THE JOURNAL OF THE NSW BAR ASSOCIATION | AUTUMN 2013

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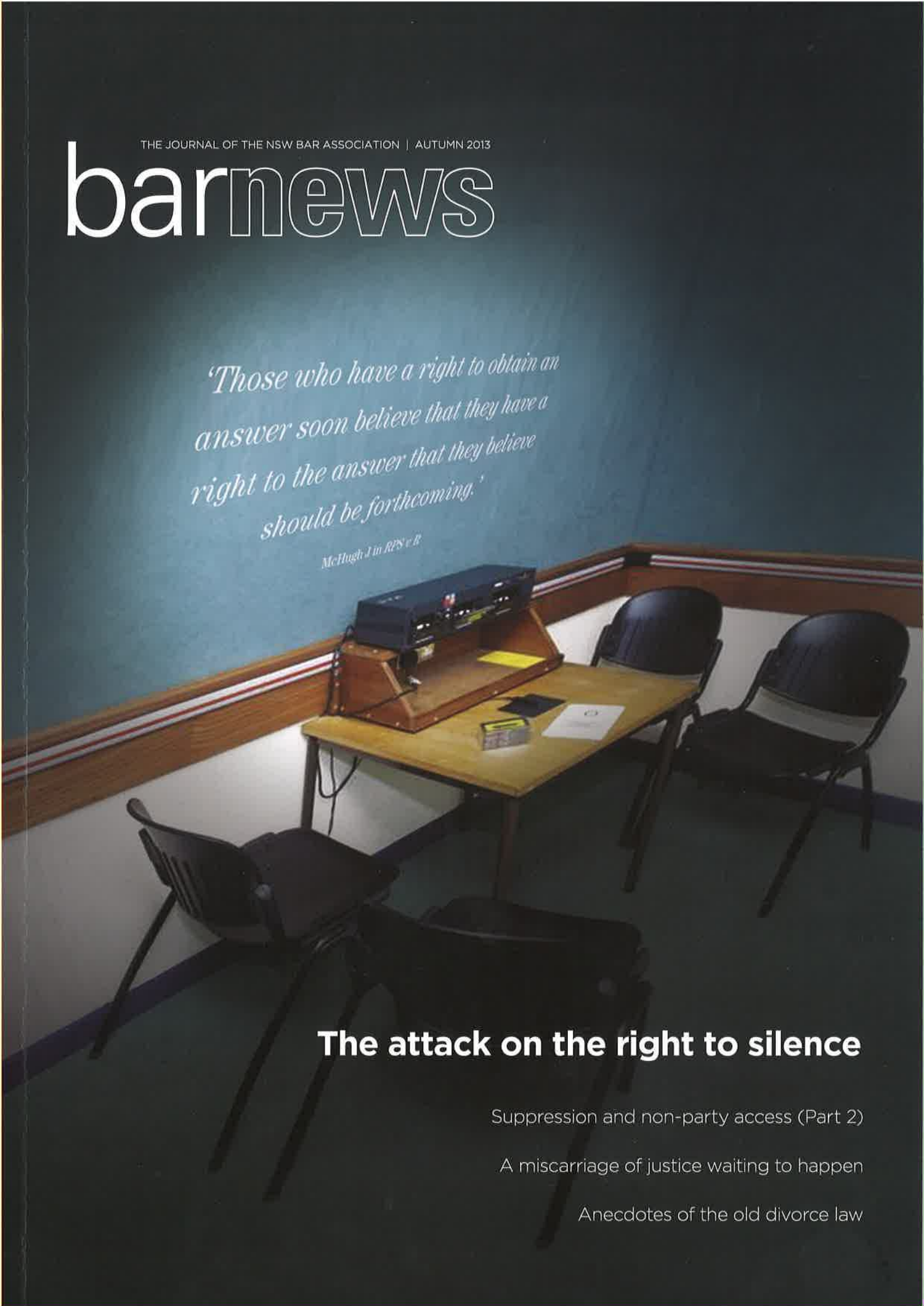

The attack on the right to silence

Suppression and non-party access (Part 2)

A miscarriage of justice waiting to happen

Anecdotes of the old divorce law

Cover: Interview room at a police station in Birmingham, UK.
Photo: West Midlands Police / iStockphoto.com

Contents

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ISSN 0817-0002

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As appears from the cover, one of the topics discussed in this issue is an accused person's right to silence.

The New South Wales Government has recently passed legislation changing the right to silence.

Among other things, the government has introduced amendments to the Evidence Act to enable adverse inferences to be drawn in some circumstances from a defendant's failure or refusal to mention a fact during police questioning.

The president's piece, 'Attack on the right to silence', examines the new legislation.

Describing it as the most significant changes to criminal procedure in more than a century, the president observes that the right to silence has been called a fundamental aspect of a fair trial and, drawing on some of his own experiences, emphasises the importance of the right to silence in practice. The president argues that there is no adequate rationale for the legislative changes and that they are unnecessary.

Separately, in his regular column, the president describes the Bar Association's campaign against the introduction of the legislation, which resulted in a number of substantial changes being made to the legislation as it was originally proposed.

Michael Gleeson has also contributed a piece on the changes to the accused's right to silence, describing the package of legislative reforms and also looking at the UK experience.

Another important debate featured in this issue is the question of whether counselling communications made to or about victims in sexual assault cases should be privileged.

Bellanto QC and Greg Walsh examine the provisions of the Criminal Procedure Act establishing this privilege and argue that reform is needed, saying it can only be a matter of time before an accused is wrongly convicted because he or she has been denied access to sexual assault communications.

Catherine Gleeson, on the other hand, argues that the provisions are an attempt to balance the right of an accused to a fair trial and the right of an alleged victim to confidentiality, and that the provisions will work, and work well, when the representatives of the Crown, defence and complainant work together to identify and confine the issues the court must consider when determining the application of the privilege.

Other articles in this issue include the second part of the article on suppression and non-party access by Sandy Dawson and Fiona Roughley. This instalment deals with the practicalities of how non-parties may obtain access to documents in court proceedings where no suppression or non-publication order is in place. The first part of this article was published in the December 2012 issue of *Bar News*.

Andrew Combe has contributed an article on financial agreements under the Family Law Act, the drafting of which, he notes, is fraught with difficulty and is one of the greatest sources of claims for professional negligence in this area. The article looks in particular at what happens if one of the parties to a financial agreement goes bankrupt.

In a related topic, in bar history John Bryson has contributed a piece called, 'Anecdotes of the old divorce law', which looks back to the days when a court had to be persuaded through admissible evidence that a marriage should be brought to an end.

Our regular columns, Julian Burnside's *The Last Word* and Keith Mason's *Miscellany*, are both back, and Daniel Klineberg has contributed a review of Mason's book *Lawyers Then And Now: An Australian Legal Miscellany*. And Bullfry has ventured into the unpredictable new world of mediations.

Jeremy Stoljar SC

Editor

Speaking out for the right to silence

By Phillip Boulten SC

Last month the government successfully ushered two important bills through the parliament that will substantially undermine an accused person's right to silence in criminal proceedings. The *Evidence (Evidence of Silence) Amendment Bill 2013* and the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Bill 2013* amend the Evidence Act and the Criminal Procedure Act to bring about some very important changes to criminal procedure. At the time of writing, neither of the bills have yet been proclaimed.

The NSW Bar Association conducted a media and lobbying campaign against the two bills which will place restrictions on the right to silence and will bring about mandatory disclosure requirements on the defence in criminal trials.

Features of the campaign included:

- a joint public forum held in conjunction with the Sydney Institute of Criminology held on 11 February in the common room;
- I made numerous electronic and print media appearances in February and March pointing out the shortcomings of the bills and their effect on individual liberties; and
- lobbying members of parliament and provision of briefing materials in an endeavour to halt the progress of the bills.

When introducing the bills, the attorney general indicated that a number of substantial changes had been made to the government's proposals, principally in response to criticisms from the bar. The police station caution provisions were changed to make it a pre-condition of the drawing of an adverse inference against a defendant that exercised their right to silence that (a) the caution was 'given in the presence of an Australian legal practitioner' and (b) that 'the defendant had ..... been allowed a reasonable opportunity to consult with that Australian Legal Practitioner ... about the general nature and effect of the special caution'.

This restriction of the circumstances in which the provision will apply is quite different to the original proposal that was contained in an exposure draft bill circulated in October 2012. It is now likely that the provision will operate in very few cases. Indeed, practitioners advising suspects are most unlikely to allow themselves to be present when the 'special caution' is administered in the police station.

Although the bar can count this manoeuvre as a measure of its successful campaign, it seems that the law as passed is a reflection of the government's intention to eventually enact a more wide ranging provision.

The Shooters and Fishers Party gave the Bar Association assurances that they would oppose the bills but they voted in favour of the legislation on 20 March...

The Criminal Defence Disclosure provisions that amend the Criminal Procedure Act have been crafted in a way that requires full prosecution disclosure prior to any defence case statements being required to be lodged.

The Bar Association continued its campaign against the bills up until the time they passed through the parliament. The Labor opposition

and the Greens Party opposed the bills in the Legislative Council. The Shooters and Fishers Party gave the Bar Association assurances that they would oppose the bills but they voted in favour of the legislation on 20 March, ensuring that the bills passed the Legislative Council by 21 votes to 19. The Shooters Party votes were crucial to the safe passage of the bills.

The Bar Association recognises the importance of making members familiar with the requirements of the new bills and has embarked on a process of conducting CPD seminars in Sydney and Newcastle to this end.

The bills are the subject of statutory review to be conducted after five years in the case of the right to silence provisions and two years in the case of the Defence Disclosure Provisions. The Bar Association will be closely monitoring the operation of the legislation and would appreciate the assistance of members in providing their own experiences of the operation of the laws once they come into effect.

... rather than taking a completely obstructionist stand on the issue, the association is attempting to formulate constructive alternative policies that might assist the government achieve some of their aims but which would ameliorate the impact of the proposed scheme on many injured people.

On a completely different front, the Bar Association is engaged in negotiations with the government about the future shape of the Motor Accidents Scheme. It is clear that the government is determined to introduce a 'no fault' scheme that is likely to substantially reduce benefits to injured persons and cut them out of court proceedings. But rather than taking a completely obstructionist stand on the issue, the association is attempting to formulate constructive alternative policies that might assist the government achieve some of their aims but which would ameliorate the impact of the proposed scheme on many injured people.

In March the Bar Council was pleased to approve new reader/tutor guidelines. The guide was launched in the common room on 23 April and will provide substantial assistance to both tutors and readers in the future.

Finally, the Bar Council was pleased to pass a resolution conferring life membership on our former president, Bernard Coles QC - a most deserved award.

A rose by any other name

By the Hon John Nader RFD QC

It is strange that professional lawyers practising in Australia cannot confidently agree about the circumstances in which one may accept a retainer. There has been disagreement in New South Wales on the question; disagreement that may, and has in one or two cases, the potential to affect significant rights of parties to litigation.

For better understanding the problem I shall summarise one of the cases that has raised it fairly and squarely.

Note though, that the facts will be edited to protect the innocent and the guilty. One of the latter - the principal offender - being no less than the New South Wales Government cannot and should not be protected. In all of its complexions, the government has still not learnt that taking legal practitioners out of important disputes does not result in quicker definition of the issues. It is argued that by this means lawyers will not be able to obfuscate and confuse poor, simple, ignorant non-lawyers. Legislation with similar provisions has been enacted over many years in a diverse range of jurisdictions.

A case subject to the *Mining Act 1992* (NSW) involved a compulsory arbitration between a miner and a landowner. The miner, relying on section 146 of the Mining Act, had informed the landowner that it did not agree to the landowner being represented by an Australian legal practitioner.

That section provides amongst other things:

> At any hearing ... a party ... may be represented: ... by an agent who is not an Australian legal practitioner, or ... *with the agreement of the parties*, … by an Australian legal practitioner. [emphasis added]

The Mining Act requires that the tribunal must act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

In all of its complexions, the government has still not learnt that taking legal practitioners out of important disputes does not result in quicker definition of the issues.

By s 6 of the *Legal Profession Act 2004* (NSW) an Australian legal practitioner is an Australian lawyer who holds a current practising certificate.

The landowner's solicitor found out by inquiry that the miner intended to be represented by a legally qualified person who had formerly held a practising certificate but who had not renewed it. Thus, would argue the miner; its representative, not holding a practising certificate, would not be an Australian legal practitioner as defined and would need no agreement to represent the miner in the arbitration.

The landowner's solicitor had intended to retain counsel for the arbitration, but was stymied when the miner did not agree to his being represented by an Australian legal practitioner. Neither the solicitor nor counsel retained by her would be permitted to appear in the arbitration. So the solicitor looked around for a legally qualified person who did not hold a current practising certificate, and one was found. But being a cautious person and not wishing to incur the wrath of the Bar Association, the former barrister sought an opinion from the New South Wales Bar Association. The question asked was 'would my appearance be in breach of section 14 of the Legal Profession Act which prohibits a person from engaging in legal practice unless the person is an Australian legal practitioner as defined. (See s 6 above).

Senior officers of the Bar Association advised the barrister, correctly with respect, that he was sailing close to the wind and that it would be inadvisable for him to appear even in an arbitration without a practising certificate. No more specific advice was given, but I will return later to why I think the Bar Association advice was good advice, even if it was not a direct answer to the question asked; perhaps it was the answer to the question that should have been asked.

The former barrister, conscious of the good sense of the advice he received, immediately took out a practising certificate knowing that by so doing he had thereby precluded himself from appearing for the landowner in the

arbitration by reason of the lack of agreement referred to above.

But the fact remains that the Mining Act in terms recognises the possibility of a qualified lawyer appearing in an arbitration without the agreement of the other party: a party may be represented by an agent who is not an Australian legal practitioner; that includes a person who does not hold a current practising certificate; a class that includes fully qualified lawyers.

In my experience lawyers often cause proceedings to move more quickly than they otherwise would.

But it might be wise for the qualified lawyer who does not hold a practising certificate to be careful not make any submission on a matter of law to the arbitrator. There is nothing in the Mining Act that can be construed as permitting an agent, who is not an Australian legal practitioner, but who is a qualified lawyer, to give legal advice. Of course it is only a tentative opinion given without the benefit of other input, but for such a person to express a legal submission, or even to concur in one in certain circumstances it may be in breach of the *Legal Profession Act 2004*.

However, if the qualified lawyer, as an employee of the miner, provides legal services to the miner in the ordinary course of his employment, and provided that he receives no fee, gain or reward for so acting, other than his ordinary remuneration as an employee, he is not prevented by the Legal Profession Act from engaging in legal practice for his employer notwithstanding that he is not an Australian legal practitioner: see s 14 and ss (1) and (3).

Can I suggest to the legislature that a more efficient and fairer way to avoid the mischief perceived to flow from allowing legal technicality from clogging the arbitrations would be to exclude the representation of the parties by legally qualified persons altogether, and to allow such representation to all parties if the arbitrator in a particular case considers that such representation would make his/her task fairer or quicker? In my experience lawyers often cause proceedings to move more quickly than they otherwise would.

The gross unfairness of the present legislative scheme is that miners, by the simple expedient of employing in-house lawyers and requiring them not to hold practising certificates, can be legally represented in arbitrations without any agreement by the landowner; while the landowner, very frequently a struggling farmer, can do nothing to secure representation even if he or she can afford to retain a solicitor or barrister. Thus the miner has a marked tactical advantage in a highly tendentious jurisdiction that the landowner must accept.

Whatever influenced the legislature to allow this serious imbalance, it should be remedied without delay.

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Advocate's immunity

Benjamin Phillips reports on *Donnellan v Woodland* [2012] NSWCA 433

In *Donnellan v Woodland* [2012] NSWCA 433 the NSW Court of Appeal sat a bench of five judges in light of the issue of advocate's immunity that arose in the appeal by a solicitor from a judgment of Hulme J. In a decision handed down on 18 December 2012, the solicitor's appeal was successful.

Decision at first instance

The appellant solicitor, Mr Donnellan, acted for Mr Woodland in relation to an application under s 88K of the *Conveyancing Act 1919* in which Mr Woodland sought the grant of a drainage easement over property owned by Manly Municipal Council (easement proceedings).

Approximately two years after the easement proceedings had been commenced by Mr Woodland, an offer was made by the council to resolve the proceedings. The easement proceedings were not settled and went to trial before Hamilton J. Mr Woodland's application was unsuccessful and he was ordered to pay the council's costs, including part of those costs on an indemnity basis from the date of a second offer made by the council.

At first instance in the subsequent proceedings brought by Mr Woodland against Mr Donnellan before Hulme J, the solicitor was found to have been negligent in advising Mr Woodland in relation to the council's first offer. The advice in relation to the first offer was found to have been negligent because the solicitor advised that Mr Woodland's prospects of success in the easement proceedings were strong and because he failed to advise that Mr Woodland was likely to be ordered to pay the council's costs regardless of the outcome of the proceedings. Hulme J found that had the correct advice been given, the proceedings would have settled at around the time the offer was made.

Relevantly to the issue of advocate's immunity discussed below, Hulme J considered that the solicitor had not been negligent by failing to advise that a second offer made by the council was likely to be considered a *Calderbank* offer and thus to attract an order for indemnity costs if it was not accepted. That finding was made on the basis that the offer in question was not a *Calderbank* offer, notwithstanding that Hamilton J, who heard the easement proceedings, effectively considered that it had been.

Findings on appeal - negligence

On appeal, all five judges agreed that the finding of negligence in relation to the solicitor's advice that the prospects were strong should be overturned. The Court of Appeal found that although the solicitor 'could have given more cautious advice' (at [103] per Beazley JA), the advice was merely an error of judgment rather than of law and was therefore not actionable.

The negligence finding regarding the advice in relation to the likely costs order was also unanimously overturned. The advice that the solicitor was found to have given, particularly the written advice provided, was considered to be properly characterised as being to the effect that Mr Woodland was likely to be ordered to pay the council's costs, which was correct and therefore not negligent.

In addition, the Court of Appeal unanimously upheld the appeal against the causation finding given the uncertainty as to the basis upon which the council would have been willing to settle the easement proceedings. In the absence of a determination of that issue, the Court of Appeal considered that it was not possible to conclude that such a settlement would have been acceptable to Mr Woodland.

Advocate's immunity

At first instance Hulme J applied the test set out in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12, which his Honour considered to be whether the solicitor's advice in relation to the council's offer was advice 'affecting the conduct of the case in court' or work 'intimately connected with work in a court'. His Honour considered that the test was not satisfied and therefore that the immunity did not apply.

In Beazley JA's leading judgment, her Honour noted that the test applied by Hulme J was effectively a hybrid of different tests set out in *D'Orta-Ekenaike,* and that the correct test was whether the breach of duty in question was conduct that led to a decision affecting the conduct of the matter in court. Her Honour suggested that application of

the incorrect test had led Hulme J into error by causing him to focus on the closeness of the connection, rather than on determining whether the conduct in question led to a decision affecting the conduct of the matter in court.

Beazley JA noted that applying the correct test, the advice of the solicitor in relation to the council's offer led to a decision by Mr Woodland about whether to continue the easement proceedings. The advice was therefore covered by the immunity.

Her Honour noted additional difficulties with the reasoning of Hulme J at first instance. While Hulme J had suggested that the finality principle would not be offended because neither the solicitor nor Mr Woodland sought to challenge the findings of Hamilton J in the easement proceedings, her Honour noted that the finality principle had in fact been offended by requiring Hulme J to consider whether Hamilton J had been right to treat the second offer by the council as a *Calderbank* offer. Her Honour described that as 'the very vice to which the immunity is directed' (at [232]).

Perhaps the most interesting aspect of the decision, and the only aspect about which there was any disagreement amongst the member of the Court of Appeal bench, was the views about how arguments in relation to advocate's immunity should be dealt with.

Basten JA indicated that in his view the appropriate course of action for the Court of Appeal was not to deal with the grounds of appeal in relation to breach or causation in light of the finding that advocate's immunity applied. However, the remaining members of the court considered that because the issue of finality had already been compromised by the determination of the breach and causation issues at first instance, there was no 'need to try to preserve something which is already lost' (at [282] per Barrett JA).

In any event, all the members of the court appeared to agree that judges at first instance should determine the applicability of advocate's immunity (where such a defence is relied upon) before determining the other liability issues. Only where such a defence is found not to apply should the court go on to determine the other liability issues. Indeed, Basten JA suggested that 'the principle of finality will often be most efficiently upheld by an application for summary judgment once the pleadings are closed' (at [262]).

Perhaps the most interesting aspect of the decision...was the views about how arguments in relation to advocate's immunity should be dealt with.

Those comments by the Court of Appeal appear inconsistent with the approach apparently preferred by the majority in *Symonds v Vass*[1] (which included Beazley JA). In that case the Court of Appeal considered that it was unable to determine whether the decision at first instance regarding advocate's immunity was correct because the court below first had to make proper findings of negligence. It may be that in some cases it is necessary at least to make findings regarding the facts relevant to negligence before advocate's immunity can be properly determined.

Endnotes

1. [2009] NSWCA 139

Statutory interpretation

Radhika Withana reports on *Commissioner of Police v Eaton* [2013] HCA 2013

In 2005, Justice Gummow gave the Byers Lecture on the topic of 'Statutes', in which he queried whether statute law continued to have the status of 'second class law' relative to the mythologised 'flexibility' and 'purity' of the common law.[1] This was not the first occasion on which he has made extra-judicial comments on the topic of statutes, their ubiquity, importance and methods of interpretation.[2]

Whatever sentimental attachment there might remain for the common law, a vast proportion of cases now deal with the proper construction of one or more Acts. There is now seldom a case that does not require some engagement with legislation and many more that require their interpretation. In December 2012 the High Court published six cases (out of a total of nine), each dealing in different ways with aspects of statutory construction.[3] On each occasion, in addition to resolving the immediate construction question at hand, the decisions reinforced, refined and clarified principles of statutory construction. The ubiquity of statutes therefore makes the principles of statutory construction an important body of law to know for all practitioners. To this end, even decisions that ostensibly concern statutes that might be obscure or relevant only to particular specialisations are instructive with respect to the relevant principles guiding the constructional choice made by a court.

The decision the subject of this note is no exception. The reasons of the High Court serve to demonstrate that whilst the principles may well be settled, their application and emphasis will continue to be debated. In the present case, the difference between the plurality (Heydon, Crennan, Kiefel and Bell JJ) and the dissenting reasons of Gageler J turned on the different principles that each sought to emphasize and utilise in the construction of the statutes in question.

The case concerns the relationship between two New South Wales statutes: the *Industrial Relations Act 1996* (the IR Act) dealing with industrial issues affecting employers and employees, and the *Police Act 1900* (the Police Act) providing 'for the management of the NSW Police Force and for the employment of its members of staff; and for other purposes'[4].

