privacy policy established by the cloud provider. The risks may be magnified when the cloud

provider has reserved the right to change its terms and policies at will. The secondary use of a cloud computing user's information by the cloud provider may violate laws under which the information was collected or are otherwise applicable to the original user.

- There are obligations that may prevent or limit the disclosure of some records to third parties, including the providers of cloud services. For example, health record privacy laws may require a formal agreement before any sharing of records is lawful. Other privacy laws may flatly prohibit personal information sharing by some corporate or institutional users. Professional obligations of confidentiality, such as those imposed on lawyers, may not allow the sharing of client information, and the sharing of information with a cloud service provider may undermine legally recognised privileges (see further below).
- When a person stores information with a third party (including a cloud provider), the information may have fewer or weaker privacy protections than when the information remains only in the possession of the person. Government agencies and private litigants may be able to obtain information from a third party more easily than from the original owner or creator of the document.
- Any information stored in the cloud eventually ends up on a physical machine owned by a particular company or person located in a specific country. That stored information may be subject to the laws of the country where the physical machine is located. For example, personal information that ends up maintained by a cloud provider in a European Union Member State could be subject permanently to European Union privacy laws.
- A cloud provider may, without notice to a user, move the user's information from jurisdiction to jurisdiction, from provider to provider, or from machine to machine. The legal location of material placed in the cloud could be one or more places of business of the cloud provider, the location of the computer(s) on which the information is stored, the location of a communication that transmits the information from user to provider and vice versa, and possibly other locations.
- The laws of some jurisdictions may oblige a cloud provider to examine the records of users for evidence of criminal activity and other matters.
- The law generally trails technology, and the application of old law to new developments can be unpredictable.

It is conceivable that the provision of material to a cloud provider (and other third parties) may affect the existence and maintenance of any applicable privilege in respect of it. The law of privilege can be complicated; it varies depending on the privilege at issue, depending on whether statute or common law applies, and depending on the jurisdiction. However, at least in some situations, the communication of privileged material to a third party can affect whether or not any privilege arises and, if so, whether or not it has been 'waived'.

It is conceivable that the provision of material to a cloud provider (and other third parties) may affect the existence and maintenance of any applicable privilege in respect of it.

Whether the storage of a privileged communication or document with a cloud provider actually affects privilege is likely to depend on the terms under which the service is offered. For example, as the World Privacy Forum has suggested,[9] if the provider merely stores material, and disclaims the right or ability to look at it, the argument that any privilege continues to inhere in the material ought be stronger. However, if the cloud provider has the right to read, disclose, transfer and use material entrusted to it (eg, as per the Terms of Service for Google Drive), privilege is likely to be more difficult to maintain. These matters would bear further and more detailed consideration (including analysis of some of the standard Terms of Service of the most common cloud service providers), and we propose to deal with this in a separate article.

In addition, barristers need to bear in mind their obligation of confidentiality, for example under

Rules 108 to 111 of the NSW Barristers' Rules. None of the exceptions to the obligation of confidentiality specifically deal with disclosure to a cloud or other service provider, although disclosure with the consent of the person to whom the barrister has an obligation of confidentiality would appear to be permissible.

US laws impacting on security and confidentiality

Given that many cloud services are offered by companies based in the USA, you may be interested to consider some of the laws which apply to them and may impact on the security or confidentiality of documents that they store. At the outset, it is important to bear in mind these matters of common sense:[10]

> As a practical threshold item, … the US government is usually interested only in matters that concern US interests, for example, payment of US taxes, crime in violation of US laws and threats to US national security. Much of the information held in cloud stores under US jurisdiction on behalf of foreign data owners may be of little interest to them for this reason. But … it is apparent that US authorities will not apply particular self-restraint in scenarios involving foreign jurisdictions and US interests.

These are important considerations when weighing up the benefits of using cloud services versus the likelihood of your documents being seen by third parties without your consent.

It will come as no surprise that there are numerous ways in which a US company (or indeed any company in the world), which provides cloud services, may have to disclose either subscriber details or even the content of the documents it hold. A summary of some of these is as follows (and is drawn from the more detailed review in Chapter 5 of the recent report by the UNSW Faculty of Law's Centre for Cyberspace Law and Policy):[11]

- The US government may make informal information requests. Many US companies are willing to comply with such requests, to cooperate with the US government on issues of shared interests (eg fraud prevention on e-commerce sites). Some companies are also obliged to comply with certain information requests. For example, telecommunication service providers have to provide access for law enforcement purposes under the *Communications Assistance for Law Enforcement Act* of 1994.
- A summons, subpoena, warrant or compliance with disclosure rules by the company in the course of litigation could very well mean that not only your details (ie as a subscriber to the service) but also the contents of documents may need to be disclosed.
- There are specific powers under US legislation which may mean that your documents are disclosed (eg the *USA Patriot Act* of 2001). This legislation was enacted after the terrorist acts of 11 September 2001, to expand the US government's powers to obtain data for investigations in connection with international terrorism and foreign intelligence. This legislation had the effect of lowering the previous thresholds for the activation of powers in existing legislation by amending the *Foreign Intelligence Surveillance Act* of 1978 ('FISA') and other legislation governing a process known as 'National Security Letters'.
- Some specific powers of law enforcement agencies under the FISA, which may constitute potential risks for those hosting data in the US, include:
  - The power of the FBI to compel the production of any 'tangible thing' for the purposes of an investigation to obtain foreign intelligence or protect against terrorism and other intelligence activities;
  - The power to conduct secret physical searches of personal property, without a warrant, for investigations in which foreign intelligence gathering is a significant purpose. The person whose property is searched need not be directly involved, and the search may be conducted without a warrant, provided that the Attorney General certifies that there is no substantial likelihood that the property of a US person is involved;
  - There is power to obtain a search warrant in all criminal investigations without providing notice to the subject for up to 30 days or longer if a Court permits;

- there is power to conduct roving wiretaps on communications lines;
- the Department of Justice has power to grant approval for law enforcement agencies to engage in electronic surveillance without a court order for up to one year for the purposes of obtaining foreign intelligence (this power again is based on there being no substantial likelihood that a US person is a party to the communications).

- As noted above, the US Patriot Act also amended other legislation governing a process known as National Security Letters. These are a type of federal administrative subpoena. Essentially, the FBI may, without court approval, use a National Security Letter to compel individuals and businesses to provide a variety of records including customer information from internet service providers. A National Security Letter may be issued to any person who the issuer believes may hold information relevant to a terrorist or other intelligence investigation. This process has been the subject of much legal and political controversy.[12]
- The US has also entered into numerous mutual legal assistance treaties including the Council of Europe's Convention on Cybercrime. The cooperation under these arrangements can mean the sharing of electronic information between law enforcement authorities in the relevant countries.[13]

The primary limit on the United States Government's power to obtain information is the Fourth Amendment of the US Constitution, which prohibits 'unreasonable searches and seizure'. Under the Fourth Amendment, the government must obtain a warrant supported by probable cause that a crime has been committed, that describes 'the place to be searched and the persons or things to be seized', and provides simultaneous notice of the search to the person. Whether a search and seizure is 'reasonable' depends on whether the person has an objective 'reasonable expectation of privacy', in the item subject to the search. However, the protection provided by the Fourth Amendment is not absolute and one exception is known as the 'third party exception'. That is, a person does not have a reasonable expectation of privacy if he or she discloses the information to a third party.[14] The Centre for Cyberspace Law and Policy has noted that:[15]

> In the context of electronically stored data, the US government has routinely relied on this Third Party Exception to dispense with the warrant requirement. Federal courts take the view that a person does not have a reasonable expectation of privacy in the subscriber information that he or she provides to an internet service provider…..
>
> At least one court took a different approach and held that whether a person has a reasonable expectation of privacy in subscriber information provided to an ISP depends in part on the ISP's terms of service.

There is also federal legislation in the US directed to protecting the privacy of electronic communications (the *Electronic Communications Privacy Act 1986*, which includes the *Wiretap Act* and the Stored Communications Act). However, it has been widely criticised by consumer groups, privacy advocates and companies as ineffective in protecting privacy in light of technological changes; they have called for its reform.[16] Critics contend that inconsistent standards may be applied to the same information, pursuant to the Fourth Amendment and the Electronic Communications Privacy Act, depending on the form in which the information is held at any particular point in time, and there has been inconsistency in the decisions of courts on these matters, which creates uncertainty for companies who host content, as to how the law applies to material on their systems. In its recent report, the Centre for Cyberspace Law and Policy stated that:[17]

> For example, the Eleventh Circuit held that individuals do not have a reasonable expectation of privacy in read e-mail messages stored with an ISP because they 'shared' them with the service provider. In contrast, the Ninth Circuit held that an electronic communications service provider who turns over opened and store text messages without a warrant or a viable exception is liable under the SCA for making an access that was not permitted 'as a matter of law'. To confuse matters more, a panel of the Sixth Circuit held that users have a reasonable expectation of privacy in e-mails, only to have its decision reversed by the Sixth Circuit sitting *en banc* on grounds that the plaintiffs did not have standing to sue, but without addressing the constitutionality of the SCA provisions. (footnotes omitted)

As a result of this ambiguity in the law, critics have proposed a variety of changes to the *Electronic Communications Privacy Act* of 1986.[18]

Some suggestions for users of cloud services

Some barristers appear to be treading a middle path, between the extremes of hoarding everything on a local hard drive, and putting everything in a cloud. One colleague says that he uses cloud storage like a 'knapsack'. He is selective about what he puts in it, and the time for which he leaves it there; password protection and encryption can assist in maintaining the security and confidentiality of documents, although they are not failsafe.

However, as the World Privacy Forum has sensibly observed, users of cloud services need to be vigilant and may need to avoid using cloud services for some classes of documents or information, while being able to select a service that meets their privacy and confidentiality needs for other categories of documents and information. The Forum has recommended that each user of a cloud provider pay more – and indeed, close – attention to the consequences of using a cloud provider and, especially, to the provider's Terms of Service.[19]

... users of cloud services need to be vigilant and may need to avoid using cloud services for some classes of documents or information,

One way of alleviating some of the concerns outlined above may be to use a cloud service that commits to hosting material on servers within national boundaries. However, even if material is hosted domestically, it is conceivable that some service providing access to the data could be hosted in a foreign jurisdiction, or under the control of another jurisdiction.[20] Even where you try to require a cloud provider to keep data within the geographic borders of your country, it cannot be assumed that you will only be subject to your own country's laws because, in certain circumstances, cloud providers may be legally obliged to communicate information, including confidential personal information, to authorities in other countries.[21] Similarly, domestic hosting does not deal with issues that may arise (particularly in the context of privilege), as a result of the provision of your material to the third party cloud service provider. The issue of privilege needs to be carefully considered by barristers in the context of use of cloud service, about which we will write more shortly.

Endnotes

1. *Data Sovereignty and the Cloud* by David Vaile, Kevin Kalinich, Patrick Fair and Adrian Lawrence for the Cyberspace Law and Policy Centre, UNSW Faculty of Law, Version 1.0, July 2013, pp.7 - 10.
2. *Privacy in the Clouds: Risks to Privacy and Confidentiality from Cloud Computing,* a report prepared by Robert Gellman for the World Privacy Forum, 23 February 2009, at p 4.
3. All of these quoted terms were available online at the time of writing: see https://www.dropbox.com/privacy#terms, http://windows.microsoft.com/en-AU/windows-live/microsoft-services-agreement, and http://www.google.com/intl/en/policies/terms/
4. Brad Linder, 'Dropbox, Cloud Storage and Who Owns Your Files?', article published on 3 July 2011 on Liliputing at http://liliputing.com/2011/07/dropbox-cloud-storage-and-who-owns-your-files.html
5. *Data Sovereignty and the Cloud*, at pp.3-4.
6. Ibid., at pp. 3, 12.
7. Ibid., at p.16.
8. *Privacy in the Clouds: Risks to Privacy and Confidentiality from Cloud Computing,* at pp.6–8.
9. *Privacy in the Clouds: Risks to Privacy and Confidentiality from Cloud Computing,* at p.10.
10. Ibid., p.32.
11. *Data Sovereignty and the Cloud*, Chapter 5, pp.31 – 48.
12. Ibid., pp.39–40.
13. Ibid., p.46.
14. Ibid., at p.34.
15. Ibid., at p.35.
16. Ibid., at pp.41 – 42.
17. Ibid., at p.42.
18. Ibid., at p.42.
19. *Privacy in the Clouds: Risks to Privacy and Confidentiality from Cloud Computing,* at pp 7–8.
20. *Data Sovereignty and the Cloud*, p.15.
21. Ibid., p.17.

Discovery and electronically stored documents

By Susan Cirillo

It is trite to say that evolving technology changes the discovery process. This article highlights some issues to consider when giving discovery via electronic means and when discovering documents that are electronically stored.[1]

What types of documents are discoverable?

The broad definition of 'document' in the dictionary to the *Evidence Act 1995* is also reflected in the dictionaries of the *Uniform Civil Procedure Rules 2005* (NSW) and the *Federal Court Rules 2011*.

In *Sony Music Entertainment (Australia) Limited v University of Tasmania*, Sony sought preliminary discovery and inspection of records held on backup tapes, disks and CD-ROMs for proposed copyright proceedings. The university argued that discovery could only be ordered in respect of the relevant discrete items of information recorded in those devices. In rejecting this argument, Tamberlin J held that the tapes, disks and CD-ROMs were records of information from which writings can be reproduced, even if only part of them may have related to relevant issues – therefore, they were 'documents' within the meaning of the court's rules and the court had power to order their discovery.[2]

Metadata[3] is also discoverable.[4] It is information about electronic data indicating the identification, origin or history of the file but which is not visible on a print out of the file document itself.[5]

Giving discovery and compliance with agreed protocols

The relevant Supreme Court practice note provides that where parties are required to discover what is known as 'discoverable electronically stored information' (ESI),[6] such discovery should be given electronically without converting the documents into a paper format. The relevant Federal Court practice note usefully remonstrates that to print such documents 'will generally be a waste of time and money'.[7]

Documents that are not stored electronically should only be discovered electronically if it is more cost effective to do so.[8] In this context, 'cost effectiveness' refers to that of the overall discovery process, including the benefits to be gained later in the trial, otherwise it would always be cheaper for a party to provide discovery in the traditional manner.[9] Such benefits include the ability to produce tender bundles and court books more quickly from an electronic database, easier search capacity and allowing counsel to access the entire discovery remotely.[10]

In the Supreme Court, parties are required to reach agreement early in the proceedings on a protocol for discovery dealing with matters such as the format for production, costs and the type and scope of the electronic documents to be discovered.[11] In the Federal Court, the parties may adopt, or be ordered to adopt, the default protocols set out by the relevant practice note.[12]

Litigants need to be aware that such protocols for discovery constitute an agreement between the parties, and the terms of such agreement, or any variation thereto, will need to be proved.[13]

In *Taylor v Burgess* Barrett J said that evidence obtained in breach of contract may be evidence that is obtained 'improperly' within the meaning of s 138(1) of the *Evidence Act 1995*.[14] That section provides that such evidence is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting the improperly obtained evidence.

In *Australian Securities and Investments Commission v Macdonald* (No 5), ASIC's tender of documents obtained by searching a defendant's laptop, where ASIC incorrectly believed that it had permission to do so under the terms of an amended search protocol, was rejected. Gzell J, after citing Barrett J in *Taylor v Burgess,* said that the admission of such improperly obtained evidence is undesirable because 'essential privileges against self-incrimination, client legal privilege and privilege against exposure to penalties are at risk.'[15]

Privilege

In the Supreme Court, parties are required to consider whether, pursuant to a discovery protocol, ESI is to be discovered on an agreed without prejudice basis, that is:

- without the need to go through the information in detail to categorise it into privileged and non-privileged information; and

- without prejudice to an entitlement subsequently to maintain a claim for privilege over any information that has been discovered and is claimed to be privileged under s 118 and/or s 119 of the *Evidence Act 1995* and/or at common law.[16]

This is known to allow 'quick peeks' or 'clawback discovery'.[17]

An agreement as to such a regime may have prevented the problem in the recent High Court decision of *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited*[18] (which is discussed in the Recent Developments section of this issue of *Bar News*).

Relevance and scope

Discovery is ordered in respect of documents that are 'relevant to a fact in issue'[19] or are 'directly relevant to the issues raised by the pleadings or in the affidavits'.[20]

When making an order for discovery of electronically stored information, the court will be required to balance the time, effort and expense of providing discovery (especially when there is some suggestion that discovery of electronically stored information would require the restoration or reorganisation of electronic data) against the possibility that discovery will yield relevant documents.[21]

Where the proposed discovery is burdensome, parties might need to demonstrate that the proposed discovery is necessary to prove a particular matter, such as a company's solvency or insolvency, because of the absence of any other means of proving that matter.[22]

Parties should consider whether a court might be inclined to order that an applicant for further discovery should examine the documents that have already been discovered and re-apply at a later stage if further documents or metadata is necessary.[23]

Further discovery and inspection may be allowed where, for example, a party proposes to tender a 'snapshot' of a computer and the other side ought to have an opportunity to at least verify that the 'snapshot' is an accurate one, and/or to obtain alternative information and evidence from the computer in question.[24]

Before seeking to oppose an order for discovery, a party should consider whether the discovery sought actually requires them to search 'all' of their documents, when in fact, a party is only required to demonstrate that it has conducted a reasonable search.[25]

Endnotes

1. See generally and for more information, M. Jackson and M. Shelly, Electronic Information and the Law, Lawbook Co. 2012, Chapter 3; Allison Stanfield, Computer Forensics, Electronic Discovery and Electronic Evidence, LexisNexis Butterworths, 2009 and M. Legg and L. Dopson, 'Discovery in the Information Age – The Interaction of ESI, Cloud Computing and Social Media with Discovery, Depositions and Privilege' [2012] UNSWLRS 11.
2. [2003] FCA 532 at [48] and [54]. See also Council of the *NSW Bar Association v Archer* [2008] NSWCA 164; (2008) 72 NSWLR 236 at [55] per Campbell JA.
3. See *Commonwealth Bank of Australia v Mohamad Saleh and Ors* [2007] NSWSC 903 at [236] for an example of how metadata was used to reject a contention by a person that certain computer documents were not created by him.
4. *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2006] FCA 1802 at [16] per Tamberlin J.
5. For the full description, see ibid at [11]-[13].
6. In Practice Note SC Gen 7 ESI is defined to mean electronically stored information and includes emails, webpages, word processing files, images, sound recordings, videos and databases stored in any device. See also Practice Note SC Eq 3. These practice notes need to be read in light of Practice Note SC Eq 11 'Disclosure in the Equity Division' which provides that the court will not make an order for disclosure of documents until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure. See also *Armstrong Strategic Management and Marketing Pty Limited & Ors v Expense Reduction Analysts Group Pty Ltd & Ors* [2012] NSWSC 393 at [65] per Bergin J on the operation of PN SC Eq 11.
7. Practice Note CM 6, 'Electronic technology in litigation' at 5.1(c).
8. Practice Note SC Eq 3 at [28].
9. *Richard Crookes Constructions Pty Limited v F Hannan (Properties) Pty Limited* [2009] NSWSC 142 at [12] per Einstein J.
10. Ibid at [18]-[19].
11. Practice Note SC Gen 7 at [15].
12. Practice Note CM 6. A Default Document Management Protocol is available where the number of discoverable documents is anticipated to be between 200 and 5,000 and an Advanced Document Management Protocol is available where the number of discoverable documents will exceed 5,000.
13. See generally *Australian Securities and Investments Commission v Macdonald (No 5)* [2008] NSWSC 1169. See also *Schutz DSL (Australia) Pty Ltd v VIP Plastic Packaging Pty Ltd (No 14)* [2011] FCA 1159 at [3] where the party giving

discovery accepted that its discovery was not in accordance with the agreed protocol and consented to re-serve its discovery.

14. [2002] NSWSC 676 at [34].
15. [2008] NSWSC 1169 at [23].
16. Practice Note SC Gen 7 at [15]. In the Federal Court, parties may agree on a regime regarding privileged documents within the default protocols.
17. M. Legg and L. Dopson (cited above at i) at 29.
18. Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited [2013] HCA 46.
19. Rules 21.2(2) and 21.2(4) of the *Uniform Civil Procedure Rules 2005*.
20. Rule 20.14(1)(a) of the *Federal Court Rules 2011*.
21. *NT Power Generation Pty Ltd v Power & Water Authority* [1999] FCA 1669 at [2] and [17]; *Slick v Westpac Banking Corporation (ACN 007 457 141)(No 2)* [2006] FCA 1712 at [41] and [43]; and *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia* [2007] WASC 65 at [29].
22. *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [67].
23. This was the effect of the order made in *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2006] FCA 1802. See also *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia* [2007] WASC 65 at [29].
24. *NAK Australia Pty Ltd v Starkey* [2008] NSWSC 1142 at [12]-[13] per Brereton J.
25. *Galati v Potato Marketing Corporation of Western Australia (No 2)* [2007] FCA 919 at [59]-[60].

Websites, social media and a barrister's practice

By Kathryn Millist-Spendlove

The bar prides itself on its traditions and history so it is unsurprising that the take up of social media and the use of websites by members of the profession has been slow. The reticence to participate appears to be driven by several forces including concerns about advertising restrictions, the possibilities of misconduct and mostly, the vague notion that using a website or social media for professional purposes is just simply something that barristers do not, or should not, do. But in an age where social media and websites have ceased to be for the technologically advanced and become the norm, is it time that the bar started welcoming the use of these mediums?

Many years ago, barristers were governed by unspoken codes of conduct, one of which was that 'gentlemen did not spruik their wares'. Therefore, even with no specific rule to that effect, it was seen to be unbecoming for a barrister to seek any particular name for himself or to publicise his practice. Advertising was limited to a name plaque at chambers or purely to word of mouth amongst solicitors. To advertise in the manner of a business would be the antithesis of the calling that was a life at the bar. This same principle is still alive and well at that bar in the twenty-first century.

The advent of the *New South Wales Barristers' Rules* saw these traditional values turned into express codes of conduct, which remained in place for some time. In 1982, the NSW Law Reform Commission

(NSWLRC) undertook a consideration of the rules surrounding the rights of barristers and solicitors to advertise. In the *Third Report on the Legal Profession: Advertising and Specialisation*, the NSWLRC recommended that the rules surrounding advertising be relaxed significantly.[1]

At that stage, the Barristers' Rules provided that:

> 72. A barrister shall not directly or indirectly do or cause or allow to be done anything for the purpose of soliciting employment as a barrister or which is likely to lead to the reasonable inference that it is done for that purpose.
>
> 73. A barrister shall not directly or indirectly do or cause or allow to be done anything for the purpose of or with the primary motive of personal advertisement of himself as a barrister or which is likely to lead to the reasonable inference that it is done for that purpose.

As well as the general prohibition on advertising contained in Rules 72 and 73, there were also

prohibitions on disclosure to the public that a person was a barrister (Rule 74a), giving interviews to the media in connection with any legal proceedings (Rule 74b) and taking steps to procure or encourage any person to procure the attendance of the media at any proceedings in which the barrister was appearing or the publication or broadcasting of any matter concerning any proceeding or dispute in relation to which the barrister was acting (Rule 75). The prohibitions extended even further to include prohibitions on visiting solicitors offices (Rules 34-35), sending them any memorandum containing the barrister's name, address, the fact they are a barrister or their resume (Rule 74f) and the use of business cards or stationary identifying the person as a barrister (Rule 74e).

These restrictions had the effect that any identification of a person as a barrister to the general public or even to a solicitor without express request was not allowed.

It was not until the introduction of the *Legal Profession Act 1987* (NSW) (LPA) and the subsequent *New South Wales Barristers' Rules* made under s 57A of the LPA that these rules were relaxed. The specific restrictions were done away with and solicitors and barristers were both permitted to advertise in any way they chose provided always that any advertising did not bring the profession into disrepute. With this in mind, it is easy to see why many barristers, with such restrictions still in recent memory, chose not to advertise with some even going as far as continuing to refuse to carry business cards.