The first respondent, David Grant Eaton, was dismissed from the NSW Police Force on 22 July 2009 pursuant to s 80(3) of the Police Act. At the time of his dismissal, the first respondent was still a probationary constable. Issues arising from Mr Eaton concealing from his superiors information relevant to his ability to cope with his policing workload had been identified in an investigation prior to his dismissal. A subsequent notice issued to him advising of his forthcoming dismissal stated that his continued employment with the NSW Police Force was 'inimical to the standards expected of police officers by parliament, the commissioner [of Police] and the community.'[5]

Mr Eaton applied to the Industrial Relations Commission of New South Wales (the IR Commission) (the second respondent) under s 84(1) of the IR Act seeking reinstatement of his position on the basis that his dismissal was 'harsh, unreasonable or unjust', which he obtained.

The commissioner of police (the commissioner) (the appellant) appealed to the full bench of the IR Commission, which determined that the IR Commission lacked jurisdiction to hear Mr Eaton's appeal and dismissed his application.

Mr Eaton then sought judicial review of the IR Commission's decision in the Supreme Court of NSW under s 69 of the *Supreme Court Act 1970* (NSW). The New South Wales Court of Appeal (Bathurst CJ, Handley and Tobias AJJA) unanimously upheld Mr Eaton's application and quashed the full bench's decision, finding that Ch 2 Pt 6 of the IR Act and s 80(3) of the Police Act could be read harmoniously and accordingly quashed the decision of the IR Commission dismissing his application and remitted the matter to the full bench of the IR Commission to be determined according to law. By a grant of special leave the commissioner appealed to the High Court.

The central issue for determination was the interaction between s 80(3) of the Police Act and Ch 2 Pt 6 of the IR Act (dealing with remedies for an employee for their unfair dismissal from employment by an employer). In particular, whether a decision under s 80(3) of the Police Act by the commissioner to dismiss a probationary constable can be challenged under s 84(1) of the IR Act and the effect of an affirmative statement in s 218(1) of the Police Act that the IR Act was not affected by anything in the Police Act.

The majority – Heydon J and the joint reasons of Crennan, Kiefel and Bell JJ – upheld the commissioner's appeal, concluding that the IR Commission has no jurisdiction under s 84(1) of the IR Act to hear applications of persons dismissed under s 80(3) of the Police Act.

The reasons of the plurality

Heydon J identified four textual features of the statutes in question pointing against the proposition that the IR Commission had jurisdiction to hear applications from probationary officers dismissed under s 80(3) of the Police Act.

First, the language of s 80(3) of the Police Act – in particular the words 'at any time', 'without giving any reasons', and 'probationary' - was said by Heydon J to point against the conferral of any jurisdiction on the IR Commission to deal with claims that dismissal under the provision is harsh, unreasonable or unjust within the meaning of s 84(1) of the IR Act.[6]

Secondly, the remedies available if a claim under s 84(1) of the IR Act is made out including reinstatement, re-employment, payment for lost remuneration and for continuity of employment, were inconsistent with the commissioners' powers to dismiss a probationary officer under s 80(3) of the Police Act without interference of that power.[7]

Thirdly, in accordance with the principle that a general provision must give way to a particular provision, the generality of s 84(1) of the IR Act must give way to the particular provision in s 80(3) of the Police Act dealing with the 'relatively narrow subject of dismissing probationary constables'.[8]

Fourthly, Heydon J compared the unreviewable powers of the commissioner under s 80(3) of the Police Act (dealing with probationary constables) and the availability of review of a commissioner's decision under Part 9 of the Police Act, dealing with police officers whose permanent employment is confirmed (confirmed police officers).[9] The review rights available to confirmed police officers are significantly qualified when compared with the scope of claims under s 84(1) of the IR Act. His Honour reasoned that if s 84(1) were available to probationary constables, that construction would produce the anomalous result that probationary constables enjoyed greater procedural rights than confirmed police officers and this was not a construction that should be preferred.[10]

Crennan, Kiefel and Bell JJ proceeded by emphasising that the question of the relationship (if any) between the two statutes is one, ultimately, of legislative intention to be discerned 'from all available indications'.[11] For their Honours, rather than reading the two statutes together to discern their proper construction, the proper focus of analysis was whether, and to what extent, the two statutes operate together having regard to the intention of the legislature.[12] Further, their Honours explained, referring to the analysis of Gummow and Hayne JJ in *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, that the proper analysis, is not whether there is any inconsistency between two statutes – since the law presumes that two statutes do not contradict one another – but whether that presumption is displaced.[13]

Their Honours concluded that the legislative intention was that a decision made under s 80(3) of the Police Act to dismiss a probationary constable is not to be subject to merits review by the IR Commission under Part 6 of the IR Act[14] and accordingly the presumption of non-contradiction was displaced having regard to factors – also identified by Heydon J but which his Honour did not explain in the language of legislative intention – such as the use of the word 'probationary' and the absence of an obligation to give reasons for the commissioner's decision to dismiss in s 80(3) – which were said to be suggestive of an unfettered power to dismiss probationary constables.[15]

Like Heydon J, Crennan, Kiefel and Bell JJ also preferred a construction of s 80(3) that did not give rise to review under the IR Act so as to avoid what their Honours thought to be the anomalous results of giving probationary constables greater procedural rights of review than confirmed police officers. Their Honours' reasons in this respect were underpinned by the principle of construing provisions to achieve a harmonious result.[16]

With respect to the effect of s 218 on the relationship between the IR Act and the Police Act, the plurality agreed with the Court of Appeal's conclusion that s 218 left intact the power of the IR Commission to deal with industrial matters relating to police officers unless a provision of the Police Act especially *restricted* that power.[17]

Gageler J's reasons

Unlike the plurality, Gageler J, in his Honour's first dissenting judgment, held the commission had jurisdiction to hear an appeal from the decision of the commissioner with respect to a probationary constable, and would have dismissed the appeal.

His Honour's decision begins with a statement of the relevant principles of statutory construction, notable for its lucid and illuminating exposition of those principles. The relevant principles included:

1. the text of a statute is to be read as speaking continuously in the present – which his Honour describes as 'reflecting an approach to legislative drafting of very long standing';[18]
2. the legal meaning of a statutory text ordinarily corresponds with the textual meaning most appropriate to its context – which his Honour described as 'at root no more than a convention of language'[19]; and
3. that statutory texts enacted by the same legislature should be construed so far as possible to operate in harmony and not in conflict, applicable to the construction of provisions within different statutes of the same legislature and multiple provisions within a single statute. The resolution of conflict in the latter is to be effected by adjusting the meaning of competing provisions to achieve the result that best gives effect to the language and purpose of the provision, while ensuring unity of all the provisions in the statute.[20]

Applied to the construction of the two statutes in question his Honour concluded that the IR Act and the Police Act are 'consistent and mutually reinforcing'.[21] With respect to the Police Act, his Honour held that the express statement in s 218(1) that the IR Act is not affected by anything in the Police Act *was determinative*[22] of the conclusion that nothing in the Police Act displaces the operation of the provisions of the IR Act.[23] As his Honour observed, application of the principle of harmonious construction is 'much more straightforward where the stated intention of the legislature that the two statutory regimes should both apply, and unless the two statutes are 'plainly repugnant' or the statement of intention improbable or inconvenient in light of a policy underpinning one or other statutory regime – neither of which his Honour considered existed in the present case[24] – then the stated intention 'is the beginning and end of the matter' and both Acts apply.[25]

Endnotes

1. WMC Gummow, 'Statutes' in N. Perram and R. Pepper (eds) *The Byers Lectures 2000–2012* (Federation Press: Sydney 2012) at 95.
2. See Introduction to 'Statutes', Ibid., at 88 fn 1.
3. *Westfield Management Limited v AMP Capital Property Nominees Limited* [2012] HCA 54 (construction of s 601NB of the *Corporations Act 2001* (Cth) and whether it can be fettered by contractual agreement); *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55 (characterisation for income tax purposes of off-market buy-back of shares within the meaning of s 159GZZZP(1) of the *Income Tax Assessment Act 1936 (Cth)*; *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56*; New South Wales v Williamson* [2012] HCA 57 (both concerning the proper construction of 'personal injury damages' in s 338 of the *Legal Profession Act 2004* (NSW) when defined to have same meaning as in Part 2 of the *Civil Liability Act 2002* (NSW)); *Newcrest Mining Limited v Thornton* [2012] HCA 60 (whether a consent judgment filed solely to give effect to an agreement to settle a claim was a 'judgment first given' within the meaning of s 7(1)(b) of *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA)); *Baini v The Queen* [2012] HCA 59 (whether refusal to sever counts resulted in 'substantial miscarriage of justice' within meaning of s 276 of *Criminal Procedure Act 2009* (Vic)).
4. Long title to the Act.
5. At [38] per Crennan, Kiefel and Bell JJ.
6. At [11].
7. At [19].
8. At [21].
9. At [22]-[35].
10. At [25].
11. At [45]-[46].
12. At [45].
13. At [48].
14. At [72].
15. At [73].
16. At [77]-[78].
17. At [34] per Heydon J, at [91] per Crennan, Kiefel and Bell JJ .
18. At [97].
19. At [97].
20. At [97]-[98].
21. At [102].
22. Cf Crennan, Kiefel and Bell JJ at [82] who said such an express statement was not determinative.
23. At [104].
24. At [105]-[106].
25. At [100].

GST payable on a missed flight

Lachlan Edwards reports on *Commissioner of Taxation v Qantas Airways Limited* [2012] HCA 41

Background

Qantas (and its subsidiary, Jetstar) sell various classes of fares. Those fares range from 'flexible' fares (in different classes of travel) that are more expensive through to saver fares (which are cheaper, but permit of little flexibility in travel arrangements for the passenger).

The 'flexibility' includes:

- the capacity for the purchaser of an air ticket to amend dates, routes, class of travel and names on tickets (whether for a fee or otherwise); and
- the availability of a refund (or credit) if a passenger is a 'no show' (that is, if a passenger fails to attend for her or his flight).

The facts of this case may be stated shortly: in accordance with applicable ticketing conditions, passengers automatically forfeited some fares while others were refundable on application within a stipulated period but no refund claim was made. The question in the appeal to the High Court was whether GST was payable to the commissioner when passengers failed to take the flights for which reservations and payment had been made (and where Qantas had received a GST amount on fares from passengers).

Procedurally this matter proceeded before the Administrative Appeals Tribunal at first instance (the commissioner was successful), and then on appeal to the full court of the Federal Court (the taxpayer was successful) before going on appeal to the High Court.

The thrust of Qantas's submission was that, in circumstances such as those described, there was no 'supply' (and therefore no requirement to remit GST) under the relevant provisions. The commissioner contended that the entry into the contract should itself be construed as a taxable supply and that could be so regardless of whether a passenger was ultimately carried.

Legislative provisions

The imposition of GST contemplated by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST) fixes on whether a 'thing' is supplied. GST is payable on 'taxable supplies'.

A taxpayer makes a taxable supply (by section 9-5) if it:

- makes the supply for consideration; and
- the supply is made in the course or furtherance of an enterprise that it carries on; and
- the supply is connected with Australia; and
- the taxpayer is registered, or required to be registered for the purposes of GST.

The application of that provision turns on the definition of 'supply'. Supply includes (among other things) any of the following:

- a supply of services;
- a creation, grant, transfer, assignment or surrender of any right;
- an entry into, or release from, an obligation:
  - to do anything; or
  - to refrain from an act; or
  - to tolerate an act or situation;
- any combination of any two or more of the matters referred to above.

The full court of the Federal Court

Two short extracts from the full court judgment are of particular relevance. Edmonds and Perram JJ (with whom Stone J agreed) held:[1]

> …the task of identifying, in a given case, the 'taxable supply' among consecutive acts of supply cannot be a function of, or dependent upon, the failure of an outcome which, if it had not failed, would have been the 'taxable supply'. In other words, simply because an outcome, which is the supply paid for, fails, does not provide some warrant, statutory mandate aside, to search for and identify some other anterior supply as the 'taxable supply'. …

Their honours continued:[2]

> In the present case, there was nothing in the statute mandating the conversion of the 'supply' constituted by the making of the contract (the making of the reservation/booking) into a 'taxable supply' upon the cancellation of the contract by the intending passenger, or by failing to attend to fly, where the fare paid is not refunded. That being so, if the cancellation of the contract to fly did not convert the 'supply' constituted by the entering into of that contract into a 'taxable supply' by want of statutory mandate, it remains to consider, assuming there is only one relevant supply, what is that supply? The contemplated flight as contended by Qantas, or the reservation/booking as contended by the Commissioner?

Their honours referred to *Reliance Carpet*.[3] The question in *Reliance Carpet* was whether a deposit for purchase, forfeited by an act of rescission, could be said to be a taxable supply even though the purpose of the transaction was to purchase property. The High Court held that it was.

In *Reliance Carpet* the High Court said that the term 'taxable supply' was a 'composite expression'. The court held that in any given case there may be disclosed consecutive acts, each of which answers the statutory description of 'supply', but upon examination it may appear that there is no more than one 'taxable supply'. On that basis, the deposit being security for the performance of the contractual obligations of the purchaser, it acted as consideration for, and was relevantly connected to, the supply of those obligations.

In *Qantas*, Edmonds and Perram JJ distinguished *Reliance Carpet* because in that case the High Court held that the statute mandated that forfeited deposits be regarded as being 'taxable supplies' in respect of contracts of that kind[4] and that it was possible (and indeed mandatory) for the court to have regard to the substance of the transaction. On that reasoning, GST was payable on the deposit on completion (when it formed part of the purchase price) or on forfeiture (when the security against non-performance crystallised) and there was no question of GST arising on an anterior supply.

The full court held that it was the contemplated flight, not the reservation or booking that constituted the relevant supply. Their Honours held:

- the actual carriage of the passenger was the real purpose of each transaction; and
- that in any event the majority of the High Court had held in *Travelex Ltd v Commissioner of Taxation*[5] (a more recent decision than *Reliance Carpet* - a case about the supply of Fijian banknotes at an airport currency exchange kiosk) that the courts must have regard to the underlying purpose of a transaction when identifying the relevant supply.

Appeal to the High Court

The High Court fixed on the wording of the contracts for carriage promulgated by Qantas and Jetstar.

The full conditions of carriage are set out in the judgment of the full court of the Federal Court, but some short extracts are necessary for an appreciation of what the High Court has said for the purposes

of this note.[6] The relevant provision of the Jetstar contract was in the following terms:

> Jetstar does not guarantee it will be able to carry you and your baggage in accordance with the scheduled date and time of the flights specified. Schedules may change without notice for a range of reasons including but not limited to bad weather, air traffic control delays, strikes, technical disruptions and late inbound aircraft. Flight times do not form part of your contract of carriage with us.

The Qantas contract stated:

> We will take all reasonable measures necessary to carry you and your baggage and to avoid delay in doing so. In doing so and in order to prevent a flight cancellation, in exceptional circumstances we may arrange for a flight to be operated on our behalf by an alternative carrier and/or aircraft.

The majority (French CJ, Hayne, Kiefel and Bell JJ) held that the Qantas conditions and the Jetstar conditions did not provide an unconditional promise to carry the passenger and baggage on a particular flight and so, in consequence, could be regarded as a supply in their own right.

Their Honours said:[7]

> They supplied something less than [an unconditional promise]. This was at least a promise to use best endeavours to carry the passenger and baggage, having regard to the circumstances of the business operations of the airline. This was a 'taxable supply' for which the consideration, being the fare, was received. …

Their Honours held that *Reliance Carpet* provided no support for the contention that it was necessary for the full court to extract from the contract for carriage the 'essence' or 'sole purpose' of the transaction. *Travelex* and other authorities were dismissed as being confined in their operation to specific provisions of the GST Act, not applicable to Division 9 as a whole.

Heydon J would have dismissed the commissioner's appeal. His Honour referred to *Travelex*, and said:[8]

> The transaction between the respondent and an intending passenger was not a nullity. It was not a sham. It was not illusory. It was not analogous to a 'promise' to supply peas, but if there were no peas, to supply beans, or anything else, or nothing at all. … The transaction was a contract of carriage by air – a conditional contract in numerous respects, but still a contract of carriage by air. Under that contract the respondent promised to supply the service of an air journey. Because the passengers with whom this appeal is concerned did not make themselves available to enjoy that service, the respondent did not supply them with any air journeys.

The next destination

The last word did not, in *Qantas*, go to Heydon J. It can in this short note. His Honour said in *Travelex*:[9]

> The rights supplied were the rights enjoyed by the holder of the currency as created by the statute law of Fiji. The handing over of the pieces of paper constituted, evidenced, and was not capable of disaggregation from, the supply of rights. Apart from those rights, the pieces of paper had little value. They might have been used to stop an uneven table wobbling, or to jam shut a loose door, or to amuse small children, or to light a cigar. If the currency included coins, the coins might have been used to turn stiff screws or to lay on railway lines for the purpose of being flattened. But uses of that kind, which are very remote from their real purpose, would not prevent both the pieces of paper and the coins from being almost worthless. The supply of the currency was a supply in relation to the rights it gave because these rights constituted the pith and substance of the transaction.

It is difficult to reconcile what the High Court has said in *Qantas* with what it had very recently said in *Travelex*. Although *Travelex* concerned the construction of specific provisions, it had been assumed (at least by the writer, and seemingly by three judges of the Federal Court), that in *Travelex* the High Court had endorsed a 'whole of transaction' approach to the interpretation and determination of GST matters. The writer was, seemingly, wrong. Best not to be a stiff screw about it.

Endnotes

1. (at [42]).
2. (at [44]).
3. *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 432
4. namely, when the deposit was forfeited for non-performance, see: Division 99 of the GST Act
5. (2010) 241 CLR 510
6. *Qantas Airways Ltd v Federal Commissioner of Taxation* (2011) 195 FCR 260 (at [32] per Edmonds and Perram JJ (with whom Stone J agreed))
7. (at [33])
8. (at [42])
9. (at [47])

Just and equitable

Martha Barnett reports on *Stanford v Stanford* [2012] HCA 52

In this decision, the High Court of Australia upheld a challenge by the husband to a marriage of a decision of the Family Court of Australia with respect to the altering of interests in property of parties to a marriage under section 79 of the *Family Law Act 1975* (Cth) in unusual factual circumstances.

Factual background

The factual scenario of *Stanford* was unusual in that it was a long marriage where separation occurred not voluntarily but because of illness of one of the parties. The husband and wife were married in 1971. They had no children together but both had children from previous marriages. In late December 2008 the wife suffered a severe stroke which no longer permitted her to remain living in the matrimonial home. There was a disagreement between the wife's children and the husband as to which nursing care facility the wife should be placed in, with the children seeking a placement in a facility that required a bond of $300,000. The husband opposed her placement in this facility.[1]

On 21 July 2009, the wife's conditioned deteriorated and she was place in a high care facility which did not require the payment of a bond, and the fees for which were paid out of the wife's pension. The husband also placed in a trust account an amount in excess of $40,000 for the wife's other expenses.

The wife filed, through her daughter as case guardian, an application for property settlement under the Family Law Act on 17 August 2009. This application was determined by the Magistrates Court of Western Australia which ordered the husband to pay the wife $612,931, which represented the proportion of 42.5 per cent of the marital assets to the wife. The husband subsequently appealed this decision but before the appeal was decided the wife died.

The full court of the Family Court of Australia determined that the decision of the magistrate was erroneous, for two reasons:

- The wife's needs were met at the time of judgment because she had been placed in a high care facility which did not require the payment of a bond; and,

- The husband wished to remain living in the matrimonial home and there was no requirement of immediacy to alter the interests of the parties in their property.[2]

Curiously, the full court of the Family Court upon re-exercising the discretion under s 79 of the Family Law Act (as the matter was not remitted back to the Federal Magistrates Court) found that the wife's estate should receive 42.5 per cent of the value of the marital property upon the death of the husband because the contributions of the wife over the length of the marriage 'demand that those moral obligations be discharged by an order for property settlement.'[3]

The High Court's decision

The challenge to the determination of the Family Court rested on two grounds, namely:

- The Family Court's jurisdiction given the circumstances of the parties, who lived apart but were in what was called by the husband an 'intact' marriage; and
- The lack of satisfaction of both sections 79(2) and 79(8)(b)(ii) that a property settlement must be 'just and equitable' should the wife not have died and that it was still appropriate to make an order with respect to property where she had.

The High Court determined, with French CJ, Hayne, Kiefel and Bell JJ in a joint judgment and Heydon J in a separate judgment, that it was only the second of these two matters which vitiated the decision of the Family Court.

With respect to the first proposition the plurality determined that although the husband and wife were not living together because of intervening factors, and not because the relationship had ended, that did not mean that the Federal Magistrates Court did not have jurisdiction. As the proceedings were commenced as between parties to a marriage, and were with respect to marital property, it could be categorised as a matrimonial cause notwithstanding the facts that the relationship had not broken down and that the proceedings were continued by the beneficiaries of the wife's estate.[4] The plurality was somewhat critical of the husband's expressions 'intact marriage' and 'breakdown of the relationship' noting a lack of definition and a lack of legal significance.

With respect to the second proposition, both the plurality and Heydon J determined that the court must decide if it would have made a property adjustment order should the wife not have died and whether it was still appropriate to make an order in light of her death. These questions are separate from, and not to be conflated with, the question of the justice and equity of what orders should be made under section 79(2). The plurality found that it was not shown that had the wife not died it would have been just and equitable to make an order with respect to the property of the parties, as the wife's needs were being met and therefore it could not be found that after her death it was 'still appropriate to make an order with respect to property'.[5]

The plurality noted several fundamental propositions pertaining to the expression 'just and equitable' under section 79 of the *Family Law Act 1975* (Cth):

- it is neither possible nor desirable to specify the 'metes and bounds' of the expression 'just and equitable';
- the court must first determine the existing legal and equitable rights of the parties;
- any alteration of the interests of the parties must rest upon the law and not be 'exercised according to an unguided judicial discretion;' and
- there is no assumption that an order for the alteration of property interests will necessarily be made.[6]

The plurality said that in many cases where the parties have separated because of a choice made by one or both of them, the just and equitable requirement is readily satisfied because there will not be common use of the property.[7] However, in this case 'the bare fact of separation, when involuntary, does not show that it is just and equitable to make a property settlement order' and so the court must look at all the circumstances of the particular case, to determine if it is just and equitable to make an order.[8]

Endnotes

1. *Stanford v Stanford* [2012] HCA 52 at [56] per Heydon J.
2. *Stanford v Stanford* (2011) FLC ¶93-483 at 85,990 [112].
3. *Stanford v Stanford* (2012) FLC ¶93-495 at 86,313 [52].
4. *Stanford v Stanford* [2012] HCA at [17] and [29] per French CJ, Hayne, Kiefel and Bell JJ. See Family Law Act 1975 s 4(1).
5. *Stanford v Stanford* [2012] HCA 52 at [3] per French CJ, Hayne, Kiefel and Bell JJ.
6. *Stanford v Stanford* [2012] HCA 52 at [36] to [40] per French CJ, Hayne, Kiefel and Bell JJ.
7. *Stanford v Stanford* [2012] HCA 52 at [42] per French CJ, Hayne, Kiefel and Bell JJ.
8. *Stanford v Stanford* [2012] HCA 52 at [43] per French CJ, Hayne, Kiefel and Bell JJ.

Fraud and mistake: the change of position defence to a restitutionary claim

Susan Cirillo reports on *Citigroup Pty Limited v National Australia Bank Limited* [2012] NSWCA 381

This was a case in which a five-member bench of the Court of Appeal unanimously upheld a change of position defence to a restitutionary claim.

Background

Two customers maintained a joint bank account with each of Citibank and NAB, on the basis that either customer's signature could operate both accounts.

On 15 November 2010 Citibank received a faxed instruction, purportedly signed by one of the customers to transfer US$500,000 from the customers' Citibank account to the customers' NAB account.

Citibank transferred US$500,000 to NAB via the 'SWIFT system', a system of secure messaging enabling one participating bank to make payments to another. The accompanying information included the amount transferred, the name of the Citibank account holders from which the funds were being drawn and details of the NAB account to which they were being credited.

Citibank debited the customers' Citibank account to the extent of the sum transferred and NAB credited the customers' NAB account in an equivalent sum.

On 19 November 2010 NAB approved three international telegraphic transfer applications, apparently signed by one of the customers and faxed by him to NAB. In accordance with the applications, NAB transferred A$465,090 to a Hong Kong bank and debited the customers' NAB account accordingly.

The faxed instruction of 15 November 2010 and the applications of 19 November 2010 were fraudulent in that neither customer had signed them or given their authorisation for the transfers. The money transferred to the Hong Kong bank was dissipated and was not recoverable.

The customers settled proceedings against NAB and Citibank on the basis that the banks made whole their losses.

Citibank claimed against NAB that it had paid money to NAB pursuant to the mistaken belief that it had been given a genuine and valid instruction and that, in the absence of restitution to it by NAB, NAB would be unjustly enriched. The parties agreed that neither bank had acted negligently or had failed to meet any standard of banking practice. NAB's defence was that (inter alia) it had irrevocably changed its position to its detriment in faith of the receipt of the funds from Citibank, by paying away the money to the Hong Kong bank.

At trial

Hammerschlag J found in favour of NAB.

His Honour opined that according to the criteria enunciated by the Court of Appeal in *State Bank of New South Wales v Swiss Bank Corporation*[1], the information conveyed by Citibank did not contemplate payment at the direction of the imposter, and therefore, NAB's subsequent payment out made at the imposter's direction was not made 'in reliance on' or 'on the faith of' NAB's receipt from Citibank. On this view, NAB was not 'entitled' to deal with the receipt as it did.

Instead, his Honour followed the later Court of Appeal decision in *Perpetual Trustees Australia Ltd v Heperu Pty Ltd*[2] paying attention to what his Honour regarded as the less demanding criteria in that case in which the recipient's 'entitlement' to act was held not to be explicitly prescribed by information received from the payer. On this view, NAB would not have made the payment unless the receipt from Citibank had been regarded as valid (which was a consequence of the information in the SWIFT message), and therefore, NAB's payment was made 'in reliance on' or 'on the faith of' the receipt from Citibank. Therefore, NAB established a change of position defence.

Court of Appeal

The plurality (Bathurst CJ, Allsop P and Meagher JA) and Macfarlan JA agreed with Barrett JA in dismissing Citibank's appeal from the finding that NAB had established a change of position defence.

According to Barrett JA, the context of NAB's receipt from Citibank, including the SWIFT message and NAB's knowledge of its customers' account, reasonably engendered in NAB a state of mind that the moneys should be credited to the customers' account and then dealt with in the ordinary course of prudently administering the customers' account.

The payment to the Hong Kong bank was consistent with the basis of the receipt from Citibank.[3]

The test advanced by Barrett JA to determine whether a recipient had changed their position was to consider whether the circumstances of the receipt induced in the recipient a 'rationally formed' 'state of mind as to the status of the moneys and the consequences that should properly flow from the receipt'.[4]

Notwithstanding its agreement with Barrett JA's conclusion, to the extent that it intended to differ,[5] the plurality also formulated a test; being that the recipient acts on the faith of, or in reliance on, the receipt if it acts within a context of knowledge including 'knowledge of the receipt and of facts that support reliance upon the stability of the receipt and an entitlement to treat the receipt as able to be dealt with'. Whether this test is made out is a factual question and whether there is reliance in the particular circumstances will be a matter of fact and degree.[6]

The plurality clarified that the decision of *State Bank of New South Wales v Swiss Bank Corporation* was not to be understood as limiting consideration of whether the recipient acted on the faith of, or in reliance on, the receipt of the payment to information that the recipient received from the payer.[7] Therefore, *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* in advancing the consideration of attendant circumstances, including matters already known to the payee, was not to be regarded as superseding *State Bank of New South Wales v Swiss Bank Corporation*.[8]

A 'but for' test?

Barrett JA also concluded that NAB's payment to the Hong Kong bank would not have occurred but for NAB's receipt of the payment from Citibank.[9] His Honour relied on *David Securities Pty Ltd v Commonwealth Bank of Australia*[10] for the proposition that a cause and effect relationship is contemplated between the receipt of a mistaken payment and subsequent expenditure or financial commitment.[11] The plurality agreed with this 'approach to causation'.[12]

Though it is not made express in any of the reasons, presumably, the 'but for' test is to operate as the threshold *factual* question to establish what has happened to any amount that is being traced. This will determine whether the change of position defence is engaged. Then the plurality's 'facts that support reliance' test, (or Barrett JA's 'rationally formed' 'state of mind' test) is to be applied to answer the *legal* question of whether the defendant to a restitutionary claim has changed their position in accordance with the defence.

A broad 'general' defence?

NAB raised two alternative defences by way of contention, being that:

1. Citibank's claim to recover the payment was lost because NAB received the payment as an intermediary and fulfilled its obligation to account to its customers for the payment by crediting its customers' account (a 'payment over' defence); and
2. Citibank was estopped from recovering the payment because in making the payment via the SWIFT transfer system, it induced NAB to alter its position to its detriment.

The plurality found it unnecessary to decide the alternative defences, and that there would be 'no useful purpose in doing so because neither would be available in the circumstances of this case if the more general change of position defence was not available'.[13]

It would appear that the plurality's reference to the 'general' defence related to their Honours' assertion that in respect of a payment that is made by mistake giving rise to a restitutionary right to recover the payment from the recipient, the change of position 'defence' operates 'conformably with the broad underlying principle enunciated in *David Securities Pty Ltd v Commonwealth Bank of Australia*...and *Lipkin Gorman (a firm) v Karpnale Ltd*'.[14] This being, to consider whether the recipient has changed his or her position in such a way that it would be inequitable in all the circumstances to require restitution.[15]

Macfarlan JA would have decided the notice of contention by upholding only the estoppel defence. Barrett JA would have dismissed both alternative defences.

Endnotes

1. (1995) 39 NSWLR 350.
2. (2009) 76 NSWLR 195.
3. *Citigroup* [2012] NSWCA 381 at [103]. The plurality and Macfarlan JA agreed respectively at [2] and [15].
4. *Citigroup* [2012] NSWCA 381 at [83].
5. The plurality at [2012] NSWCA 381 [2] and [6] expressed its agreement with certain paragraphs in Barrett JA's reasons, and paragraph [83] in which Barrett JA formulated his test was not included.
6. *Citigroup* [2012] NSWCA 381 at [6].
7. *Citigroup* [2012] NSWCA 381 at [4] per the plurality.
8. *Citigroup* [2012] NSWCA 381 at [104] per Barrett JA.
9. *Citigroup* [2012] NSWCA 381 at [103]. The plurality and Macfarlan JA agreed respectively at [2] and [15].
10. [1992] HCA 48; 175 CLR 353 at 385.
11. *Citigroup* [2012] NSWCA 381 at [86].
12. *Citigroup* [2012] NSWCA 381 at [6].
13. *Citigroup* [2012] NSWCA 381 at [7].
14. *Citigroup* [2012] NSWCA 381 at [5].
15. Contrast Barrett JA's distinction between a 'narrow version' and a 'wide version' of the defence and adopting the 'narrow version' in *Citigroup* [2012] NSWCA 381 at [61]–[65] (Macfarlan agreeing at [15]). The plurality's approach appears consistent with the observation by Justice Gummow in '*Moses v Macferlan*: 250 years on' (2010) 84 ALJ 756 at 762 that '[o]ver-definition and dissection of the phrase "change of position" may only serve to divert attention from what is the central question, whether it would be an inequitable result for the claimant to require repayment', even though the plurality did not cite this extract. But Hammerschlag J did and observed that 'on this approach the result would be the same. Both parties were duped…it would lead to an inequitable result were Citibank to be made whole at the expense of NAB': *William Co-Buchong* [2011] NSWSC 1199 at [42]–[43].

Costs submissions on appeal

Victoria Brigden reports on *Kable v State of New South Wales (No.2)* [2012] NSWCA 361

This decision of the Court of Appeal concerned an application by the respondent to vary costs orders made by the court at the time of handing down judgment in the matter. It provides important practical guidance in relation to the appropriate time to make submissions on costs and the necessity of complying with the rules with respect to variation of orders.

The court had ordered, inter alia, that the state as unsuccessful respondent in the appeal pay Mr Kable's costs at first instance and on appeal. The state sought the vacation of those orders, and in lieu thereof insertion of orders to the effect that the costs of the first instance proceedings be remitted to a judge of the court and determined following the assessment of damages, and that there be no order as to the costs of the appeal, or alternatively, that the state pay such proportion of Mr Kable's costs of the appeal as seemed appropriate in light of Mr Kable's success.

The day after delivery of judgment and making of the orders, the state's solicitors had sent an email to the court, copied to Mr Kable's solicitors, noting that the court had heard no submissions on costs, and respectfully seeking to be heard on the order in relation to the costs at first instance, described in the email as the order 'relating to the costs of the proceedings to date'. However, a notice of motion for variation was not filed for another 15 days. By operation of Rule 36.16(3A), the notice of motion was filed two days out of time, and Rule 36.16(3C) provided that the court may not extend that time limit.

Parties should not think that they can, at their choice, avoid the operation of the rules by less formal communication.

The state accepted that the notice of motion needed to be brought within 14 days after the judgment or order was entered and that the time could not be extended, but relied on the power to dispense with the need for filing a notice of motion in the form prescribed where notice had been given to the court and the appellant the day after entry of judgment, under s 14 of the *Civil Procedure Act 2005* (NSW).

Basten JA, who delivered the leading judgment, observed that while it was correct that the court had heard no submissions on costs, the orders sought by Mr Kable included an order for costs. His Honour remarked that there were circumstances which may give rise to the common practice of counsel inviting the court to reserve questions of costs until after determination of the substantive issues, for instance where the orders sought on an appeal might give rise to a variety of possible outcomes, or where there have been offers of settlement in damages claims. However, his Honour noted that such an invitation had not been made in this case.[1] His Honour also noted that the fact that offers of compromise had been served, which the parties did not wish to disclose in case damages were still to be assessed, could have been noted at the original hearing.

His Honour stated the general position as follows:[2]

> As a general rule, any party which would seek to be heard in opposition to the usual order as to costs should raise the issue with the court at the hearing of the appeal. If it does not, and seeks to be heard with respect to costs after orders have been made, even if the application is made in a timely fashion, that party should expect to have to explain and justify its failure to take advantage of the opportunity to address on costs at the hearing of the appeal and, if there were reasons for not doing so, why those reasons were not explained to the court on the hearing of the appeal.

Ultimately, Basten JA found that the interests of justice supported an order dispensing with the requirement to file a notice of motion with respect to the costs of the trial, but not the costs of the appeal as no notice was given in respect of that order prior to the filing of the notice of motion, notwithstanding the reference in the email to the court to the 'costs of the proceedings to date'.[3] The order with respect of the costs of the trial was set aside, and a direction was made that the costs below be determined by the trial court on the remitter.

Allsop P, Campbell and Meagher JJA and McClellan CJ at CL agreed with Basten JA. Allsop P made additional observations on the nature of the rules providing for variation of orders of the court, with which Campbell and Meagher JJA also agreed.

Allsop P remarked that rules 36.15, 36.16, 36.17 and 36.18 address important questions concerning

variation of orders of the court, and that rule 36.16 was particularly important in dealing with the fundamentally important question of finality of litigation. His Honour gave the following words of caution for parties and practitioners in relation to the operation of those rules:[4]

> Parties should not think that they can, at their choice, avoid the operation of the Rules by less formal communication. The Rules take their form because of the regularity and good order promoted by the procedures there set down in respect of such an important topic. Too often practitioners consider that they can say something on the occasion of delivery of judgment or send an email to judge's chambers (the latter sometimes, though not here, without the knowledge of the other side – a serious breach of professional etiquette and possibly a breach of duty to the court) and thereby hold their client's position, irrespective of the Rules. The profession should understand that this is not the case.

Like Basten JA, Allsop P did not permit the exercise of the power under s 14 of the *Civil Procedure Act 2005* to go beyond the content of the letter sent by the solicitors for the state the day following the making of the orders, as it would raise the issue of whether s 14 could operate to override the operation of rule 36.16(3C) and if it could, the stringency of that operation.

There has been a grant of special leave to appeal to the High Court in respect of the court's decision in *Kable v State of New South Wales* [2012] NSWCA 243.

Endnotes

1. *Kable v State of New South Wales (No 2)* [2012] NSWCA 361 at [12].
2. Ibid at [14].
3. Ibid at [15]; [16]; [21].
4. Ibidd at [2].

Verbatim

From Heydon J in *Monis v the Queen* [2013] HCA 4 at [249]

For the most part, Australians know nothing of New Zealand affairs. The information which the Australian public does possess of New Zealand affairs is more likely to generate great public boredom, not interest.

Heydon J in *Papaconstuntinos v Holmes a Court* [2012] HCA 53 at [64]:

There is authority in this Court, not overruled by the Court of Appeal of the Supreme Court of New South Wales, that to satisfy the test for qualified privilege it is not necessary to prove that the publication advanced 'the common convenience and welfare of society'.

From *Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd (No 8)* [2013] FCA 172 Perram J at [9]

I do not accept that Mr Wingfield's observation about what it is that article 8(2) 'on its face' provides for, involves the application by him of Hong Kong law to the facts. Indeed, I do not accept it involves the expression of an expert opinion at all — it is purely a statement about what the text of the article says. Any competent speaker of English could make the same point. The short of the matter is that article 8(2) does not, in terms, say that an airline may charge less than an approved tariff. It also does not refer to the Norman Conquest. In my opinion Mr Wingfield can admissibly make either of those observations.

Enforcement under the UNCITRAL Model Law

Jonathon Redwood reports on *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410; [2013] HCA 5

Introduction

In *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410; [2013] HCA 5 ('TCL') the High Court unanimously upheld the validity of key features of Australia's international arbitral regime.

The challenge attacked the enforcement mechanism under the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') given effect to by s 16(1) of the International Arbitration Act 1974 (Cth)('IAA'). In particular, TCL challenged the enforcement mechanism under Article 35 of the Model Law for non-foreign awards.

The Model Law is a model national arbitral law that has been adopted by over 60 countries. It had operated as part of the IAA since 1988 and has also now been adopted by several states as the key element of their domestic arbitration statutes. The IAA also gives effect to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the 'New York Convention') which has been ratified by over 140 countries.

TCL is a very significant decision for future of international arbitration as a beneficial form of alternative dispute resolution for cross-border disputes within the Asia-Pacific region. The decision has already attracted significant international attention.

Background

TCL, a company based in China, agreed to supply air conditioners to Castel, a company based in Victoria, under a distribution agreement. A dispute arose concerning the distribution agreement and in accordance with that agreement the dispute was referred to arbitration in Melbourne before an eminent arbitral tribunal constituted by Dr Gavan Griffith AO QC, the Honourable Alan Goldberg AO and Mr Peter Riordan SC. Castel was successful in the arbitration and two awards for damages and legal costs were given in its favour. In default of payment, Castel then sought to have the awards recognised and enforced against TCL's assets in Australia under Article 35 of the Model Law.

Article 35(1) of the Model Law provides:

> An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

The Federal Court is a 'competent court' for certain identified functions which a court performs pursuant to the Model Law.

Murphy J had ruled that the Federal Court had jurisdiction under the IAA to enforce the awards.[1] Subsequently, his Honour rejected TCL's claims of a breach of the rules of natural justice by the tribunal.[2]

In separate proceedings instituted in the High Court, TCL applied for an order restraining the judges of the Federal Court from enforcing the awards, and for an order quashing decisions of that Court in relation to the awards.

Submissions

There were two, related strands to TCL's argument. TCL submitted that the Model Law provided for the exercise of the judicial power of the Commonwealth in a manner contrary to Ch III of the Constitution. Under the Model Law, the Federal Court has no power to refuse to enforce an arbitral award on the ground that an error of law is apparent on the face of the award. TCL argued that consequently, the jurisdiction conferred on the Federal Court under the IAA requires it to act in a manner that substantially impairs its institutional integrity. TCL submitted that the effect of the Model Law is to co-opt or enlist the Federal Court into providing assistance during the course of the arbitral proceeding and in enforcing the resulting awards while denying the Federal Court any scope for reviewing substantively the matter referred to arbitration, and the ability to act in accordance with the judicial process. TCL submitted that this distorts the institutional independence of the Federal Court.

The second limb of TCL's argument was the Model Law was said to vest the judicial power of the Commonwealth in arbitral tribunals because the enforcement provisions of the IAA render an arbitral award determinative. TCL relied again on its contention that no independent exercise of judicial power by the Federal Court was required for the enforcement of an award. A significant indicator of this state of affairs was said to be the exclusion, to a

significant degree, of any curial power to supervise the arbitral process, in particular by conducting substantive review of an award.

Central to TCL's constitutional argument under both limbs was that to avoid contravening Ch III of the Constitution, courts must be able to determine whether an arbitrator applied the law correctly in reaching an award. In support of that proposition, TCL submitted that Art 28(1) of the Model Law, which provides that '[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties,' predicates an arbitrator's authority under an arbitration agreement on deciding a dispute correctly and therefore an award founded on an erroneous principle is not binding upon the parties. Alternatively, it was submitted that such a term could be implied into every arbitration agreement.

In response, Castel submitted that curial recognition and enforcement of arbitral awards has long been an unexceptionable exercise of judicial power. Castel submitted that the source of the authority of an arbitral tribunal is the private agreement of the parties, not the state. The clear exclusion in the IAA of a power to set aside an award for error apparent on the face of the award was said to be consistent with the general rule supporting the finality of arbitral awards.

Castel's submissions were supported and amplified by detailed written submissions from the interveners, particularly the Commonwealth, New South Wales and ACICA.[3] Castel adopted most of those interveners' written submissions in its oral submissions.

The decision

The court unanimously rejected TCL's arguments, delivering two judgments (French CJ and Gaegler J; and Hayne, Crennan, Kiefel and Bell JJ). The judgments are complementary and are discussed together. Both judgments made it plain that when an arbitral tribunal makes an award it is not exercising judicial power. The exercise of judicial power is an assertion of the sovereign, public authority of a polity.[4] It is exercised coercively against the will of at least one side.[5] Therein is the essential distinction with arbitral authority, which is based on the voluntary agreement of the parties.

TCL's interpretation of Article 28 of the Model Law was rejected. After a careful consideration of the legislative history to Article 28, French CJ and Gageler concluded that Article 28 is directed to the rules of law to be applied, not the correctness of their application.[6] It reflected the same principle of party autonomy running throughout the Model Law. Hayne, Crennan, Kiefel and Bell J expressed a similar conclusion, that Article 28 is primarily directed to questions of choice of law. They emphasised that legal error is not one of circumstances in which recognition and enforcement of an award can be denied. TCL's argument, therefore, depended on treating the language of Article 28(1) as forming part of the agreement between the parties, whilst simultaneously treating the Model Law regulating the recognition and enforcement of awards as not forming part of that agreement.[7] Nor was it necessary for the efficacious operation of an arbitration agreement that any term as to legal correctness be implied. Such a term would also flatly contradict the terms of Articles 34–36 of the Model Law.[8]

French CJ and Gageler J accepted the Commonwealth's argument that the exceptional common law jurisdiction to set aside for error of law bore no meaningful resemblance to the jurisdiction to set aside an exercise of administrative or judicial power for jurisdictional error. The common law rule was obscure in origin and operated haphazardly.[9] It operated as an exception to the general rule that parties must abide by their agreement to accept an arbitrator's determination.[10]

Next, both judgments directed attention to the nature of the judicial power exercised by a Ch III court on proceedings for recognition and/or enforcement of an arbitral award. French CJ and Gageler J accepted ACICA's argument that enforcement an arbitral award is enforcement of the binding result of the agreement of the parties to submit their dispute to arbitration, not enforcement of any disputed right.[11] This occurred in accordance with the judicial process and the making of such an order did not signify the court's endorsement of the legal content of the award. The court is not asked to affirm the substance (or merits) of the award but that it has been made in accordance with the requirements of the IAA.