This new freedom to advertise was not curtailed at all until the introduction of legislation in 2003 restricting advertising with respect to legal services for personal injury and compensation. The Carr government become very concerned about blatant and predatory advertising by personal injury law firms, which involved, infamously, a large advertisement on the ceiling of a lift at the Royal North Shore Hospital. Following input from the Law Society, who were in favour of the ban, and the New South Wales Bar Association, who felt that current rules were sufficient, legislation was introduced in the form of the *Legal Profession Amendment (Personal Injury) Regulation 2003* (NSW) which was then included at clause 23 to 40 of the *Legal Profession Regulation 2005* (NSW) (note that clause 74-80 of the *Workers Compensation Regulation 2003* (NSW) includes similar provisions for advertising workers compensation). This legislation prohibits the advertising by solicitors, barrister or third parties on their behalf of legal services for personal injury or workers compensation except in very limited circumstances.

So despite there being no limit on barristers advertising except with respect to personal injury and workers compensation, advertising is just not something barristers seem to do. Not in the traditional sense anyway.

The advent of the Internet and the use of websites and webpages is something that went largely unnoticed by the bar community until fairly recently. The Bar Association member directory lists all NSW barristers (and is not subject to the personal injury or workers compensation advertising restrictions) as well as their contact details and areas of practice. While most barristers passively appear in this directory, there are only a few who have taken the next steps of launching their own personal websites.

Interestingly enough, it appears that more senior barristers are leading the way when it comes to personal websites. Senior counsel such as Jane Needham SC, Christopher Barry QC and Richard Lancaster SC are beginning to use personal websites to put information about themselves out into cyberspace. While it is becoming more common-place at the bar, the reasons barristers are putting themselves out there are differing.

Christopher Barry QC started his website a few years ago after his son, a leading IT recruiter, suggested he set up a website. Barry QC freely admits he knows

little about how it all works and that his son set it up for him, but he also believes it is the way of the future. 'In ten years this will be the usual way people practice,' he says. He finds that the advantages of having a website outweigh the disadvantages. While his listed email address tends to be spammed occasionally and he has had half a dozen random direct-access clients contacting him each year, the ease with which his solicitors and clients can find him makes it well worthwhile. 'It is much easier for people to find you through the website than through the Bar Association website and a Google search takes you directly to my details. Smaller firms need the information readily available to find the best barrister for a particular case', says Barry QC. Further, he believes there is a disadvantage in not having a websites, saying, 'There is an expectation in this day and age that people will have a website. It is expected by the community.' Barry QC is happy that simply stating on the website that he does not accept direct-access briefs is enough to put most people off and he agrees that '...if I were not a QC I would get a lot more random people contacting me.' Barry QC states the he has a fairly consistent number of hits on the website, in the vicinity of 300 per month. When asked about colleagues' responses to the website, he says he had only ever had positive feedback.

Twitter has also proved very useful for barristers in attempting to educate the public about controversial matters.

The use of social media platforms amongst barristers, particularly Twitter and LinkedIn, is also becoming much more common, even more common than the use of websites. This may be partly due to the influx of new barristers who are joining the bar already with LinkedIn profiles and Twitter accounts that were used for previous jobs or personal pursuits. It is generally accepted that LinkedIn is more for professional use than other platforms such as Facebook and there is a strong presence of members of the bar on LinkedIn. It conveniently provides details about the particular barrister but has enhanced value in that it allows more information that that provided through the Bar Association's 'Find a Barrister' directory and it also provides for online networking amongst barristers, solicitors and clients.

The ability to contact and connect with other barristers and solicitors is the reason why LinkedIn has been so popular. In a profession where the level of work you are able to garner is based on who you know and your reputation in the legal arena, the ability to network online provides a cost and time efficient method of keeping up connections without the often timely and costly social occasions. That said, there is no suggestion that platforms such as LinkedIn would ever completely replace the face-to-face interactions necessary to establish a long-lasting and personal connection, which is often the basis of a good barrister-solicitor relationship.

The main benefit of social media platforms such as LinkedIn is that they perform the same role as a personal website. They are searchable through Google and they provide a ready template for listing the barrister's contact details, areas of expertise and achievements. The general consensus appears to be that a barrister's work rarely, if ever, directly comes through their presence on LinkedIn or other social media platforms but that solicitors often use such sites to get further information about a barrister that has been recommended to them before approaching the barrister personally. It is really the provision of information that is the benefit rather than as a direct source of work, or as actual promotional or advertising material.

The use of the news feed feature on LinkedIn is similar to Twitter in that both allow a short statement as well as the ability to attach a link to an outside source. While it seems that the majority of barristers on LinkedIn do not actively use the news feed feature, many that do use a third application which allows a single post to go to both the LinkedIn news feed and to Twitter simultaneously, thus reaching both audiences through the one action.

Oddly, Twitter seems to be the interactive medium of choice for barristers. Twitter hosts numerous barristers both junior and senior counsel including, Jane Needham SC, Dominique Hogan-Doran, Mark Cohen, Charles Waterstreet and others. Posts tend to be either of a personal nature or alerting followers to new court decisions or interesting articles and reviews. Twitter has also proved very useful for

barristers in attempting to educate the public about controversial matters. The courtroom, despite being open to the public, tends to be an area of some confusion for much of the population and therefore, what occurs there is often the basis of sensationalism, particularly from the media. Many high-profile court cases have resulted in the reporting of one-sided or even misleading articles about the operation of the law, particularly sentencing, which can paint the bar, the judiciary and legal professionals in an unwarranted negative light. Twitter provides barristers a forum where they are able to direct their followers to articles and resources which are more impartial and whose authors have a much better understanding of the intricacies of law. This makes Twitter, and other social media platforms like it, an invaluable resource in promoting the transparency of the legal profession and the work barristers do. It also assists in educating the public about how the justice system works and ensuring they are aware of why sometimes ostensibly sensational decisions are made.

Naturally, barrister users of Twitter also seem very reticent to self-promote in any overt fashion. This reticence no doubt harks back to the traditional values of the bar and to the concerns with how one's colleagues might perceive one.

This concern about perception is well-founded. There is still a feeling amongst some barristers that the use of social media and even websites is in some way unbecoming for a barrister although those that share this view are becoming less. One barrister interviewed for this article expressed concern about the perception of their colleagues should they be named which proves that this concern persists.

The president of the New South Wales Bar Association, Mr Phillip Boulten SC, while not a user of social media himself, has no intrinsic concerns about social media or websites as a general rule. He admits that he has on occasion received complaints, mainly about barristers' websites but that these almost always relate to a complaint that the information about a particular practitioner is incorrect rather than concerns about the website being unbecoming or not in keeping with the values of the profession. In fact the main worry with websites is not to do with self-promotion or unbecoming behaviour at all. 'The worry is that websites might increase the number of direct access matters, which create a disproportionate number of complaints,' says Boulten SC. He admits that barristers are allowed to take direct access matters, but his personal view is that to do so is 'dangerous.' Overall, however, Boulten SC is in favour of websites, stating that he would like all floors to have a website as it improves access to information.

The New South Wales Bar Association's concern with social media is slightly different. Boulten SC confirms that they have had complaints regarding barristers using Twitter to 'tweet' in court. No action has been taken on these complaints at this stage but it highlights the possible issues that could arise with respect to contempt of court or breaches of the media comment rules. This he believes is easily cured, however by people being sensible and thoughtful in their communication. 'It's the modern way. It is just risky because it is instant. The rules regarding media in the Barristers' Rules are equally applicable to all forms of communication and the issue is that it is likely there could be inadvertent breaches of the rules because electronic communication is so quick,' Boulten SC comments.

Despite these issues, Boulten SC is firmly of the view that there is value in social media. Considering Needham SC currently has a website and an active Twitter account of her own, it makes sense that there will be an increase in the acceptance of social media and online presence throughout the Bar Association's membership.

It appears clear that many barristers' concerns about the use of websites and social media are unfounded. There are no longer issues with advertising generally and provided social media is used in a careful and thoughtful way it can be a very useful tool for networking and information dissemination. No barrister approached for this article had obtained work solely from their website or social media presence however many felt that their online profile had assisted indirectly in them obtaining work because it allowed potential clients and solicitors to find out about them without having to directly contact them in the first instance.

It is clear that there remains some caginess amongst barristers to embrace the use of social media

technology but this is unsurprising considering the slow nature of major changes in the profession. It is expected however, that the next few years will see more and more barristers taking up the opportunities that an online presence provides, particularly where the New South Wales Bar Association is beginning to utilise this medium.

Endnotes

1. NSW Law Reform Commission Report, Report 33 (1982), *Third Report on the Legal Profession: Advertising and Specialisation.*

Electronic briefs – briefing by email

By Kylie Day and Caroline Dobraszczyk

It is increasingly common for solicitors to brief barristers by email, without providing documents in hard copy. That has its advantages and disadvantages. On the positive side, barristers can obtain instructions and relevant materials more quickly, often enabling whatever is sought (whether it be advice, advocacy or other work), to be provided quickly in response. This is particularly useful in urgent matters. Providing briefs by email also allows us to read the material wherever we are, so long as we have access to the internet (on an iPad, iPhone, laptop, home computer or the like). The use of clouds for the storage and sharing of electronic documents is a more recent development. It has the potential to house briefs, or parts of them, electronically (and independently of email) so that they can be accessed wherever we have access to the internet. We have dealt with clouds in more detail in a separate article in this edition of *Bar News*. If barristers are accommodating about the receipt of briefs electronically, that should make the lives of our solicitors easier, and hopefully that will result in further briefs for barristers. Importantly, the use of electronic briefs should also help to keep expenses down for the client, given that solicitors would otherwise charge for printing and delivering the brief to chambers.

However, there are disadvantages and risks associated with electronic briefs. They are less likely to come with helpful and considered observations, and most of us will eventually need some hard copy documents for work in chambers or in court. One of the downsides of the trend towards providing material to us electronically is that we can find ourselves preparing more of the hard copy material ourselves, in circumstances where we often have less administrative support than solicitors. Barristers often just absorb this cost and inconvenience. However, disadvantages arise when the volume of material, or its timing, makes that an unreasonable burden. Often it is possible to request a hard copy or other assistance from the solicitor, but that is not always practicable. The instantaneous nature of email can also lead to unreasonable expectations as to how quickly a barrister is able to attend to the matter. And sometimes the piecemeal nature in which briefs are provided by email can lead to a lack of clarity about the precise content of the barrister's brief and his or her instructions. There can also be an unreasonable assumption that a barrister will be able to read everything that is sent by email or stored electronically. Sometimes, that is simply not possible. Similarly, sending an email (or copying a barrister in on an email) can seem to imply that there is some ongoing involvement or oversight by the barrister, when this may not be the case. In other words, the practice of providing briefs electronically does have some particular risks for barristers. Those are best managed by clear communication in response, regarding what you understand your instructions to be, the material which you have been asked to consider, what you have and haven't been able to read for the purpose of your work, and so forth.

Technology has changed, and will continue to change, the way in which we receive briefs and undertake the work required by them. Like most things, that is likely to bring us both risks and opportunities. The trick will be always to identify them.

Social media and the courts

By Catherine Gleeson

You haven't read a court report until you have read Kate McClymont's twitter coverage of the committal hearing of murder charges against Ron Medich. Her minute-by-minute updates of proceedings included the following:

> Hitman Safetli said his payment for murdering Michael McGurk was $300,000 the threatening of Mrs McGurk was 'extra' another $50k #Medich. …
>
> Another prospective hitman wanted $100k upfront and $100k after the murder but Lucky said too dear. Not good with figures as cheaper offer (@Kate_McClymont, 12:07 and 12:10 pm, 26 August 2013)
>
> How old were you in 1990? Safetli's lips start moving as he does the mental arithmetic. Please don't tell us you don't know: sighs the Terra (@Kate_McClymont 2:33 pm, 22 August 2013)
>
> You paid $15,000 for a handgun!? says the Terra incredulously to Safetli, the hitman. Did it have a pearl handle? he said sarcastically. (@Kate_McClymont 2:13pm, 22 August 2013)
>
> The Terra theatrically marched 2 the witness box, flourishing a magnifying glass & then claimed he couldn't see Safetli's burn scars on hand (@Kate_McClymont 12:54 pm, 22 August 2013)

McClymont does not solely tweet.[1] Her report of proceedings she has attended is reduced, in the traditional way, to an article usually on Fairfax media websites, usually on the day of the hearing.[2] Both contain similar accounts to those posted on Twitter during the proceedings. One assumes that the tweets, and the articles, are all fair reports of what transpired during the evidence of the witnesses against Medich. The fact that they are entertaining, and concern cases of significant interest to the public (McClymont also regularly covers the recent ICAC inquiries concerning the New South Wales Labor government) result in McClymont's tweets having an extensive and dedicated following[3].

This relatively new form of court reporting is but one example of the manner in which the court must grapple with issues concerning the use of social media. This article considers how the courts are engaging with social media and the issues concerning its use.

Court reporting and social media

The ability to tweet or post other public comment in the course of court proceedings is facilitated by the use of smartphones and other mobile devices, such as tablets. Operation of these devices from within a courtroom is increasingly permitted by the courts.[4]

Justice Cowdroy allowed media to tweet live from the courtroom in *Roadshow Films Pty Ltd v iiNet Ltd (No 3)*.[5] In doing so, his Honour recognized that Twitter facilitated the public's right to be fully informed of proceedings.[6] Courts in the United Kingdom have also permitted live tweeting of court proceedings,[7] however, the use of Twitter or other social media broadcasting in the courtroom is not unregulated by the courts.

The Federal Court Rules confer a discretion to make directions in relation to the use of communication or recording devices.[8] The Victorian Supreme Court has issued a policy that permits journalists to use electronic devices in court, but requires permission of the presiding judge for immediate publication of material while in court.[9] The Supreme Court of South Australia has recently allowed live tweeting from the courtroom, with accompanying amendments to the Supreme Court Rules, including a 15 minute delay on posting to enable any applications for suppression orders to be made.[10]

In New South Wales, amendments were introduced to the *Court Security Act 2005* (NSW) in February 2013 preventing the transmission of sounds, images or information from a court proceeding from the courtroom by a number of means, including 'broadcasting or publishing the sounds, images or information by means of the Internet' (section 9A(1)(c)). Despite considerable disquiet among legal

practitioners and the media about the proposed legislation, Attorney General Greg Smith SC identified legitimate security concerns about the use of electronic devices in the courtroom, including an incident in which people in court were sending messages about evidence to witnesses who were waiting outside to give their evidence.[11]

Section 9A(2)(f) provides for exemptions to be given under the regulations. The *Court Security Regulation 2011* (NSW), Reg 6B, provides exemptions from the operation of the Act for a number of persons, including a journalist for the purposes of a media report on the proceedings concerned, or a lawyer, or court officers or other persons authorized by a practice note or policy direction.

The use of social media from the courtroom is otherwise not the subject of any specific direction in the court rules or in any practice directions issued by New South Wales courts. In the past, some judicial officers have had occasion to restrict live tweeting of proceedings, particularly where there are significant concerns about the accuracy of tweets that have been broadcast.[12]

Contempt and social media

More formal controls may also be utilized to prevent any prejudice to the administration of justice arising from the use of social media.

Concerns about the tendency of social media commentary to interfere with the administration of justice are several:

First, there is a risk that the immediate reporting, transcript style, of what is said in court may not be accurate. Twitter for example affords the user 140 characters per post, tweets are often truncated or abbreviated to fit within the medium.

Second, there is a risk that the report of what occurs in court may be blended with the personal observations and impressions of the poster in such a way that it is unclear to the reader what is a report of the proceedings and what is not.

Third, immediate posting of what is heard in court might result in the publication of material that should be the subject of a suppression order, before there is time for an application for that order to be made.

Fourth, there is a risk that any report of court proceedings[13] might be picked up by other users of social media and commented on in a way that might have the tendency to influence jurors or witnesses. Social media is designed to facilitate conversation, with the ability to comment on individual posts or to post with a 'hashtag' marker so that the post can be linked to other posts on the same subject. In this way, it is easy for posts on popular topics, including prominent court proceedings, to proliferate in largely unrestricted fashion. That may lead to the publication of prejudicial material not from the courtroom. It also raises the spectre of material being published in breach of a suppression order.[14]

Controlling the publication of material on social media can be facilitated in a number of ways. What is important is to strike a balance between the obvious benefits to open justice for there to be accessible reports of court proceedings, and the need for there to be such controls on publication as are necessary to ensure that the administration of justice is not compromised.

The *Court Suppression and Non-Publications Orders Act 2010* (NSW) (CSPO) operates to achieve that balance, by providing first that the primary objective to the administration of justice is to safeguard the public interest in open justice (s 6), and by then empowering the court to make orders restricting the disclosure of information that might identify a person or information comprising evidence in proceedings before the court (ss 7 and 8). The legislation is not intended to trespass on the existing law as it relates to contempt of court, or any specific legislative provisions that restrict publication of information connected with trials (ss 4 and 5).

When it comes to restriction of material disseminated in social media, the CSPO is applicable, as broadcast or publication by means of the internet falls within the scope of the Act.[15] The question then arises as to whether orders can be made that effectively protect the integrity of proceedings in circumstances in which the reach of social media platforms (both in terms of who may post material to the platforms and who may access the material) is global.

For example, in *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim*[16] the District Court made an order restricting any disclosure or dissemination

within Australia, including broadcast or publication by means of the internet, of any material in which the three accused were parties or witnesses, or any material referring to other unlawful conduct in which the accused were allegedly involved.

The Court of Appeal overturned the order. In doing so, Basten JA affirmed that superior courts did not have the power to make orders binding the world at large.[17] However, it was within the scope of ss 7 and 8 of the Act to make orders restricting public access to existing material contained on a website.[18] His Honour held that this power did not extend so far as to permit the making of orders to third parties unconnected with the proceedings to remove material from potential access to jurors.[19]

Basten JA then turned to whether 'whether novel problems are created with respect to the fairness of criminal trials where there is significant prejudicial material available on the internet.' Considering cases in which the court has ordered the removal of identified material from specified websites,[20] and in which the court has made a more broad ranging order intended to bind not just the direct publisher, but secondary content providers such as Wikipedia and Google (provided they had notice of the order)[21] his Honour observed that 'it invites consideration as to how an internet content host or search engine operator in another country can properly be given notice of the order or be the subject of enforcement proceedings.'[22]

The rejection of the order sought in Ibrahim ultimately turned on its effectiveness, and therefore whether it was 'necessary' for the prevention of the administration of justice within the meaning of s 8(1) of the CSPO. Basten JA held that an order which is ineffective could not be construed as necessary for the purposes of s 8(1).[23] An order which is insufficiently specific, both in terms of the persons potentially bound by the order, and the geographical limits of the order, will not be necessary because it will be other unnecessary and impracticable to enforce.[24] As to the first issue, his Honour observed:

> Assuming, as the evidence reveals, that such material may be available on the internet despite its removal from sites controlled by the applicants, there are serious questions raised as to whether a whole range of businesses which provide access to the internet through public use of computers may fall within the terms of the order. Secondly, there is a question as to whether internet service providers, which make available search engines permitting access to material without knowledge of the relevant URLs, may also be caught by the terms of the order, if the access is had anywhere in Australia.[25]

As to the second issue, Basten JA observed that the utility of an order limiting access to the material to persons outside the pool of potential jurors at a trial in Sydney was limited.[26] Observing that the order sought to overcome the geographical reach of the internet, his Honour observed:

> …the fact that it is not possible to control material on servers outside Australia demonstrates the limited value of an order seeking to control availability on servers inside the country. No doubt it is arguable that most of the offending material, being of more topical than national let alone international interest, will be found on servers within the country, and even perhaps within New South Wales. However, that may underestimate the likelihood that such material is also available from other sources. Given the efficiency of modern search engines, limiting the number of sources, without removing them all, is likely to be ineffective.[27]

Finally, Basten JA observed that the scope of any order must be determined by what is necessary to provide a control on the existing restrictions on jurors making their own enquiries. The order should take account of the type of material an errant juror is likely to seek out, whether because it is of recent origin or because it was likely to have come to the juror's attention at an earlier time.[28]

The outcome of *Ibrahim* was that any orders sought under CSPO must be targeted in their approach. It is unlikely, though not impossible, that an order seeking to pre-emptively restrain publication of prejudicial material will not fall within the scope of the Act. However, Basten JA did identify a solution that would allow for the making of specified orders: the Crown could undertake searches to identify potentially prejudicial material before the trial, and then issue a notice to the content provider and request removal of the material for a specified period. If the request was not complied with within a reasonable period, the Crown could seek an order in respect of the identified material.[29]

Courts have also been astute to punish contempts

committed by persons using social media. Two examples illustrate the degree to which the interaction between social media users can influence the application of contempt principles.

In *The Queen v Hinch* [2013] VSC 520, media personality Derryn Hinch was convicted of contempt in relation to an article he had written and posted on his website that discussed information relating to the previous criminal history of Adrian Bayley who was then being tried for the murder of Jill Meagher. The article was also posted by means of a link to his Twitter feed. The material contained in the article was caught by a suppression order made in the Victorian Magistrate's Court. Following publication, a similar suppression order was made by Nettle JA in the Victorian Supreme Court.

Following the making of the second order, Hinch re-posted the link to the article on Twitter. He then posted a series of tweets, first criticizing the suppression order and then indicating to his followers that he had been summoned to appear before Nettle JA. Upon learning that he was to be charged with contempt, Hinch arranged for the offending parts of the article to be redacted.

At the hearing the defence adduced reams of material, including extracts from discussions of the case on Facebook and Twitter, that revealed information of the same nature as that contained in the Hinch article. The defence also relied on forensic evidence of the number of page 'hits' of the article versus the circulation of other major news publications that had published material relating to the Meagher trial. The material was relied on in support of a submission that, first, the material published by Hinch did not have a tendency to frustrate the administration of justice, because of the breadth of publication on the issue; and second, that there was a significant public concern in the issues surrounding Bayley's criminal history that outweighed the public interest in the administration of justice.

In convicting Hinch of the charge of contravening the suppression order, Kaye J relied on Hinch's tweets to infer knowledge of the terms of the suppression order in the period following publication.[30] Hinch was acquitted of a separate charge of publishing material that had a tendency to prejudice the administration of justice. Kaye J took into account the relatively small readership of the article (at least before the charge of contempt), the time to the likely date of the trial, and publication of other prejudicial material, and concluded that they raised a reasonable doubt as to the prejudicial nature of the article.[31] The publication of prejudicial material was found to be of lesser significance, because it was historical (having been published at the time of Meagher's death)[32] and because, being comprised of comments and allegations on Facebook and Twitter, it was 'conversational', by contrast with Hinch's article which was 'editorial'[33] (and presumably for that reason more credible). Were it necessary for his Honour to decide, Kaye J would not have found that the degree of public discussion of the Meagher case in social media and elsewhere elevated the public interest in the issues surrounding Bayley's criminal history above the interest in Bayley receiving a fair trial.[34]

In *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)*[35] the ACCC moved to punish the defendants for contempt for breaches of undertakings given by the defendants not to undertake misleading and deceptive advertising in relation to the merits of allergy treatments marketed by the defendants. The breaches concerned publication of advertisements on the company's Facebook and Twitter pages. The advertisements consisted of statements by the company, as well as testimonials from third parties posted on the Facebook and Twitter pages, both by the company and by the third parties themselves by means of posting on the company's Facebook wall and Twitter feed.

Finkelstein J held that Allergy Pathway became the publisher of the third party testimonials posted on the Facebook wall when it became aware of the postings and did not remove them.[36] It is easy to infer that this was the case as the company often posted responses to the testimonials or questions posted by third parties.

Service via social media

A number of judgments have recognized that substituted service might be effected using social media, particularly Facebook but also Twitter. Both platforms provide for 'private messaging' that is

a possible means of making proceeding known to a defendant.[37] The considerations attendant on whether service should be allowed are no different to those attending any other form of alternative service, namely, that the documents being served are likely to come to the attention of the defendant by that means of service. It has been suggested that it would not be appropriate for service to be effected in this manner without the court's approval.[38]

In the case of social media, this requires proof that, first, the social media account identified is in fact that of the defendant, and second, that the defendant's use of the site is of such a nature that service by that means will come to the defendant's notice. A further issue arises as to the limits to territorial jurisdiction can be overcome by access to social media platforms that are available worldwide.

In *Flo Rida v Mothership Music Pty Ltd*[39] the Court of Appeal set aside a judgment against a defendant that was based on an order for substituted service by means of a message posted on Facebook. The defendant was a performer who had cancelled an appearance at a music festival and was being sued for damages for breach of contract. By the time of the application for substituted service, the defendant had left the jurisdiction.