Similarly, Hayne, Crennan, Kiefel and Bell JJ, emphasised that the enlistment of judicial power in enforcing an arbitral award occurs at a point in time when the obligations sought to be enforced are those created by the award itself. Relying on *Dobbs v National Bank of Australiasia*,[12] they concluded that the making of an award both extinguishes the original cause of action and imposes new obligations in substitution for the rights and liabilities the subject of the dispute referred to arbitration. The former rights are discharged by an accord and satisfaction.[13]

So understood, there was no basis for the suggestion that enforcement of an arbitral award under the Model Law impairs the institutional integrity of the court. The court accepted the Commonwealth and New South Wales's submissions that, as with the enforcement of foreign judgments, enforcement depends on an anterior decision or determination that was not made in the exercise of judicial power.[14]

Hayne, Crennan, Kiefel and Bell JJ also emphasised two other matters. First, their Honours accepted Castel's argument that a court undertaking the task of enforcing an award under the IAA is able to refuse enforcement, or under Article 34 set aside an award, on several bases, including that the award is inconsistent with public policy. These provisions themselves were protective of the court's institutional integrity.[15] Secondly, the doctrine of separation of powers is directed to ensuring an independent and impartial judicial branch of government to enforce the lawful limits on the exercise of public power. Judicial independence mandates independence from the political arms of government, the legislature and the executive. The determination of the enforceability of awards in furtherance of the legitimate legislative policy of encouraging efficiency, impartiality and finality in arbitral awards had no analogue with the co-opting by the executive of the judicial branch in cases such as *Kable* and *Totani*.[16]

Importantly, the essential reasoning in support of validity in both judgments was preceded by a discussion of the Model Law that recognised its 'basic design' is based on the consensual submission by the parties of their dispute for resolution by binding arbitration and the wider context in which the Model Law operates as an essential component of an international system of dispute resolution.[17] Its relationship with the New York Convention was acknowledged and emphasised. As French CJ and Gageler J observed:

> Those considerations of international origin and international application make imperative that the Model Law be construed without any assumptions that it embodies common law concepts or that it will apply only to arbitral awards or arbitration agreements that are governed by common law principles. The first of those considerations makes equally imperative that so much of the text of the Model Law as has its origin in the New York Convention be construed in the context, and in the light of the object and purpose, of the New York Convention.[18]

Conclusion

Had the attack in TCL been successful, it had the potential to seriously undermine recent efforts taken by both the Australian and New South Wales governments and the Australian arbitration community to promote Australia as a regional hub for international arbitration. Instead, the ruling in TCL strongly reaffirms the essential justification for arbitration and the vital role of the Model Law within a coherent system for the settlement of international disputes. No other final court of appeal in any other jurisdiction has so clearly explained the essential basis for arbitration and how its various strands intersect. The decision should, therefore, unambiguously project to the international community that Australian courts support arbitration and that Australia's arbitration framework is secure.

More difficult issues might arise in circumstances where a federal statutory right or remedy is concerned[19] or where the arbitral tribunal selects the wrong applicable law to determine the dispute (i.e., non-application as distinct from mis-application).[20] If difficult issues of that kind arise for future consideration they are likely to be determined by the proper interpretation of the scope of existing grounds for refusing enforcement contained in the IAA, including whether the arbitral tribunal has exceeded the jurisdiction conferred on it by the parties and the metes and bounds of arbitrability and public policy. But TCL suggests that those grounds are likely to be interpreted narrowly in accordance with the pro-enforcement bias of the New York Convention and the principles of finality and international uniformity underpinning modern international arbitration.

Endnotes

1. *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209.
2. *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214.
3. The Australian Centre for International Commercial Arbitration.
4. At [76].
5. At [28].
6. At [15].
7. At [73].
8. At [16] and [74].
9. At [37]; see also Hayne, Crennan, Kiefel and Bell JJ at [95].
10. At [99].
11. At [34].
12. (1935) 53 CLR 643 at 652–654.
13. At [78].
14. At [105].
15. At [103].
16. At [104]–[105].
17. As submitted by Castel and ACICA.
18. At [8]. See also Hayne, Crennan, Kiefel and Bell JJ at [45]–[46].
19. The case concerned an underlying common law claim for breach of contract. There was no federal statutory claim for misleading and deceptive conduct.
20. The court in TCL did not need to consider the applicability of the 'manifest disregard of the law' principle invoked by some US courts. The status of the principle in US law remains unclear.

Freedom of political communication under scrutiny

Juliet Curtin reports on *Monis v The Queen; Droudis v The Queen* [2013] HCA 4 and *Attorney-General for the State of South Australia v Corporation of the City of Adelaide & Ors* [2013] HCA 3

In two recent sets of appeals heard by the High Court, the implied constitutional freedom of political communication came under scrutiny.[1] At issue in *Monis v The Queen; Droudis v The Queen*[2] was the validity of s 471.12 of the Criminal Code (Cth), which makes it a crime to use a postal or similar service in a way that 'reasonable persons would regard as being, in all the circumstances ...offensive.' In *Attorney-General for South Australia v Corporation of the City of Adelaide and Ors*,[3] a by-law made by the Corporation of the City of Adelaide (the council) was challenged, in part due to its alleged infringement of the implied constitutional freedom of political communication.

Monis v R; Droudis v R

Mr Monis was said to have sent letters to the families of Australian soldiers killed whilst on active service in Afghanistan. The letters were critical of the Australian Defence Force's deployment in Afghanistan and referred to the deceased soldiers in a denigrating manner. In one letter to the parents of a deceased solider their son was referred to as a murderer of civilians, compared to a pig and to a dirty animal, and to Hitler, with the latter being described as not inferior to the recipients' son in moral merit.[4] Mr Monis was charged with multiple offences against s 471.12 of the Criminal Code, and Ms Droudis with multiple counts of aiding and abetting the commission of offences against s 471.12 of the code. The appellants' motions to quash the indictment were dismissed by Tupman DCJ, and appeals to the Court of Criminal Appeal (Bathurst CL, Allsop P and McClellan CJ at CL) were also dismissed.[5]

The Court of Criminal Appeal construed 'offensive' for the purposes of s 471.12 as conduct 'calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances'.[6] Key to the Court of Criminal Appeal's decision to uphold the validity of the provision was its finding that the legitimate ends served by the provision included the protection of persons from being subject to material that is 'offensive'[7] and the protection of 'the integrity of the post'.[8]

The High Court unanimously accepted the Court of Criminal Appeal's narrow definition of 'offensive'.[9] Each of the justices also accepted that, so construed, s 471.12 effectively burdened the freedom of political communication (applying the first step in the test

for validity articulated by the High Court in *Lange*).[10] However, the High Court split in applying the second limb of the *Lange* test[11] (as modified by the High Court's decision in *Coleman v Power*[12]), which asks whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. French CJ, Hayne and Heydon JJ found that the provision impermissibly burdened the freedom of political communication protected by the Constitution,[13] while Crennan, Kiefel and Bell JJ upheld the validity of s 471.12. Accordingly, the decision of the Court of Criminal Appeal was affirmed and the appeals dismissed.[14]

French CJ

In his Honour's view, the Court of Criminal Appeal's formulation of the legitimate ends served by s 471.12 was incorrect for two reasons.[15] First, 'postal and similar services' are broadly defined under the Criminal Code, extending beyond the delivery of material to homes and businesses via Australia Post to packet or parcel carrying services conducted by trading corporations.[16] Second, the range of uses of those services which could be captured by s 471.12 are extensive, including the delivery of all forms of literature as well as DVDs and CDs, to homes and offices or even to distributors of such material.[17] Further, a person could breach the provision by sending offensive communications to persons who are pleased to receive them.[18]

His Honour found that the scope of the provision was such that its purpose could not be determined by reference to the common characteristics of the services to which it applies.[19] Accordingly, the purpose of the provision could only be described as the prevention of the conduct which it prohibits, namely, the use of postal or similar services which reasonable persons would regard as being, in all the circumstances, offensive.[20] This was not a legitimate end because the breadth of the provision was incompatible with its implementation in a manner consistent with the maintenance of that freedom of communication which is a necessary incident of the constitutionally prescribed system of representative government.[21] His Honour declined to read down s 471.12 so as to exclude its application to

10 November 2009, Sydney. Iranian born Muslim cleric, Sheik Haron, who is named in court papers as Man Haron Monis, chained to a railing outside the Downing Centre in an anti-war protest. Photo by Cameron Richardson / Newspix.

offensive content in communications on matters of government or political concern, given the nature of the communications complained of in the indictment, which on their face involved matters of government or political concern.[22]

Hayne J

According to his Honour, s 471.12 was beyond legislative power.[23] As with French CJ, his Honour held that the purpose of the provision must be determined via the ordinary process of statutory construction.[24] The only purpose evidenced from the text of the provision was the prevention of the use of a postal or similar service in a way that would give offence.[25] It followed from the High Court's earlier decisions in *Lange and Coleman v Power*[26] that this was not a legitimate object, and was not compatible with the implied constitutional freedom of political communication.[27] His Honour observed that giving and taking offence are 'inevitable consequences of political debate and discourse,' and to eliminate the

prospect of either would be fundamentally to change the way we engage in political debate and discourse within our constitutionally prescribed system of representative government. [28]

Heydon J

His Honour agreed, for the reasons identified by French CJ, that s 471.12 was beyond the legislative power of the Commonwealth, and that the provision should not be read down so as to make it valid.[29] However, that the existing law should dictate this outcome was, in his Honour's view, reason to doubt the legitimacy of 'the fundamental assumption', to wit, that the implied freedom of communication about government or political matters is correctly identified and elucidated in the authorities of the High Court.[30]

While no party had sought to challenge the fundamental assumption, Heydon J identified a number of issues which his Honour considered to be worthy of examination, should such a challenge ever be made. Among these issues was the lack of guidance provided by the 'reasonably appropriate and adapted test',[31] the legitimacy of implying a limited free speech protection into our Constitution when its framers had considered but rejected transplanting the First Amendment to the United States Constitution,[32] and the validity of the *Lange* decision itself.[33] In his Honour's view, a close examination of the implied freedom of political communication would reveal that 'it is a noble and idealist enterprise which has failed, is failing, and will go on failing'.[34]

Crennan, Kiefel and Bell JJ

Their honours held that s 471.12 was a valid exercise of Commonwealth legislative power. According to their Honours, the purpose of s 471.12 was the prevention of the misuse of postal services to effect an intrusion of seriously offensive material into a person's home or workplace.[35] This purpose was not, in their Honours' view, incompatible with the maintenance of the constitutionally prescribed system of government or the implied freedom which it supports.[36]

As with Heydon J, their Honours considered that the second limb of the test articulated in *Lange* lacks clarity and provides no guidance as to its intended application.[37] Their Honours suggested that the second limb of the *Lange* test could be better understood as requiring that the law be proportionate to the object it seeks to serve.[38] Applying the proportionality analysis to s 471.12, their Honours found that the provision did not impermissibly burden the implied freedom.[39] Key to their Honours' finding were the observations that the effect of s 471.12 was incidental only,[40] and that the only communications captured by the provision are those which are of a seriously offensive nature. [41]

Attorney General (SA) v Corporation of the City of Adelaide and Others

Caleb and Samuel Corneloup (the second and third respondents, respectively) claimed that a by-law made by the council, which prohibited preaching or distributing printed matter on any road to any bystander or passer-by without the council's permission, was invalid. A majority of the High Court upheld the by-law, finding that while it effectively burdened the implied freedom of political communication, it was reasonably appropriate and adapted to serve the legitimate end of the by-law making power.[42] The majority also found that the by-law was a valid exercise of the council's statutory power to make by-laws.[43]

French CJ

His Honour found that the by-law was reasonably appropriate and adapted to serve the legitimate end of the by-law making power, namely, the regulation of the public use of roads and public places. [44] The by-law was confined in its application to particular places, was directed to unsolicited communications, contained an exception relating to conduct during the course of referendums, or federal, state or local government elections, and permission to engage in activities could not be granted or withheld based on approval or disapproval of their content.[45] His Honour accepted that the second limb of the *Lange* test, as modified in *Coleman*, could equally be expressed as a test of proportionality.[46]

Hayne J

His Honour found that the legitimate end of the by-law was to prevent obstruction of roads.[47] His Honour

pointed to the features of the by-law enumerated by French CJ as a basis for finding that the by-law satisfied the second limb of the *Lange* test.[48] While not expressly articulating a preference for the test of proportionality, his Honour's finding that the by-law 'adequately balanced the competing interests in political communication and the reasonable use by others of a road'[49] suggests agreement with the comments of Crennan and Kiefel JJ that the test of proportionality provides a more transparent way of applying the second limb of the *Lange* test.

Crennan and Kiefel JJ

Their Honours found that the object of the by-law and the means by which that object was achieved were not incompatible with the implied freedom of political communication.[50] In so finding, their Honours reiterated that the second limb of the *Lange* test directs attention first to whether the means of attaining a valid legislative object are proportionate to that object and second, to whether the provision is proportionate in its effects upon the system of representative government, which is the object of the implied freedom.[51] Their honours considered that the test of reasonable necessity[52] may be deployed to assess a provision's proportionality, stating that if the means employed go further than is reasonably necessary to achieve the legislative object, they will be disproportionate, and invalid for that reason.[53]

Endnotes

1. As articulated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at p.567 (*Lange*).
2. *Monis v R; Droudis v R* (2013) 295 ALR 259; [2013] HCA 4 (Monis).
3. (2013) 295 ALR 197; [2013] HCA 3 (City of Adelaide).
4. *Monis*, at [238] per Heydon J.
5. *Monis v R* (2011) 256 FLR 28; [2011] NSWCCA 231.
6. Ibid., at [44] per Bathurst CJ; at [81]–[83] Allsop P.
7. Ibid., at [59] per Bathurst CJ.
8. Ibid., at [78] per Allsop P.
9. *Monis*, at [57]–[59] per French CJ (Heydon J agreeing); at [91] per Hayne J; at [333] per Crennan, Kiefel and Bell JJ.
10. Ibid., at [71] per French CJ (Heydon J agreeing); at [171] per Hayne J; at [343] per Crennan, Kiefel and Bell JJ.
11. *Lange*, at 567–8.
12. (2004) 220 CLR 1 at [93] and [95]–[96] per McHugh J; at [196] per Gummow J and Hayne J agreeing.
13. *Monis*, at [74] per French CJ; at [214] per Hayne J; at [236] per Heydon J.
14. By operation of s 23(2)(a) of the *Judiciary Act 1903* (Cth).
15. Monis, at [29] per French CJ.
16. See s 470.1 of the Code; *Monis*, at [69] per French CJ.
17. *Monis*, at [9] and [29] and [69] per French CJ.
18. Ibid., at [29] and [69] per French CJ.
19. Ibid., at [73] per French CJ.
20. Ibid., at [73] per French CJ.
21. Ibid., at [73]–[74] per French CJ.
22. Ibid., at [76] per French CJ.
23. Ibid., at [220] per Hayne J.
24. Ibid., at [125] per Hayne J.
25. Ibid., at [184] per Hayne J.
26. (2004) 220 CLR 1 (Coleman).
27. *Monis*, at [97] per Hayne J.
28. Ibid., at [220] per Hayne J.
29. Ibid., at [236] per Heydon J.
30. Ibid., at [237] per Heydon J.
31. Ibid., at [246] per Haydon J.
32. Ibid., at [248] per Heydon J.
33. Ibid., at [249] per Heydon J.
34. Ibid., at [251] per Heydon J.
35. Ibid., at [348], per Crennan, Kiefel and Bell JJ.
36. Ibid., at [349], per Crennan, Kiefel and Bell JJ.
37. Ibid., at [345], per Crennan, Kiefel and Bell JJ.
38. Ibid., at [346], per Crennan, Kiefel and Bell JJ.
39. Ibid., at [353], per Crennan, Kiefel and Bell JJ.
40. Ibid., at [342], per Crennan, Kiefel and Bell JJ.
41. Ibid., at [352], per Crennan, Kiefel and Bell JJ.
42. *City of Adelaide*, at [68] per French CJ; at [141] per Hayne J; at [221] per Crennan and Kiefel JJ (Bell J agreeing).
43. Ibid., at [66] per French CJ; at [96] and [119] per Hayne J (Bell J agreeing); at [190] per Crennan and Kiefel JJ; at [155] – [161] per Heydon J, dissenting.
44. Ibid., at [68], per French CJ.
45. Ibid.
46. Ibid.
47. Ibid., at [134] per Hayne J.
48. Ibid., at [141] per Hayne J.
49. Ibid., at [141] per Hayne J.
50. Ibid., at [221] per Crennan and Kiefel JJ (Bell J agreeing).
51. Ibid., at [210] per Crennan and Kiefel (Bell J agreeing).
52. As adopted by the High Court in relation to the freedoms spoken of in s 92 of the Constitution, in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [102] – [103] and [110].
53. *City of Adelaide*, at [202] per Crennan and Kiefel JJ (Bell J agreeing).

The Devil's Triangle: civil liberties, the media and parliament

In November 2012 Bob Debus AM* delivered the Sir Frank Kitto Lecture at the University of New England's Faculty of Law

This lecture commemorates the great figure in Australian legal history Justice Sir Frank Kitto, who served on the High Court of Australia from 1950 to 1970 and was thereupon elected chancellor of this university.

As long ago as 1998 Justice Michael Kirby used this lecture to describe not only Sir Frank's contribution to the law but his high integrity, demonstrated for instance, in the unequivocal judgment in which he joined the majority in the seminal decision to strike down the Menzies government's *Communist Party Dissolution Act 1950*. It was the beginning of the Cold War but Kitto was immune to the politics of the situation:

> …it may have been thought (although never said in those more graceful days) that Justice Kitto was a 'capital C conservative'. His skills were in the black letter law…
>
> He had just succeeded in a substantial brief for the banks in striking down the nationalisation scheme of the former Labor Government. Yet in less than a year, he performed his function as a judge of our highest court, in accordance with his understanding of the law and the Constitution precisely and only as his learning and conscience dictated.[1]

In the period 1976 to 1982 he was inaugural chairman of the Australian Press Council. I venture to believe that he may have grudgingly approved the national defamation law finally achieved by the Commonwealth and state attorneys-general in 2005 after years of difficult negotiation.

That kind of law reform, as I have found, can require strenuous negotiation with persistent interest groups around issues of substantial policy and technical difficulty. It was a rare opportunity for me to have a broad commonality of view and sympathy with the legal representatives of the major news organisations and their clients who took the view, I think rightly, that speculative defamation litigation was a blight upon press freedom.

That kind of law reform is necessary because it can bring substantial improvement to the administration of the law, the efficiency of the economy and the welfare of the community. It does not normally raise difficult issues of morality or justice. If that kind of law reform is able to resolve conflicts of opinion and interest, without creating a serious sense of grievance among some of the parties, it is likely to achieve a level of uncontroversial permanence.

However, when Professor Paul Martin invited me on behalf of your faculty to present this lecture he was thinking about another kind of role that I believe is essential to the role of an attorney-general in our Westminster system of government: the protection of the fundamental norms and principles of the Australian legal system.

Almost all of those who have previously given this lecture have been legal philosophers or judges but today I want to talk about how those values played out among the contingencies of real life in the realm of government during a quite turbulent period in the recent history of our society and therefore in the administration of the law itself in New South Wales.

Let me set the scene. I was New South Wales minister for emergency services for seven years from 1995. During that time we suffered the worst floods in thirty years, the worst bushfires in fifty years; and the hailstorm in the eastern suburbs of Sydney was at the time the most expensive natural disaster in Australian history. When I ceased to hold the portfolio the weather seemed to become quiet.

In the same period, I was minister for corrections. The new government had come to power after an election campaign marked by strident cries for the imposition of preventative detention. The notorious cases of wife killer Gregory Kable and child murderer John Lewthwaite were prominent. Soon after the election, the High Court brought down its somewhat delphic judgement in *Kable*; not long after that, it was my task to defend the decision of the Parole Board to free John Lewthwaite and to stand against tabloid calls for new preventative detention legislation, while a howling mob surrounded the inner city terrace in which the freed murderer had been accommodated. The inner city terrace in which the Parole Service had astutely chosen to place this notorious offender, I might add, was opposite a convent school full of tiny children. My subsequent conversation with the rather saintly nun in charge of the school was, all things considered, less unpleasant than it might have been.

I was attorney general of NSW for seven years from 2000 and attentive listeners among you will

be beginning to discern something of a pattern. Charges were laid in 2000 against Bilal Skaf and his associates for a series of pack rapes, which, as their circumstances became known, agonised the state; the fraught and racially charged trials, retrials and appeals went on for several years raising hard questions in the general media about sentencing policy, the treatment in courts of complainants in sexual assault hearings and the rules for the conduct of jury trials.

In 2003 a violent offender on bail murdered his wife in Newcastle, reviving memories of the unspeakable Bega Schoolgirl murders of half a dozen years before, raising questions about the efficiency of administration of the justice system and encouraging complaint about the established presumptions for granting bail. The violence and racism of the Cronulla Riots appalled us in 2005.

The rate of crime had generally risen through the nineteen nineties and against that background these high profile events were collectively to encourage some of the most vituperative tabloid media campaigns against the courts ever seen.

Outside New South Wales the 'Tampa' incident, followed instantly by Commonwealth legislation to introduce the so-called 'Pacific Solution' for asylum-seekers, occurred in August 2001. Three months later the terrorist attack on the World Trade Centre in New York traumatised the world, and caused an extreme legislative response in Australia. The Bali Bombing shocked us in 2002. A second Bali bombing and the 7/7 Bombing in London followed the Djakarta Embassy Bombing in 2004. They all involved Australian victims. The London bombing raised new fears about so called home grown terrorists and caused another extreme legislative response.

Constellations of violent criminal offences and acts of terrorism preoccupied public attention but they were not the only matters of concern. For instance, the High Court decision in *Brodie*[2] abolished the rule distinguishing misfeasance and nonfeasance in negligence, thereby extending the tortious liability of local government and contributing to an acute crisis in public liability insurance. The dramatic events concerning the compensation by the Hardies Company of victims of asbestos poisoning played out in the media and the government.

This list of often unpredictable events could be made longer. It was not a comfortable time to be administering the legal system or seeking to protect its fundamental values. Indeed, some of those values as I had understood them were open to considerable challenge in the media and the parliament and in the electorate at large, as they often have been in history when society is subject to feelings of fear and threat.

I should acknowledge that there exists some degree of ambivalence about the role of the contemporary attorney-general as first law officer, in Australia anyway. The establishment of the Office of The Director of Public Prosecutions was the most important of the systematic changes that have seen public law officials take over many of the historic functions of attorneys-general. In Australia the attorney-general is not the government's legal representative but a regular cabinet minister in charge of a department: a department that nevertheless holds responsibility for the administration of the legal system and for the criminal law and other legislation dealing with legal rights.

A former minister who served in the late nineteen seventies has told me that if the attorney general in those years told the New South Wales Cabinet that a particular proposal would not be legally acceptable that was an end to the matter. I can attest that such is no longer the situation!

Nevertheless, with a few blatant exceptions ministers and members still acknowledge that the attorney general has a particular responsibility for advising the government on legal matters, for the appointment of judicial officers and for the comity of the relationship between the executive, parliament and the other arm of government existing under the doctrine of the separation of powers, the courts.

A state attorney-general also has an especially intense relationship with the legal profession. I acknowledge that the minister for agriculture has an important relationship with the Farmers' Association and the minister for local government has a special relationship with local government defined by legislation. However, the attorney general of NSW and the Attorney General's Department are permanently engaged in a dialogue with the profession through the Law Society and the Bar Association, with the Law Reform Commission, the

Judicial Commission and the public law officers, as well as with the court jurisdictions, concerning the effective, principled conduct of the legal system and the protection of its values.

Of course the legal profession is hardly free of self-interest, tax evasion, overcharging or neglect: of course not. Indeed, while I was New South Wales attorney general, the huge scandal erupted over a small number of extremely senior barristers who were systematically cheating the Taxation Office and exploiting bankruptcy provisions in a manner both flagrant and baroque. However, I wish precisely to say that in my experience professional, ethical ideals remain important for the great majority of lawyers. The professional associations, along with the legal services commissioner, support and nurture this culture, and indeed in the case of the 'bankrupt barristers' scandal the office holders and executive of the Bar Association responded with exemplary courage and vigour.

It is not just the existence of the principles that matters. In the day-to-day life of the nation basic values of the law critical to our democracy are more carefully nurtured and understood and more often vigorously defended by the culture of the wider legal profession than they are by our parliaments or the media.

Within the Australian Westminster tradition, one of the oldest continuously existing democratic systems in the world, the attorney-general is also a part of the legal professional culture, unless he or she deliberately chooses otherwise. The old roles of prosecutor and government advocate are gone but the critical responsibility for protecting fundamental values and ensuring continuing public confidence in the administration of justice remain. They are inseparable, it seems to me, from the attorney's continuing responsibility for the appointment of judicial officers and the administration of the criminal law and of the court system itself.

In a paper given to the National Judicial College the former chief justice, Murray Gleeson, provided a characteristically precise account of public confidence in the courts:

> …in the determination of civil rights and obligations, and criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Competence, independence and impartiality are basic qualities required of judges as individuals, and of courts as institutions. Fair and public hearings are the required standard of judicial process. Confidence in the courts is a state of reasonable assurance that these qualities and standards are met.

The chief justice went on to point out that:

> … courts also have the benefit of cultural reinforcement of their authority, and of faith in their integrity. This is a society which accepts the rule of law as the natural order of things. The decisions of courts are obeyed, even when they are unpopular, or offend powerful interests.[3]

This cultural habit of acceptance cannot however be taken entirely for granted. From time to time it can partially break down, a matter to which I will return.

It is of practical relevance that the judicial officers who deal with the great volume of matters involving the citizens of New South Wales are actually not judges at all: they are magistrates and they conduct ninety per cent of criminal and civil hearings in our jurisdiction. Public confidence in the courts can be undermined if the local courts are seen by local people to be conducted incompetently. For that reason, I worked closely while in office with the chief magistrate to improve procedures, to introduce substantial diversionary and rehabilitation programs for offenders, to appoint competent practitioners from a variety of backgrounds and to enhance the public reputation of magistrates.

In that last respect and with the assistance of Chief Justice Spigelman I arranged to change the form of address for magistrates from the obsolete and faintly ridiculous honorific 'your worship' to the form 'your honour,' which is used for any other judicial officer. I know that my initiatives were successful. It was a startling experience to have a chorus of magistrates actually sing me a song of appreciation at their annual dinner to the tune of 'A Policeman's Life is not a Happy One' from *The Pirates of Penzance*. Regrettably the higher courts never exhibited the same creative flair.

Threats to confidence in the courts are not always pragmatic. Ideological conflict over the proper role of the courts has flared often in the last twenty years.

In 2004 a particularly intense episode in intellectual debate about what was called 'judicial activism' and the rule of law was under way. It was conducted as a high profile political campaign in the pages of *The Australian* newspaper and elsewhere. The politically conservative commentators, politicians and establishment figures who drove the debate were angry about decisions of the High Court of the 1990s; for instance, its implication of a right to freedom of political communication in *Political Advertising*[4] and subsequent cases but especially its decision to over turn the brutal historical injustice of the doctrine of *terra nullius* in *Mabo*.[5]

The critics suggested that the work of judges was not to make law but to find the existing law and to apply it to the situation before them, not to pay attention to the context of the matters before them or to contemporary values or ideas of justice. They overtly attacked those judges, not least High Court judges who, they said, were undermining the role of the parliament by 'legislating from the bench'.

I concede that this position is not a long way from the formal view argued by Sir Frank Kitto. However, if you were in a parliament, as I was, and understood the nature of judicial reasoning as I had been taught it, you drew the conclusion that the commentators were doing precisely *the opposite* to that which they claimed. They were attempting, often in exceptionally aggressive language, actually to reduce the *established* role of the judiciary in law making. They had a broad, radical conservative political agenda and they did not seem to mind if they undermined public confidence in the courts along the way.

When I was at Sydney Law School more than forty years ago we were taught jurisprudence by the formidable Professor Julius Stone but more often by his protégé, the brilliant young lecturer Tony Blackshield. It was a homecoming for me therefore to walk into a conference on constitutional law in February 2004 at the Art Gallery of New South Wales to find the now venerable Professor Blackshield in full flight, restating the familiar robust teaching of Julius Stone:

> …when politicians and newspaper columnists inveigh against 'activism', what they usually postulate as its antithesis is the old idea that judges cannot *make* the law, but can only *apply* the law – and behind that, the old fiction that 'the law' exists in advance in some objectively knowable, unambiguous, predetermined form, so that all the judge has to do is to apply it in the correct mechanical manner…'

However:

> We all *know* that judges make the law, and that even in the simplest case they always have to restate, develop, rationalise and reinterpret the law in order to apply it to the case before them – so that the judicial process is always and inevitably a creative process. And once we've agreed on that, we can also agree that what is meant by 'activism' must be not that judicial creativity is bad in itself, but only that it might sometimes go too far, be exercised too sweepingly…

Professor Blackshield went on to discuss the manifest constraints on the exercise of judicial 'creativity,' beginning with the fact the judges must decide the particular matter or dispute before them 'on the basis of existing legal materials':

> …justifying the decision by a process of reasoning persuasively constructed through an interpretation of those materials and either consistent with those materials or confronting any inconsistencies and plausibly explaining them away. [6]

Nevertheless, the clear antithesis to judicial activism, Professor Blackshield concluded, was not timid restraint but abnegation of judicial responsibility.

I recall that it was also in February 2004 that Justice Keith Mason, then president of The New South Wales Court of Appeal, presented the Sir Maurice Byers Lecture to the Bar Association.[7] Justice Mason mentioned the appearance of Byers QC before the High Court in three famous cases: the *Political Advertising* case, which I have mentioned; *The Wik Peoples v Queensland*[8], which found that native title rights could co-exist with rights under a pastoral lease, depending upon the precise terms of the lease; and the case of *Kable v Director of Public Prosecutions (NSW)* [9], to which I have already in part alluded and which held that legislation in New South Wales allowing the Supreme Court to detain a single individual was not compatible with the exercise of the judicial power of the Commonwealth vested in the Supreme Court under the Constitution.

These were decisions that stood as 'remarkable

tributes' to the advocacy of Byers QC but they were also all demonstrations of the legitimate judicial creativity that appears from time to time 'in every age' whether it is admitted or not.

Justice Mason went on to point to the dramatic changes that had actually been occurring in the law of negligence at the time. Unlike the case of *Brodie,* the slightly later case of *Tame*[10] had constrained a field of tortious liability, this time in nervous shock. He showed that the case depended on much more than reading earlier precedents. It also depended on new understanding in the field of psychology, recognition that old distinctions were incoherent, an acceptance of the public mood of impatience with ambulance chasing and concern about the cost of insurance. That was the reality.

My last example is from earlier this year when Professor Hal Wootten, Supreme Court judge, royal commissioner into Aboriginal Deaths in Custody, founding dean of the Law School at the University of New South Wales paid tribute to Sir Gerard Brennan who, of course, wrote the leading judgment in *Mabo*. Recognising that there is always a tension 'between the claims of continuity and consistency, which give certainty and predictability to the law, and claims of justice according to contemporary values, which give respect and acceptance,' Professor Wootten described the momentous historical events, the profound social change and the advances in understanding of Aboriginal culture that had occurred in the two centuries since the legal doctrines of *terra nullius* were established. For Sir Gerard, he explained:

> a legal doctrine denying indigenous people rights because it deemed them 'barbarous' or 'so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society' seriously offended 'the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.'

I share Hal Wootten's pride that our independent court system could discard *terra nullius* as the foundational doctrine of Australian law:

> I wonder what…[the High Court's] critics would say of their extravagant language today, when everyone can see *Mabo's* modest effect on land titles and its beneficent effect on our race relations and, whether black or white, on our self respect and feelings of legitimacy in our land.[11]

Though the opportunities for courts to make a change of such consequence will always be rare, they would be a little more frequent if our parliaments legislated to establish charters of rights, a matter to which I will return.

In any event powerful explanations of the true role of the courts and realistic explanations of judicial reasoning such as those I have mentioned have helped to subdue the political campaign against so-called 'activist' judges. It is true also that the nature of the High Court and its approach to constitutional questions has altered in recent years: different times, different personalities.

I like to think, on the other hand, that conservative commentators are embarrassed into silence at least to some degree by the unrestrained, flagrantly partisan decisions by Republican appointees to the Supreme Court of the United States of America in cases like *Bush v Gore*[12] or *Citizens United v FEC.*[13] The latter decision has given corporations all the free speech rights of real people and thus an unlimited right to spend corporate funds on political agitation. In consequence American politics threatens to drown in money influence: although it was pleasant to see so much of the money wasted in the recent presidential election.

Restraint is something that does not come to mind either when one turns ones attention to the approach of the media to the courts during my time in office. I refer particularly to tabloid newspapers and talk back radio, forms of communication it must be said that are quite unfamiliar to most judges, perhaps most lawyers.

It is easy to underestimate the ferocity of the environment that can be created by a sustained talk back campaign – supplemented these days by social media - especially if it is coordinated with other elements of tabloid media. The attack in recent years against the Australian Government's 'stimulus package' school building program by the talk back host Ray Hadley demonstrates exactly how a campaign can reach far beyond its direct audience. A well-orchestrated assault against a sentence that is perceived to be lenient or a bail decision

that is contentious has the potential to taint public confidence in the justice system. The cycle, in the agitated atmosphere surrounding discussion of crime and sentencing a decade ago, was fairly predictable. Let us consider an only mildly fictionalised example.

Leaked security footage appears of an adolescent boy on a railway station cruelly casting a small kitten under the wheels of a train. The boy is arrested, charged and bailed. Talkback radio begins a crazed campaign denouncing the magistrate, wanting the bail revoked, wanting the bail laws changed, wanting animal cruelty laws changed. In a week thousands of letters and faxes – this is in a time just before the advent of social media campaigns – arrive in the office of the attorney general. Staff in his electorate office are deluged and abused on the phone. Parliamentary colleagues, likewise deluged, approach the attorney general in corridors demanding action. The police union puts out statements indicating that such cases are all too common; that hardworking police are too often undermined by lenient magistrates and inadequate laws; that police need new powers; that more police are needed. Tabloid newspapers run photos of the presiding magistrate and lists of previous decisions generally misunderstood but deemed contentious. Tabloid radio invites police and public to phone in with other examples of alleged judicial incompetence. Members of the staff of the premier's office ring the staff of the attorney general at all hours of the day and night screaming for action.

Sometimes of course there is a kernel of legitimate cause for concern in among all the tabloid hysteria. Sometimes long held conventions understandable to those within the legal profession serve to make the criminal justice system opaque and unresponsive to ordinary people. The *Victims Rights Act 1996* responds to what was in my view the entirely justified movement of protest by the relatives of victims of homicide who had previously been refused information about trials on the basis that they were not parties to proceedings, given no opportunity to express their feelings other than in emotional press conferences on courthouse steps and overwhelmed by the feeling that only the rights of the defendant were protected. For similar reasons, in 2004 I introduced legislation, somewhat controversial within the legal profession, to better protect complainants giving evidence in sexual assault trials from harassment by defendants and their representatives.

In any event, terrible criminal acts have always resonated with the general public: modern media, including social media magnify the effect. In a normal time the fictionalised situation I have described could probably be dealt with effectively at a political level by the calling of a press conference in which the attorney general explains the principles behind the bail laws, releases some accurate information on bail and sentencing in the company of the highly persuasive director of The Bureau of Crime Statistics and Research (BOCSAR) and promises to ask the director of public prosecutions to review the case. It is after all necessary in a democracy to take the fears and concerns of citizens seriously and to address them if possible.

In 2002 however that kind of stately approach, which I attempted with some frequency, simply would not answer. Extraordinary crimes, dramatic trials and the unrelenting criticism of the entire justice system by tabloid media had reinforced strong perceptions in the public mind that criminal sentencing was inadequate. Private opinion research confirmed that concern about sentencing was at the time a major issue, perhaps the major issue, in the public mind. It became obvious that the parliamentary opposition had access to similar research. The government found itself vulnerable to attack of quite uncommon intensity and persistence. It was into this charged and opinionated environment that the opposition introduced its main political strategy for the general election of March 2003: a policy of 'compulsory sentences'.

At that time mandatory sentencing was applied to minor property offences in the Northern Territory and Western Australia, where it acted like a super-trawler sucking Indigenous kids and young adults into the prison system. In the parliament and in the media members of the New South Wales Government , including myself, spent some months arguing the injustice of mandatory sentencing. It was, we said, inherently unjust to treat all cases as if they were the same; it was fundamental to our system of criminal justice that judges should exercise discretion in each individual sentencing decision; in practise crime

rates never really fell where mandatory sentencing was applied.

Of course these arguments were true and entirely supported within the legal profession but they had no discernible effect at all upon public opinion. It was rationally believed within the government and, it seemed the opposition, that sentencing policy would be of strategic significance at the coming election. The choice was mandatory sentencing, an idea abhorrent to established values of our system of criminal justice, or something else.

It was against that background, and assisted by a small band of particularly accomplished criminal lawyers, that I introduced amendments to the Crimes (Sentencing Procedure) Act in November 2002 to 'establish a scheme of standard minimum sentencing for a number of serious indictable offences and to establish the Sentencing Council to advise the attorney general in connection with sentencing matters.' Its purpose was to encourage adequacy, consistency and transparency in sentencing while avoiding the dangers involved in grid or mandatory sentencing.

In the second reading speech I was out to make my purpose obvious.

> At the outset I wish to make it perfectly clear: the scheme being introduced by the government today is not mandatory sentencing… the scheme provides further guidance and structure to judicial discretion .It does not replace judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process.
>
> By preserving judicial discretion we ensure that a just, fair and humane criminal justice system is able to do justice in the individual case. This is the mark of a criminal justice system in a civilised society.

I concede that other members of the government were not always so fastidious on the point.

I will attempt only a short explanation of the legislation here. The first important point of reference to be considered in a conventional sentencing exercise by a judge is the maximum penalty. The new scheme introduced a further reference point, being a point in the middle of the range of objective seriousness for the particular offence. Standard non-parole periods, set out in a table, were in some cases set substantially higher than the median non parole periods for the offences involved indicated by statistics collected by the Judicial Commission over the previous seven years. The court was to set a standard non-parole period as the non-parole period for the offence unless it determined that there were reasons for setting a non-parole period that was longer or shorter than the standard non-parole period. Nevertheless the legislation maintained the court-defined 'instinctive synthesis' approach to sentencing already established in New South Wales It contained an expanded and comprehensive list of clearly identified 'aggravating' and 'mitigating' factors already existing in the common law that the sentencing judge could take into account in each particular case: for instance, the offender has a record of criminal activity, the offence involved gratuitous cruelty; or on the other hand, the offender has no criminal record, the offender was provoked by the victim.

The New South Wales Sentencing Council has reported that there has been some increase in the non-parole periods for standard non-parole Table offences and that there has been greater consistency in sentences imposed for table offences. That is to say, at least to a significant extent the legislation has worked as intended. I remain aware nevertheless that application of the legislation has taken enormous effort by members of the judiciary and defence lawyers in particular.

An exceptionally strong Court of Criminal Appeal in the leading case of *R v Way*[14] interpreted the statute to imply that a judge was obliged to adopt a two-stage process in the sentencing of an offender for a standard non-parole offence. First they should ask whether an offence fell into the mid range of objective seriousness by comparison with an hypothesised offence answering that description and, in the event that it did, by inquiring if there are matters justifying a longer or shorter non-parole period. However, the fairly recent High Court decision of *Muldrock* [15] overturned the mandatory two-stage sentencing process established in *Way* and instead treated the standard non-parole period as an overall guide to sentencing of equivalent importance to

the maximum sentence. The High Court described the maximum penalty and the standard non- parole period as 'legislative guide posts'.

It is to be expected in consequence, that the increase in sentences that had been occurring in some standard non-parole offences will taper off. If I were of a more conservative caste of mind I should describe the creative statutory interpretation of the High Court in this instance as 'activism'. The effect is that the influence of the standard non-parole period scheme will be subdued and I am content.

The *political* effect of the standard non-parole period scheme however, was astounding. Admittedly influenced by tendentious headlines like one in the *Sydney Morning Herald* that referred to 'Carr's Killer Sentences', the community responded positively to the proposals. There was a widespread acceptance that the government had made a reasonable settlement of a problem. This in turn left the electorate open to an implicit acceptance of the lawyers' argument that not every case deserved the harshest penalty.

The opposition attempted nevertheless to exploit the fact that judicial discretion had been maintained. Political discourse fell to a very low ebb. Advertisements and direct mail letters listed the common law mitigating circumstances recited in the legislation and sought to persuade voters in marginal electorates that random killers would walk free because of the actions of soft judges: 'Bob Carr …will give criminals thirteen excuses to get out of gaol early'. Judges will be able to 'look for mitigating circumstances to let rapists, murderers, drug lords and violent criminals under the bar'. However, this rhetoric was unpersuasive. The wheels had fallen off mandatory sentencing and public confidence in the courts had been restored; or at least widespread concern had been ameliorated.

Today, crime rates for most offences in New South Wales, in decline for ten years, are at their lowest level in more than twenty years. Fear of crime in the streets has therefore declined, tabloid media has perforce turned to other issues and in consequence the contingent politics of law and order, so consuming in the hothouse of politics and media a decade ago, has virtually disappeared.

The politics of terrorism is subdued at the present time as well. In 2005 it was in full cry. A few days ago I found an old copy of the front page of the *Sydney Morning Herald,* 28 October 2005.

> The NSW Attorney General Bob Debus has publicly questioned the adequacy of the safeguards in the Howard Governments anti-terrorism bill.
>
> In remarks that are at odds with the Premier, Morris Iemma's determined support for the legislation, Mr Debus told the *Herald* yesterday: 'I think I share the concern about this legislation with plenty of other people. I don't query that we need to have very tough responses to the threat of terrorism and I don't query that the Premiers have signed off on a framework last month.
>
> But that was a framework that said judicial review of preventative detention and control orders would be meaningful and I'm concerned that in the drafted provisions that presently exist there are many aspects of normal judicial review that have been left out…
>
> I'm also concerned that debate so far has been so secret. I do think we are talking here about some of the most profound changes to the criminal law that we have known in a generation and, necessary as they may be in general, it is obviously extremely important for democracy that they should be debated in a rational manner, both before they get into parliament and when they get there.

That was a pretty good account of my troubled state of mind at the time.

The many schemes and amendments to counter terrorism laws passed by the Commonwealth after the ninth of November 2001, over fifty of them, have been conducted often in the rhetorical context of a 'War in Terror'. At a political level the spectre of a war has been used to justify the swift implementation of legislation, generally with little time for reflection. A sense of emergency has been used to justify the suspension of established rights or safeguards, to dismiss reasonable misgivings. Not a few political leaders took unabashed pride in claiming 'we have the strongest counter terrorism laws in the world.' They were probably correct.

Absurd levels of secrecy were justified by the alleged requirements of national security. When officials from my department visited Canberra in 2005 to discuss the terms of counter terrorism legislation

to be presented to parliament they were startled to discover they were scanned and taken into a secure room without mobile phones for their meeting.

There was no better demonstration of the unbalanced approach to law making at the time than the Commonwealth's decision to reintroduce a version of the defunct and essentially medieval law of sedition into the Crimes Act: a law that would mean in reality that you could be prosecuted if the government didn't like what you said. Those amendments were passed but under protest from MPs on both side of the House of Representatives. The Commonwealth attorney-general agreed to refer the sedition provisions for the consideration of the Australian Law Reform Commission and the Labor government carried out its recommendations for the repeal and replacement of the offending sections in 2010.

The Commonwealth had used the 7 July 2005 London Underground Bombing as the trigger for a further round of counter terrorism legislation. It was able to legislate a scheme for control orders under its own constitutional head of power, and did so. However, it had received legal advice casting doubt on its power to detain a suspect without charge for longer than 48 hours. Thus it was that the Commonwealth needed the assistance of the states, who were not so hampered, to introduce supplementary legislation for a scheme of preventative detention that would allow authorities to hold a terrorism suspect without charge for up to 14 days.

The Terrorism (Police Powers) Amendment (Preventative Detention) Bill essentially imported British legislation developed in the 1980s to hold members of the IRA without trial. Controversy had followed the British laws as the period of detention was steadily increased from 48 hours to seven days to 14 days to 28 days; a 2008 bill to increase the detention time to 42 days was defeated in the House of Lords. Now, it seemed to many of my colleagues and I, the Commonwealth legislation sought to remove protections for no better purpose than to superfluously demonstrate that the government was tough on terrorism.

Assisted again by criminal law officers of the highest calibre and strongly supported by many parliamentary colleagues I introduced a scheme which replicated the Commonwealth preventative detention provisions but differed in some important respects. The Commonwealth scheme was administrative. Initial orders were made by a senior police officer and later confirmed by judicial officers acting in a personal capacity. The New South wales scheme was judicial: both initial and final orders made by a judge.

The Commonwealth scheme at no time allowed a hearing on the merits between the parties before the expiry of the detention. The New South Wales scheme allowed an initial order to be made in the absence of the subject person but at subsequent confirmation or revocation hearings the detained person was permitted to be present and contest the matter. The Commonwealth scheme contained disclosure offences designed to keep the existence of the preventative detention order secret. The New South Wales scheme included no such disclosure offences but allowed the Supreme Court to make the kind of non-disclosure order that might be applied to any criminal matter. I quote from my second reading speech:

> A 14 day scheme where a person was arrested secretly and held incommunicado without access to the courts would offend not only fundamental principles, such as habeas corpus, but also basic common sense. In the end the disclosure offences were not included in the New South Wales scheme as they are not effective in keeping a preventative detention order secret over a 14 day period. But their inclusion would have added greatly to the complexities of the bill. The bill implements a fairer scheme of preventative detention. This balance, sadly lacking in the Commonwealth bill, will mean the legislation can still operate effectively in preventing a terrorist attack and in preserving evidence of an attack, but eliminates some of the more rigid and unreasonable aspects of the Commonwealth bill…'

I went on:

> The government has consistently proven that strong counter terrorism laws can be crafted that include strict safeguards and effective oversight. Whilst being ever vigilant as to the security and safety of the citizens of New South Wales I also want to assure the public that the government will always attend to the liberties and freedoms that are the mark of our democracy.'