The Court of Appeal noted that the jurisdiction of the District Court is dependent on proper service of the Statement of Claim.[40] Accordingly, it would not have been possible to obtain substituted service of the Statement of Claim in the event that the defendant had left Australia. The position would be different if the defendant was merely interstate and personal service was possible under the *Service and Execution of Process Act 1992* (Cth).[41]

In any event, the Court of Appeal was not convinced that there was a prospect that the message would come to the defendant's attention while he remained in Australia.[42] Moreover, there was no evidence on which the court could be satisfied that the Facebook page was in fact that of the defendant.[43] It is common for social media pages for public personalities to be maintained by other persons.

Courts on social media

Notwithstanding the issues surrounding the treatment of court-related matters on social media, courts themselves have not shied away from Twitter. A number of courts have now set up Twitter accounts by which judgments and other announcements may be posted.[44] There is less evidence of courts on Facebook, with only the European Court of Human Rights actively maintaining a page.

The existence of court Twitter accounts accompanies a number of other web-based advances. For example, the Federal Court and other courts have long maintained court portal sites allowing members of the public to access details about the progress of various matters before the court.[45] The High Court has in recent years posted summaries of its judgments on the High Court website immediately after they are handed down. The full reasons are simultaneously posted on AustLII. The High Court also makes available all submissions filed in hearings before it on its websites, together with transcripts of proceedings on Austlii. You can now view audio-visual recordings of proceedings before the full court on the High Court website.[46] The recordings will initially be posted some days after the hearing to enable vetting of the recording to identify any material that should be suppressed. By contrast, the UK Supreme Court has recently commenced live steaming of hearings in the court and the Privy Council.[47]

Use of the technology discussed above renders the court system more accessible to users. Questions arise as to whether the courts may seek to use social media as a form of more direct public engagement in the face of public criticism of the judiciary, for example by providing some (presumably anonymous) explanation of the role of judges in presiding over trials and in sentencing.[48]

Endnotes

1. This article assumes knowledge of the workings of prominent social media platforms. A useful explanation of their workings can be found in *ACCC v Allergy Pathway Pty Ltd (No 2)* (2011) 192 FCR 34 at [18] (describing Twitter) and [15]-[16] (describing Facebook).
2. The articles published on 22 August 2013 were as follows: 'Hitmen, rat poison, gun buys and Maccas: it's just another day in court' <http://www.smh.com.au/nsw/hitmen-rat-poison-gun-buys-and-maccas-its-ust-another-day-in-court-20130821-2sbmy.html#ixzz2kWFA4Ggd> and 'Safetli denies making teen a 'fall guy' in McGurk hit' <http://www.smh.com.au/nsw/safetli-denies-making-teen-a-fall-guy-in-mcgurk-hit-20130822-2sdfj.html#ixzz2kWFq4nQK>.

3. At the time of writing, McClymont has 14,530 followers.
4. In this writers' experience, it is now extremely rare in superior court proceedings for there to be no-one at the bar table using an ipad. The smartphone is now the most common means of consulting one's diary at directions hearings.
5. (2010) 263 ALR 215.
6. *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 263 ALR 215, see *The Australian* 'Judges have final decision on Twitter' <http://www.theaustralian.com.au/archive/news/judges-have-final-decision-on-twitter/story-e6frgal6-1225788184795> 19 October 2009.
7. *Swedish Judicial Authority v Assange* [2010] EWHC 3473 (Admin); Lord Chief Justice of England and Wales, 'Practice Guidance: the use of live text-based forms of communication (including Twitter) from court for the purposes of fair and accurate reporting', 14 December 2011.
8. FCR 2011 r 6.11(2)
9. Victorian Supreme Court Media and Policies and Practices 'Journalists using electronic equipment in court' p 6.
10. Media Release, 9 September 2013: http://www.courts.sa.gov.au/ForMedia/Pages/Media-Releases.aspx; *Supreme Court Civil Rules 2006* rules 9A and 9B, Supreme Court Criminal Rules 2013 rules 37 and 38.
11. *Sydney Morning Herald* 'Laws may stop media blogging from court' 14 January 2013, http://www.smh.com.au/technology/technology-news/laws-may-stop-media-blogging-from-court-20130113-2cnm1.html.
12. See, for example, Magistrate Mealy's direction in the committal hearing of Simon Artz discussed in B Fitzgerald, C Foong and M Tucker, 'Web 2.0, Social Networking and the courts' (2011) 35 *Australian Bar Review* 281 at 293.
13. It is common practice for journalists and publications to post links to long-form articles on Twitter and Facebook.
14. An example is the publication of the identity of an English footballer on social media after he obtained a so-called 'super-injunction' restricting publication of his name in connection with allegations that he had had an extramarital affair, and the fact that he had obtained the order. His name had been identified so widely on Twitter that it was eventually revealed in the House of Commons, with MP John Hemmings saying under parliamentary privilege: 'With about 75,000 people having named Ryan Giggs on Twitter, it is obviously impracticable to imprison them all …' BBC News 'Ryan Giggs named by MP as injunction footballer' 23 May 2011 <http://www.bbc.co.uk/news/uk-13503847>.
15. see s 3, definition of 'publish', *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [1], [43], [106].
16. (2012) 83 NSWLR 52. The case has been discussed in greater detail in a previous issue of *Bar News*: see Dawson S and Roughley F 'Suppression and non-party access Part 1: Keeping it quiet' *Bar News Summer* 2012-2013, 45 at 49, see also Fitzgerald B and Foong C 'Suppression orders after Fairfax v Ibrahim: Implications for internet communications' (2013) 37 *Australian Bar Review* 175.
17. At [56]-[60], citing *General Television Corporation Pty Ltd v Director of Public Prosecutions* (2008) 19 VR 68; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465.
18. At [61].
19. At [63].
20. *R v Perish* [2011] NSWSC 1102 at [44], [55].
21. *R v Debs* [2011] NSWSC 1248 at [40], [52].
22. At [70].
23. At [78].
24. At [78]. His Honour found that enforcement was a realistic impossibility because the evidence did not disclose how material could be removed globally so as to prevent its being accessed in New South Wales, or how the material could be blocked from access by users within New South Wales. The latter outcome may not be an impossibility as many websites engage in location-specific content blocking by reference to the user's IP address: see Fitzgerald B and Foong C 'Suppression orders after *Fairfax v Ibrahim*: Implications for internet communications' (2013) 37 *Australian Bar Review* 175 at 186-187.
25. At [72].
26. At [73].
27. At [74].
28. At [77].
29. At [94]. For further discussion see Fitzgerald B and Foong C 'Suppression orders after Fairfax v Ibrahim: Implications for internet communications' (2013) 37 *Australian Bar Review* 175 at 188-190.
30. At 83.
31. At 116.
32. At 107.
33. At 108.
34. At 120.
35. [2011] FCA 74.
36. At [32]-[33].
37. *MKM Capital Pty Ltd v Corbo & Poyser* (unreported, ACTSC, Harper M, 12 December 2008) (service via Facebook); *Blaney v Persons Unknown* (unreported, EWHC Ch D, Lewison J, 1 October 2009) (service via Twitter); Symes v Saunders [2011] QDC 217.
38. *Symes v Saunders* [2011] QDC 217.
39. [2013] NSWCA 268.
40. At [25], s 47 of the *District Court Act 1973* (NSW).
41. At [29]-[31], [36].
42. At [37].
43. At [38].
44. Examples include the Family Court of Australia (@FamilyCourtAU) Supreme Court of Victoria (@SCVSupremeCourt), County Court of Victoria (@CCVMedia) Magistrate's Court of Victoria (@MagCourtVic), the UK Supreme Court: (@UKSupremeCourt) UK Judiciary (@JudiciaryUK) Scottish Judiciary (@JudgesScotland), US Supreme Court (@USSupremeCourt), the European Court of Justice (@EUCourtPress) and the International Criminal Court in the Hague (@IntlCrimCourt).
45. Available on https://www.comcourts.gov.au/public/esearch/disclaimer.
46. See media release at: http://www.hcourt.gov.au/assets/news/MR-audio-visual-recordings-Oct13.pdf
47. Accessible at http://news.sky.com/info/supreme-court.
48. Victorian Chief Justice Warren made reference to these possibilities when announcing the launch of the Supreme Court's Twitter account: http://news.smh.com.au/breaking-news-national/victorian-courts-look-at-tweeting-rulings-20110831-1jloc.html. See B Fitzgerald, C Foong and M Tucker, 'Web 2.0, Social Networking and the courts' (2011) 35 *Australian Bar Review* 281 at 295.

Legal research in the electronic age

By Danny Moujalli[1]

The electronic age has transformed the way in which legal research is carried out. A decade or so ago, any serious legal research required at least one visit to the library to consult hard-copy materials. It often called for multiple visits. In the present day, a vast array of legal research materials, both national and international, can be accessed electronically without the need for a lawyer to leave his or her desk. While this has undoubtedly brought benefits, it has also been suggested that the proliferation of freely available material over the internet has produced hidden costs in the provision of legal services as more and more information has to be searched and reviewed.[2] This underscores the need for freely available legal research websites to be utilised as effectively and efficiently as possible. This article seeks to provide some suggestions for how this can be done.

Bar Library links

A great deal of time can be saved by making use of the Bar Library links page on the website of the New South Wales Bar Association. The library links page can be accessed under 'Library' on the website of the Bar Association. It assembles conveniently in one place links to websites, across all Australian jurisdictions and internationally, which provide online free-access resources for legal research. It is likely that AustLII's website is the first port of call for many lawyers undertaking legal research. As valuable as that website is, it is only one of many that facilities legal research. By making the library links page your first port of call, you will be provided with a gate-way to numerous free-access websites which will allow you to assess which one is likely to be the most effective starting point for the particular research task that needs to be carried out.

The Bar Library suggests that barristers use the library links as their home page. That certainly is an option. The writer has contented himself with placing it under his Favourite sites for easy access. As the websites referred to in this article can be accessed directly through the library links page, the specific website addresses are not set out.

The links of primary interest from the point of view of legal research on the library links page are those assembled under 'Legislation' and 'Case Law'. The next part of this article will address some features and useful tips for legislation focused research. The remainder of the article will do the same in relation to case law research.

Government websites for legislation

If the focus of the research is legislation focused, utilise the government websites.

For NSW legislation, the official New South Wales Government website for online publication of legislation is provided and maintained by the Parliamentary Counsel's Office.

For Commonwealth legislation, the ComLaw website is provided and maintained by the Commonwealth Office of Parliamentary Counsel.

The principal advantage of the government websites is that they provide online access to authorised legislation (although not all legislation on the government websites is authorised – see further below). They also have greater coverage than AustLII for historical versions of legislation for the purpose of researching legislation in force as at a particular point in time.

A great deal of time can be saved by making use of the Bar Library links page on the website of the New South Wales Bar Association.

Authorised legislation online

With legislation focused research, be mindful of the need to check whether legislation accessible online is an authorised version and therefore suitable for court use.

Section 45C(5) of the *Interpretation Act 1987* (NSW) enables the Parliamentary Counsel to certify the form of legislation that is correct. On the 'About' page of the website for the NSW Parliamentary Counsel's Office, an explanation is given as to which of the legislative content on the site has been so certified and is therefore considered to be authorised. This comprises the legislative content on the In Force database (in HTML format) and the legislative content on the As Made database (in PDF) dated 2000 or later. While it may seem counter-

intuitive, this means that PDF versions of titles in the In Force database are not authorised whereas the HTML versions are. This underscores the need to be vigilant in checking which of the legislative content on the website is authorised. As historical versions of legislation are accessed through the In Force database (see further below), those versions of the legislation are authorised provided they are in HTML format.

In relation to Commonwealth legislation, the *Acts Publication Act 1905* (Cth) provides that the Parliamentary Counsel may maintain an electronic database of Commonwealth legislation. ComLaw includes the only database of Commonwealth legislation that is authoritative for the purposes of legal proceedings. Unlike the NSW Parliamentary Counsel website, authoritative text on ComLaw is always in PDF format. It is also stamped with the document's unique ComLaw ID on every page. When searching in the database, authorised records are always identified with a distinctive 'tick' logo and you will see two variations of it as follows:

If the authoritative logo is not available for a document, or if the text in which the document is accessed is a format other than PDF, then the material is not authoritative and it may not have been subject to the same quality checks as authoritative material.

Point-in-time legislation

An important feature of legislation based research is to identify the legislation applicable as at the relevant time. This can be a laborious and time-consuming exercise to carry out with hard-copy materials. Electronically, the process is faster and more simplified. However, as matters presently stand, no website offers comprehensive coverage for historical versions of legislation.

Historical versions of current legislation on the website of the New South Wales Parliamentary Counsel's Office can be accessed through the In Force database. You need to click on the relevant act or regulation and then go to 'Historical versions'. You can then select the relevant period during which the applicable date falls. As indicated above, historical versions of the legislation are authorised in HTML format.

All titles in the In Force database have complete sets of historical versions from a base date of 1 January 2002. Selected titles in the In Force database have more extensive collections of historical versions, for example the *Crimes Act 1900*, and the *Environmental Planning and Assessment Act 1979*, and additional historical versions of key titles are in the process of being captured.

In ComLaw, historical versions of legislation can be obtained though 'View series' for acts and legislative instruments. You can then select the document for the relevant point in time. The tick logo will indicate whether a particular historical compilation for legislation is authorised.

In AustLII, the 'point-in-time' facility allows some current NSW legislation to be searched for historical versions of the legislation but this is not available for Commonwealth legislation. To search for historical versions of NSW legislation, click on the relevant legislation and then click on 'History' at the top of the page. You can then enter the date for the relevant point-in-time.

AustLII provides 'near complete' coverage for historical versions of NSW legislation from a base date of July 2002. But a word of warning is appropriate. The AustLII website contains a disclaimer which states that its point-in-time databases are to be considered experimental. While AustLII's point-in-time system provides a convenient way to view legislative changes over time, it should be crossed-checked against other sources.

Extrinsic materials

Extrinsic material is now often referred to ascertain the meaning of legislative provisions: see section 34 of the *Interpretation Act 1987* (NSW); section 15AB of the *Acts Interpretation Act 1901* (Cth).

For NSW legislation, the explanatory notes and second reading speeches for bills assented to since 1997 can be located easily in the one place on the website for the New South Wales Parliament. For

NSW bills assented to before 1997, online access to the extrinsic materials is not as straight-forward. AustLII contains copies of NSW explanatory notes for bills from 1978 onwards. The second reading speeches may be available from Hansard, which is published online on the website for the New South Wales Parliament. There are two principal difficulties here. First, there is not, as yet, a complete historical record of Hansard for NSW online. Second, unless you know the specific date of the second reading speech for the relevant bill, it can be a time-consuming process to locate it through Hansard online.

In searching for extrinsic materials for Commonwealth legislation, it may be necessary to visit a number of websites to obtain the relevant explanatory memoranda and second reading speeches. The ComLaw website contains explanatory memoranda for certain bills. These can be accessed by clicking on 'Bills' at the top of the page, selecting the relevant bill and then clicking on 'Download'. AustLII contains copies of Commonwealth explanatory memoranda for bills from 1980. The second reading speeches can be obtained from Hansard, which is published online on the website for the Parliament of Australia. This contains a complete online record for Hansard from 1901.

Noteup in AustLII

A useful (and often overlooked) facility in AustLII for locating cases which have considered a specific statutory provision is Noteup. If you click on a section of an Act, the section will appear on the screen. One of the links at the top of the page is 'Noteup'. If you click on that link, it will bring up cases which have considered the statutory provision. As with all research tools and techniques, this facility does have limitations. It may, for example, bring up cases which have only referred to the relevant statutory provision in passing. On the other hand, in the writer's experience, there have been occasions when this facility has allowed easy and speedy identification of cases which have comprehensively or authoritatively considered a particular statutory provision.

Cases considering legislative provisions

Another useful technique for locating cases which have considered a particular statutory provision is to use a phrase from the relevant statutory provision as the search query. For example, section 61 of the *Probate and Administration Act 1998* (NSW) provides that until probate or administration is granted, a deceased person's estate shall be deemed to be vested in the NSW Trustee 'in the same manner and to the same extent as aforetime the personal estate and effects vested in the Ordinary in England'. If the phrase 'Ordinary in England' is used as the search query in AustLII, it will bring up cases which have considered section 61. It will reveal, for example, that the section was recently considered in *Gel Custodians Pty Ltd v The Estate of Wells* [2013] NSWSC 973.

The utility of this search technique depends on there being a phrase within the relevant legislative provision which is of an unusual or distinctive nature. Phrases which are of a more standard or recurring nature are likely to bring up cases dealing with legislation which is not on point.

A useful (and often overlooked) facility in AustLII for locating cases which have considered a specific statutory provision is Noteup.

Restricted decisions

In NSW, some decisions are either temporarily unavailable due to further proceedings or permanently restricted from publication on NSW CaseLaw. On CaseLaw, unavailable and restricted decisions delivered after 1 January 2011 will display in the Medium Neutral Citation and Case Number pages as 'decision restricted'. Unavailable and restricted decisions delivered between 1999 and 2010 are not published, however, they are listed on CaseLaw on the Access Policy page.

Practitioners may have a legitimate reason to consider an unavailable or restricted decision for the purpose of a case in which they are involved. It may be, for example, that the restricted decision considers the operation of a particular legislative provision which is relevant to a case in which a barrister is briefed. To accommodate this, the Judicial Commission of NSW has made certain unavailable and restricted decisions available to practitioners who need to refer to such

decisions for the purpose of a particular court case. These decisions are available online, obviously on a restricted basis, and only through the Bar Library.

LawCite

The most impressive freely available case citator is LawCite which is accessible through the WorldLII and AustLII websites. LawCite is a collaborative project of the Free Access to Law Movement, the members of which include WorldLII, AustIII, BAILII, CanLII, NZLII and others. It allows searches for cases which have considered a particular term, legal principle or other cases. The search is conducted over a vast database covering decisions of Australian and overseas jurisdictions.

The most impressive freely available case citator is LawCite which is accessible through the WorldLII and AustLII websites.

A key advantage of LawCite is that once the search is conducted, there is a hyperlink to the cases brought up by the search result. This can pose a considerable advantage over case citators provided by subscription-based commercial publishers. A search in CaseBase, accessible through Lexis Nexis, may bring up English cases in the search results. However, if the user's subscription to Lexis Nexis does not extend to overseas decisions, there will be no hyperlink to these decisions in the search results. This is not the case with LawCite. To take a random example, a search for cases which have considered *Conquer v Boot* [1928] 2 KB 336, a decision dealing with the principle of *res judicata* in respect of causes of action under a building contract, will give results showing the consideration of that case by the courts of England, Australia, New Zealand, Malaysia, Fiji and Hong Kong. There is hyperlink to the text of all of these decisions.

Incorporated Council of Law Reporting

One advantage of subscribing to commercial legal publishers is that it allows easy preparation of pdf copies of authorities from the authorised law reports. This can result in a huge saving of time when copies of authorities from the authorised law reports are required for court. Gone are the days of having to arrange for the case to be photocopied. For the benefit of this service however, there is the cost of the subscription. However, the free-to-air website of the Incorporated Council of Law Reporting (ICLR) allows pdf copies of cases to be obtained on an as needed basis without the requirement for a subscription. ICLR publishes the official law reports for the superior and appellant courts in England and Wales. Its website allows pdf versions of the authorised reports of individual cases to be obtained without the need to have a subscription. Cases can be bought over the internet for £12 each as and when they are required for court use.

Conclusion

This article provides only a sampling of the many resources for legal research which are now freely available over the internet. No single website can cater for all legal research requirements. An essential aspect of conducting efficient and effective legal research is to identify which particular website and research technique will be best suited for the particular research task at hand.

Endnotes

1. The writer is grateful for the valuable assistance and guidance provided by Lisa Allen of the Bar Library. Any errors remain those of the writer.
2. See the Hon Justice Lindsay, *The future of authorised law reporting in Australia, Judicial Officer's Bulletin*, Oct 2013, Vol 25 No 9, p76.

Technology and the world turned upside down

By John Bryson QC

I first worked in the city in 1954. I joined the Public Service when I was 16 after completing the university entrance examination, then known as the Leaving Certificate. To me the world looked modern but with retrospect the city was ramshackle and unpainted. Only the Stalinesque Maritime Services Board building at Circular Quay, now the home of artworks that cannot be shown anywhere else, had been built since 1945. Only the largest and most modern buildings had air-conditioning, and courtrooms did not. Most offices were gritty with dirt, and a chimney at Sydney Hospital discharged mysterious black smoke at most times - they burned off soiled bandages at best, and I shudder to think of the worst. A few businesses still used horses for city deliveries. Huge draught horses hauled wooden beer barrels on drays, and Penfold's Stationery used lighter carts. Signs of their passing were evident. Trams emitted many noises, such as clanging bells, rumbles, electric flashes and a special metallic scream as they rounded a tight curve into Phillip Street.

I worked at 237 Macquarie Street, an office building which has since disappeared under the Law Courts Building - no loss. Working conditions were extremely crowded and the furniture was antique. There was a great deal of dark stained wood, and dirt and dust were everywhere. Six people worked in the room where I was junior record clerk in the Department of Justice. The record clerk composed a one-sentence précis of every letter in and out, and four clerks including myself copied each précis onto four or five subject cards, so that all correspondence on any particular subject could be found again. Each document was numbered as a registered paper, and handwritten records showed which papers were in each file and to which officer the file had been sent. All the records were handwritten with steel-nibbed pens with wooden handles, dipped in an inkwell every sentence or so. When an enquiry came for the papers dealing with some subject or other we all riffled through cards and taxed our memories until we came up with something. The record clerk himself had little need or use for the cards. He had done this job for about thirty years and had a photographic memory of the correspondence, knew all the people and had followed all the controversies. State government was his culture and music. He loved it. His uncle had been state premier and his

Photo: Macinate

father had been a member of the Legislative Council. Each morning he conferred with the assistant under-secretary and between them they decided most of what the department was to do. As he was quite unable to pass examinations he was never promoted and remained in a low grade on low wages all his career, while participating in making important decisions. Forty years later someone explained to me what the memory of a laptop computer could do; I had no trouble understanding as I had been a cog in one before they existed. Two early lessons of my life:

1. Power is sometimes in unexpected hands.
2. The world has no need for computers.

Only one was true.

After passing several initial Public Service examinations and learning to calculate leave entitlements I was transferred next year into a real law office: the Crown Solicitor's Office. This office

handled the state government's constitutional advice and litigation; but none of that for me. I was dropped into a litigation factory which did nothing except acting for motorist defendants in common law claims for damages. From 1942 and for many more years the Government Insurance Office was the only insurer for motorcar personal-injury insurance in New South Wales. Nobody else was allowed to write a policy, the premiums were fixed and had no regard to the previous claims history of the insured. The GIO had to insure anybody who paid the fixed premium, no matter what motoring havoc he had wrought. About twenty or thirty solicitors and unqualified clerks like me managed thousands and tens of thousands of motorcar claims. All cases were heard by jury, and their assessments of damages were weirdly random. I attended to instruct counsel at District and Circuit courts all over the state, and got a good general view of what judges and barristers were like and what they did. All my travel was by steam train, except for really distant places. I was allowed to take planes to reach Wentworth at the Murray-Darling junction and Broken Hill. My first plane journey was the return from Tamworth to Sydney, at my own expense. it cost me most of a week's pay, as an 18-year-old clerk, and I was mildly reproved for not using the railways.

Few things in daily life are as transformed over the past half-century as the telephone. I took settlement instructions to country courts with me, but quite often needed to refer back to the GIO according to the course of negotiations. This involved using the telephone, but where was it? The usefulness of portable communications was obvious, and in comic strips Dick Tracy wore a two-way wrist radio and often used it, but no such thing existed in reality. When I first heard of STD in the 1970s it meant subscriber trunk dialling. You could pick up the phone and dial any number in Australia. In the 1950s and 1960s this was not possible. There might or there might not have been one public telephone somewhere in a country courthouse, it might not have worked. The public telephone might have been down the street at the Post Office. One had to fill a pocket with silver coins, find a public phone in working order, push a button marked Trunks. A woman answered 'Trunks' in an unwelcoming tone. 'State the number and town you wish to call' and she hung up. There was no predicting how long it would take before she rang you with the connection. Quite commonly half an hour was required, say, to phone Sydney from Tamworth: it could have been much longer or it could have been 30 seconds. This complicated negotiations, and requests to judges for time to negotiate, no end. Settlement of a Supreme Court claim might involve the need to refer to reinsurers in London. At the worst this took days. Communication was by cable, and there could be no subtle explanations. Nowadays the mobile phone in your pocket can speed-dial your uncle in Stromness. The speed and efficiency of communication which we now know were beyond all imagining.