Of course an observer may feel that I hadn't really

done as well as I said I had done in balancing the needs of security and fundamental protections. My blunt point however is that the Commonwealth demonstrated little concern to do so at all.

A level of conflict over related issues persisted between the attorneys-general of some of the states and the Commonwealth. The detention of the Australian David Hicks in the American prison camp at Guantanamo Bay, Cuba without trial for five years was an issue of increasing concern for civil rights activists.

It remains shocking to me that the Commonwealth of Australia would acquiesce to the indefinite detention of an Australian citizen without charge

Awareness had grown about dramatic attacks on the rule of law by the Bush Administration after the events of 9/11. Evidence emerged of covert CIA kidnapping of terrorism suspects and their torture at secret prisons in Eastern Europe and the Middle East. The evasive official term was 'rendition'. Officials of the US Justice Department wrote detailed memoranda justifying the use of torture to elicit evidence. The Abu Graib scandal broke. Lawyers from some of the most prestigious firms in the United States sought to provide *pro bono* representation to detainees at Guantanamo Bay and were treated for practical purposes as enemies of the state.

Against this background the military defence counsel appointed to represent Hicks, the straight talking, charismatic Marine Major Michael Mori visited Australia with the purpose of persuading the Australian government to seek his repatriation. I arranged for Mori to address the Standing Committee of Attorneys' General in Fremantle in November 2006. Following the meeting the state and territory attorneys-general signed the Fremantle Declaration affirming our commitment to fundamental principles of justice including the right to a fair trial, the principle of *habeas corpus*, the prohibition of indefinite detention without trial, the prohibition on torture, access to rights under the Geneva Conventions, the separation of powers and the prohibition of the death penalty.

I wrote to the Commonwealth attorney-general expressing doubt that Hicks could ever receive a fair trial under the relevant US Military Commissions Act. That legislation allowed the commission that would try Hicks to hear coerced testimony and denied defence counsel access to certain evidence; authorised the exclusion of the defendant from the court room; prohibited any person from invoking the Geneva Conventions as a source of rights or action; permitted the prosecution to admit hearsay evidence and placed the burden on the defence to show why hearsay evidence was not reliable; eliminated the right of non-US inmates to challenge their detention with *habeas corpus* petitions, and much else besides. Some US officials apparently referred approvingly to this manifest misuse of the law as 'lawfare', by which they meant the deliberate, careful subversion of centuries of Anglo Saxon legal tradition.

It remains shocking to me that the Commonwealth of Australia would acquiesce to the indefinite detention of an Australian citizen without charge in circumstances such as these. In the end of course, David Hicks went through the form of a guilty plea and was released to become, for a while, one of only two people in Australia ever actually subjected to a control order.

Fundamental freedoms and guarantees can be much more fragile than we often assume. Here is Alfred McCoy, the American writer and scholar once resident in Sydney, writing about public acceptance of interrogation by torture that he was observing in the United States in 2006:

> Why has the public response to issues that cut to the core of America' national identity been so muted? The short answer: The administration's increasingly unapologetic advocacy of torture has echoed subtly but effectively with the trauma of 9/11.
>
> With the horrific reality of the Twin Towers attack still resonating and endless nuclear-bomb-in-Times-Square… scenarios ricocheting around the media and pop culture, torture seems to have gained an eerie emotional attraction…

McCoy went on:

> With a complex reality reduced to a few terrifyingly simple, fantasy-ridden scenarios, torture in defence of the 'homeland' has gained surprisingly wide acceptance, while

> the torture debate has been reframed as a choice between public safety and the lives of millions or private morality and bleeding–heart qualms over a few slaps on the head. In this way old fashioned morality has been made to seem little short of immoral.'[16]

The experience of years in the Devils Triangle, as I have called it, has done nothing to change my conventional view that a system of elected parliamentary government, a free press and an independent legal system are the foundation of democracy. It has not changed my view that it is within democratic political systems that human possibilities are most effectively realised. I have also meant to demonstrate however that long nurtured legal values critical to the strength of our democracy, admirable as it is in plenty of ways, can be hastily broken down or overlooked in the executive and the parliament and the media in times of fear and threat.

Over many years I have therefore supported the enactment of a charter of rights, which has the primary purpose of causing a parliament to hasten more slowly, in such difficult times especially. As the chief justice reminded us in last year's Kitto Lecture the common law does protect many rights and freedoms but it cannot withstand plainly inconsistent statute law operating within constitutional limits.

As Australia had been the only comparable country not to recognise Indigenous rights to land before *Mabo,* it is now the *only* comparable country governed without any agreed statement of basic rights. There is no law at all to protect many of our assumed freedoms.

Professor George Williams has been a tireless advocate of a national charter of human rights in the form of a so-called parliamentary rights model. This model allows the judiciary to exercise an important role but not at the cost of parliamentary sovereignty. Unlike the United States Bill of Rights, a charter of this sort does not leave a final decision to the courts. The charter is an ordinary act of parliament that can be changed to meet circumstances over time: no need for a permanent debate about whether or not to try to understand the intentions of the original framers.

In Australia only Victoria and the Australian Capital Territory have legislated for a charter. As Professor Williams explains:

> Victorian courts and tribunals are required to interpret all legislation, 'so far as it is possible to do so consistently with their purpose' in a way compatible with human rights.
>
> Where the legislation cannot be interpreted in a way that is consistent with the Charter, the Supreme Court may make a Declaration of Inconsistent Interpretation. This refers the law back to the Parliament but does not strike it down. Parliament can decide to amend the law or leave it as it is.[17]

The rights protected in Victoria are generally consistent with the International Covenant on Civil and Political Rights and include, for instance, freedom from arbitrary detention and freedom from cruel and degrading treatment.

As Australia had been the only comparable country not to recognise Indigenous rights to land before Mabo, it is now the only comparable country governed without any agreed statement of basic rights.

It is gratifying to see that the federal government has recently announced a review of national counter terrorism laws by the retired and experienced judge, Anthony Whealey QC. It will look at control orders, preventative detention orders and police search powers.

Demonstrating the truth of my earlier remarks about the legal profession Law Council president-elect, Joe Cantanzariti welcomed the review. He said that a lot of legislation had been rushed through parliament, some was counter to principles of criminal justice and some had never been used.

Subjected to the kind of charter processes available in Victoria or New Zealand a good many of our terrorism and migration laws would almost certainly not have been passed in their present form in the first place. I say this not unaware of significant

work anyway done by several federal parliamentary committees to modify some of the counter terrorism legislation of the last decade.

I conclude by acknowledging that public confidence in the courts in contemporary society is generally very much higher than confidence in the media: that at the very least there is a widespread belief that Australian media are not as accountable as might reasonably be expected in a democracy. The Press Council, a body for the self-regulation of newspapers does not have the authority to ensure the reliable publication of apologies and corrections. The enforcement procedures of the Australian Communications and Media Authority, the statutory body that regulates commercial broadcasting, are slow and cumbersome. Newer forms of media are not covered at all. It is not clear if this situation will be remedied.

In Australia we have been surprised to see the influence of talk back host Alan Jones suddenly undermined by a social media campaign against unacceptable commentary about the prime minister. We have seen nothing to quite match the collapse of standards and ethics leading to criminal charges against well connected editors of massively influential tabloid newspapers in the United Kingdom for systematic illegal phone hacking, that is, invasion of privacy and for bribery of public officials. We watch in astonishment as the head of I daresay the most venerable and respected media organisation on the planet, the BBC, is forced to resign after an inadequately researched and vetted media report is put to air with allegations of paedophilia against an unnamed but prominent MP subsequently named on numerous Twitter accounts and other social media.

That kind of organisational failure aside, roiling changes to the structure of the media, driven by new technology and changing market conditions, will continue to perturb the environment in which the administration of the law will be conducted.

In an age not merely of rapidly escalating news cycles but of uncontrolled storms of idiocy and hysteria on social media, pressure will increase. Governments and attorneys-general are often enough already denounced if a response to the latest scandal or crisis is not fully formulated between the thump of the newspaper on the front doorstep at dawn and the first radio interview of the day. Shrill demands for new laws, new police powers, for response, action, activity will probably only escalate.

Nevertheless reactive legislation is more often than not ill thought out. We drink the heady brew of the knee jerk response and wake up months or years later hung over and aghast at unintended consequences. As lawyers we cannot ignore legitimate grievances or cries for reform. It is however our responsibility to urge the value of principle when those principles seem unpopular and to try to bring to legal reform the kind of diligent and conscientious effort to preserve the integrity of the legal system that was exemplified by Sir Frank Kitto.

Endnotes

* Bob Debus AM was attorney general of New South Wales 2000-2007

1. Justice Michael Kirby, Sir Frank Kitto Lecture 1998, University of New England, 'Kitto and The High Court of Australia – Continuity and Change.'
2. *Brodie v Singleton Shire Council* (2001) 206 CLR 512.
3. 'Public Confidence in The Courts', National Judicial College of Australia, 9 February 2007.
4. *Australian Capital Television Pty Ltd and New South Wales v The Commonwealth* (1992) 177 CLR 106.
5. *Mabo v Queensland (No2)* (1992) 175 CLR 1.
6. Constitutional Law Conference, Gilbert and Tobin Public Law Centre, Faculty of Law, University of New South Wales. 20 February 2004.
7. 'What is Wrong With Top-Down Reasoning?' 2004 Sir Maurice Byers Lecture, *Bar News*, Winter 2004.
8. *The Wik Peoples v Queensland* (1996) 187 CLR 1.
9. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
10. *Tame v New South Wales* (2002) 211 CLR 317.
11. Hal Wootten Lecture 2012, University of New South Wales: quote from the response to the lecture delivered by Sir Gerard Brennan (personal communication).
12. *Bush v Gore* 531 US 98 (2000).
13. *Citizens United v FEC* 558 US 310 (2010).
14. *R v Way* (2004) NSWCCA 131.
15. *Muldrock v The Queen* (2011) HCA 39.
16. http:// www.tomdispatch.com 17 March 2006.
17. Senate Occasional Lecture 22 May 2009.

The attack on the right to silence

The following is an edited version of an address to the bar given by the president of the New South Wales Bar Association, Phillip Boulten SC, on Monday, 11 February 2013.

Recently, the New South Wales Government legislated the most significant changes to criminal procedure in more than a century. It's part of a multifaceted plan, which allows for an amended police caution, with adverse inferences available to be drawn at trial if the accused fails or refuses to mention a fact in an interview that is subsequently relied upon at trial. It also requires the accused to disclose their defence to the prosecuting authorities and the courts ahead of the trial.

Together, the changes represent a fundamental alteration in criminal procedure that very significantly undermines an accused's rights and disturbs the long-standing balance between the prosecution and the defence in the trial process.

The government had some difficulties persuading the Legislative Council about the merits of the changes. They are part of a developing landscape where the right to silence and the privilege against self-incrimination are being disregarded and undermined - often in public, but more commonly behind closed doors - in fora like:

- ICAC
- NSW Crime Commission
- The Australian Crime Commission
- The Police Integrity Commission
- ASIC examinations
- royal commissions
- ASIO questioning warrants

Currently there are a number of important cases being considered by the Court of Criminal Appeal where the DPP have received the transcript of the interrogation of the accused in camera at the NSW Crime Commission enabling the prosecuting authorities to gain potential and, probably real, advantage in its handling of the case knowing exactly what the accused is likely to say in their defence.

The police station provision

The Evidence Act was amended so that in proceedings for a serious indictable offence unfavourable inferences may be drawn from the defendant's failure or refusal to mention a fact during questioning where the defendant could reasonably be expected to mention the fact and that the defence later relies on in proceedings (s 89A).

A serious indictable offence is defined in the Interpretation Act as any indictable offence carrying a maximum penalty of five years or more. The measure will apply to nearly every trial in the District Court and Supreme Court and, potentially, in many cases dealt with summarily.

An adverse inference may only be drawn if the defendant has received both the usual caution in standard terms[1] and a 'special caution' to the effect that:

- the person does not have to say or do anything, but it may harm that person's defence if the person does not mention when questioned something the person later relies on in court; and
- anything the person does say or do may be used in evidence.

The provisions will not apply to people:

- under the age of 18; or
- to people who are incapable of understanding the general nature and effect of a special caution.

An adverse inference would only be available where:

- the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time; and
- the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that Australian legal practitioner, in the absence of the investigating official, about the general nature and effect of the special cautions.

The High Court on the right to silence

The High Court has made it plain that the right to silence is a fundamental aspect of a fair trial. In *Petty and Maiden v The Queen (1991) 173 CLR 95* at 128-9 Gaudron J. said:

> Although ordinary experience allows that an inference may be drawn to the effect that an explanation is false simply because it was not given when an earlier opportunity arose, that reasoning process has no place in a criminal trial. It is fundamental to our system of criminal justice that it is for the prosecution to establish guilt beyond reasonable doubt. … it is never for the accused person to prove his innocence … Therein lies an important aspect of the right to silence, which right also encompasses the privilege against incrimination.'

Mason CJ, Deane, Toohey and McHugh JJ said in their judgment in the same case that the right to silence has complex origins but has become 'a fundamental rule of the common law'.

Brennan J described the right to silence in *Hammond v The Commonwealth (1982) 152 CLR 188* as: 'a freedom so treasured by tradition and so central to the judicial administration to criminal justice'.

McHugh J in *RPS v R (2000) 199 CLR 620* at [61]-[62] described the right having derived 'from the privilege against self incrimination'. He said:

> That privilege is one of the bulwarks of liberty. History, and not only the history of totalitarian societies, shows that all too frequently those who have a right to obtain an answer soon believe that they have a right to the answer that they believe should be forthcoming. Because they hold that belief, often they do not hesitate to use physical or psychological means to obtain the answer they want. The privilege against self-incrimination helps to avoid this socially undesirable consequence. … The privilege exists to protect the citizen against official oppression.

No adequate rationale

There has been no adequate reason advanced for undermining the right to silence in the police station. The premier, the attorney-general and various shock jock style commentators have offered views about why the amendment should apply. They are all misconceived.

(1) Criminals refuse to speak at the police station but later produce 'evidence' at the trial

The most frequently used example in media discussion is alibi evidence. But as you all know, it has been the law in this state for decades that the accused must give written notice of an alibi well in advance of the trial — including a list of witnesses' names and contact details.

In any event, a review in 2000 of the English equivalent has demonstrated that since the introduction of the *Justice and Public Order Act 1994*, there has been no discernable increase in the number of people charged or convicted and no change in the proportion of suspects providing admissions (about 55 per cent according to The Home Office Research Study, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994*.)

This English study also found that, despite these measures, police officers were sceptical about their impact on 'professional' criminals, who were still thought to be refusing to answer questions or were using a range of tactics to circumvent the provisions.

History, and not only the history of totalitarian societies, shows that all too frequently those who have a right to obtain an answer soon believe that they have a right to the answer that they believe should be forthcoming.

(2) The proposal will help police investigate drive by shootings

It has been claimed that these measures will break the 'wall of silence' surrounding the recent spate of drive by shootings.

But the measures will have no impact on those cases because they do not apply to eye-witnesses or anybody else that possesses information that might assist the police. The measures only apply to people who are charged with offences and who ultimately go to trial. It is already a criminal offence for eye-witnesses and others to fail to provide information

to the authorities. Concealing a serious offence — s 316 of the Crimes Act — carries a maximum penalty of two years and, if the person accepts a benefit for withholding information, the maximum penalty is 5 years. This proposal will not help the police in the way it has been suggested.

There is no public utility in this measure

No one suggests that this change in the law will lead to an increased number of convictions. The NSW Law Reform Commission published a report about this topic in 2000. They found that the English experience provided no support for the argument that the right to silence was widely exploited by guilty suspects, as distinct from innocent ones. Nor did the right to silence impede the prosecution and conviction of offenders.

The NSWLRC found that it was not appropriate to qualify the right to silence as is currently proposed. They found the right to silence was 'a necessary protection for suspects. Its modification … would … undermine fundamental principles concerning the appropriate relationship between the powers of the state on the one hand and the liberty of the citizen on the other, exacerbated by its tendency to substitute trial in the police station for trial by a court of law.' (*The Right to Silence*, 2000 para 2.138.)

The power imbalance in a police station

A police station is a remarkable place. In my early years of practice I was a very regular attender of police stations. I don't go there very often now, but every year or two someone still thinks it necessary for me to visit a police station for them.

No matter how much experience you have or how skilled you might be in your craft, you know that you are not on home territory in a police station. Lawyers are tolerated — not always with good grace or good manners.

For a suspect a police station is a very scary place. Police, often young and energetic, have the power to: interrogate or not, initiate criminal proceedings or not and to deprive or curtail a person's liberty or not — according to the exercise of their own judgment.

Police interviewers can be extremely foreboding — even when they are acting entirely within the law. It is not just the questioning that is difficult for a suspect; it is the context in which it takes place. Usually, the suspect is questioned after an arrest. Being arrested is a shocking experience. It is often meant to be a shock. Arrests are timed for police convenience — often late at night or early in the morning.

Sometimes an arrest is at gunpoint. Always an arrest is accompanied by actions that make it clear that the suspect is no longer a free agent. People who are arrested, hand-cuffed and locked in a cell are not in a good condition to be able to make important decisions about what to say in their defence.

Not everybody who is arrested is a 'hardened criminal'.

Rajeevan's arrest

Sydney accountant Arumugam Rajeevan, was on his way to lobby a NSW senator in July 2007 when federal police removed him from his car at gunpoint, demanding he lie face down outside the senator's office with his hands cuffed behind his back. He was held in that state outside the senator's office for over an hour. This ordinary, hard-working, decent Australian citizen would never, see him self as anti-social.

As the member for Dobell learnt recently, an arrest is usually accompanied by intrusive physical searches including strip searches.

People are often drunk or under the influence of drugs. They feel unwell. They are afraid of what their family will think. Some disadvantaged communities are especially vulnerable in police custody. Aboriginal suspects are particularly vulnerable and ill-equipped to make judgments about what to say or not to say to police.

Police do not disclose their hand

When police arrest someone they have already got a body of evidence pointing toward their guilt. Usually, they have detailed statements from witnesses, maybe forensic evidence, phone taps and listening device tapes. But they are very protective of this information. They guard it closely to their chests.

The suspect is never given an opportunity to review the evidence against them prior to an interview or to even be given a summary of the key evidence

against them. At best, they are told the nature of the charges. In some cases they are told where, when and how they are said to have offended. But they are given very little detail about the evidence underpinning the charges.

When a suspect does participate in an interview, the questions often roam far and wide. There is a plethora of questions about peripheral issues of varying degrees of importance. The police know that a suspect claiming innocence is entirely unlikely to break down and confess. So, knowing the texture and detail of the brief, the police probe the side issues. If a suspect gets a detail wrong or if they attempt to obscure something, a trap has been sprung that will ultimately lead a prosecutor to submit that the accused's answers were not credible or worse, they demonstrate a consciousness of guilt.

But, as a trial judge is required to direct the jury in relation to such 'consciousness of guilt' lies, the jury have to first be satisfied that there were in fact deliberate lies. In any event, there are many reasons why people lie other than from a consciousness of guilt. They might be scared. They could be covering up some different unworthy or illegal act. They may be protecting others. They may just be ashamed of having been found in compromising circumstances.

The example of the young man with three alibis

Not everybody who gives false evidence in an interview is telling a lie.

Many years ago I represented an 18 year-old youth who was charged with arson. When he was arrested he gave the police an alibi. The police disproved it. They re-interviewed him and confronted him with the falsity of his alibi. He gave them a different alibi. They disproved it.

I met him in Long Bay with his trial looming. He maintained his innocence. I asked him for more particulars. He didn't have any. I expressed doubts about his prospects at trial and left him to think about his position. A week later, he asked me if the offence occurred on cracker night. I asked why? He said, 'if it was on cracker night I couldn't have done it. I stole a car, got caught and was locked up in Gosford Police Station'.

The offence occurred on cracker night. He had a water-tight alibi. The proceedings were discontinued.

My client's memory was faulty. He was probably overwhelmed by his contact with the police. He would have been well advised not to speak with the police at all. This kind of disconnect with the investigating police is common.

Difficult enough as it is to draw inferences from demonstrated untruths, the ability to safely draw an adverse inference from silence is enormous. This is especially so when the suspect is left in the dark about important aspects of the prosecution's evidence. How can an adverse inference be drawn when an accused fails to address a fact in his interview when they are likely to be blithely unaware of its importance at the time?

In England the police provide much more information to the accused prior to being interviewed. They have a culture of continuous disclosure by the police to the defence. Police disclose evidence to the defence as it comes to hand. Police disclosure is supervised by prosecutors. In those circumstances the legal practitioner is able to advise the suspect in the light of the evidence against the suspect which has been disclosed to the police. Interviews are often suspended if a question is put concerning a fact not previously disclosed.

Here interview in a police station is a form of trial by ambush.

Legal advice

The new provisions will only operate if the defendant was:

- given the special caution in the presence of a lawyer who was acting for the defendant at the time; and
- the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that lawyer, in the absence of the investigating official, about the general nature and effect of special cautions.

The Law Society has suggested that it is difficult to conceive of a situation where a solicitor could properly advise a client about the effects of the legislation on the phone or even face to face without being properly apprised of the case against their

client and having had the opportunity to speak with their client in a considered way and to take proper instructions. In a majority of cases lawyers would simply have to tell the suspect that they can not give them advice.

There are also problems about lawyers having a conflict of interest and with threats to legal professional privilege.

Under the proposal, a judge will need to consider directing the jury about drawing adverse inferences if the accused failed to mention a fact that the defendant could reasonably have been expected to mention in the circumstances existing at the time of the interview. It is likely, therefore, that the jury will need to hear evidence about all the circumstances existing at the time of the interview including evidence about what legal advice they received and whether it was reasonable to follow that advice.

This is likely to lead to a waiver of legal professional privilege. Evidence from lawyers about what advice was given will lead to questions about what instructions their client gave them when the advice was given.

The privileged nature of the professional relationship between a lawyer and client is another fundamental legal tenet threatened by these proposals.