Another branch of daily life which has been completely transformed since my career began is the exchange of letters and messages and the delivery of documents. In my first days telegram boys, on poorly maintained red bicycles owned by the Post Office, interleaved traffic recklessly and in great numbers. I suppose there were always courier services, but they would have been pursued by the Post Office enforcing its monopoly, so they kept their heads down. It was once usual – I suppose this has gone out of use, as it should have - to give an urgent parcel and a fistful of money to a taxi driver and ask him to deliver the parcel. This was reasonably reliable but there can only be misgivings about giving a parcel with something valuable like a certificate of title in it to a completely unknown taxi driver and telling him to take it to a solicitor's office a few suburbs away. At some time in the 1970s solicitors organised the document exchange, or DX. This may have been an initiative of the Law Society. At first only solicitors and barristers used the DX. It was probably outside the Post Office's reach because it did not deliver. You had to go and pick up your documents. It did not charge per item and you had to be a subscriber. DX soon became a success, then became a business and the Law Society sold it off.

Telex machines enabled a message typed in one office to appear immediately on the telex machine in another office. It was an instant telegram and the beginning of the end for the telegram boy. Telex was followed by the fax machine, which should appear in economics lectures as an example of a splendid piece of technology with nothing wrong with it overtaken by an even better one. The Post Office monopoly began to break down in the 1970s, when

some change brought couriers on pedal cycles or motorbikes onto city streets in great numbers. These too had a great success and I suppose that they still exist, but e-mail conquers all.

An exchange of emails which takes a few minutes would once have required a letter to be dictated, transcribed, checked, posted, delivered, with the same sequence for the reply; quite commonly a week to get attention and answer, but far longer if the recipient was not disposed to cooperate. Everything was on paper, everything had to be typed and everything had to be posted, or delivered around the town to other solicitors or to counsel by armies of messengers and articled clerks. Many a mile I have tramped around the inner city delivering papers in my earliest years. Telex and fax rose and fell: email sent them off to join the Diprotodon. A laptop or desk computer is now almost universal for office-workers. Almost everyone can produce typewritten work with keyboard or electronic dictation.

For many years the Post Office had a legal monopoly on delivering letters as a business. It may seem that a courier service is a simple, obvious and useful service for the community to have, but for many years the business of carrying letters was illegal and Post Office policed its monopoly. Before the 1980s long strikes attacking the convenience of the public at large happened all the time. There have been some spectacular strikes since then, but in the old days there seemed to be an endless succession of interruptions: to gas and electricity supply, to railway bus and tram services, to petrol supply, to postal services - anything that would annoy the public at large. Postal services were especially vulnerable, in an age when there was really no other way of getting letters, briefs and documents around the country. I recall a telephone call from a solicitor in Broken Hill pleading for an advice on a brief he had sent me six weeks earlier, but I had not received the brief because of a go-slow in Broken Hill Post Office.

I have begun to show that many things happened early in my career in ways which now would seem so inefficient as to defeat the exercise completely. But the world rolled around and all the business was done. The case was heard or settled. Perhaps we had to wait a day for the next train back to Sydney.

Another area of life which has been transformed is the world of ready money, money payments and bank transfers. Each currency had a fixed ratio of value to the United States dollar, and there was no room for trading in currencies. While exchange control lasted the Commonwealth Treasury exercised close control over availability of foreign currencies to Australians. Essentially any economic relations with overseas required Treasury approval, as no payment could be made without it. This complicated everything to do with overseas to a point approaching paralysis. If an Australian wished to travel overseas and take some money, or to buy and import something from overseas, or to remit a legacy or trust income overseas, it was necessary to have exchange control approval from the Treasury before your bank could give you sterling or foreign money. The banks had delegated authority and could give some approvals.

Exchange control regulations had the effect, or were often contended to have the effect, of making agreements which potentially could involve paying money to anyone overseas illegal and void. Gerard Horton built his bar career on ingeniously perceiving or devising grounds for attacking commercial transactions for real or alleged entanglement with these regulations. In large, the regime of exchange control became a distorting influence on foreign trade. In detail exchange control was a great nuisance in everyday life. Ordering goods in small retail quantities from overseas and paying for them was possible only for determined purchasers with a taste for clerical work, and the Amazon book business could not have existed. In 1965 I purchased a barrister's wig from Ede and Ravenscroft in London. Paying for it involved obtaining exchange control approval through my bank in Sydney, buying a bank draft in sterling in favour of Ede and Ravenscroft for which my bank made a noticeable charge, posting it off to London and then when the wig arrived on the ship after some months, dealing with Customs through the local Post Office to have duty assessed, and paying duty at a high rate to protect Australian manufacturers of barristers' wigs - not that there were any. I had quite a file of papers for something which now would be handled on the internet in ten minutes or so. I was given a clear lesson that I should not go about wasting sterling currency selfishly just to buy things for myself.

For a long time it was not possible to leave

Australia without a tax clearance: a certificate from the Taxation Department which showed that you had paid all your taxes or given the department satisfactory security. If you were in default in filing a tax return, or had never filed one, you could not leave the country. Getting a tax clearance was a time-consuming process involving waiting around in the Taxation Department for hours and hours, a significant burden on travelling overseas.

Money could only be moved around Australia by sending a cheque or money order, a physical piece of paper, to the recipient. At one time the banks charged exchange, several pence in the pound, for negotiating cheques drawn on accounts in other states. This effrontery faded out about 1960. In the 1950s few people had cheque accounts. Many people bought money orders from the Post Office (and some still do). Most people dealt with banks only through savings accounts, and every transaction involved attending at the bank branch and filling out a deposit or withdrawal form, then queueing up to see the teller and show him your pass book, in which he wrote laboriously. Before going on holiday or travelling interstate one must call at one's bank branch, fill in some forms and send one's signature to the branch of the savings bank nearest one's destination, so that one could get money there. I bought travellers cheques to be able to pay my hotel bill in Melbourne. Less orderly people complicated their lives by asking hotel proprietors, club stewards or casual friends to cash cheques, with uneven success, rupturing many a friendship. From about 1960 onwards Diners Club and American Express credit cards began to appear and around 1975 there followed a revolution when banks started to issue credit cards. At first a bankcard purchase involved a telephone call by the merchant to the bank to see whether all was in order. ATMs began to appear, and the marriage of credit cards and electronic communications was the revolution. Now Woolworths will hand out money to you. The final simplification (so far) came with operating one's own bank account on the Internet. The ease and speed of transactions and the facility of everyday life have been transformed. The facility with which money can be transferred electronically has an air of magic to me.

In 1954 Australian currency was organised in £ s d, pounds, shillings and pence, the English arrangement since King Alfred or thereabouts. It continued when Australia acquired a separate currency in about 1913, with the same value as sterling until Australian currency was devalued in 1925. In primary school everyone learnt to think in think of money in units of 20 shillings to the pound, 12 pence to the shilling and 240 pence to the pound, and no-one seemed to have much difficulty with the arithmetic of everyday life. At one time, fading out in the seventeenth century, English money had often been reckoned in marks; a mark was two-thirds of a pound, 160 d, 13 s 4 d or 40 groats each of 4 d. When marks went out of use they left a ghostly trace in solicitors' bills, as many attendances were charged at one mark, 13 s 4 d, or half a mark, 6 s 8d. (A mediaeval statute required a serjeant-at-law to give advice for half a mark, a gold coin known as an angel, and this inspired mediaeval humour in which the barrister was called Balaam's Ass because he would not speak until he saw an angel: see Numbers ch 22 v26-28.)

In the 1950s I had to attend many taxations of detailed bills of costs, in which every item was a step taken by the solicitor in the conduct of the proceedings. Mercifully I have forgotten details, but an example (and there might be some hundreds of such items in a bill) would be perusing letter 6 s 8 d. The amount to be charged for each such attendance was fixed by rules of court before the war, and twenty years later bills were taxed in pre-war values and increased by percentages to allow for inflation. The work may have been done over several years, so there might be several different sections of the bill to which different percentages were applied. All of this was done by mental arithmetic; in the head, without electronic calculating machines, which did not exist; quite laborious. After the solicitors' costs came barristers' fees, which were always calculated in guineas. A guinea was not a coin or a note, but a notional piece of money worth £1 1s, 21 shillings. It was necessary to be adept in mental arithmetic in units of 21; the 21 times table. This was quite simple really; 100 guineas were £105 and 500 guineas were £525. However when I first started barristers' guineas were different; if a barrister said that his fee would be 20 guineas the guineas he was talking about were worth £1 2s 6 d: a clerk's fee of 1s 6d was added to the 21 shillings. This ended, as far as I can remember, in 1955, and after then a guinea meant what it said

in plain English. On the backsheet of the brief under the barrister's name the solicitor wrote the fee, and the word 'guineas' was abbreviated as 'guas', often pronounced as spelt.

On Friday, 11 February 1966 I was admitted to the bar again after being a solicitor for a few years, opened my bar practice on that day by sending off several advices for which I had already received briefs, and charged for them in guineas; seven, I think. That was my last opportunity to charge in guineas. On Monday, 14 February 1966 the currency changed to decimal currency and all accounting changed to dollars and cents. All the banks closed for one or two days and then issued the new money. They both circulated for a while and the old money was soon recalled and disappeared. One aspect was that many of the old coins actually had silver in them and were getting to be worth more than their face value. For a few years ghostly guineas lingered in barristers' fees, often multiples of $21, ten guas. Since then the world has been decimal. The money is not the same. Steady inflation eats it all the time. Slow hyperinflation gives all economic life a slightly frantic edge. In 1969 I bought my room in Wentworth Chambers for $8400: this huge sum nearly broke me.

A great deal of the furniture of everyday life has been transformed, and much of it was unknown. At some time during my four years with the crown solicitor I bought a fountain pen, so that I could function away from my steel pen and inkwell. Fountain pens were marketed as luxuries and were ridiculously dear; several pounds. A rubber sac in the pen contained the ink, and had to be watched carefully. On aircraft the sac sometimes emptied itself into one's suit. Ballpoint pens were in use but they, too, might empty out unpredictably. Plastic articles were just beginning to be part of everyday life. Among the small things of life which have been transformed are keys. Searches for keys, usually in short supply and often in the care of someone who happened to be absent, were a great source of trouble and inefficiency. Electronic keys, swipe cards and keypads have greatly enhanced security of office buildings, motor cars and much else. Perhaps some people now lose their swipe cards all the time.

Photo: Wikipedia / Oliver Kurmis

Electronic equipment hardly existed in everyday life. Typewriters were manual, mechanical, extremely expensive and cost several months' pay. Few men ever learnt to use them well. When a barrister employed a secretary he was beginning to achieve some success and could have his written work done properly. Writing shorthand and typing were highly skilled and required one or two years' training before employment. A few barristers could write shorthand, usually because they had earlier careers in journalism or one of the few government departments where internal correspondence was in shorthand. The smallest typing error caused great difficulty, often a retyped page. A transcript of evidence took many hours to produce, as the court reporter dictated from his shorthand notes to a copy-typist. It might be eight o'clock at night before the transcript was available, or perhaps the next day. Transcripts were typed on manual typewriters and about four or five copies could be made with carbon paper. To arrange the paper, say five white sheets interleaved with four pages of carbon paper, took time and patience. After the first carbon copy the products were fuzzy, indistinct and not much use. Many women were court reporters, but they could not be sent to a country court sitting if there was to be a trial for a sexual offence: 'dirty deps.' Only with electronic equipment have there been progressive availability of transcripts through the day, with multiple copies and prompt completion soon after the court rises. Word-processing machines have transformed the

productivity and efficiency of barristers in long cases.

Copying documents was a great difficulty. Copying was done by a second rank of women typists. To be classified as a copy-typist was a mild insult and the work was unbelievably tedious, to sit hour by hour reading and transcribing a document held in a frame just to the top right of the typewriter, impossible unless one had sufficient skill to keep one's eyes off the keys. Completely accurate copies were rare. Somewhere in a large firm's office there would be a poorly-lit room of copy-typists toiling away, usually taking at least a day to achieve anything. At Allen Allen and Hemsley the manager of the typing pool was the Dragon, addressed to her face as 'Dragon.'

Late in the 1950s primitive photocopying equipment began to appear. Copies were on photographic paper with a grey background, emerged wet from the machine to be hung out to dry on the Venetian blinds, and faded in a few months. Then about 1960 Xerox burst on the world and printed money and fabled fortunes for its shareholders, while its patent lasted. This was the parent of large-scale litigation with its thousands of copies. I remember my first astonished sight of a Xerox machine, demonstrated to wondering young solicitors by the office manager of Allens in October 1962. What was his name? I remember him as 'Puff Puff', his usual name, as he smoked a pipe at all times. We watched dumbfounded as clear printed copies rolled off at high speed, consigning carbon paper to oblivion. 'We will have to be careful with this' said Puff Puff. 'It costs thrippence a page! It could get away.' The Cumaean Sybil had no clearer moment.

Tobacco and tobacco smoke were everywhere. At any one time half the people working in an office room would be smoking, so too on trains and buses. As with beer, tobacco is something I have never seen the point of, the smoke and the ash were disgusting and I lived in a world of them. In law school lectures a bench near the door held about eight undergraduates who were not smoking. Professor Stone's cigars were awful.

A large innovation of my time has been the penalty notice, written by a policeman or public officer and imposing a fine which has to be paid unless the recipient requires court proceedings. In the 1950s there was no such procedure. Penalties were rarely imposed by administrative action. There were some instances in customs law and these were regarded as harsh. Sometimes there were newspaper stories about Australians in, say, Switzerland who were

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astonished to be handed a penalty notice by a policeman for doing something or other, and to be told that the policeman had fixed the fine which they had to pay. These stories were presented as examples of what happened in strongly etatist European countries where they did not know about the presumption of innocence and the police had altogether too much power. In the 1950s and perhaps later a magistrate sat more or less all the time in the court at Phillip Street North, commonly known as the Water Police Court, hearing parking prosecutions. These were prosecutions on the classic model where an information was filed, a summons was issued and served, the defendant was called three times, the process server went into the witness box and proved service and the parking officer deposed to what he had observed about the car. No defendant with any wit turned up, but a few came along to waste the magistrate's time by saying yes, the car was parked there but the parking officer was very rude. It was probably with parking offences that the penalty notice system began. Gradually, it was extended to many traffic offences, then much further into everyday administration, for all I know for eating underage oysters. The saving in public, court and police time and effort must be very large. I do not think that there is any residual resentment of this process - if you want to hearing you can get a one.

Another transformation relates to the presence of women in legal practice. Women lawyers employed in the Crown Solicitor's Office, and there were a few,

Electronic searching can dredge up even greater masses of arguably or marginally relevant unconvincing material. The mind of the researcher is the real scene of action, the search engine is not, and heroic capacity for rejection is called for.

received 85 per cent of the salary paid to a man holding the same position. I do not know of any women who were in bar practice when I first started noticing barristers in 1955, there may have been one or two. When I went to the bar in 1966 there were four or five. Two early stars soon appeared: Mary Gaudron and Priscilla Fleming, and many since. Many women practised as solicitors. There were firms where the principal or the senior partners were women, some were quite strong practices, but there were few of them. Big city firms had one or two women partners, inconspicuously working hard. Many women worked in law offices, but they were seldom in charge. In Allens' office in 1962 two Allen sisters were reputed to have been the first women to work in a legal office in Sydney. They had been there for about sixty years and were well over eighty. One drifted around putting incoming letters on the wrong desks, and the other worked, with intensity and accuracy, as secretary to a peppery senior partner, whom she spoke to as if he were a small boy. When displeased she would say 'Mr Hemsley would not have done it this way.'

Where women were most seen in my early years was as secretaries to lawyers who were men. Some were remarkably talented, nominally personal assistant to the partner, in reality close to running the practice. I marvelled at the high ability of some of these people, who could well have practised law themselves. Some barristers' secretaries thought the impious thought 'I can do better than this bloke,' read for the bar and did better. Sometimes I thought it was unfortunate for the community that such talented people were employed as auxiliaries to somebody else, but this is a tendency of my mind, as I have often thought that far too much of the community's talent goes to advocacy rather than, say, to governing the country.

The Jury Act provided for women to serve on juries, but for many years they did not do so, and the ministerial line was that money could not be found to install toilets next to jury rooms. At some time in the 1960s this was overcome, and women began to be seen on juries. At first the bar was nervous, but soon experience showed that their presence made no remarkable change to verdicts.

With the rise of technology and the decline of jury trial there has been a rise in the elaboration of the issues which legislatures refer to the courts, in the rules of decision devised by courts of appeal, and in the length and complexity of hearings. Increased complexity has marched with increased capacity to manage complexity conferred by technology. Each decade legislatures devise more new remedies, state their grounds with complexity and send them to the courts for disposition. The community has a strong taste for referring its problems for disposition to the courts, or to tribunals which operate more or less on the judicial model, and for steering resolution away from the Executive. Mysteriously there is also an unending drumbeat of grievance about the complexity and cost of judicial proceedings. I see this as an implied compliment, ungenerously expressed.

Before 1960 most common law trials with juries lasted about two days; there was a fear that if the trial lasted more than three days the jury would resent its complexity and visit their disapproval on whoever was thought to have caused this. In principle jury trial in civil litigation does much for the attainment of justice because it brings the views of the community effectively to bear on decision. So much for high principle; but I felt that if people were personally unpopular or members of an unpopular group this worked against them with juries and there were influences the other way. I well remember a case where an old soldier was injured on Anzac Day while riding as a passenger on a flattop lorry driven by another old soldier who had drunk rather a lot. In theory there was a strong defence –*volenti non fit injuria* – but no arrangement of available objections to the panel could produce fewer than four jurors wearing RSL badges. The plaintiff won.

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In recent decades advocacy has become less dramatic and more to the point. Cases are won as much by thought and preparation before the hearing as by conduct during it. Electronic searching has improved, simplified and complicated the means of research. The quality of the research is still in the insight of the researcher. Written submissions or speaking notes were once almost unknown and unwelcome. They are a great advance, the enemy of brilliant shallow extemporisations. There always were advocates whose preparation was well directed and exhaustive. There were also people whose minds were astonishingly well stored with cases on all points imaginable. Minds like these were particularly drawn to practice points. Passing observations interred in the *Weekly Notes* could be dredged up in great numbers with claims for their high authority. Much of the law about practice of the courts had a folkloric quality, largely dispelled by the *Supreme Court Act 1970*. Electronic searching can dredge up even greater masses of arguably or marginally relevant unconvincing material. The mind of the researcher is the real scene of action, the search engine is not, and heroic capacity for rejection is called for. In my impression there is now a stronger disposition of courts to expect the submissions of counsel and the legal principles contended for to make sense, to be credibly consistent with an overall system of justice. Arguments which might bemuse the hearer with detail but never achieve coherence seem to have become less common.

How difficult research once was! Research consumed endless time and required a wide table covered with volumes open and closed, old and new, five text books with insights cribbed from each other, a spread of volumes of the *English and Empire Digest* open at unlikely topics, a few volumes of the *Australian Digest* and a few additional annual volumes. There were law reports shedding yellow dust from decaying leather bindings; scribbled notes of inspirations from friends who had not really thought about it; and trips up and down stairs to borrow someone else's books, perhaps in the owner's absence, in too much haste to sign them out. It was chaos. Was this decision reversed under a completely different name? Was such and such a nineteenth century judge not over-wise? Was such and such an eighteenth century law reporter reputed to be insane? Here is an academic journal article comprehensible only in its relentlessly critical tendency. The FW Maitland correspondence contains an elusive Cambridge inside joke about the leading case. But nowadays the search engine can print out a slightly off-the-point authority in the Old Munster Circuit before your critical faculty has lighted up. Progress cannot be stopped.

The courts have moved from a position where they rarely interfered with decisions of the Executive to the present position where judicial review is a large part of their business. In the 1950s federal constitutional litigation was repeatedly cast in the constitutional remedies of prohibition and mandamus, but in the state little was heard of judicial review, although there were well-established legal bases for the courts to restrain excesses of power, and Jordan CJ published a little pamphlet with all the case references. One difficulty was the procedural thicket which then surrounded the prerogative writs. Another was that judicial attitudes did not favour interfering with Executive action; there was an inappropriate extension of the separation of powers. In the intervening decades judicial attitudes have transformed themselves, procedural difficulties have more or less vanished and legislation has facilitated judicial review. There has been an enormous change in what the courts are practically able to do and are willing to do.

The world has turned itself upside down.

Tutors & Readers Dinner

The 2013 Tutors and Readers Dinner was held on 2 August 2013 at Level Fourteen

Philippa Ryan, MC

L to R: Adrian Williams, Duncan Berents, Anais d'Arville, Andrew Isaacs

L to R: Courtney Ensor, Jonathan Hyde, Bernard Lloyd

John Longworth

L to R: Anne Healey, John Longworth, Mark Anderson

L to R: David D'Souza, Lachlan Edwards, Jarrod White, Jay Williams

L to R: Louise Jackson, Jodi Steele, Teni Berberian, Kirralee Young

L to R: Stephen Free and Zelie Heger

L to R: Kate Barrett, Andrew Stone, Julia Roy

L to R: Ingrid King, Scott Holmes, Mehen Gaven, Adam Gerard, Frank Hicks

The conviction of Frederick Lincoln McDermott

By Chester Porter QC

Since I am the last survivor of the 1951 McDermott Royal Commission, I have followed the further proceedings consequent to the finding of the body of Lavers with great interest. It is now quite clear that McDermott was an innocent man, wrongly convicted of murder. The dreadful injustice suffered by him was only fully revealed long after his death.

Before moving on, some thought should be given to how this injustice occurred.

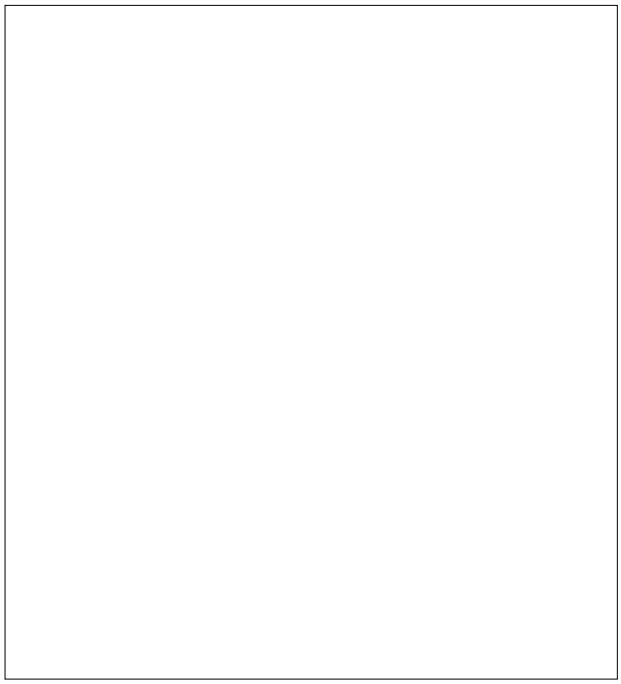
Lavers disappeared in September 1936 (when I was 10 years old) and McDermott was arrested in 1946. The case was presented as a triumph of police investigation solving this murder after 10 years. The atmosphere of the trial was 'Aren't the police wonderful', which hardly assisted the accused. In fact, the first lesson of the McDermott injustice is that care needs to be taken when cold cases are allegedly solved. The jury needs to be aware of the idea that an old case has been marvellously solved.

... the first lesson of the McDermott injustice is that care needs to be taken when cold cases are allegedly solved.

Furthermore, there is the question of the public reward for solving old cases. These rewards are paid out at the discretion of the police. The key lay witness against McDermott shared the reward money. In particular, Ms Essie May King, who purported to identify McDermott from photographs ten years after a very casual encounter, received a substantial payment in return for her evidence. Of course this was unknown to the jury.

Ms King's identification was from a series of photos but one of them of Parker turned out to have been after the alleged identification. Under the Evidence Act and in accordance with High Court rulings today the jury would receive far more detailed direction as to the dangers of identification evidence. Some judges might have refused to admit this evidence as being too unreliable and prejudicial.

The notebook shorthand verbal in which McDermott allegedly admitted to saying that he had killed



Itinerant rural worker Fred McDermott (pictured) on his way to the Grenfell courthouse for the committal hearing, Photo: Newspix

Lavers and then refused to say any more, would not be admitted in evidence today. It is quite possible that so far as it went, this evidence was true. That is McDermott did admit to telling his partner Florence Hampton that he had murdered Lavers. McDermott, like many shearers had been questioned by the police in 1936 and when they were drunk, as often occurred, she would accuse and he would agree.