My colleague, Tom Molomby, has been giving some thought to the advice he might give to a suspect if this legislation comes into effect. He is thinking about providing his clients with a written document along these lines:

> If an innocent person is arrested or being treated with suspicion by police, something has gone wrong.
>
> There are ways in which it can go even more wrong.
>
> If the police want to question you, they are very unlikely to tell you what they have been told or who told them. If you tell them anything, and that gets back to someone who is setting you up, that person could change their story to get around anything in what you say that does not fit. You might even find details of activities that you reveal becoming part of their story in an attempt to make it more plausible. History, through the Wood Royal Commission and otherwise, shows that both police and others can be behind false allegations.
>
> In short, the result of innocent people playing their hand can be that it is used against them.
>
> Another problem is that a discussion or interview on the run is not always the best way to recall events accurately. It is quite easy to forget detail, or get it confused, in trying to recall things in immediate response to questions. But that is the way interviews are conducted. They are also recorded on sound and video. The result often is that when people who have given an interview come to trial, changes to their story either by way of detail added, or corrections to what they said, are ruthlessly analysed and treated with great suspicion as the signs of a guilty person who is trying to tell a better story to get out of trouble.
>
> My firm advice to you is to say nothing.

Conclusion

There is no demonstrated need for this amendment to the law. No other state or territory in Australia has such a provision.

Singapore has adopted the English provision. But it has been studiously ignored in most other common law jurisdictions. It hasn't even made it across the border to Scotland where a damning report in 2011 ruled it out of question. Lord Carloway, the report's author, described such schemes as being 'of labyrinthine complexity'.

The Bar Association agrees with the Scots. Should the state profit from the ignorance of suspected persons where ignorant suspects could accidentally incriminate themselves in the way a more studied villain would not? We will be seeking to convince our law-makers that this provision is unnecessary and we would be better off without it.

Endnotes

1. 'You do not have to say or do anything but anything you do or say will be recorded and may be used in evidence'.

Right to silence changes in NSW

By Michael Gleeson

A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law, which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country. An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless.[1]

The criminal law landscape in New South Wales is beginning to alter dramatically after a package of legislative reforms passed through the state's parliament recently.[2] This article will focus predominantly on some of the main changes under the highly publicised and contentious[3] Evidence Amendment (Evidence of Silence) Bill and asks whether this bill will encounter similar difficulties as its earlier English counterpart.[4]

Outline of the new provisions

The main objective[5] of the Evidence Amendment (Evidence of Silence) Bill is to allow an unfavourable inference to be drawn against certain accused persons who refuse to cooperate with the police during official questioning and who later seek to rely on a fact in their defence at trial that they could reasonably have mentioned during this questioning.

Section 89 of the Evidence Act, which currently shields against unfavourable inferences being drawn against defendants who remain silent while under questioning by an investigating officer, has been amended. It has been qualified by subsection (1) of a new s 89A, which provides:

> such unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact:
>
> that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and *that is relied on in his or her defence in that proceeding.*

The right to silence would therefore be significantly amended in New South Wales for those defendants in criminal proceedings charged with serious indictable offences, that is, offences that are punishable with five years imprisonment or more.[6]

An unfavourable inference will not be able to be drawn unless, before the questioning, a special caution was given to the defendant by an investigating officer that had, at the time the caution was given, formed a reasonable suspicion that the defendant had committed a serious indictable offence.[7] The special caution is defined in new subsection (9) as a caution to the effect that saying or doing nothing may result in an inference being drawn that may harm the person's defence because of their failure or refusal to mention a fact that is later relied on at trial. The special caution must be given in the presence of a legal practitioner who is acting for the defendant at the time and who must be physically present when the caution is given, and after the defendant had been given a reasonable opportunity to consult with the legal practitioner in private about the effect of special cautions.[8]

The inference will not apply to those persons who are unable or 'incapable' of understanding the nature and effect of the special caution. Furthermore, those under 18 years of age at the time of official questioning will also be exempt from the new regime.[9] New subsection (5)(b) provides that the unfavourable inference cannot be drawn when evidence of a failure or refusal to mention a fact is the only evidence that the defendant is guilty of the serious indictable offence.

It is important to stress that under the new provisions the right to silence technically still remains. As before, a suspect can still choose to remain silent when interviewed by police and can still choose not to testify at trial if later charged. However, remaining silent is now a far less attractive option in respect of persons suspected of serious offences as there is a risk it may prejudice the defence case.

The stated rationale behind this fundamental reform is to prevent 'hardened criminals from hiding behind a wall of silence'.[10] However, the NSW Law Reform Commission, having collated extensive research material in Australia and from overseas indicated that suspects rarely remain silent when questioned by police and therefore modifying the right to

silence would be unlikely to significantly increase prosecutions or convictions. There is no evidence that the 1994 English amendment has led to any increase in guilty pleas or convictions.

The UK experience

In England and Wales the right to silence was curtailed under the *Criminal Justice and Public Order Act 1994* (UK) (CJPOA). In summary, section 34 of the CJPOA provides that a court may draw such inferences as appear proper to it in circumstances where the accused: fails, either during questioning under caution or on being charged, to mention any fact relied on in his/her defence, such fact being one which, in circumstances existing at the time, the accused could reasonably have been expected to mention.

The restrictions introduced by the CJPOA have been reviewed many times by the English Court of Appeal (Criminal Division). Section 34 has been described by the same court as 'a notorious minefield.'[11] The European Court of Human Rights has not directly declared there is a direct inconsistency between Article 6 of the European Convention on Human Rights (which in summary guarantees a right to a fair trial before an independent court and the presumption of innocence) and s 34 of the CJPOA. However, in a number of cases the European Court has held that on the facts of particular cases, the direction should not have been given, or the direction was erroneous, because of Article 6. *Condron v The United Kingdom*[12] was a case where the two accused were heroin addicts. They were arrested whilst withdrawing from heroin. The accused were advised by a solicitor not to take part in an interview with police. A direction was given to the jury in terms of s 34. They were convicted. Their appeal against conviction was upheld. The court said (at [61]):

> In the Court's opinion, as a matter of fairness, the jury should have been directed that it could only draw an adverse inference if satisfied that the applicants' silence at the police interview *could only sensibly be attributed to their having no answer or none that would stand up to cross – examination.*

In 2000[13], the NSWLRC examined whether NSW should adopt the UK changes regarding adverse inferences flowing from silence to police.

The report was highly critical of the UK regime and its perceived adaptability to Australian states, noting that there are many reasons for silence consistent with innocence, and that the right to silence is an

> …important corollary of the fundamental requirement that the prosecution bears the onus of proof, and a necessary protection for suspects. Its modification… would undermine fundamental principles concerning the appropriate relationship between the power of the State on the one hand and the liberty of the citizen on the other, exacerbated by its tendency to substitute trial in the police station for trial by a court of law.

The report also recommended against adopting the UK regime because of the absence of a funded duty solicitor scheme for suspects at police stations, and because the required significant increases in legal aid funding, to provide for such a scheme here, would not be forthcoming.

Conclusions

It remains to be seen whether this new radical proposal will achieve its desired effect of preventing 'hardened criminals hiding behind a wall of silence'. It can be strongly argued that the detailed analytical research from the 2000 NSWLRC and the Home Office research paper published in 2000[14] suggests that any resulting convictions stemming from the right of silence provisions will be slight. There is, in this author's opinion, no apparent support from the NSW and UK research to indicate that curtailment of the right to silence will induce suspects to talk more freely to police.

It is highly likely that NSW will encounter the same difficulties as s 34 does in England and Wales. The already overworked Court of Criminal Appeal can expect to receive a deluge of appeals on areas such as whether a trial judge was correct to direct the jury that the inference could be drawn, whether a prepared statement by the suspect in the police interview could avoid an inference being drawn, and whether or not the suspect's solicitor provided the correct advice at the police station. These areas continue to be argued the English Court of Appeal and in the ECHR. It has led Scotland to avoid any similar curtailment. In a report in 2011, Lord Carloway described such a scheme as being 'of labyrinthine complexity'.[15]

Solicitors in NSW who now attend at the police station to protect their client's legal rights will need to know quickly whether it is wise or not to advise their clients to provide 'no comment' interviews. In

order to provide such advice, advisers need to have a reasonable appreciation of the case against their client. Therefore the current system of disclosure of information prior to interview will need to be overhauled and improved. It is difficult to anticipate how police will adapt to this new procedure.

Finally there is a real risk inherent in these legislative reforms that it won't be the professional or hardened criminals who will be caught out by the changes, those criminals already know the law and will be no doubt be well represented. It is the inexperienced and vulnerable, and those unable to afford legal representation, who could be highly suggestible to police questioning. Some past miscarriages of justice were attributable to vulnerable suspects failing to remain silent, when this may have been the best course, but instead providing false confessions.

Defence disclosure requirements

The government introduced at the same time the Criminal Procedure Amendment (Pre-Trial Defence Disclosure) Bill. The object[16] of this bill is to amend section 136 of the *Criminal Procedure Act 1986* to:

- expand the matters that must be disclosed by the defence and the prosecution before a trial for an indictable offence, and
- enable the court (and other parties with the leave of the court) to make proper comments in a trial for an indictable offence in circumstances where the accused person fails to comply with certain pre-trial disclosure requirements, and
- enable the court or the jury in such circumstances to then draw such unfavourable inferences as appear proper.

The bill has been modeled on the English *Criminal Procedure & Investigations Act 1996 (*CPIA*),* notably s 5 which encompasses compulsory disclosure by accused. Under the amended NSW legislation an accused will have to disclose all relevant material regarding the nature of their defence before the trial commences. Failure to do will invoke s 146A, which will allow judges and juries to draw an unfavourable inference against an accused at trial for failing to comply with disclosure requirements. It is interesting to note that all major stakeholders in the NSW criminal justice system opposed the introduction of compulsory disclosure provisions, including the Trial Efficency Working Group, who unaminously rejected introducing this provision.[17]

The outcome of the amendment will be that the prosecution and sefence will have to address the issue of disclosure at a much earlier stage in proceedings. This may not appear at first blush a bad thing, but the mechanics of operating such a system will undoubtedly require financial input and increased manpower to address the sometimes thorny issues of disclosure. The current parlous state of the economy of NSW means it is unlikely that the new regime will attract government investment.

The introduction in England of a defence case statement requirement brought with it increased mentions, listings and fixtures in an already overburdened Crown Court jurisdiction. It is difficult to say with certainty whether NSW can circumvent this particular case management difficulty, it is unlikely. Cases with pre-trial disclosure problems will presumably have to be listed before the trial judge if either side is struggling to cope with the time limits set down for disclosure. This particular procedural concern was not raised during the debate of the bill. It will without question need addressing if this brave new world of mandatory disclosure is to be effective.

Endnotes

1. *Petty and Maiden v The Queen* (1991) 173 CLR 95.
2. *Evidence Amendment (Evidence of Silence) Bill 2013* (NSW) and *Criminal Procedure Amendment (Pre-Trial Defence Disclosure) Bill 2013* (NSW).
3. The draft bill was only made available on 12 September 2012 and the time limit for debate and reply expired on 28 September 2012. None of the major stakeholders in the NSW criminal justice system were formally consulted. Most major stakeholders, including the NSW Bar Association, took the opportunity to make submissions opposing the draft bill and many of these submissions were referred to in parliamentary debates. The English modifications were debated for approximately 22 years.
4. *Criminal Justice and Public Order Act 1994* (UK) .
5. The Hon Greg Smith SC MP, 2nd Reading, *Evidence Amendment (Evidence of Silence) Bill 2013*, NSW Parliament, 13 March 2013.
6. Evidence Act s 89A(1), (4); *Crimes Act 1900* (NSW) s 4(1).
7. s 89A (2)(a) and (b).
8. s 89A(2)(c) and (d).
9. s 89A(5)(a).
10. The Hon Greg Smith SC MP, Media Release 12 September 2012.
11. *Regina v Beckles* [2005] 1 WLR 2829 at [6].
12. (2001) 31 EHRR 1.
13. NSW Law Reform Commission, Report 95, *The Right to Silence* in 2000.
14. Buck, Street and Brown *The Right of Silence: The impact of the Criminal Justice and Public Order Act 1994 (UK)* Great Britain Home Office Research Development and Statistics Directorate, 2000.
15. The Carloway Review: Report & Recommendations, 17 November 2011.
16. The Hon Mr Greg Smith SC MP, 2nd reading speech, Wednesday 13 March 2013.
17. The Hon Mr Paul Lynch MP, 2nd Reading Speech, Wednesday 13 March 2013.

Suppression and non-party access

Part II: The how, when and where of non-party access, by Sandy Dawson and Fiona Roughley

Introduction

In the last edition of *Bar News*, Part I of this article detailed the operation of the statutory law in New South Wales (and proposed federal law to similar effect) relating to non-publication and suppression orders.

Since publication of Part I, the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* has been enacted. That Act has had broad-reaching consequences, for example the repeal of s 52 of the *Federal Court of Australia Act 1976*. That and other changes were addressed in Part I of this article.

This second and final instalment addresses the practicalities of how non-parties may get access to documents in court proceedings where no such suppression or non-publication order is in place. It details what kinds of information may be accessed. Finally, it provides some consideration of the benefits and limitations of the various alternative options available to non-parties.

The context for access

Where material disclosed in open court is not subject to disclosure restrictions (be they by way of suppression, non-publication or confidentiality orders), the practical question for non-parties is how and when that material might be accessed. For a person physically present in the body of the court, what is said is known; what is not known is the voluminous documentary bundles accompanying modern-day litigation and encompassing written evidence, submissions, transcripts and other court documents.

The remainder of this article tracks the various options available and the limitations and considerations appertaining to each.

Obtaining information from a party

One potential source of the material is a party to the proceedings. Although parties are subject to a substantive legal obligation (often referred to as the 'implied undertaking') not to use or disclose documents or information obtained during the proceedings for another purpose except with leave of the court,[1] that principle is subject to numerous qualifications.

First, if the material has been received into evidence, absent a suppression, non-publication or confidentiality order (or other obligation of confidence which continues to attach to that party),[2] the party may disclose the material to a non-party.[3] The same applies where any other material is adduced in court proceedings.[4]

Second, even if the material has not been received into evidence (or indeed it is material not in the nature of evidence, for example pleadings), if it has not been 'obtained' from any other person (ie it is the party's own material) and does not otherwise disclose information obtained from another person in the course of proceedings, a party is at liberty to provide that material to third parties for purposes unconnected with the proceedings. Depending on the circumstances, that party would be wise to consider any attendant risk of defamation proceedings, to which there may no defence of fair report.[5]

Third, material provided voluntarily, that is, absent circumstances of constructive or actual compulsion, is generally understood to be outside the scope of the Harman undertaking, though the approach to what may be classified as circumstances of compulsion appears to be expansive.[6]

Fourth, it is always open to a party to approach the court for an order releasing the party from the implied undertaking. 'Special circumstances' are required, but that does not require something extraordinary; it is sufficient that there be 'good reason' for why the material should be used for the advantage of a party in another piece of litigation or for non-litigious purposes.[7] Relevant considerations include the nature of the document or information, the circumstances under which it came into existence and/or into the hands of the applicant, the attitude for the author and any prejudice the author may sustain, whether the document pre-existed litigation or was created for it and hence expected to enter the public domain, and the likely contribution of the material to achieving justice in the proceedings.[8]

In *Sapphire (SA) Pty Limited (t/a River City Grain) v*

Barry Smith Grains Pty Limited (in liq) [2011] NSWSC 1451 an issue arose as to the use, in arbitral and later appellate proceedings, of material disclosed in other unrelated arbitration proceedings involving one of the parties. The material at issue was a defence, a claimant's rebuttal and two statutory declarations. Applicable trade rules had provided for the confidentiality of any documents exchanged and generated for the purposes of the arbitration and that such documents 'should not be used for any other ulterior purpose'.[9] In a comprehensive analysis of the authorities, Ward J clarified that the implied undertaking applies to material that has not entered the public domain and was made or produced in the course of arbitral proceedings under some form of compulsory process.[10] A confidential arbitration is not a public domain.[11] Further, a statutory declaration or affidavit made simply for the purpose of evidence in a hearing without such compulsion will not necessarily attract the undertaking.[12] However, as with all curial proceedings, even where the undertaking applies, a court will either release the undertaking, or refuse to enjoin a third party's use of the material, if special circumstances exist. In the case of *Sapphire*, those special circumstances included the fact that it would be unfair for a party to be able to complain as to the use of the material in circumstances where, at least on one view, it appeared to contradict evidence put by the same witness on behalf of the same party in other arbitral proceedings.[13]

Obtaining information from the court

There is no common law right for a non-party (or indeed parties) to access a court document held as part of a court record: the principle of open justice is a 'principle, it is not a freestanding right'.[14]

There are marked differences between jurisdictions as to public access to evidence and other documents produced in proceedings. In 2004, the Australian Law Reform Commission drew attention to the variance then extant in its report *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98):

> 7.25 The legislation establishing some Australian courts expressly provides for public access to evidence and other documents produced in relation to proceedings in those courts. However, the legislation and court rules vary from jurisdiction to jurisdiction. Some are more detailed than others in specifying the exact documents to which a non-party may be granted access either with or without the leave of the court. In some cases, there is a presumption that access will be given to documents unless the court otherwise orders; in other cases, the opposite applies. Differences also exist in relation to the release of transcripts to non-parties. In some cases, it is sufficient for a non-party to make an application for the transcript; in others, the non-party has to show good or sufficient reasons for requesting the transcript. [citations omitted]

The ALRC recommended that the Standing Committee of Attorneys-General order a review of federal, state and territory legislation and court and tribunal rules in relation to non-party access to evidence and other documents produced in proceedings with a view to developing and promulgating a clear and consistent national policy.[15] That recommendation was not taken up, but the ALRC revisited the matter again in a subsequent report, *For Your Information: Australian Privacy Law and Practice* (ALRC 108). In the intervening four years, various rules of court and/or practice notes had of course changed, but the extent of the inconsistencies between and within jurisdictions remained. Although noting that the different functions by different courts would make inappropriate one set of access rules for all federal courts, the ALRC again came to the view that there is 'merit in promoting consistency in access rules for courts that deal with similar types of cases'. The recommendation that the SCAG undertake an inquiry with a view to developing clear and consistent national policy was reaffirmed and renewed.[16]

The SCAG has not taken up the recommendations of the ALRC. There remains no nationally consistent policy. Indeed, within jurisdictions, different rules apply to different courts and tribunals. That is a matter that affects not only media interests, but researchers, witnesses and other private persons for whom access to particular court records is of significance.

Despite the lack of national reform, various jurisdictions, and some courts have recently made substantial changes to the standard regime for non-party access to documents. The position in New South Wales and in the Federal Court is outlined below.

New South Wales

The combined work of the New South Wales Law Reform Commission,[17] the Supreme Court of New South Wales,[18] and the Attorney General's Department[19] led to the enactment of legislation, the *Court Information Act 2010* (NSW), which was intended to harmonise and standardise the processes and policy for non-party access across all New South Wales courts and tribunals.[20] As set out in s 3 of that Act, its objects are:

(a) to promote consistency in the provision of access to court information across NSW courts,

(b) to provide for open access to the public to certain court information to promote transparency and a greater understanding of the justice system,

(c) to provide for additional access to the media to certain court information to facilitate fair and accurate reporting of court proceedings,

(d) to ensure that access to court information does not compromise the fair conduct of court proceedings, the administration of justice, or the privacy or safety of participants in court proceedings, by restricting access to certain court information.

The *Court Information Act 2010* was not only intended to standardise access for non-parties, but to expand the circumstances in which access will be granted. As explained by the Hon Michael Veitch in the second reading speech for the bill,

> Clause 5 of the bill gives any member of the public, including victims of crime and the media, an entitlement to access all court information that is classified as open access information. Courts will no longer be able to refuse access to open access information on the grounds that the person seeking access does not have a sufficient or proper interest in the case.

The recognition of an 'entitlement' to access even certain documents is a direct reversal of the common law position.[21] Under the Act, 'open access information', in both civil and criminal proceedings, includes documentation, which commences proceedings, written submissions made by a party to proceedings, statements and affidavits admitted into evidence (including experts reports), and judgments, directions and orders given or made in the proceedings (including a record of conviction in criminal proceedings). The time at which access is to be granted is also clarified and standardised.

The Courts Information Act was in fact intended as part of a two-stage process to consolidate all statutory provisions relating to access to court information into a single statute. Indeed, the CSPO Act was meant to be the second step. However, although the CSPO Act has commenced, the earlier Court Information Act (which received royal assent on 26 May 2010) is still yet to commence. It appears the cause of the sustained delay are operational difficulties, including a question as to who should be responsible for redacting personal identifying information from court information.[22] The New South Wales experience highlights both the merit of consolidation and its practical difficulty.

Unsurprisingly, most applications for access or inspection are made by media organisations for the purpose of reporting the proceedings in question. This is a strong starting point for an application: as Spigelman CJ said in *John Fairfax Publications Pty Ltd v District Court of NSW*[23] '[t]he entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public. Nothing should be done to discourage fair and accurate reporting of proceedings'.

However, in the absence of the Court Information Act commencing, practice and procedure in New South Wales remains governed by various court-specific procedures. For example, in all divisions of the Supreme Court, in the Court of Appeal and in the Court of Criminal Appeal, access to court files by non-parties is currently informed by Practice Note SC Gen 2 'Access to Court Files'. In civil proceedings in the District Court the relevant practice note is Practice Note DC (Civil) 11, 'Access to Court Files by Non-Parties'. In criminal proceedings in the District Court, s 314 of the *Criminal Procedure Act 1986* (NSW) provides that a media representative is 'entitled' to inspect certain documents once proceedings commence 'for the purpose of compiling a fair report of the proceedings for publication'.[24]

In contrast to the provisions of the Court Information Act, the Supreme Court and District Court practice notes provide for a general position that access to material in any proceedings is restricted to parties

except with the leave of the court.[25] Both contain the same guidance that:

> Access will normally be granted to non-parties in respect of:
>
> - pleadings and judgments in proceedings that have been concluded, except in so far as an order has been made that they or portions of them be kept confidential;
> - documents that record what was said or done in open court;
> - material that was admitted into evidence; and
> - information that would have been heard or seen by any person present in open court,
>
> unless the judge or registrar dealing with the application considers that the material or portions of it should be kept confidential. Access to other material will not be allowed unless a registrar or judge is satisfied that exceptional circumstances exist.[26]

Information that, although not actually set out in open court by reason of efficient procedure or the application of particular rules of practice, has been taken as read or otherwise influences the action of the judicial officer, is included in the material available to non-parties with the leave of the court.[27] The reference to 'proceedings that have been concluded' in the first bullet point has been taken to refer to proceedings for which the hearing has concluded even if judgment remains reserved.[28] The absence of any reference to concluded proceedings in the remaining three bullet points prima facie permits a grant of access to that material at any time, although in practice a number of considerations will guide whether access is granted. Relevantly, however, in *Hogan v Australian Crime Commission* the High Court indicated, in respect of the former O 46 r 6(3) of the Federal Court Rules, that where file material has been admitted into evidence the interests of open justice are engaged. Where a party can adduce no evidence of apprehended particular or specific harm or damage by disclosure of the material to a non-party seeking access, leave is properly granted to that non-party to inspect documents in the proceedings.[29] Although there are substantial differences between the access regime set out in Order 46, r 6 of the former Federal Court Rules and those that prevail in New South Wales, those differences are not material on this point. In essence, Hogan identifies the nub of the inquiry: What is the unacceptable harm that prejudices the administration of justice if the principle of open justice is followed?