The key lay witness against McDermott shared the reward money.

However, McDermott maintained his innocence after conviction so impressively as to convince the Anglican chaplain of Long Bay Gaol, plus the warders. I heard one warder urge Jack Shand to free McDermott, saying 'He should not be here'.

Yet according to the police, McDermott did not assert his innocence when accused. It is hard to believe. Fortunately today the entire interview would be videoed and recorded. That is one great reform.

The work of Tom Molomby SC, improving at times on what was revealed in the royal commission, shows

that the police concealed exonerating evidence, in particular that the witness, who saw the suspect car with the cocky cage not long before Lavers disappeared, would have said (but was not asked) that McDermott was not in the car.

Certainly since Nick Cowdery QC became director of public prosecutions, every effort should be made by the prosecution to reveal all relevant evidence to the defence.

At his trial McDermott, in his statement from the dock, tried to raise an alibi. The property owner where McDermott claimed to be shearing rebutted this alibi and the rebuttal was strongly put before the jury as evidence of guilt. This was even claimed when an ignorant, often drunken shearer was trying to trace his movements after more than ten years.

The idea that a mistaken alibi is strong evidence of guilt seems misconceived to me. Who among us, with all our written records can safely claim an alibi for a time ten years ago. It would depend on chance. But a casual shearer has no records and frequent drunkenness would not assist his memory.

... a casual shearer has no records and frequent drunkenness would not assist his memory.

This was an example of the atmosphere of the trial. The clever police have nailed this murderer after ten years and we the jury will not let him wriggle out of it.

The police mistake as to the suspect car having a 56 inch track, when in reality it was 54 7/8 inches, was no one's fault. The manufacturer of the Essex car was happy for all the journals to publish incorrectly that the suspect car had a standard track. The error was only discovered by measuring car tracks. However this error substantially destroyed the Crown case.

It must be noted that McDermott, an innocent man, with no police record apart from drunken behaviour, did not give evidence. Yet this was the man who could convince prison officers that he was innocent. I know of no other prisoner who managed to do this.

Fred Vizzard, the public defender chose to advise his client to make a statement rather than give evidence. Vizzard was convinced that McDermott was innocent, as was his instructing solicitor Cec Bourke. Yet who could say Fred Vizzard's advice was wrong.

In those days an accused person who gave evidence was open to Crown badgering and bullying, not infrequently assisted by the presiding judge. An ill educated, drink afflicted shearer giving evidence of events ten years ago would have no chance of not making a mistake, and not contradicting himself. A well educated intelligent person giving evidence in his own defence would have a hard enough time, nervous badgered and bullied, to give a good account of himself. A person such as McDermott would have no chance.

That is why the cases of wrongful convictions are crowded with ignorant, ill educated persons, persons with IQs as low as 70. That is why McDermott was the ideal suspect to solve an old murder. And that is one of the main reasons why he was convicted.

In those days an accused person who gave evidence was open to Crown badgering and bullying, not infrequently assisted by the presiding judge.

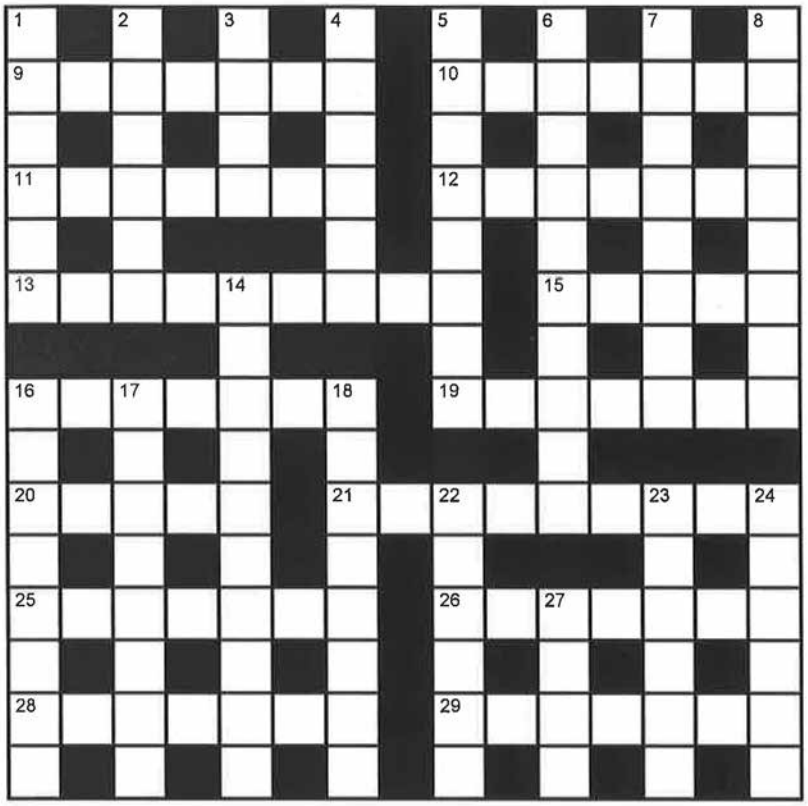
Had he been an intelligent salesman still in possession of a business diary he might well have survived cross-examination, unless he was nervous and made one mistake, which would then be regarded as strong evidence of guilt.

Statements from the dock have been abolished. Now an accused must choose either to give evidence or say nothing. I hope that modern judges will ensure that an accused, giving evidence, is heard and treated fairly. It was not so in the past. That may well be the fundamental reason for the injustice suffered by Frederick McDermott.

I note that Johann Pohl, wrongly convicted of murdering his wife on 9 March 1973 was subsequently exonerated after serving his full sentence, when the true murderer confessed. Pohl did not given evidence at his trial, but made a statement from the dock.

Crossword

By Rapunzel



Across

9 Stirrer last up a stir. (7)

10 Eccentric courser polisher? (7)

11 nth acre gives rise to a piece. (7)

12 Attracts nicest 'e' to rights. (7)

13 Body odour doctor behind 'Saint Squid' produces a schoolboy's delight. (5,4)

15 Introduction in favour of rule. (5)

16 Rule huge, writ large. (7)

19 Avoidance becomes Gabor number three's charge. (7)

20 Silent smelly shenanigans. (5)

21 Communal bodyspeak? (9)

25 Able and wired in father. (7)

26 Naval favourite kingpin at sea. (4,3)

28 Niether male nor female yet sound introduction to either? (7)

29 Frenzied father of the prank. (7)

Down

1 Spy agency surrounds it [stet]. (2,2,2)

2 Go to the dogs? Fair as hunt. (6)

3 Early to mid-20th century silk surrounds international organisation to produce a musical judge. (4)

4 A belvedere from which to observe body odour. (6)

5 Put together, as it seems [L]? (8)

6 Loud and soft, on fire atop modified instrument. (10)

7 Boil croc, chew up, produce member of cabbage family. (8)

8 A printer who is pressed into service? (8)

14 Boisterous? Sounds rude about boxing match... (10)

16 Peculiar, this sixth sense Alice lost. (8)

17 Grasps Greek fruit. (8)

18 Erect sly anagram in this way. (8)

22 Overpriced tearaway. (3-3)

23 A bridge side around tax fears. (6)

24 Harem head almost one-off, we hear. (6)

27 New super tribunal to reform cant. (4)

Solution on p.91

Distance for a Difference Tour

By Giles Stapleton

If you've become a parent you would no doubt have experienced the extremes of your emotions at some point along the way. Joy, fear, exhaustion, anger and elation are a few of the many things our little people help us feel, often at the same time and on any normal day. Most of us will share the funny stories about our children with each other but few will freely off-load the burden of the difficult ones, often because it takes all of our strength to keep it all together.

I dread to think how that emotional rollercoaster would increase if a child suffered a serious injury. Every day I feel very fortunate my own children are healthy, happy and normal but I am constantly reminded how quickly that can all change.

My wife and I have committed to both cycle 600 from Cessnock to Gloucester then Hornsby over four days in March 2014 (www.distanceforadifferencetour.org.au). We will join 58 other cyclists to ride approx. 150 kms a day to raise $2000 each for the Day of Difference Foundation.

The foundation was founded in 2004 by Ron Delezio and his wife, Carolyn Martin, following the tragic, highly publicised accidents of their daughter Sophie. It is a non-profit registered national charity based in Sydney and governed by an independent board of directors. The foundation's revenue is generated by donations, philanthropic grants and sponsorships. Its purpose is to permanently reduce the incidence and impact of children's critical injury in Australia.

Critical injuries can happen to anyone's child. If they do they are mostly unexpected and change the child's and parents' life dramatically. Answering the questions parents face when a dreadful injury occurs and providing vital support to the children is the work the foundation does to care for these extraordinarily vulnerable families.

Cycling is a sport that appeals for its lack of wear and tear on already sport damaged joints and limbs. It can have a positive effect on cardiovascular fitness, muscle strength and flexibility, joint mobility, stress, posture and coordination, bone strength, body fat levels and anxiety and depression. Whilst I have always known how to ride a bike, having it as a health and social asset had never really been a consideration.

Recently, encouraged by a good mate to do the Distance for a Difference Tour, I started serious training. It started with a two hour ride from Curl Curl to Palm Beach at 6am on a Saturday morning, infused half way with vegemite toast and a strong flat white to offset the effects of the weekly celebrations of Friday evening. That morphed into occasionally cycling the 20kms from Curl Curl to Selborne Chambers and back to shed some hip-bone handles. A few weeks later I am part of a group that goes flat out for 65 to 90 kms on a Saturday morning before the rest of the family has opened the curtains and have joined another group that cycles to the city three times a week.

The threat of having to back up three days in a row from 150kms the day before is serious motivation for finding ways to use my bike. The mental benefits of having a break from the day to day domesticity of life help you relax and the physical benefits keep on shining through. The best part is I have not had to sacrifice my love of chocolate, cheese or pinot noir. Whilst my first year at the New South Wales Bar might be the easiest time in my new career to spread my time around, I am hoping to embed the habits so they stick as balancing benefits as I get increasingly busy.

Our children are our most precious gifts. We can marvel at their resilience and even those that are recovering from serious injury can talk about Lego, Barbie, helicopters and iPad games the same as any more fortunate child can. As parents though it is possible to become traumatised and overwhelmed with guilt. As an expression of my continual gratitude for healthy, happy children I would like to do my part to improve the care and support of those less fortunate parents.

If donating to the foundation could be a similar expression of gratitude for you, please feel free to sponsor me at https://distanceforadifference2014.everydayhero.com/au/giles

Thank you very much for your support. Every dollar donated will go directly to the foundation. Also, if you like the idea of cycling for sport or already have the bug, don't hesitate to consider joining this or a similar type of tour next year.

Bar FC's year of triumphs and near triumphs

By Anthony Lo Surdo SC, Michael Fordham SC, John Harris and David Stanton

Introduction

The NSW Bar Football Club (NSW Bar FC) is open to barristers, members of the judiciary, clerks and employees of the Bar Association regardless of gender, level of ability or fitness but united in an abiding passion for the world game. It currently boasts approximately 50 members including five women drawn from diverse practice areas.

NSW Bar FC celebrated 2013 in grand style with the unveiling of its new kit to coincide with the opening match of the Domain Soccer League (lunchtime) Competition in April (DSL).

New members

In 2013, NSW Bar FC welcomed David (Sir Alex Ferguson) Stanton as its inaugural full-time manager/coach. David was one of the original members of NSW Bar FC who was reluctantly forced to retire from playing duties due to injury. He was joined by new-comers Richard di Michael, Anais D'Arville, Ivan Griscti, Mitch Lozina, Rob Munro, Rico Jedrzejczyk and Jack Tyler-Stott.

DSL

NSW Bar FC competed for the fifth successive year in the DSL competition which was held at lunchtime between April and September in the Domain. NSW Bar FC finished strongly in the home and away series booking a semi-final berth for the first time since entering the competition. It bowed out in the sudden death semi-final but not before securing third spot in its division. It was a true testament to the grit, determination and enthusiasm with which players took to the pitch each week and proof positive of the influence of David Stanton's guiding managerial hand. Congratulations!

Third Annual Sports Law Conference

On 21 September 2013, approximately 50 barristers convened at the 12 Wentworth Selborne Chambers conference facilities in Sydney to attend the 3rd Annual Sports Law Conference. The theme for the conference, chaired by the Honourable Justice Geoff Lindsay of the Supreme Court of NSW was the topical 'Anti-Doping in Sport.' Michael Gleeson spoke about the role of the criminal law and doping in sport, John Marshall SC and Simon Philips considered aspects of the peptide inquiry announced in February 2013 whilst Graham Turnbull SC regaled us with stories (and footage) about when contact in sport becomes a crime.

The conference raised $2,100 which was donated to Camp Quality. The funds raised will be used to help a child newly diagnosed with cancer to attend a family camp with their parents and siblings. These camps address a list of specific needs each member of the family has from diagnosis, through treatment and into remission, or in preparation for palliative care and bereavement.

A special thanks to Justice Lindsay and to each of the speakers who gave generously of their time to ensure the success of the conference and to those who attended.

Bar Football 'State of Origin'

Immediately following the Sports Law Conference, over 60 barristers drawn from Queensland, Victoria and NSW met at St Andrews Oval at the University of Sydney under clear blue skies to take part in the 6th Annual Suncorp NSW Bar v Vic Bar Annual Challenge Cup and the 4th Annual Suncorp NSW Bar v Victoria Bar v Queensland Bar Annual Football Challenge Cup.

NSW Bar FC, assisted by the home turf advantage, fielded two strong sides which seamlessly combined youth, experience and enthusiasm together with a determination to wrest the Suncorp NSW Bar v Victoria Bar v Queensland Bar Annual Football Challenge Cup from the control of the Queenslanders who had scored the Holy Grail the previous year.

St Andrews Oval has not seen such beautiful controlled football in a long, long time.

Game 1 – Queensland v Victoria

The Queenslanders, led by Johnny Selfridge comfortably disposed of a depleted but enthusiastic Victorian team led by Tony Klotz in the opening match of the 'State of Origin Series' 2 goals to nil. John Harris (NSW) generously stepped in as goal keeper for the Victorians and was kept busy, saving more than penetrated his vice-like grip on the ball.

Best and fairest gongs went to Guy Andrew for Queensland and Con Lichnakis for Victoria.

The game was ably refereed by newcomer to the whistle, John Marshall SC.

Game 2 – NSW v Queensland

The second game in the series saw NSW meet a buoyant Queensland which looked confident having just disposed of Victoria 2-0. The team was comprised of di Michael, Harris, Magee, Maghami, Griscti, (Ben) Phillips, d'Arville, Bedrossian, Mahony, (Simon) Philips(c), Munro, Free and (Matt) Graham. The mix of experience (Free) and youth (Munro) ensured that NSW ably and expertly controlled the centre of the park. Bedrossian played a 'Rooneyesque' role in setting up many of the plays but unfortunately had his strikes saved by the Queensland keeper (Favell) who was working overtime. Good support play was also provided by Jackson, di Michael, Ben Phillips and Maghami. The back line was rock solid with Mahony, d'Arville, Philips and Griscti ensuring NSW keeper Harris had little to do. At half time, and with NSW up 3-0, Captain Philips was heard (uncharacteristically) to suggest that perhaps NSW should ease up on the Queenslanders a little. However, the manager (Stanton) saw it differently and the end result was a comprehensive 4-0 victory.

Man of the match went to new-comer Rob Munro for NSW and Daniel Favell for Queensland.

Graham Turnbull SC was in control of the game.

Game 3 – NSW v Victoria

Following victory over the Maroons, all that remained was for de Meyrick's NSW team to dispose of Victoria. This team was comprised of Tyler-Stott, Kuklik, de Meyrick(c), Turnbull SC, Gleeson, Watkins, Marshall SC, (David) Jordan, Newton, Patch, Clark, Lozina, Jackson and Younan. Again this was a great game to watch with a number of talking points.

Barcelona football was on display with Tyler-Stott, Gleeson and Lozina controlling the first half with some silky exchanges. Gleeson's persistence paid off with a great individual goal and an equally impressive celebration. Kuklik in goals saw little action as a result of the backline consisting of de Meyrick, Younan, Turnbull SC, Marshall SC and Magee working hard. Indeed Magee was almost everywhere and but for Lozina's dominance in the midfield and hat trick (the first ever in the State of Origin series), would have been hard to beat for man of the match. The midfield was strengthened by the presence of Jonathan Clark, Nicholas Newton and the returning to fitness of Watkins. However, the talk of the day was the front line led by Tyler-Stott, Jordan and the seasoned performer, David (Patchaldinho) Patch. Known for his ability to push the envelope, Patchaldinho ensured referee Lo Surdo SC knew where his whistle was and fully understood the intricacies of the off side rule. He was no doubt keen to enjoy the spoils as NSW put Victoria to the sword 6-1.

Best and fairest awards went to a deserving Lozina for NSW and Klotz for Victoria for a gutsy captain's knock.

This was by far the most dominant

performance to date by NSW BAR FC who comfortably won all the silverware.

On a final note, many thanks to those whose support made for 'the most successful games ever.' Special mention should be made of Tony Klotz from the Victoria Bar, John Selfridge of the Queensland Bar and David Stanton of the NSW Bar for organizing the teams. Thanks also to Lo Surdo SC and Simon Philips in ensuring the day's success and to Marshall SC, Turnbull SC and Lo Surdo SC for officiating.

The Sports Law Conference and the State of Origin series head off to sunny Brisbane in 2014.

Law Firm & Finance Challenge Cup

A depleted Bar FC travelled to the Kings School, Parramatta, to participate in the Law Firm & Finance Challenge Cup on Sunday 10 November 2013.

A lean outfit led by Captain Harris and assisted by two budding readers, who assured us they were just about to sit the bar exams, put in a good showing against a younger and fitter opposition.

Game 1 saw Bar FC burst out of the blocks with a forfeit. The team needed little motivation to triumph 2-1 over the fill-in team from LexisNexis.

The depleted Bar FC called for reinforcements who arrived in the shape of another potential reader.

In Game 2 an over exuberant representative from Kemp Strang received a yellow card after going studs up into keeper Harris and attracted another yellow and a red card for taking out controversial striker Patchildinho with a high boot to the face which drew 2 stitches. With Patchildinho gone, the heavy responsibility of being star striker shifted to di Michael who responded by scoring all of Bar FC's goals in a 3 – 3 draw.

The third game against Gadens ended in a 1-0 loss largely due to a tired defence being offset by sensational keeping at both ends.

Bar FC then squeaked into the play offs after finishing third in its group. Magee departed for a 3 pm conference with senior counsel and the numbers dwindled.

The first round of the finals saw Bar FC drawn against Perpetual who had scored 22 goals to none against in their preliminary games.

The depleted Bar FC called for reinforcements who arrived in the shape of another potential reader. A spirited defensive effort, masterminded by Turnbull SC (who moved to the midfield) and Jedrzejczyk saw Bar FC lose 2-0 in the first round of the play offs.

All in all, a sensational day and a fine effort.

Acknowledgements

NSW Bar FC acknowledges Suncorp, MLIG and Peter Steele for their continuing support.

The future

Like all good football sides, NSW Bar FC will be recruiting heavily in the off-season. Bar FC is also indebted to the female members of the team who made for a successful 2013 campaign. We look forward to welcoming more women to the squad in 2014. If you are interested in dusting off those boots and joining the team, please email David Stanton (d.stanton@mauricebyers.com) to join the mailing list.

Surfing Lawyers win SurfAid Cup

By John Sampson

With barely seconds to go, the Australian Surfing Lawyers won the prestigious OzForex SurfAid Cup at South Curl Curl Beach, Sydney, on Friday, 1 November.

Against more favoured corporate teams, the lawyers came from behind using wit, a close analysis of cup rules and a measure of skill to take home the annual event in difficult two-foot plus waves.

Supported by surfing luminaries such as Tom Carroll, Layne Beachley, Simon Anderson, Luke Egan and Matt Hoy, as well as Rugby League legends Andrew Johns and Mark Gasnier, this year's event raised a record $183,000 for remote communities in popular surfing regions in Indonesia.

Founding father of ALSA (Australian Lawyers Surfing Association) New South Wales barristers Peter Strain and Patron Craig Leggat SC were delighted with the win. 'We are an informal group of lawyers bonded by our love of surfing and with a commitment to 'not for profit' groups connected to the surfing community and other groups interested in matters concerning the environment,' Craig said.

'Hopefully the win will raise our profile, attract more members and more importantly raise more funds for the causes we support.'

Team captain Matt 'Warbo' Warburton, Hudson's chief legal Officer, said: 'Each year ALSA (Australian Lawyers Surfing Association) travels to a remote surfing location and while it's a fantastic adventure for us we endeavour to give something back to where we surf, which is generally in impoverished communities.

'This year we surfed in West Timor and donated to the local school. We have competed in the SurfAid Cup since its inception and to win against some of the corporate heavyweights is a great thrill. More importantly it is another way of giving back in a structured way through SurfAid who are doing great things.'

The Surfing Lawyers made the finals but were given little hope of winning in the tag-event against more formidable teams stacked with ex-pros.

Hopes were revived when Trent March of Allens picked up an outside set and flew down the line launching a furious backhand attack at the lip and scoring one of the longest and highest scoring waves of the day with an 8.67.

However the lawyers' hopes dimmed as the normally steadfast Guy Foster of Allens lost his way in the choppy, onshore conditions - only to be revived by Ryan 'Whippet' Clark of Bondi Rescue fame (each team is appointed a surfing legend) who slashed his way to put the lawyers within title contention.

They were dashed again as team

Far left: Trent March on the winning wave.

Left: cups aloft. L to R: Matt Warburton, Ryan Clark, Guy Foster, Trent March, James Walker-Powell.

Above: Victory to Surfing Lawyers. L to R: James Walker-Powell, Matt Warburton, Trent March, Guy Foster, Ryan Clark.

Photos: Blaise Bell.

captain Warbo got lost in the trashy conditions but not for lack of trying - taking off late and getting pitched onto the sand bar and winning 'Best Wipeout' of the event in the process.

With minutes to go it was up to James 'JWP' Walker-Powell, CEO of More4life, to save the day. Displaying disdain for youth or surfing legend, JWP sprinted to the water's edge, turbo paddled out the back, picked up a quick inside wave and paddled back out for his second wave which scores double points.

Only 90 seconds left hot favourites and defending champions, Aquabumps Shredders, needed just one decent wave to dash the lawyers' hopes. However the lawyers had studied the rules and realised JWP could win the cup if he could catch a wave and sprint up the beach ahead of Aquabumps and garner two bonus points for crossing the line first.

Losing all lawyerly restraint, the team dashed to the water's edge, shouting out instructions to JWP. JWP heard. He caught what was by any standards a mediocre wave, furiously paddled to the shore, good-naturedly flipped the bird at his competitor breathing down his neck, sprinted up the beach and fell, with seconds to spare, into the arms of his team mates.

Victory snatched from the jaws of defeat, the brief fulfilled, and 'the most exciting finish in SurfAid Cup history', according to SurfAid's Kirk Willcox. The lawyers beat their nearest rival, accountants Allan Hall, by 1.4 points, 46.73 – 45.33.

Sixteen teams competed in this year's SurfAid Cup including OzForex, Perpetual, Shaw Brothers, AMP Capital 1 and 2, CBA, Toybell, Citi Frothers, Paradice Investment Management, BlackRock, oOh!media and Crown Clowns.

SurfAid is a community-based humanitarian organisation whose programs include water and sanitation, malaria reduction and health education. For more information see http://www.surfaid.org/

For more information on The Australian Lawyers Surfing Association see http://www.surfinglawyers.com.au/

The Hon Justice Rowan Darke

Rowan Darke SC was sworn in as a judge of the Supreme Court on 16 August 2013.

The Hon Justice Rowan Darke was born and raised in Bathurst where his parents were school teachers. Darke J attended Bathurst High School where his Honour believed that he received an 'excellent education'.

Darke J graduated with a Bachelor of Economics and a Bachelor of Laws from the University of Sydney in 1985. During his time at university, his Honour pursued various sporting interests including cricket and second grade rugby league.

As to rugby league, Mr John Dobson, president of the Law Society of New South Wales who spoke at his Honour's swearing in on behalf of the solicitors of New South Wales noted Darke J's agility in playing wing, centre or full-back, a true 'utility back'.

Ms Jane Needham SC, senior vice-president of the New South Wales Bar Association who spoke on behalf of the bar was informed by his Honour's then coach, now Judge Norrish SC of the District Court of New South Wales, of Darke J's skill on the wing; Darke J was 'lithe and elegant, quick on his feet and courageous … he never questioned the coach's judgment and was definitely the soberest person in all five grades', all fine qualities for a judge.

Darke J served as associate to the Hon Justice Lockhart at a time coinciding with the long-running matter of *State Bank of New South Wales v Commonwealth Savings Bank of Australia*. His Honour described Justice Lockhart as 'a gifted man who, with apparent ease, combined a top level intellect with abundant personal charm and grace'. His Honour said:

> Towards the end of my time with him he suggested that I should think about going to the Bar. I had not taken any steps to find employment and the counsel I had seen in action, such as Ken Handley, appeared to do it with ease so I decided I would give it a go.

His Honour commenced practice at the New South Wales Bar in September 1986 without having practised as a solicitor. He Honour obtained a berth on the 11 Wentworth/Selborne Chambers and read with the Hon Dyson Heydon AC QC and the late Paul Donohoe QC.

In 1987 his Honour took a room on what is now the Tenth Floor of Selborne Wentworth and remained there until his Honour's appointment to the court.

Darke J was 'lithe and elegant, quick on his feet and courageous … he never questioned the coach's judgment and was definitely the soberest person in all five grades', all fine qualities for a judge.

His Honour practised principally in commercial, equity, insurance and trade practices law, as well as professional negligence. Ms Jane Needham SC quoted the praise of an unnamed silk on the Tenth Floor of Selborne Wentworth chambers who said:

> Your Honour's ability to attend to all chamber work within promised times, to give concise, legally precise and commercially sensible advice to solicitors and clients from behind an impossibly tidy desk and in a courteous and polite manner, has been a boon to solicitors and clients.

In court, his Honour was known to be always efficient, polite and courteous to the bench, opponents and witnesses alike. His Honour's door was also known to be open to junior members of his Honour's floor who sought his professional advice.

His Honour appeared in the Court of Appeal, Supreme Court, Federal Court and High Court, the most recent being the successful appeal before the High Court in relation to personal injuries damages in the case of *Certain Underwriters at Lloyds v Cross* in which his Honour represented the appellants.

Darke J served as a director of the South Eastern Sydney Area Health Service and chaired its audit committee. In 2001 Darke J was the Bar Association's representative on the Hon Terry Sheahan's committee for the review of workers compensation in New South Wales. In September 2011 his Honour joined the board of the Barristers Sickness and Accident Fund.

His Honour has interests in American politics and history as well as domestic politics.

His Honour's long-standing devotion to the South Sydney Rabbitohs resulted in pro bono support in the litigation and campaigning to have the Rabbitohs reinstated in the competition when they were dropped in 1999.

Towards the end of his Honour's swearing in speech, his Honour said:

> I am fond of saying that 'the Bar is not for everyone'. There are undoubted stresses and strains involved. There is fierce competition. Yet it gives to each of its members an independence which is truly rare in today's world. That is something to cherish.

The Hon Justice Melissa Perry

Melissa Perry QC was sworn in as a judge of the Federal Court on 23 September 2013.

The Hon Justice Melissa Perry's paternal grandfather came to Australia from Cypress and anglicised his name from Pieris to Perry. Her Honour's father was the late Hon John Perry AO QC of the Supreme Court of South Australia, an accomplished violinist who, as a student, led the Elder Conservatorium Orchestra and went on to play at the Adelaide Symphony Orchestra. There he met her Honour's mother, Jenny, who was a student pianist at the Conservatorium.

Perry J opted to follow her mother by taking up the piano, rather than the violin, and is a talented classical pianist; she shows her versatility of taste with a passionate interest in British rock music.

Perry J graduated with honours in law at the University of Adelaide in 1985. Her Honour worked as an associate to Hon Patrick Matheson a former Justice of the Supreme Court of South Australia. In 1988, she read for a Master of Laws at the University of Cambridge on a Shell Scholarship.

Her Honour was called to the bar in 1992, joining Bar Chambers in Adelaide and purchased a room. During her Honour's swearing-in speech, her Honour said:

> …the words of encouragement that I received as I signed the customarily large cheque to buy my room, were that, 'You know there are many solicitors who won't brief you because you are a woman.' However, as Michael Jordan said on being inducted into the basketball hall of fame, 'Limits like fears, are often just an illusion,' - a sentiment that resonated with me…

Her Honour returned to Cambridge to complete a PhD and received the Yorke Prize in 1995 for her dissertation in public international law on state succession. Sir Elihu Lauterpacht QC was her thesis supervisor for the first year, after which her Honour worked with Professor Vaughan Lowe QC. Fiona McLeod SC, one of those who spoke at her Honour's swearing-in, quoted Professor Crawford, Whewell Professor of International Law at Cambridge, in saying that Perry J's PhD thesis was 'an excellent piece of work, first class in conception and execution.'

In 2004 her Honour was appointed queen's counsel in South Australia.

Perry J's practice was broad, with a particular interest in native title and public law. Her Honour appeared in the High Court of Australia on more than 40

occasions, including with successive Commonwealth solicitors-general Gavan Griffith AO QC, David Bennett AC QC and Stephen Gageler SC in a number of constitutional and environmental cases.

In 1997, her Honour was briefed to appear in *Yarmirr v the Northern Territory*. Her Honour later appeared in, or gave advice in connection with, *Jango v the Northern Territory*, the *Wik Peoples v the Commonwealth*, *Yorta Yorta* and the *Waanyi People v Queensland*. In 2003, her Honour co-authored with Stephen Lloyd the well-respected textbook *Australian Native Title Law*.

In April 2009, her Honour appeared in *Qarase v Bainimarama* in Fiji's Court of Appeal as amicus for the Citizens' Constitutional Forum. Jane Needham SC who also spoke at her Honour's swearing-in said that Perry J's address to the court on the importance of constitutionalism and its application to the situation in Fiji was described as powerful and cogent.

Her Honour came to the Sydney bar in 2004, first as a licensee on the sixth floor of Selborne Chambers, then as a full member in 2006. In July 2012, her Honour was called to the Bar of England and Wales as a member of Inner Temple and became a tenant at 20 Essex Street.

Her Honour appeared in the High Court of Australia on more than 40 occasions, including with successive Commonwealth solicitors-general Gavan Griffith AO QC, David Bennett AC QC and Stephen Gageler SC in a number of constitutional and environmental cases

Her Honour is known for her warmth and engaging nature, complementing formidable legal skills which include seemingly tireless diligence in preparation.

Her Honour has been a board member of Voiceless, the Animal Protection Institute and has also conducted pro bono cases for the New South Wales Animal Welfare League, helped to establish the Barristers Animal Welfare Panel, and is a governor of World Wildlife Fund Australia.

Her Honour was involved in various legal professional bodies, including as a director and fellow of the Australian Academy of Law, a member of the Law Council Resources Energy and Environment Subcommittee since 2008 and a member of the Administrative Law Committee from 2005 to 2012.

Her Honour is also a squadron leader in the Royal Australian Air Force Legal Specialist Reserves.

The Honourable Bronwyn Bishop speaking at Perry's swearing-in said:

> You have an impressive legal mind and deep understanding of legal principles and their rationale. You have been known and sought after for your high quality work, and admired for your courtesy, patience and kindness. To this end, one of your colleagues remarked that your immense legal knowledge and intelligence will be a wonderful asset to the Federal Court. Litigants will always be treated with the utmost respect. Your temperament and integrity positions you to adeptly face the challenges and responsibilities of this appointment.

The Hon Justice Michael Wigney

Michael Wigney SC was sworn in as a judge of the Federal Court of Australia on 9 September 2013.

The Hon Justice Michael Wigney grew up in a sporting family, his mother Gloria having twice represented Australia in the Olympic Games, winning a bronze medal at the 1958 Commonwealth Games, and his father, Brian, having played competitive tennis until age 78.

Justice Wigney attended Davidson High in Frenchs Forest and played cricket and rugby, travelling a number of times to New Zealand with the school rugby team.

His Honour graduated with a Bachelor of Economics in 1985 and a Bachelor of Laws in 1988 and following his admission commenced work at Clayton Utz. In 1989, his Honour moved to the Office of the Commonwealth Director of Public Prosecutions, initially as a legal officer and later as a principal legal officer in the fraud section.

His Honour was called to the bar in 1993 and read on the Eleventh Floor, Wentworth Selborne Chambers and in 1990 moved to Third Floor, Selborne Chambers. In that year, his Honour also completed a Master of Laws at the University of Sydney.

At that time, the Third Floor of Selborne Chambers had recently been vacated by the Office of the Public Defenders and accommodated mainly licensees. His Honour, during his swearing-in speech, described the 'rag-tag' bunch on the Third Floor of Selborne Chambers as all getting along so well and having so much fun that they stayed together, moving, en masse, to a floor they set up across the road at 3 St James Hall. This was in 1998, when his Honour helped establish that floor, led by Ian Temby AO QC, and where Wigney J spent the rest of his career as counsel.

Justice Wigney took silk in 2007.

His Honour was said to have acted in almost every high-profile insider trading case in the last 15 years, as well as a range of other complex matters involving companies and securities offences, taxation contraventions, extradition hearings, prosecutions for drug-related offences under the Customs Act, and for the ACCC in relation to restrictive trade practices and consumer protection matters.

His Honour also appeared in a number of cases arising out of Project Wickenby and was counsel assisting in a number of the major commissions of inquiry over the last decade, including the 2002 Human Rights Commission Inquiry into Children in Immigration Detention and the 2005 Cole Inquiry into the UN Oil for Food Program. In 2009 his Honour assisted at the inquest into the deaths of four people in a collision between a ferry and the pleasure craft *Merinda* on Sydney Harbour, and in 2011 his Honour assisted at the inquest into the death of Mullumbimby student Jai Morcom. More recently, in 2012 his Honour assisted Gail Furness SC's commission of inquiry for the Independent Liquor and Gaming Authority into Sydney's Star Casino.

Phillip Boulten SC, who spoke at his Honour's swearing-in, said:

> In the finest traditions of the cab-rank principle, your Honour accepted briefs for the prosecution and the defence in complex matters relating to white-collar crime. Rene Rivkin was one of the business identities whose solicitors managed to beat ASIC in the race to secure your services. On the other hand, Ray Williams and Rodney Adler were unlucky enough to be prosecuted by you.

His Honour was known to be courteous, even-tempered, persuasive and highly composed in court.

His Honour is the father of four children, three of whom are triplets, and is an avid and skilled surfer, cyclist and tennis player.

His Honour concluded his swearing-in speech with the following:

> When the former attorney rang me with the news some weeks ago, he said to me, 'Thank you for agreeing to serve the people of the Commonwealth.' Those words very much resonated with me. My response was and is, 'Mr Attorney, the people of the Commonwealth have given me the gift of a quality public education and many years of free tertiary education at one of Australia's most esteemed universities. It's my absolute pleasure to be able to give something back.'

The Hon Justice Murray Aldridge

Murray Aldridge SC was sworn in as a judge of the Family Court on 13 December 2012.

His Honour was born in Wanganui, New Zealand and went to secondary school in Hamilton. Upon arriving in Australia, his Honour finished his schooling by duxing Woolooware High School where he was a renowned captain of debating and was involved in sport and dramatic productions, and worked part-time in his father's tyre business.

His Honour graduated with a Bachelor of Laws and a Bachelor of Economics from the University of Sydney. Aldridge J did not practise as a solicitor and was admitted as a barrister in 1980. He read with Robert Hulme and Greg Maidment and acquired a room in Frederick Jordan Chambers.

His Honour took silk in 1999.

His Honour practised in corporations law, banking, tax, equity, bankruptcy, family law and appellate work and appeared in many leading cases including *Commissioner of Taxation v Linter Textiles.*

His Honour was mentored, especially in bankruptcy law, by the late Paul Urquart QC. During his swearing-in speech, his Honour described the development of his practice:

> After I had been at the Bar for some 18 months or so, I received a brief to present a petition in the Federal Court for the bankruptcy of a debtor. For reasons that escape me, people then and people now think that bankruptcy and insolvency is a strange, obscure and difficult subject, a bit like potions at Hogwarts.
>
> …
>
> Insolvency quickly became the mainstay of my practice. It was then an area where to call an argument technical was simply to praise it, and to describe it as merely technical was just to display your jealously.
>
> One of the first family law matters in which his Honour appeared was *Rand v Rand,* which involved multiple parties and over 30 days of hearing spread over 18 months. The litigation was complex, involving liquidators and receivers, and concerned the Family Court's power to make orders against third parties.

His Honour was described as a thoughtful and forceful advocate, but always unflappably polite and affable.

His Honour was described as a thoughtful and forceful advocate, but always unflappably polite and affable.

His Honour's varied interests include orchid growing (his Honour is a judge of the Sutherland Shire Orchid Society), fly fishing, jam making and beer brewing (including Dusseldorf Altbier, American Pale Ale and Bohemian Pilsner). His Honour has won prizes at the Royal Easter Show for his beers and jams.

His Honour has been a member of the Advocacy Specialist Accreditation Committee of the Law Society of NSW, an instructor with the Australian Advocacy Institute, and a member of the Insolvency and Reconstruction Committee of the Law Council of Australia since 1995. Justice Aldridge also served as a member of the Bar Association's Professional Conduct Committee between 1999 and 2002.

Justin Gleeson SC, speaking at his Honour's swearing-in, said:

> Your Honour's skills as a fine generalist will stand you in good stead as a judge of [this Court]…
>
> This is true in areas of property and family estates, with increasing complexity in trust and corporate arrangements, and, indeed the relationship between the parties to the marriage and third parties. As well, we're all familiar with the fact that questions of private and international law are increasingly engaging the attention of this Court. …it's well to recognise that for many Australians, this Court will be their first, their most important, even if sometimes reluctant, engagement with the Australian judicial system. The principles of justice and equity, mirrored through the prism of the statute which governs this Court, are [its] daily challenge…

Her Honour Judge Sharron Norton

Sharron Norton SC was sworn in as a judge of the New Wales District Court on 16 September 2013.

Judge Norton graduated from the University of New South Wales with a combined Bachelor of Commerce and a Bachelor of Laws in 1978 and in July of that year began working at the firm of Gunn Hamilton and Blay as a conveyancer and real property lawyer.

Her Honour was called to the bar in September 1979 and read with G Barry Hall. Her Honour began at Frederick Jordan Chambers, when they were still on Macquarie Street, occupying the Women's Room, putting her Honour in the company of the Hon Justice Jan Stevenson, the Hon Justice Virginia Bell, the Hon Justice Elizabeth Fullerton and her Honour Judge Anne Ainslie Wallace.

Her Honour developed a practice predominantly in personal injury work. In 2001, her Honour took silk. Phillip Boulten SC, who spoke on behalf of the bar at her Honour's swearing-in, said that, since taking silk, her Honour built up what was 'arguably the largest appellate practice at the New South Wales Bar' with more than 150 appeals, of which at least 50 percent were successful, and continued:

> You established a reputation for being very calm, with a down to earth, disarming style of advocacy. You have acquired a reputation for efficiency and industriousness and for your ability to reduce weeks of dense transcript and a lengthy judgment to their essential elements. Your submissions were always a model of precision and persuasion.

Her Honour undertook a generous amount of pro bono work, through organisations such as the Marrickville Legal Centre, the Shopfront and the Women's Legal Service.

Judge Norton was a part-time judicial member of the Legal Service Division of the Administrative Decisions Tribunal for fifteen years, during which time her Honour heard various matters involving the professional conduct of barristers and solicitors. In the late 1990s her Honour was appointed an acting judge of the District Court. Her Honour also contributed to the continuing education of the profession through lessons in the Bar Practice Course and CPD seminars.

... since taking silk, her Honour built up what was 'arguably the largest appellate practice at the New South Wales Bar' with more than 150 appeals, of which at least 50 percent were successful...

Mr Boulten spoke of aid of her Honour's reputation in chambers at Frederick Jordan Chambers as a 'kind and thoughtful mentor':

> The door to your Honour's chambers was, as the saying goes, always open, though not just for generous amounts of time listening to questions and giving advice. Your Honour is a skilful knitter and colleagues often would receive a shawl or some other item of clothing for their newborn children. 'Morning tea' and celebratory drinks were a staple part of the convivial atmosphere that always seemed to surround your Honour's room.

His Honour Judge Mark Williams

Mark Williams SC was sworn in as a judge of the New Wales District Court on 23 September 2013.

Judge Williams graduated from the University of New South Wales with a Bachelor of Commerce and a Bachelor of Laws in 1978 and immediately began practice at the New South Wales Bar in December 1978. His Honour read with Ian Johnston on 16 Wardell Chambers, then headed by Tom Hughes QC. From 1986 his Honour practised from Tenth Floor Wentworth Selborne Chambers.

His Honour's practice began as an eclectic mix of equity, personal injury, insurance, crime and some family law. Judge Williams took silk in October 1999 and thereafter the nature of his Honour's practice changed in such a way as to concentrate more on insurance and negligence cases.

His Honour's passion for sport was reflected in working in various courts and tribunals on a pro bono basis. His Honour appeared often in the International Court of Arbitration for Sport and was appointed by the Australian Olympic Committee to chair a number of appeals tribunals handling disputes over selection.

His Honour completed countless hours of work for the Bar Association's Legal Assistance Referral Scheme and similar programs established by state and federal courts, including two substantial matters in the Court of Appeal.

In *Bott v Carter* [2010] NSWCA 21, Allsop P said (at [5]):

> Mr Mark Williams of Senior Counsel, has appeared pro bono for the applicant, pursuant to a request by the Registrar. The Court is grateful to Mr Williams for undertaking the task he has. The Bar's assistance in giving assistance to litigants where it is required assists fundamentally in the administration of justice, and the Court is always grateful for assistance, and in particular for the clear and helpful assistance of Mr Williams.

Judge Williams also served on one of the Bar Association's professional conduct committees for five years and delivered some well-regarded CPD seminars exploring the ethical constraints on a barrister's life outside the practice of law.

Phillip Boulten SC who spoke on behalf of the bar at his Honour's swearing-in said:

> …it's surely a good thing when one of the busiest courts in the country can readily complement its bench by drawing upon the talent and experience at the Bar. That benefit is multiplied when the appointee combines 35 years at the Bar with experience as a director of various successful commercial ventures.

At one time or another Judge Williams was an investor and director of the iconic Australian clothing company Drizabone, a co-owner of a successful pine plantation and sawmill located near Tea Gardens and, while living in the UK, a part-owner of a ski-shop.

His Honour appeared often in the International Court of Arbitration for Sport and was appointed by the Australian Olympic Committee to chair a number of appeals tribunals handling disputes over selection.

Judge Williams is an accomplished surf and still water oarsman representing NSW in Masters rowing since 2002. His Honour was a director of the NSW Rowing Association between 2007-09 and held the role of director and ultimately president of Mosman Rowing Club.

Phillip Boulton SC concluded:

> Judge Williams, you bring to this position a wealth and variety of experience, both in the courtroom and in the boardroom. You are regarded with great warmth and affection by your colleagues for being a hard working, practical, but extraordinarily generous person.

Other appointments of note

Former chief justice of New South Wales, Hon James Spigelman AC QC and former High Court judge, Hon William Gummow AC QC were appointed to the Hong Kong Court of Final Appeal with effect from 29 July 2013.

The court is currently served by a chief justice, three permanent judges and 18 highly distinguished non-permanent judges, including Sir Anthony Mason, Lord Hoffman, Lord Millett, Sir Anthony Mason, the Hon Murray Gleeson AC QC, Lord Neuberger and Lord Phillips.

***

Robertson Wright SC was sworn in as a Supreme Court judge on 25 October 2013 and on that same date began a five-year term as inaugural president of the NSW Civil and Administrative Tribunal (NCAT). NCAT consolidates 23 state tribunals and bodies and operates through four divisions: consumer and commercial, guardianship, administrative and equal opportunity, and occupational and regulatory. A substantive note on Justice Wright will appear in the next issue of *Bar News*.

***

Former District Court of New South Wales judge, Helen Murrell SC was appointed as chief justice of the ACT Supreme Court replacing Chief Justice Terence Higgins on 28 October 2013. Chief Justice Murrell took silk in NSW in 1995 and practiced across criminal law, administrative law, environmental law, common law and equity. Her Honour was appointed as a NSW District Court judge in 1996.

***

Nicholas Manousaridis was appointed as a judge of the Federal Circuit Court of Australia on 1 July 2013. A special sitting to welcome his Honour took place on 29 July 2013.

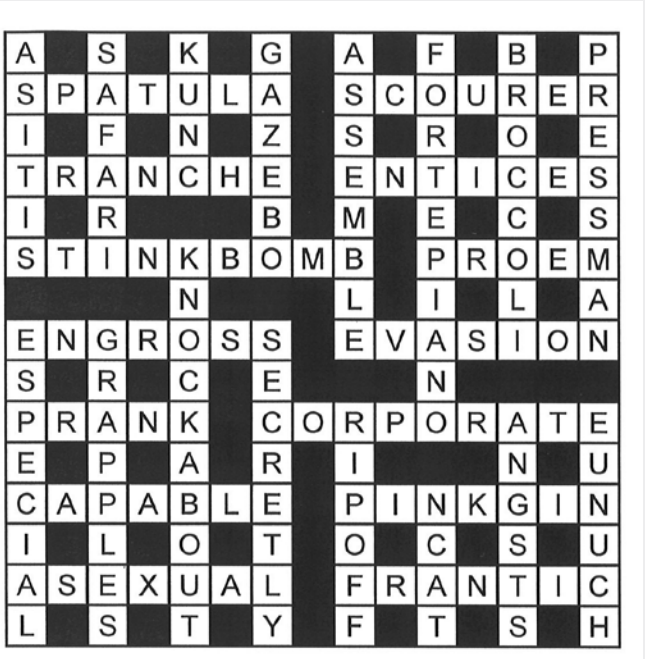
Judge Garry Foster, a judge of the Federal Circuit Court, was appointed to the Parramatta Registry of the Family Court of Australia, with effect from 8 August 2013.

***

Michael Barnes was sworn in as magistrate of the Local Court of New South Wales on 26 August 2013.

Carolyn Huntsman was sworn in as magistrate of the Local Court of New South Wales on 15 July 2013.

Crossword solution



Donna Therese Spears (1963–2013)

Dr Donna Therese Spears was ahead of her time even before birth. Her father, Arthur had married her Chinese mother, Rita, at a time when interracial marriages were uncommon. Donna, an only child was born to the couple on 19 September 1963. The family lived in the Canberra suburb of Curtin, where Donna attended the local Catholic school.

Donna was very academic as a child, with a great love of reading and literature. She graduated high school in 1982. In 1983, her first year at Australian National University (ANU) studying a combined Bachelor of Arts (Philosophy) and Bachelor of Laws, she was devastated by the death of her father from cancer.

During her time at ANU, Donna was very active in student politics. She was a Labor supporter and took a position as an electoral officer for Mr Jim Snow, the Labor member for Eden-Monaro at the time. In her final year at ANU in 1987, Donna was elected to the ANU Student Council. She graduated ANU with Honours in Philosophy and moved to Sydney to attend The College of Law. Donna was admitted to practice on 21 December 1988.

In Sydney, Donna took up a graduate position at Clayton Utz, however she quickly realised that civil private practice was not for her and she left before the year finished. She was next employed at the Independent Commission Against Corruption (ICAC) where she worked for several years investigating and prosecuting corruption.

Her love of criminal law sprang, at least in part, from her love of crime novels. Donna was a voracious reader of fiction with a particular love of crime fiction. Her time at ICAC cemented for her that she wanted a career in criminal law.

Her love of the academic life saw Donna complete her Masters in Law with Honours majoring in Criminal Law at the University of Sydney graduating in 1993. That same year, Donna started as a Research Director at the Judicial Commission of New South Wales. At the Judicial Commission, Donna was in her element. She was particularly passionate about discretion in criminal sentencing and went on later to complete a PhD in the area. In 1996, Donna was involved in a review of the Homosexual Advances Defence which has finally been put forward to be abolished by the *Crimes Amendment (Provocation) Bill* 2013 (NSW) this year. Donna very much enjoyed her role as researcher and relished being in a position to assist in the education of judicial officers. She also became involved in matters dealing with judicial misconduct during her time at the Judicial Commission.

It was while at the Judicial Commission in 1997, that Donna was first diagnosed with cancer. She underwent chemotherapy, including an experimental treatment that was ultimately successful and has gone on to become the standard treatment used today. Due to chemotherapy treatment requiring her to spend hours each week in hospital, Donna took advantage of the time to study for the bar exams which she passed in late 1997.

Commencing as a reader at Ground Floor Windeyer Chambers in February 1998, Donna spent her early years at the bar doing criminal defence work. She loved the technicality of criminal law and felt great satisfaction in meticulously checking police

treatment of her clients to ensure police procedures were followed. Many of her clients benefited from her thoroughness and research, as she was particularly good at finding loopholes and hunting down technicalities, which acted in her clients' favour. Donna felt this was important to ensure the honesty of the prosecution and to improve the justice system.

In 2002, Donna started her PhD at the University of Sydney. While studying for her doctorate, she began lecturing in criminal law and procedure at the University of Sydney as well as casual lecturing at the University of New South Wales. One of her goals in life was to complete a PhD so her graduation from a Doctor of Philosophy (Law) majoring in Criminal Law and Criminology in May 2005 was one of her proudest moments. The same year, Donna moved from Ground Floor Windeyer Chambers to 8 Garfield Barwick Chambers.

At the end of 2006, with things going well in her professional life, Donna met and fell in love with her gym instructor, Anetone Va. However, in early 2007, Donna's cancer returned and she finished up teaching at University of Sydney and University of New South Wales to focus on her treatment and recovery with Anetone by her side.

By 2008, she had improved and she took up a lecturing position at the University of Wollongong lecturing in Criminal Law and Advanced Criminal Law. Donna reignited her passion for research and published several articles as well as being interviewed on ABC Radio regarding identity information in jury trials. Donna and Anetone also became engaged but decided not to get married in the short-term.

For the next few years, Donna focussed on fighting cancer while continuing to teach and publishing several books including *Criminal Law for Common Law States* with Dr Julia Quilter and Associate Professor Clive Harfield , *Criminal Laws: Material and Commentary* with several other authors and *Criminal Law and Process in NSW* in 2011.

Donna became an Honorary Fellow at the University of Wollongong in 2012 but finished actual teaching duties in July 2012. She remained on staff until being medically retired in 2013.

In her later years at the bar, Donna focused on research and criminal appellate work, where her true talents lay. She was a complex thinker and incredibly well suited to the bar. Described by her peers as sharp-witted but low-key, she possessed a down to earth attitude that can be rare in a barrister. Donna had an incredible eye for detail and was extremely thorough which made her a formidable opponent on a criminal appellant brief.

Her passion for law was only one of her passions. she was a great lover of red wines and had an enviable cellar. Guests at her home for dinner were often treated to a carefully selected and perfectly matched vintage red wine. As well as being an avid reader, she had a secret love of video games, particularly shoot-em-up style games like Halo.

When she wasn't working, Donna loved to travel. In 1987, she could be found in Moscow during the Regan/Gorbachev summit. This was very brave considering the political situation in the old Soviet Union at the time. In later years she enjoyed attending legal conferences around the world. She delighted in taking a driving holiday through France tasting wine and cheese as well as visits to the UK and America. Donna's last trip with Anetone was to one of her favourite destinations: Hong Kong.

She started her career incredibly driven, but mellowed somewhat after her lengthy illness. Despite never having pets as a child, when she was first diagnosed she bought a King Charles spaniel named Joel who became her partner in recovery.

Dr Donna Spears finally lost her battle with cancer and passed away on the evening of Tuesday, 28 August 2013, a few weeks shy of her 50th birthday. She left behind her mother, Rita, her fiancé, Anetone as well as her beloved dogs, Trixie and Merlin who also attended her funeral. She was laid to rest with the ashes of her first dog, Joel, in Rookwood Catholic Cemetery.

Bullfry and the billable hour

By Lee Aitken

'We are going in with all the engines on! I have just been offered a tasty injunction – settle this for what we can get'...

What a beautiful day! The sun shone down, the waves lapped the shore. Was it time for him to risk the shoulder reconstruction, and go for another quick paddle? How many such sunny days had he wasted in the past in Chambers, working steadily through files 4 and 5 of voluminous bank discovery? The central problem with any legal analysis was distilling the facts – this is why legal advice is so expensive, even though in hindsight when the facts have been lucidly set out in a judgment, the result seems obvious. A lay client could not understand how a large fee note could arise when the entire dispute was encompassed in a lucid judgment consisting of but 25 paragraphs.

And yet, because of the business model which applied to the 'cadet' branch of the profession, Bullfry himself was now reduced to charging at an 'hourly rate'. Presumably, this 'rate' represented, in his case, the capitalised 'return' on 35 years of legal practice, long hours on the Madame Recamier immersed in Balzac, and the recovery time from too happy a lunch in the city. But Bullfry did not stand at the summit of any pyramid of workers and drones – he took no-one else's 'surplus product' – he was part of no Faustian bargain in which, on what appeared to be a rapidly failing business model, callow youngsters, fresh from the Varsity, were paid a fraction of their gross earnings for working 1800 hours per annum on the basis that, after fifteen years of toiling to climb a greasy pole, 'all this will be yours, and you too may exploit the newbies'.

To the contrary, on the validity of an easement, or the existence of a caveatable interest, Bullfry could give the interrogator an opinion almost immediately. Was he then to charge some fraction of an hour for that? It did not suit him, as it suited many of those instructing him, to spend endless hours considering every aspect to the problem to their greater profit.

And how was the 'rate' to be set in any event? Timely advice given over an hour might save the client

millions of dollars – yet there was no suggestion, and nor could there be, that some percentage of the saving could be charged. When he had worked in Hong Kong, Bullfry had occasion to brief London silk in a very large liquidation – he had prepared and delivered a brief with the fee 'marked' at six hundred thousand pounds, with appropriate daily 'refreshers'. The statutory requirement of costs disclosures had done away with 'marking' any modern brief (and when, in reality, were Barristers' Rules 91 and 99(c) ever invoked?)

In addition, like every other business where the work was done first, and the fee note then delivered, timely payment was ever a problem. Had not the Supreme Tribunal, in its latest discussion on the topic, and after an impeccable analysis of the relevant statutory regime, recently decried the notion that funds received by a solicitor to deal with counsel's fees were immediately impressed with any form of trust to ensure that the money found its proper home?

At the top of the profession stood a few counsel with real market power. Once he had been called to assist in an appeal which had gone awry when he ran the case at first instance on behalf of a millionaire, exposed as mendacious in the witness box. Inevitably, he had been 'sacked', and a new team recruited for the appeal. The new leader had sought his assistance to explicate and understand certain Delphic aspects of the trial transcript . Adventitiously, it had emerged in colloquy that Bullfry's last, modest, fee note was still outstanding after three months.

The leader's face blenched. 'That is intolerable', he said. And there and then, without further ado, he picked up the telephone and dialled the recalcitrant solicitors. 'I have just been told by Bullfry that payment is still outstanding in relation to the last day of the trial; if he does not receive payment by noon today, I am returning all my papers in the matter'.

The conference meandered to a useful conclusion. Getting out of the lift, the clerk approached, clutching an envelope – 'Jack, by hand of messenger!'

It did not suit him, as it suited many of those instructing him, to spend endless hours considering every aspect to the problem to their greater profit.

Moreover, despite the most diligent preparation, once the matter was in court, any case could change in an instant.

He remembered just such a transformation from his youth. A large Australian insurer via its bibulous claims director had been persuaded over several long lunches with the vendors, smooth-tongued wizards all, Lloyds brokers, (turned out with the inevitable silk-lined, Saville Row suits) to reinsure a large amount of risk by the usual misleading blandishments – the largest law firm had prepared a six hundred page 'statement' for use in the Commercial List – the key witness entered the box, and, almost as soon as he began to testify, began to suffer complete 'Stockholm syndrome' in cross-examination at the hands of the sinuous, upright silk deployed for the defendants – after 25 minutes of constant concession, and acknowledgement that the fault, if such it be, was all the witness's own, Bullfry had leant over to his own leader and said: 'We are going in with all the engines on! I have just been offered a tasty injunction – settle this for what we can get', and promptly departed. (There are two types of junior at the Sydney Bar – those who call after the case to find out how it went, and those who don't). You can know too much about a case before it begins – the thousands of hours of preparation all went for nought.

Looking down, Bullfry could just see his wiggling toes as they peeped out beyond the convexity of an XXL 'rashie'. It had come to this – despite hours of walking around the park, his BMI (calculated on the basis of a mesomorphic body shape) still exceeded 30! (The metric on obesity which looked not to a BMI but to the actual circumference of his waist in centimetres at its greatest point was even more disturbing!)

He thought back to a famous leader, now sadly deceased, overwhelmed by the damage done through too busy a practice – Bullfry had consulted him urgently on a complex issue of set-off the night before the relevant directions hearing (at which the threat of peremptory summary judgment for a very large amount was threatening). He had reached him just after 8 pm – his interlocutor forgot his current case, and, seizing a crystalline decanter, poured a young Bullfry three fingers of neat Scotch to replicate his own drink – both of them downed it in a gulp – and turned

at once to the fresh matter in hand - 'I've been told by my doctor to do three laps of the park every morning', rasped his leader. 'I have to get my weight down – if it gets nasty, just stand it in the list and I will come up and see what can be done' – and with that Bullfry had left, into the night. Later, he used to see his old adviser (by then a senior jurist) as he puffed slowly up the hill from the ferry – but the fatal damage, sadly, had already been done.

Out on the waves he could see a fishing boat going past – it reminded him a little of the words of the famous poet, which equally applied to a fractious Court of Appeal – 'they may not look out far, they may not look in deep, but when was that ever a bar, to any watch they keep'.

His mobile jangled – not for him the artifice of an iPhone. Oh no – a trusty waterproof Nokia ($25 from the nice Vietnamese man in McLeay Street) – that was all he needed.

'Bullfry speaking'.

'Oh, Jack, we've got a bit of a problem.'

'If it wasn't serious, you wouldn't need me. The doors of the Court of Equity, like the gateways to Hell, are always open'.

He stumbled towards the shoreline, his mind already alive to the subrogation issue latent in his questioner's recitation of the facts. The beach was one thing but the smell of greasepaint was, to an ageing forensic thespian, ever and more attractive.

And of course, he would have time to prepare and robe. Never again an appearance in shorts and thongs as many years before. Solicitors had wanted consent order revisited on Christmas Eve – Palmer J presiding – 'we are holding a cheque for you as soon as the orders are made'.

'I am already there', he had said. He had slipped quickly into robes and bar jacket over his regular summer chambers attire, and headed into action. His favourite usher had remarked on his get up, but said nothing as he reached the bar table, and had the orders made. *Ou sont les neiges d'antan?*

Continued from page 23

are 'plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect', a question that is determined by reference to 'considerations of fairness that inform the court's view about an inconsistency which may be seen between the conduct of a party and the maintenance of confidentiality'.[17]

A note on the CPA and the interests of justice

The High Court's decision was quickly delivered (one month and two days after oral argument occurred). The timing is pointed given the admonishments it includes against practitioners, parties and courts losing sight of their common duty to facilitate the just, quick and cheap resolution of proceedings with a 'tangential issue'[18] that, in the words of the court:[19]

> distracted [parties] from taking steps to a final hearing, encouraged the outlay of considerable expense and squandered the resources of the Court.

There is nothing gentle in the court's reminder to litigators about the centrality of the overriding purpose of the CPA. The court has indicated that, should parties and practitioners not heed the call, it is for courts to take a more 'robust and proactive approach'[20] to enforcing that purpose.

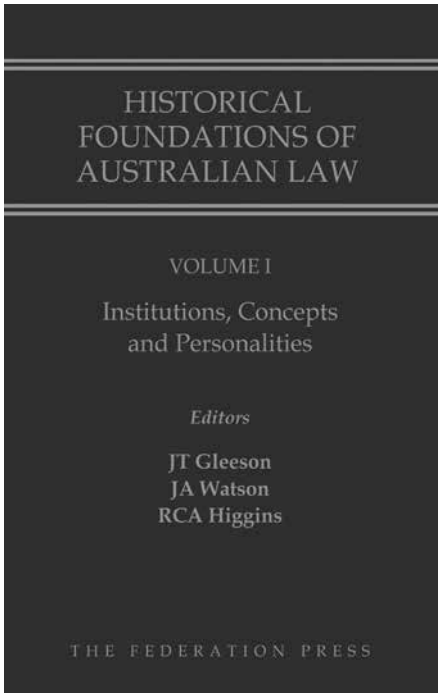
Endnotes

1. At [4].
2. At [57].
3. At 66].
4. At [63].
5. *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393.
6. At [20].
7. At [7].
8. At [45].
9. At [49].
10. At [49].
11. At [35].
12. At [61], [63].
13. At [30].
14. At [34].
15. At [30].
16. At [30], [35].
17. At [31], citing *Mann v Carnell* (1999) 201 CLR 1 at 13 [29].
18. At [7].
19. At [59].
20. At [57].

Historical Foundations of Australian Law

By JT Gleeson, JA Watson and RCA Higgins (eds) | Federation Press | 2013

On 22 August 2013 Chief Justice Robert French AC launched *Historical Foundations of Australian Law,* vols I and II.



In this age of 'accountability' and 'transparency' it is necessary to pose, by way of disclosure, the rhetorical question: Is it appropriate to launch a book without having read it from cover to cover? The short answer is that it is no less appropriate than it is to launch a boat without having sailed in it. The great and the good do that all the time. That being said the purpose, arrangement and contents of the book, and the chapters I have read enable me to say that I am very pleased to launch it and look forward to exploring further its undoubted riches at leisure and from time to time.

The book, which is published by Federation Press, comprises two volumes. The first, edited by Justin Gleeson, James Watson and Ruth Higgins is entitled: *Institutions, Concepts and Personalities*. The second, edited by Justin Gleeson, James Watson and Elizabeth Peden is entitled *Commercial Common Law*. Each of the essayists is a person whose contribution is worth reading. Their work and its thematic arrangement creates an important and valuable resource and makes accessible to Australian lawyers, law students and judges in a convenient way, an array of materials which would otherwise require resort to a large range of disparate texts and law review articles.

In their introduction to the first volume the editors identify four themes:

1. The common law process was and still is organic. The early judges did not claim to pronounce on the whole of the common law. They decided the issues brought forward by the parties so that only over time did a body of authority on a point or related points accumulate.

2. It has always been a feature of the common law that judges would give reasons and that those reasons would be made public. In the common law tradition the burden of acceptance is placed on the judges who follow.

3. The effect of an organic law, developed upon reasons, means that no single judge has or ever had the authority to decide the law for all time or to depart without reason from what has gone before.

4. Those appointed as judges have every reason to maintain a sense of modesty in the office. The best ones recognise this trait — this sense of legal history — as inherent in the fabric of the common law.

There is a practical dimension to the purpose of the book as it has been prepared with a view to the reintroduction of a course in legal history at a Sydney university. That is a purpose which I think worthy of general support, and not limited to universities in Sydney. There is no doubt legal history plays, and will continue to play, a significant role in adjudication certainly at the higher appellate levels although there are debates from time to time about how it is appropriately used.

History and the use of history have often been matters of contention within the law. Indeed, it was only recently when preparing an address for the Australian Bar Association conference in Rome that I became more conscious of the history wars over the question: Whether and to what extent Roman law had influenced the development of the common law. Henry Maine's denunciation of 'Bracton's plagiarisms' was one of the shots fired in those wars. It came 600 years after Bracton's tract setting out the law and customs of England which was published in the twelfth century. Maine said:

> That an English writer at the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and

> a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence…[1]

Lord Mansfield was attacked along similar lines by the pseudonymous Junius:

> In contempt or ignorance of the Common law of England, you have made it your study to introduce into the Court where you preside, maxims of jurisprudence unknown to Englishmen.[2]

William Blackstone organised his *Commentaries* in categories which were inspired by Roman law. His story that a copy of Justinian's *Digest* was accidentally discovered at the siege of Amalfi in 1135, and that the discovery caused a revival of the Roman law was said by Pollock and Maitland to be 'regarded as apocryphal by modern scholars.'[3] William Howes in his *Studies in the Civil Law* said that while all might admit his great ability as a lawyer and a lecturer 'it is manifest that history was not his forté'.[4]

Pollock and Maitland and Howes were, however, kinder to Blackstone than John Austin who, in his *Lectures on Jurisprudence*, heaped one insult after another upon him, saying of his manner of writing:

> It was not the manner of those classical Roman jurists who are always models of expression, though their meaning be never so faulty. It differs from their unaffected, yet apt and nervous style, as the tawdry and the flimsy dress of a milliner's doll, from the graceful and imposing nakedness of a Grecian statute.[5]

There was also controversy about the role of Roman law and its concept of aequitas on the growth of equity jurisprudence in England. The question was: 'was this a case of one system influencing another or just legal minds thinking alike across the millennia?' My remarks on those topics to the Australian Bar Association in Rome were gathered from a variety of sources. I would have been much assisted by Arthur Emmett's chapter in the first volume of the book entitled 'Reception of Roman Law in the Common Law', not to mention the chapter on Glanville and Bracton, by Justin Gleeson, the chapter on Joseph Story by James Allsop and Amanda Foong, and the chapter on Mansfield by Ben Kremer which appears in the second volume.

The book has two very useful tables at the commencement of Volume 1. The first is a chronology of events relevant to legal history commencing from the foundation of Rome in 753BC and concluding with the passage of the Australia Acts in 1986. Scanning through the chronology, I was reminded of the definition of history offered by one of the young male characters in *The History Boys* as 'just one damn thing after another'. That having been said, it is very useful to have such a convenient historical framework within which to read all or any of the essays that follow. The second list is a selected glossary of terms. When looking through the list of the writs it is hard to avoid a sense of loss of the colour and movement of the law as it was, albeit it inflicted a heavy burden on those trying to decide in what form they should bring their claims to court. For some reason my eye alighted on the 'Writ of Darrein presentment', which is not often in the thoughts or upon the lips of members of the Australian legal profession. The 'Writ of Darrein presentment' also known as an 'advowson of churches' was available to enforce the right to present a candidate for a parsonage to the bishop. As the entry in the chronology points out, the parson of a parish church owned the land the church was on and had the right to collect tithes in the parish. The writ was linked to valuable rights. There seems to be little occasion for its invocation in contemporary society.

Various terms related to feudal rights, titles and obligations also appear. One of those is 'subinfeudation'. As the book explains, where the king granted tenure to a baron, and the baron to a mesne lord, and the mesne lord carved out of his grant a little more, the tenure was said to be subinfeudated. This was abolished by *Quia Emptores*. The glossary entry remarks that:

> The preface to the second edition of *Meagher, Gummow and Lehane's Equity* suggested (obliquely, but sternly) that if the statute was ever repealed, subinfeudation would revive as a possible way to make land grants in England.[6]

There does not, however, seem to be a popular call for the reinstatement of this threatening sounding term which might now usefully be appropriated to name some uncomfortable medical procedure.

The legal histories covered by the chapters of both volumes begin with that of the common law and

equity introduced by James Watson under the title 'A Sketch'. The great exponents of the common law, Glanville and Bracton, and their treatises, are dealt with in a single chapter by Justin Gleeson. Statutes which shaped the common law are discussed by James Emmett, and the development of the conscience of equity explained by Fiona Roughley. The introduction of the common law into Australia is described by Jeremy Stoljar and the development of Australian land law by Patricia Lane. Australia's constitutional evolution from colony to dominion and from dominion to nation is outlined by Susan Kenny. The role of doctrines of precedent is considered as an aspect of the common law tradition and as an aspect of Australian nation building. The conclusion offered by Geoff Lindsay who wrote the chapter on that topic is that:

> The Australian legal system having come of age with confirmation of the High Court as its ultimate court of appeal, the 'moral' of this historical essay is that any legal researcher in search of an Australian 'doctrine of precedent' could do well, hereafter, to start there.[7]

Along the way, Mark Leeming, in an essay entitled 'Five Judicature Fallacies', creates the character of a mysterious 'Teacher' who guides two guilless students through shoals of misconception about equity and the effects of the Judicature Acts. It may be that the students are proxies for miscreant judges and others on the wrong side of fusion debates. There is a notional evaluation by the two students at the end of the class. One says 'I don't know what to think!', the other says 'Before we started today, I thought I understood this material completely.' The Teacher is evidently satisfied with the outcome, observing:

> I overheard you both. I regard the class as a success.[8]

It was pleasing to see that the Teacher did not use 'Ashburner's metaphor' that:

> The two streams of jurisprudence, though they run in the same channel, run side by side and they do not mingle their waters.[9]

— a metaphor which seems to challenge common sense and classical physics.

In a chapter entitled 'The Separation of Powers and the Unity of the Common Law', written by Justin Gleeson and Robert Yezerski, the influence of Chief Justice Marshall's decision in *Marbury v Madison*[10] upon Australia and particularly, via Andrew Inglis Clark, upon the inclusion of s 75(v) in the Constitution is discussed. The authors describe its period of dormancy in Australian law after federation and its restoration which began in 1975 with the judgment of Gibbs J in *Victoria v Commonwealth.*[11] As the authors observe:

> *Marbury* has been generalised to a principle about the rule of law and its administration, asserting the primary role of the courts to review the actions of both co-ordinate branches of government, and to hold those branches to the norms of both constitutional law and now the ever-burgeoning administrative law.[12]

There is a chapter in the book written by James Allsop and Amanda Foong dedicated to Justice Joseph Story, whose contribution by way of his legal writings was not limited to the United States but travelled across the Atlantic to England and indeed to Australia where his works are still quoted in judgments of the High Court. The court has referred to Story in a number of decisions in recent years dealing variously with the equitable doctrine of contribution,[13] the validity of control orders under anti-terrorism legislation,[14] the unpaid vendor's lien,[15] contribution between co-obligors,[16] the common law doctrine of failure of consideration,[17] unconscionable conduct[18] and the notion that guardianship applies to property and not to persons.[19]

The second last chapter in the first volume, written by my colleague Justice Hayne, is about Sir Owen Dixon. In that essay, Justice Hayne quotes Robert Menzies at Dixon's farewell sitting:

> when some student ultimately essays the task of examining your own work … he will find that you, perhaps more than any other man, have woven the stuff of legal history into the fabric of modern statute and modern decision.[20]

The final chapter in Volume I is by Ruth Higgins and is entitled 'The Jurisprudes'. It discusses those jurisprudential thinkers whose work has influenced the development of our law. The chapter ranges from the philosophers of ancient Greece and Rome to those of medieval Europe, the period of the Enlightenment and then the proponents of a scientific approach to jurisprudence. The Hart-Fuller

debate is covered and what the author describes as the 'post-modern departure'.

In the second volume, which moves into the history of commercial common law, we begin with a 'sketch' by James Watson entitled 'Praecipe to Negligence and Contract'. There is a discussion of the *writs praecipe* and their relationship to modes of trial. The writs of trespass on the case and trespass on the case on assumpsit and the growth of the actions in negligence and contract are discussed, as are *quantum meruit* and *indebitatus assumpsit*. The history of the idea of debt is covered in the second chapter entitled 'A Note on the Curious Incidents of Debt', written by CJR Duncan and James Watson. A chapter by Mark Lunney on 'Trespass, the Action on the Case and Tort' follows, then 'Detinue Trover and Conversion' by John Randall and Brendan Edgeworth. 'The Sources of Defamation Law' is the title of Chapter 5, written by David Rolph, which begins correctly:

> Defamation law is one of the most arcane areas of private law.[21]

The author quotes Ipp JA who described that field of the law as 'the Galapagos Islands Division of the law of torts'.[22] There is a chapter on legal professional privilege by Peter Brereton and then more on negligence, this time in the nineteenth and early twentieth centuries by Barbara McDonald. Contract development through the looking glass of implied terms is discussed by Elizabeth Peden, followed by a chapter on the history of restitution by Ian Jackman and why it matters. A well-deserved place is found for Lord Mansfield in Chapter 10, written by Ben Kremer, which is followed by a history of money and bills of exchange written by Ann McNaughton who, in the following chapter, also sets out the history of cheques and banking. The history of assignment is discussed by Greg Tolhurst. The question of the assignment of choses in action in restitution was recently before the High Court in *Equuscorp Pty Ltd v Haxton*.[23] That decision merits an equivocal reference in footnote 127 against the proposition in the text that the interest necessary to support an assignment of a chose in action '… cannot flow from the assignment itself.' The footnote supports

This book is a rich source of learning and reference for students, practitioners and judges alike.

the proposition in the text by reference to a decision of the New South Wales Court of Appeal followed by the notation '… Cf *Equuscorp Pty Ltd v Haxton …*' and a quote from the plurality judgment stating that 'the assignment of the purported contractual rights for value indicates a legitimate commercial interest on the part of the assignee.' The last three chapters cover the legal concept of agency written by Robert Dick, corporations by Michelle Wibisono, and the history of bankruptcy, and insolvency law by James Allsop and Louise Dargan.

I have two complaints about the book. The first is that it doesn't mention *Cadia Holdings Pty Ltd*,[24] not that there was a topic in any of the chapters that was directly relevant to it, save perhaps for the chapter on the reception of the common law into Australia. The entitlement of the minister for mines for New South Wales, considered in that case, to more than $8,000,000.00 of royalties in copper mined from land at Orange, was linked to the content of the Crown's prerogative rights to the royal metals and statutes of the sixteenth and seventeenth centuries modifying that prerogative. The connection and the outcome were rather direct evidence in that context of the significance that legal history can sometimes have in contemporary litigation.

The other case not listed was *Bilbie v Lumley*.[25] It was a demonstration of the sometimes slender foundations of longstanding rules of judge-made law, in that case longstanding until the decision of the High Court in *David Securities Pty Ltd v Commonwealth Bank of Australia*.[26] In *Bilbie v Lumley*, Lord Ellenbrough asked counsel for the plaintiff, Mr Wood, later Baron Wood:

> whether he could state any case where if a party paid money to another voluntarily with full knowledge of the facts of the case, he could recover it back on account of his ignorance of the law.[27]

The report of the decision recorded that no answer was given. His Lordship went on to say:

> Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.[28]

That dictum solidified into a rule with the blessing of Chief Justice Mansfield in *Brisbane v Dacres*[29] who accepted the proposition from *Bilbie v Lumley* observing:

> Certainly it was not argued, but it was a most positive decision; and the counsel was certainly a most experienced advocate and not disposed to abandon tenable points.[30]

And the rest, as they say, 'was history'.

This book is a rich source of learning and reference for students, practitioners and judges alike. I certainly hope that it will find its place, inter alia, in legal history courses in more than one law school. I congratulate the editors: Justin Gleeson, James Watson, Ruth Higgins and Elizabeth Peden for compiling these volumes and Federation Press for publishing them. We should be grateful to them and to the contributors. They have done a great service to us all.

Endnotes

1. Sir Henry Maine, *Ancient Law: Its Connection to the History of Early Society* (1883), p.48.
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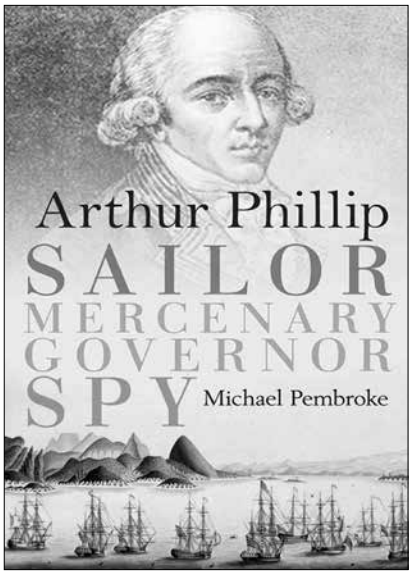
3. Sir Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I* (Cambridge University Press, 2nd ed, 1898) vol 1, p.23.
4. William Wirt Howe, *Studies in the Civil Law and its Relations to the Jurisprudence of England and America: With Reference to the Law of Our Insular Possessions* (Little Brown, 2nd ed, 1905) p.112.
5. John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law* (John Murray, 1895), p.69.
6. Justin Gleeson, James Watson and Ruth Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol I, Selected Glossary xxxi.
7. Geoff Lindsay, 'Building a Nation: The Doctrine of Precedent in Australian Legal History' in James Gleeson, James Watson and Ruth Higgins (eds), *Historical Foundations of Australian Law*: *Institutions*, *Concepts and Personalities* (Federation Press, 2013) vol I, p.267, p.296.
8. Mark Leeming, 'Five Judicature Fallacies' in James Gleeson, James Watson and Ruth Higgins (eds), *Historical Foundations of Australian Law: Institutions*, *Concepts and Personalities* (Federation Press, 2013) vol I, p.169, pp.192–93.
9. Denis Browne, *Ashburner's Principles of Equity* (Butterworths, 2nd ed, 1933), p.18.
10. 5 US (1 Cranch) 137.
11. (1975) 134 CLR 338.
12. Justin Gleeson and Robert Yezerski, 'The Separation of Powers and the Unity of the Common Law' in Justin Gleeson, James Watson and Ruth Higgins (eds), *Historical Foundations of Australia Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol I, p.297, p.328.
13. *Friend v Brooker* (2009) 239 CLR 129, 148 [38] (French CJ, Gummow, Hayne and Bell JJ).
14. *Thomas v Mowbray* (2007) 233 CLR 307, 357 n 199 (Gummow and Crennan JJ).
15. *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 324 [21] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).
16. *Burke v LFOT Pty Ltd* (2002) 209 CLR 280, 316 [87], 318 [94] (Kirby J).
17. *Roxborough v Rothmans of Pal Mal Australia Ltd* (2001) 208 CLR 516, 552–553 [94] (Gummow J).
18. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 242–243 [93] (Gummow and Hayne JJ).
19. *Clay v Clay* (2001) 202 CLR 410, 428–429 [37]–[38] (Gleeson CJ, McHugh, Gummow and Callinan JJ).
20. Kenneth Hayne, 'Sir Owen Dixon' in Justin Gleeson, James Watson and Ruth Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol I, p.372, p.373.
21. David Rolph, 'The Sources of Defamation Law' in Justin Gleeson, James Watson and Elisabeth Peden, *Historical Foundations of Australian Law: Commercial Common Law* (Federation Press, 2013) vol II, p.106.
22. See David Ipp, 'Themes in the Law of Torts' (2007) 81 *Australian Law Journal* 609, 615.
23. (2012) 246 CLR 498.
24. (2010) 242 CLR 195.
25. (1802) 2 East 469, 102 ER 448.
26. (1992) 175 CLR 353.
27. (1802) 2 East 469 471; 102 ER 448, 449.
28. (1802) 2 East 469, 473; 102 ER 448, 449–50.
29. (1813) 5 Taunt 143, 128 ER 611.
30. (1813) 5 Taunt 143, 163; 128 ER 611, 649.

Arthur Phillip: Sailor, Mercenary, Governor, Spy

By Michael Pembroke | Hardie Grant Books | 2013

An address by the Hon James Spigelman AC QC at the launch of *Arthur Phillip: Sailor, Mercenary, Governor, Spy*



Sydney's Powerhouse Museum is the home of one of the most significant cultural objects in Australia. The Boulton and Watt engine is the oldest rotative steam engine in the world. Originally installed in 1785 at Whitbread's Brewery, London, it operated for a century: grinding and lifting malt, stirring vats and pumping water and beer. It was on its way to the scrap-yard in 1887, when a trustee of what became the Powerhouse acquired it as a donation.

The engine arrived in Sydney in 1888 on the Centenary of the foundation of modern Australia and was a feature of the original museum for decades. After a full restoration, it was given pride of place in the new Powerhouse Museum, opened for the Bicentenary in 1988. The engine represents a critical turning point in the industrial revolution. It was the first commercially successful stationary power plant that operated without wind, water or muscle. In the case of Whitbread Brewery, it replaced a horse wheel.

The importance of this innovation was recognised at the time. King George III came to inspect this marvel of the new age in 1787, a public relations triumph for the brewery. Its historical significance was recognised two years ago when the Bank of England issued a £50 note displaying portraits of the entrepreneur Matthew Boulton and the engineer James Watt, together with an image of the Powerhouse Museum's engine.

Here on display in working order is a visual image of the nation which had the confidence and the competence to dispatch over 1000 people in 11 wooden boats over thousands of miles to create an open air prison and found a new colony, at a place about which virtually nothing was known. No other object in Australia so powerfully represents this extraordinary period of British history.

The Boulton and Watt engine – created at the time of the Founding, acquired on the Centenary and re-installed on the Bicentenary - joins other national treasures which celebrate our British heritage.

I refer to the *Endeavour Journal*, the handwritten account by Captain Cook of his first Pacific voyage, bought in 1923 for the then huge sum of £5000, to great controversy, at the direction of Prime Minister Stanley Melbourne Bruce, on display in the Treasures Gallery of the National Library.

I refer also to the copy of the Magna Carta, acquired by Prime Minister Sir Robert Menzies in 1952, for the sum of £15,600, on display at Parliament House in Canberra. This is one of only two original versions in existence of the reissue of Magna Carta by Edward I in 1297. This version is of greater practical significance than the original, somewhat different, Charter of 1215, of which four originals exist. It was the 1297 version that became the first piece of legislation in the English statute book and is, accordingly, of greater constitutional significance than the mediaeval peace treaty of 1215, the 800th anniversary of which will, I trust, not be overwhelmed in Australia by popular enthusiasm for the Gallipoli Centennary.

A third example is the colossal 50 foot high fountain in Sydney's Botanic Gardens, with its 15 foot high statue of Governor Arthur Phillip, surrounded by four classic bronze figures, representing commerce, agriculture, navigation and mining and featuring four marble consoles with bronze plaques of Aboriginal Australians. Commissioned by Sir Henry Parkes from an Italian born and trained resident of Sydney, Achille Simonetti, it suffered years of controversy over both style and cost, particularly after Parkes lost office. It was eventually unveiled

on the occasion of Queen Victoria's Diamond Jubilee in June 1897. It cost £14,000, about $1.5 million in today's dollars. It is probably the most expensive statue in Australia.

This monumental fountain in Sydney is the only significant memorial to the outstanding achievements of an extraordinary man, so well documented in Michael Pembroke's new biography.

Phillip has never received appropriate recognition in England. His treatment does not suggest that there is any sense of pride in England about Australia's success.

A few years ago, on the basis of a ruling by the Consistory Court of the Church of England, which permitted the remains of a national hero to be returned to the nation he had served, Geoffrey Robertson QC led a campaign to bring Phillip's remains to Australia, if they could be found after the change of orientation of the plaque in the modest church in Bathampton where Phillip is buried. The church, as Geoffrey put it, in his inimitable style, had literally 'lost the plot'. However, if we can find Richard III, I suppose we can find Phillip.

Laying the foundations for a successful nation in Australia was, all Australians would agree, Phillip's crowning achievement. Phillip has never received appropriate recognition in England. His treatment does not suggest that there is any sense of pride in England about Australia's success. Indeed, often it appears that the British attitude to us is that we are too successful for our proper station in life, of which we need to be reminded from time to time. (As is happening in the current cricket test series). This is, unfortunately, the same as our own attitude towards the success of New Zealand.

Past indifference in England will change next year, on the 200th anniversary of Phillip's death.

Most significantly, a memorial stone is to be placed in Westminster Abbey, to commemorate his service to the Royal Navy and as the first governor of Australia. Joining many of the most famous names in British history, this is a high, and entirely appropriate, form of recognition. Under the Abbey Statutes, the dean of Westminster has authority to direct the creation of memorials. I am informed by the abbey that the dean has approved such a memorial after representations by the Britain–Australia Society, supported by the Australian High Commission.

Further, suitably etched glass doors will be installed at the entrance of the church where he is buried, to enhance access to the Memorial Chapel and the Phillip ledgerstone. A new tribute sculpture is to be erected, across from his former house, in the garden of the classical Upper Refreshment Rooms – of great social significance, as Michael tells us - in the Bath of Phillip's day.

From an Australian perspective, the greatest interest is Phillip's remarkable contribution to our history. For me, two aspects of this contribution stand out. First, the high level of organisational skill involved in ensuring the proper provisioning of the First Fleet and its safe journey across more than half the world, to Sydney. Secondly, the strength of Phillip's humanitarianism and sense of moral responsibility. This was manifest in his early rejection of the possibility of allowing slavery in the new colony, in his empathetic dealing with subordinates, in his efforts to ensure good relations with indigenous Australians and in his regime for convicts based more on the principle of rehabilitation than that of punishment. He set a high moral tone and promoted an egalitarian ethos for the colony, which proved to be resurgent despite subsequent regimes with a contrary persuasion.

Michael Pembroke's biography is not, however, a book only about Australia. Other historians set out and assess Phillip's contribution in that respect in great detail. This is a biography in the true sense: a story of a man's life in his times, with equal weight being given to each phase of that life. Phillips's life is placed in its context. That context is British. The Australian years are only one part of his life.

In 2009, when I delivered the Annual History Lecture on the Bicentennial of Lachlan

Macquarie, I sought to place the Bigge Reports in their British context, rejecting the parochial perspective of most Australian writing on the subject. Michael's book is another example of the importance of that historical context.

Unlike so much history writing, this is an exceptionally readable book. The narrative never flags and the reader is borne along effortlessly through the personal chronology, whilst absorbing an enormous amount of detailed information about the incidents of life in the eighteenth century.

The author takes us through the contemporary streets of the city of London, to the Hampshire countryside, to Rio de Janeiro and to Cape Town – when the former was full of Catholic churches and the latter had only two churches, one Lutheran and one Calvinist. We are introduced to fashions in music and clothes, to the virtues recognised in Enlightenment England, to the legal incidents of a marriage breakdown, to the development of London's pleasure gardens, to the presumed health benefits of the hot springs at Bath and to the difference between a subscription library and a circulating library. We are given short vignettes on the conduct of whaling operations, on the textile trade and on the uses of cochineal, providing the dye essential for the red coats of British soldiers.

Although all this detail is fascinating and informative, the life of Arthur Phillip is dominated by one central theme: the Royal Navy. This is the world within which he made his life, from a young recruit with origins in genteel poverty until his final rank as a full admiral of the blue, at the top of the nine ranks of British admirals.

The key to the long-term success of the Royal Navy was that, within the limits of an aristocratic culture, it was a meritocracy. Contrast this with the British Army where commissions were available for purchase, until the costs became manifestly too great after the incompetence displayed in the Crimean War. That is not to say that patronage, in accordance with the standards of a status-bound society, was not important in the navy. Phillip's career manifests such, both received and given. Nevertheless, this book records the story of a man promoted on merit.

Unlike so much history writing, this is an exceptionally readable book.

I am reinforced in the view I have earlier expressed about the importance of the financial incentives, by way of prize money, to the success of the Royal Navy over the centuries. To this I was able to add information, of which I was hitherto unaware, about the monetary rewards for the successful deployment of fire ships.

This book provides considerable insight about an institution at the heart of English power and empire, a fascinating array of fact that drives the narrative and entrances the reader. We learn of the employment of young boys, as Phillip was when first recruited, and the operations of the charity school he attended. We are introduced to the operation of press gangs, to the duties and entitlements of different levels of the complex hierarchy of ranks in the navy, to the differentiation of kinds of ships and the rating system of vessels based on number of cannons. There are short but incisive descriptions of the rhythms of shipboard life, of the symptoms and treatment of scurvy, of the mechanics of cannon firing and of battle tactics.

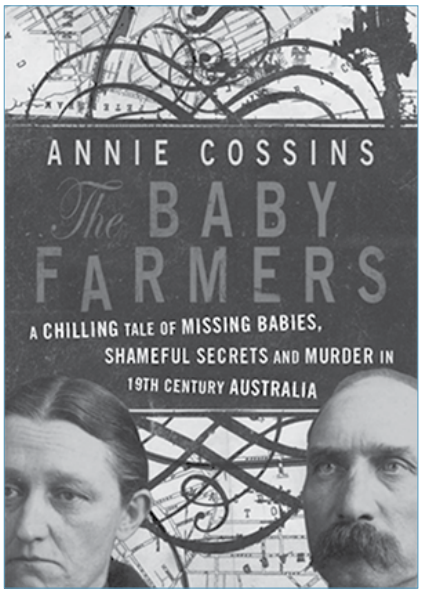
The reader is also given sketches of the crucial international disputes in which Phillip was involved: including the Seven Years War, the Third Colonial War between Spain and Portugal, the American Revolutionary War and the Napoleonic War. Phillip served on secondment to the navy of Portugal, England's oldest ally, and was involved in the border disputes of the Plate estuary in South America, where, we are informed, his capacity for covert work developed. We are told of the espionage priorities in his subsequent secret missions in France.

And always there is the sea: the currents and winds of the Atlantic and Indian Oceans, the perils of the Cape of Good Hope and of Cape Horn, the dramatic perils of the Southern Ocean and the tactics involved in saving a ship in huge seas.

This was a life lived in service of the Royal Navy. An honourable distinguished life. It is well told and I commend this biography to you.

The Baby Farmers: A Chilling Tale of Missing Babies, Family Secrets and Murder in 19th Century Australia

By Annie Cossins | Allen & Unwin | 2013



Baby farming in late Victorian New South Wales was a well-known occupation. Advertisements appeared regularly in newspaper classified sections offering children for adoption, sometimes for a 'premium'. If these words were used, the child was to be sold to the baby farmer. The advertisements were often vaguely coded:

> WANTED Lady to adopt pretty little GIRL two and a half months old, fair, large blue eyes, no premium give. Address: Mrs Greves, G.P.O., Sydney.
>
> WANTED, kind person to take charge of Baby. Apply, stating terms to 333 Herald Office, King-st.

Syphilis was then rampant in the colony, and inordinate numbers of children were born affected. Many of them perished in their infancy, as they were the offspring of syphilitic parents. Many were sold for paltry sums to couples who themselves were also infected.

This is the backdrop to Dr Anne Cossins' fascinating look at the lives of John and Sarah Makin, who were convicted of murder of Horace Amber Murray in 1893 at Darlinghurst in Sydney. They are, of course, the subject of the decision of the Privy Council in *Makin v AG for NSW* [1894] AC 57, perhaps one of the most famous cases in the law of evidence, and prior to the introduction of the co-incidence rule in the *Evidence Act* 1995, a leading case on similar fact evidence.

Dr Cossins, who is an Associate Professor at the Faculty of Law at the University of New South Wales, is an occasional screenwriter, author and actress. Indeed she played Sarah Makin in the 2009 production of *Deadly Women,* which was broadcast on the ABC. Dr Cossins is also a criminologist who has conducted important research into evidence given by sexual assault victims, and in particular delayed complaints made by children.

The book relies largely on historical documents that Dr Cossins has managed to find in archives throughout New South Wales. To say that she is a dedicated researcher is something of an understatement. Birth, marriage and death certificates are examined in detail and contemporary newspaper accounts are rummaged through. She tells the surprising story of *Godfrey's Cordial*, a potion of opiates that was commonly given to babies to stop them from crying, and its use and abuse by mother of all classes and social strata.

As a result of her efforts, Dr Cossins uncovers the strange tale of the bigamist Constable James Joyce (Australia's own) who pursues the Makins over several years, from the discovery of the bodies of thirteen babies buried in the backyards of cottages in inner Sydney, to inquests to murder convictions and ultimately to John's execution and Sarah's imprisonment. It is Dr Cossins' thesis that whilst John and Sarah Makin were likely guilty of many crimes, including the manslaughter of several if not all of the many children they 'adopted', they were ultimately convicted of the death of the wrong baby.

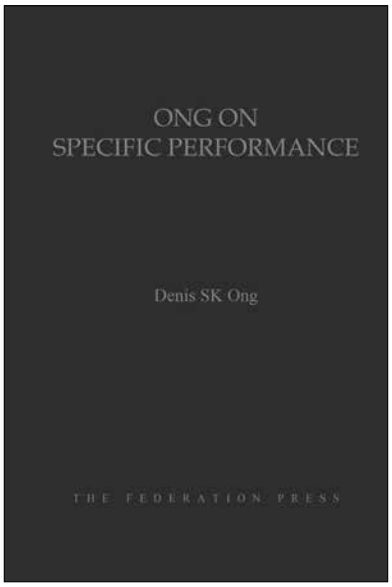
The book is successful in several respects. First it is a fascinating historical cultural snapshot of life in pre-federation Sydney. Dr Cossins describes a thriving colonial town, a distant outpost of the Empire locked in the hypocrisy of a puritanical time. As Dr Cossins points out:-

> Sarah' s and John's crimes were also the crimes of a society that condoned infanticide while, paradoxically, stigmatizing unmarried mothers.
>
> The legal status of an illegitimate child was described as 'filius nullius', child of no-one, which sums up the legal and social reality of the times. Since these children had no legal status, it is hardly surprising they had little or no social value. Life was cheap for illegitimate babies. Baby farmers provided an unsavoury but

continued on page 106

Ong on Specific Performance

By Denis SK Ong | The Federation Press | 2013



Professor Denis Ong of Bond University has taught and written extensively on the topic of equity for many years.

His latest book on specific performance accompanies his previous works, *Ong on Equity* and *Trusts Law in Australia* (the latter now in its fourth edition).

Ong on Specific Performance is arranged in six chapters and examines all aspects of suits for specific performance.

The first chapter analyses the difference between performance of an executory and an executed contract.

The second, much longer, chapter considers the requirements for the making of orders for specific performance, including the inadequacy of common law damages and the plaintiff's readiness and willingness to perform the contract.

Chapter three gives examples of contracts where specific performance may be refused, including contracts requiring the supervision of the court and contracts of personal service.

Chapter four deals with the doctrine of part performance.

Chapter five looks at specific performance and common law damages as alternative remedies. This includes a detailed discussion of *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 which established the proposition, among others, that a vendor who has initiated proceedings for specific performance may be able despite, and during the pendency of, such proceedings to rescind the contract for further breach.

The final chapter deals with the defence of hardship.

Ong is not afraid to speak his mind. He describes the decision of one member of the High Court in *Foran v Wight* (1989) 168 CLR 385 as 'conceptually problematic as well as irreconcilable with pre-existing high authority' and one which gives rise to 'a capricious dichotomy of outcomes'. All this despite the fact that the said approach – as Professor Ong fairly acknowledges – has attracted support at intermediate appellate level on at least two occasions.

Ong on Specific Performance is written in a lively way, but also in a clear, accessible style. Possibly it was written with students in mind. It will attract a wider readership. Professor Ong has produced a useful, concise yet comprehensive survey of this important remedy.

Reviewed by Jeremy Stoljar SC

Continued from page 106

> necessary service that filled the vacuum left wide open by government policies, the market economy and the limited assistances available through charitable organisations.

It is also a romp of a detective story. Dr Cossins clearly relishes being able to uncover facts and evidence in order to tell a story which has never been told in full. It is a story of convict heritage, family betrayal and forensic science still in its infancy. In the days before radio, television and mass communication, it is easy to understand how the Makins' notoriety fascinated the people Sydney, many of who attended or attempted to attend the inquests, trial and appeal. Contemporary accounts suggest that the court hearings were each and every one a full house.

From a lawyer's perspective the book provides a fascinating insight into how considerably the criminal law has evolved, and in particular how our notions of a fair trial have developed in the 120 years since the convictions of the Makins. Dr Cossins applies the sensibilities of the twenty first century criminal lawyer to demonstrate how different the outcome might have been, had the trial been held today.

Reviewed by Richard Weinstein

Poetry

By Trevor Bailey

The Court is Pleased

Oh! as your Honour pleases!
Your Honour is *such* a wit!
Your funny funny wheezes?
Sui generis, we submit!
It demeans us not one bit
when we chorus as appeasers:
Oh! as your Honour pleases!
Your Honour is *such* a wit!
At law school you copped teases
as a boring little tit;
now from Wills to Dust Diseases,
we groan through teeth that grit:
Oh! as your Honour pleases!
Your Honour is *such* a wit!

The End of Silk Road

Article in *Sydney Morning Herald*, 4 October 2013. New senior counsel were announced the same day, but the article concerned a different drug of addiction.

Your years of slogging up the hill
have finally found a stop;
your tears from floggings at the mill
have finely raised a crop

of blooming opportunities
to practise what you preach;
but will new-found impunities
put charm beyond your reach?

A harder-working weaver one
is sorely pressed to name,
and fabricating can be fun
when spinning is your game.

The Spinners' Guild has recognised
the virtues of your gift
- for 'also rans' they organised some short
to add to shrift -

so arrogance you must eschew
within the elite band,
now the union's christened you
a worthy Leading Hand.

Yes, bid farewell to woollen stuff
and say hello to silk!
With overalls quite flash enough
to show you've found your ilk

among the workers at the loom,
now you can say with ease:
'I so deserve the largest room
and need the largest fees!'