In the Court of Appeal, Supreme Court, and the District Court, the practical means by which a non-party applies for access to material held by the court is by application to the appropriate registrar and using the template attached to the relevant practice note.[30] In practice, applications are often made to the trial judge with varying degrees of success. For example, different approaches are taken not only to whether access ought to be given, but also as to the type of access: although the practice notes contemplate that a grant of access to material will generally permit copies of it to be made,[31] s 314 of the Criminal Procedure Act refers only to an entitlement to 'inspect'. Whealy J's decision in *R (Cth) v Mohamed Ali Elomar (No 3)*,[32] in which media representatives were permitted to film and photograph weaponry which had been admitted into evidence, is a useful guide to a clear and principled approach to the legal and practical issues which arise on such applications, especially in criminal proceedings.

Federal Court

The *Federal Court Rules 2011* made some changes to the access regime that applies to non-parties in that court. Unlike the practice of the New South Wales courts, both the previous rules and their replacement provides an entitlement to access for certain documents (so long as there is no extant confidentiality or non-publication or suppression order) and requires that leave be obtained to inspect others. With the adoption of the *Federal Court Rules 2011*, a non-party is no longer entitled to inspect written submissions,[33] but a party, upon payment of the requisite fee and in the absence of a confidentiality order, is entitled to obtain a copy of the transcript of a proceedings from the court's transcript provider.[34]

As was made clear in *Hogan v Australian Crime Commission*, access to material admitted into evidence, although not expressly dealt with in Rule 2.32, is generally permitted,[35] but where the application by a non-party is not founded upon the principle of open justice, access may be limited.[36]

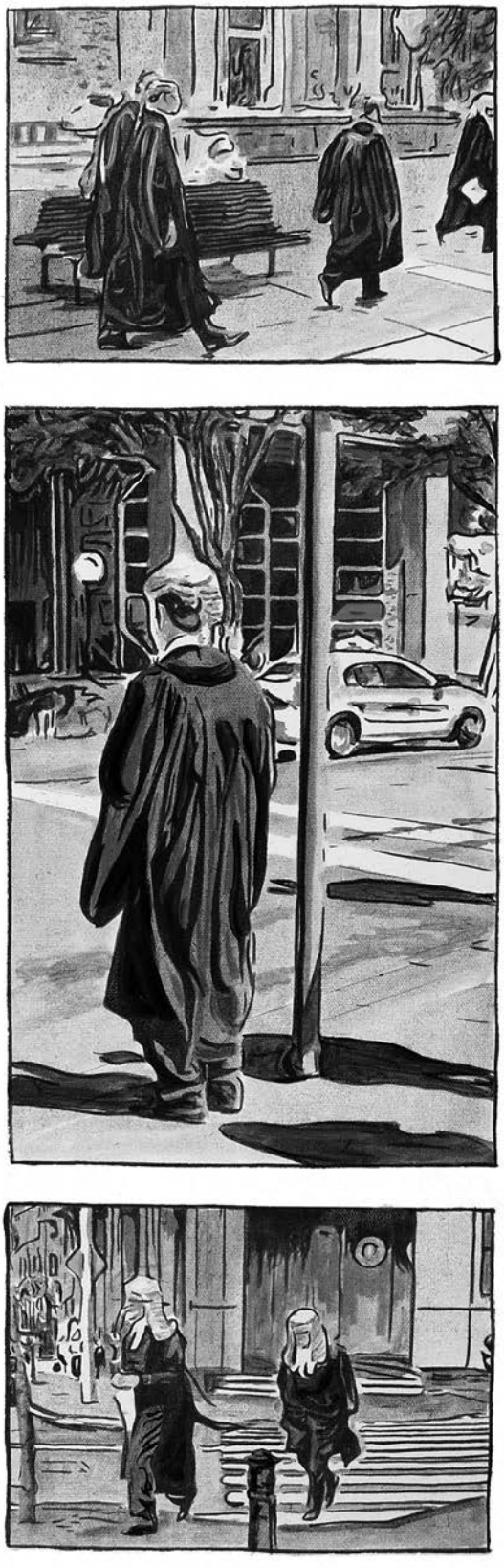
Conclusion

This two-part article has considered the practical means by which parties may apply for information in proceedings to be suppressed or subject to non-publication orders (Part I), and the means by which non-parties may seek access to information relevant to court proceedings (Part II). As is evident from the topics covered, the issues are ones that have been paid a not insignificant amount of legislative and judicial attention over the past few years. Despite the concerted effort for simplification and codification, the law and practice remains something of a rabbit warren for both parties and non-parties.

Endnotes

1. That is, the Harman undertaking: *Home Office v Harman* [1983] 1 AC 280, which is 'now better understood as a substantive obligation of law': *Hearne v Street* (2008) 235 CLR 125; [2008] HCA 36 at [3] (Gleeson CJ) and at [96],[105]–[108] (Hayne, Heydon and Crennan JJ); *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10; [1995] HCA 19 at 32-33 (Mason J, with whom Dawson and McHugh JJ agreed).
2. See, for example, *Missingham v Shamin* [2012] NSWSC 288 (Ward J) at [55]–[68], [69] (Ward J) concerning the continuing obligations imposed by a Deed of Settlement notwithstanding that the court had reproduced sections of the Deed in an ex tempore judgment. See also *Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451 (Ward J) at [172]–[202] concerning the role of continuing obligations of confidence in relation to material disclosed in a confidential arbitration.
3. *Hearne v Street* (2008) 235 CLR 125; [2008] HCA 36 at [96] (Hayne, Heydon and Crennan JJ).
4. *Home Office v Harman* [1983] 1 AC 280 at 306, 307–308, 319–326; *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10; [1995] HCA 19 at 32–33 (Mason J, with whom Dawson and McHugh JJ agreed); *Moage Ltd v Jagelman and Others* [2002] NSWSC 953 at [12] (Gzell J).
5. See, for example, s 29 of the *Defamation Act 2005* (NSW).
6. Groves M, 'The implied undertaking restricting the use of material obtained during legal proceedings' (2003) 23 *Australian Bar Review* 314.
7. *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283; [2005] FCAFC 3 at [31] (Branson, Sundberg and Allsop JJ).
8. *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283; [2005] FCAFC 3 at [31] (Branson, Sundberg and Allsop JJ), citing *Springfield Nominees Pty Ltd v Bridge Lands Securities Limited* (1992) 38 FCR 217 at 225 (Wilcox J).
9. The arbitration was conducted pursuant to the *Commercial Arbitration Act 1984* (NSW), now repealed, which did not provide for the confidentiality of arbitral proceedings. *The Commercial Arbitration Act 2010* (NSW) makes comprehensive provision for the confidentiality of arbitral proceedings.
10. *Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451 (Ward J) at [188].
11. *Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451 (Ward J) at [195].
12. *Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451 (Ward J) at [188].
13. *Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451 (Ward J) at [197].
14. *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [29] (Spigelman CJ, Mason P and Beazley JA agreeing).
15. ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98), 24 June 2004, Recommendation 7-1.
16. ALRC, *For Your Information: Australian Privacy Law and Practice* (ALRC 108), 12 August 2008 at [35.126]–[35.127].
17. New South Wales Law Reform Commission, *Contempt by Publication*, Report 100 (2003), Ch 11.
18. Supreme Court of New South Wales, *Non-Party Access to Court Records—Consultation Paper and Draft Policy* (2004). That consultation process resulted in the court adopting Practice Note SC Gen 2 (17 August 2005) to replace the former Practice Note No. 97 which had previously provided guidance on the court's exercise of the discretion to grant non-party access to court records pursuant to Part 65, r 7 of the then *Supreme Court Rules 1970* (NSW). The current version of Practice Note SC Gen 2 was issued and commenced on 1 March 2006.
19. New South Wales Government Attorney General's Department, *Review of the Policy on Access to Court Information*, Discussion Paper, 2006.
20. *Court Information Bill 2010* (NSW), Second Reading Speech by the Hon Michael Veitch (Parliamentary Secretary) on behalf of the Hon. John Hatzistergos, New South Wales Legislative Council, Hansard, 18 May 2010.
21. *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [29] (Spigelman CJ, Mason P and Beazley JA agreeing).
22. Susannah Moran, 'Court information act verges on farce as horse chases the cart', *The Australian*, 4 November 2011, http://www.theaustralian.com.au/business/legal-affairs/court-information-act-verges-on-farce-as-horse-chases-the-cart/story-e6frg97x-1226185125998 viewed 22 August 2012.
23. (2004) 61 NSWLR 344 at [20] (Handley JA and M W Campbell A-JA agreeing).
24. Those documents are set out in subsection (2): the indictment, court attendance notice or other document commencing the proceedings, witnesses' statements tendered as evidence, brief of evidence, police fact sheet (in the case of a guilty plea), transcripts of evidence and any record of a conviction or an order, and pursuant to subsection (1) may be inspected at any time from 'when the proceedings commence until the expiry of two working days after they are finally disposed of'.

25. Supreme Court of New South Wales, Practice Note SC Gen 2 (3 January 2006) at [5]–[6]; District Court of New South Wales, Practice Note DC (Civil) 11, (9 August 2005) at [1].
26. Supreme Court of New South Wales, Practice Note SC Gen 2 (3 January 2006) at [7]; District Court of New South Wales, Practice Note DC (Civil) 11, (9 August 2005) at [2].
27. *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [66] (Spigelman CJ, Mason P and Beazley JA agreeing); *Hammond v Scheinberg* (2001) 52 NSWLR 49 at [8].
28. This was the approach taken by the Court of Appeal on an application brought by third-party media interests seeking access to certain appeal books in *Rinehart v Welker* [2012] NSWCA 95 prior to the delivery of reserved judgment: unreported reasons of Registrar Riznyczok, 9 March 2012.
29. (2010) 240 CLR 651 at [41].
30. Supreme Court of New South Wales, Practice Note SC Gen 2 (3 January 2006) at [17]; District Court of New South Wales, Practice Note DC (Civil) 11, (9 August 2005) at [6].
31. Supreme Court of New South Wales, Practice Note SC Gen 2 (3 January 2006) at [18]; District Court of New South Wales, Practice Note DC (Civil) 11, (9 August 2005) at [7].
32. [2008] NSWSC 1443.
33. *Federal Court Rules 2011,* r 2.32(2); cf Federal Court Rules, O 46, r 6(2)(g).
34. *Federal Court Rules 2011*, r 2.32(5), note 2; cf Federal Court Rules, O 46, r 6(5).
35. See also *Seven Network Ltd v News Ltd* (No 9) (2005) FCA 1934 at [27] (Sackville J); *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd (No 3)* [2002] FCA 609 at [7] (Finkelstein J).
36. *Re Universal Music (Australia) Pty Ltd v Sharman Licence Holdings Ltd; Ex parte Merlin BV* [2008] FCA 783 (Jacobson J).



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Financial agreements under the Family Law Act*

By Andrew Matthew Combe

Introduction to financial agreements under the FLA

The drafting of financial agreements between married couples is fraught with difficulty for practitioners and is now one of the greatest sources of claims for professional negligence. Financial agreements may be set aside by a court exercising jurisdiction in respect of a 'matrimonial cause' as per s 39 of the *Family Law Act 1975* (Cth) (FLA). The power and grounds to set aside financial agreements under the FLA is pursuant to s 90K (in respect of a financial agreement between spouses) or s 90UM of the FLA (with respect to a financial agreement between a de facto couple).

More recently, however, trustees have enjoyed some success in setting aside financial agreements entered under the provisions of the FLA, either between a spouse or a de facto couple, pursuant to sections 120 or 121 of the *Bankruptcy Act 1966* (Cth) (the BA). These are not sections that family law practitioners ordinarily have an acquaintance with. They permit a trustee to avoid a transfer of property in circumstances where the transfer was for less than market value consideration or no market value consideration or, in the alternative, there was an intention to defeat creditors.

This is not an area of law that will be at the forefront of most practitioners' minds when advising as to financial agreements as it is very rare that a party will anticipate that the other party will be made bankrupt in the future and for up to five years from the date of a transfer. Further, it is even more rare that a practitioner of any ethical standing will advise a client to enter into a transaction with the intention of defeating creditors as such an act is clearly anathema to the structure of the BA and sound commercial practice.

Nevertheless, in light of decisions of the Federal Magistrates Court pursuant to section 120 of the BA setting aside transfers of property under a financial agreement it is incumbent upon practitioners advising clients entering into financial agreements of the pitfalls that may arise if the transferring spouse or de facto subsequently becomes bankrupt.

This article will address the following:

1. sections 120 and 121 of the BA;
2. application of sections 120 and 121 of the BA to transfers pursuant to financial agreements under the FLA;
3. setting aside a financial agreement that defrauds or defeats creditors under sections 90K or 90UM of the FLA;
4. the effect of a successful application under sections 120 or 121 of the BA on the subject property;
5. response by the non-bankrupt spouse or de facto to the setting aside of a transfer under sections 120 or 121 of the BA; and
6. appeal difficulties from a decision of the Federal Magistrates Court.

Sections 120 and 121 of the BA

Sections 120 and 121 of the BA are vital to bankruptcy trustees in recovering property that has been transferred from a bankrupt to another person prior to the date of bankruptcy. They reverse such transfers and allow the subject property to be available for division amongst creditors pursuant to section 116(1) of the BA.

The elements of section 120 are as follows:

- that there has been a transfer of property by a person who later becomes bankrupt to another person; and
- the transfer took place in the period commencing five years before the commencement of the bankruptcy and ending on the date of the bankruptcy as defined by section 115 of the BA; and
- the transferee gave no consideration for the transfer; or
- the transferee gave consideration of less than market value of the property.

The fact that the property is no longer physically available, in other words no longer exists in specie, as at the commencement of the bankruptcy but can be seen to exist as an identifiable substitute in property such as a fund representing sale of proceeds, means that an action may still exist under s 120.[1] That fund may then vest under sections 58 and 116 of the BA.

Section 120(3) is a defence to an action under section 120(1) of the BA and provides that a transfer is not

void if, in the case of a transfer to a related entity of the transferor the transfer took place more than four years before the commencement of the bankruptcy and the transferee proves that, at the time of the transfer, the transferor was solvent. A 'related entity' is defined by section 5(1)(a) of the BA to include 'a relative of the person' and a 'relative' is defined by section 5(1) to mean 'the spouse of the person'. The word 'spouse' is given extended definition to include 'a de facto partner'.

Under section 120 of the BA there is no obligation to prove intent on the part of the transferor or the transferee. It is merely necessary to prove either that there was no consideration provided for the transfer or the transfer was of less value than the market value of the property at the time of the transfer.

Section 120(5) and (7) of the BA mean that 'consideration' for the purposes of section 120(1) is to be construed 'in the ordinary legal and commercial understanding of that term' and as 'commercial people would construe it'.[2] It is insufficient the transfer was at the end of a long domestic relationship given the fact that subsection (5)(d) expressly excludes such acts as 'love or affection'. The use of the words 'market value' in section 120(1) and the definition of 'market value' in section 120(7)(c) means that full market value in cash or in kind must be paid to the transferor, thereby extinguishing contract law concepts that valuable consideration merely be 'sufficient' and may include a promise by a promisor to do something.[3] An undertaking to forbear from suing for an entitlement to property orders under s 79 of the FLA was held to not be consideration as a spouse cannot, by entering into an agreement with another spouse, preclude him or herself from applying to the court for an order for maintenance or property adjustment.[4] Further, past acts such as past payments of a home loan/mortgage do not constitute consideration as they are past consideration and therefore no consideration.[5]

For there to be an effective transfer to avoid the application of section 120 of the Bankruptcy Act, the transferee must provide the equivalent of market value to the transferor, whether in cash or in kind. This would necessarily mean that a party taking, for instance, a transferor's interest in land subject to an encumbrance must pay to the transferor the net value of the transferor's interest (calculated as a reasonable market value assessment of the land less the sum of the encumbrance and reasonable sale costs and then the transferor's share of that net sum) or else provide an equivalent transfer of real or personal property in kind.[6]

Section 121 of the BA provides that a transfer of property may be void if, among other things, the transferor's main purpose in making the transfer was to prevent the property becoming divisible among the transferor's creditors. The words 'main purpose' invoke an intention which may necessarily be inferred. While the onus of proving the main purpose lies upon the applicant to have the transfer set aside, the conclusion can be drawn from all the relevant circumstances[7] and on the balance of probabilities.[8] That intent may be inferred when proper funds available for payment of creditors become insufficient and may be established by reference to future creditors.[9] The 'main purpose' is able to be proved from the surrounding circumstances of the transfer, as well as the fact that a transferor was or was about to become insolvent. If a debtor makes a voluntary settlement of property, leaving the debtor without sufficient assets to meet his or her debts, it can be inferred that the debtor's main purpose was to prevent the transferred property from being divisible among creditors since that is the necessary consequence of the disposition of the property.[10]

Pursuant to section 121(4) of the BA the transferee may defeat an action to void a transfer if the following can be established:

1. that the consideration given for the transfer was at least as valuable as the market value of the property; and
2. the transferee did not know and could not reasonably have inferred that the transferor's main purpose was to defeat creditors; and
3. the transferee could not have reasonably inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.

The cumulative stringency of section 121(4) of the BA means that it is highly unlikely that a de facto or spouse would be able to establish those elements, in particular the absence of knowledge of the main purpose or a reasonable inference of the main purpose to defeat creditors.

What is important in section 121 is not the intention of the transferee but the intention of the transferor. The difficulty for a trustee is the bankrupt will usually be unco-operative in the provision of evidence or may be actively hostile and may collude with the transferee to create evidence. The bankrupt will be unlikely to admit the 'main purpose' of the transfer was to defeat creditors. Therefore, objective evidence of the surrounding circumstances leading up to transfer as well as contemporaneous communications between the transferee and transferor and any professional advisors will be highly relevant.

Application of sections 120 and 121 of the BA to financial agreements under the FLA

Section 120(2)(b) of the BA contains an exemption: a transfer at undervalue that would otherwise be caught by section 121 of the BA is exempted if it is a transfer to meet all or part of a liability under a 'maintenance agreement' or a 'maintenance order' under the FLA. A 'maintenance agreement' is defined by s 5(1) of the BA to mean a maintenance agreement within the meaning of the FLA that has been registered in or approved by a court in Australia or an external territory but does not include a financial agreement or Part VIIIAB financial agreement within the meaning of the FLA. This exclusion is consistent with the intention of amendments to the FLA and BA by the *Bankruptcy and Family Law Legislation Amendment Act 2005* (Cth) to prevent the misuse of financial agreements as a means of avoiding payment to creditors (para [2](b), explanatory memorandum, *Bankruptcy and Family Law Legislation Amendment Bill 2004*). The explanatory memorandum stated as follows:

> 17. The Bill also proposes amendments to ensure that a bankrupt cannot use financial agreements under Part VIIIA of the Family Law Act to defeat the claims of creditors. One amendment will exclude financial agreements from the definition of 'maintenance agreement' in the Bankruptcy Act to ensure that trustees can use that Act's 'clawback' provisions to recover property transferred prior to bankruptcy pursuant to such an agreement. A further amendment will introduce a new act of bankruptcy which will occur when a person is rendered insolvent as a result of assets being transferred under a financial agreement – this will mean that the person's bankruptcy will be taken to have commenced at the time of that transfer which will extend the 'relation back' period. This will allow the trustee to claim property transferred under the agreement as divisible property in the bankrupt's estate.'[11]

It has been established by at least one interlocutory decision in the Federal Court of Australia that the provisions of section 120 or 121 of the BA may set aside financial agreements under the FLA.[12] It has been accepted in that interlocutory decision that Family Court orders are excluded from the operation of sections 120 and 121 of the BA on the basis that any transfer pursuant to such orders is not 'by a person who later becomes a bankrupt' for the purposes of section 120 or 121 of the BA.[13] On this basis, to avoid the application of sections 120 and 121 of the BA, practitioners may advise their clients that a preferred approach would be to apply to the Family Court or Federal Magistrates Court for family law orders. This would create complications that financial agreements were designed to avoid, including the following:

- substantial documentation is required to comply with *Harris v Caladine*[14];
- less ability to restrict future maintenance claims;
- less privacy;
- less flexibility to have settlements which are not 'just and equitable', as per s 79 and s 90SM of the FLA.

The Federal Magistrates Court has applied section 120 of the Bankruptcy Act to set aside a transfer for 'nil' consideration of an equal share in tenancy in common in a former 'matrimonial' home, such transfer having been conducted pursuant to a de facto financial agreement under section 90UD of the FLA. The court found consideration that should have been paid by the transferee was the net value of the bankrupt transferor's tenancy in common equivalent to the gross market value at the time of transfer less costs of sale less discharge of a mortgage and then divided by 50 per cent.[15] In that matter, valuations by real estate agents at the time of the transfer were in evidence, thereby allowing 'market value' to be proved. In the absence of such evidence, a bankruptcy trustee would need to obtain evidence such as a retrospective valuation report based on comparable sales.

Setting aside a financial agreement that defrauds or defeats creditors pursuant to sections 90K or 90UM of the FLA

A trustee in bankruptcy may also bring an application to set aside a financial agreement under section 90K(1)(aa) (applying to spouses) or section 90UM(1)(b) (applying to de facto couples) of the FLA. These sections apply if a party to the financial agreement entered into the agreement for the purpose or purposes that included the purpose of defrauding or defeating a creditor or creditors of the party or with reckless disregard of the interests of a creditor or creditors of the party. These sections require proof of intent or recklessness. Therefore, the evidence that may be adduced would be similar to that relied on under section 121 of the BA.

An application under section 90K or 90UM of the FLA may be made by 'any other interested person', apart from a party to the financial agreement provided the applicant can establish as per s 90K(3) and 90UM(6) that it is 'just and equitable for the purpose of preserving or adjusting the rights of persons who are parties to that financial agreement and any other interested persons'. As per s 90K(1A) and 90UM(2) of the FLA the definition of 'creditor' for the purposes of section 90K(1)(aa) and 90UM(1)(B) includes in relation to the person who is a party to the agreement a person who 'could reasonably have been foreseen by the parties as being reasonably likely to become a creditor of the party'. This extended definition of 'creditor' means the 'interested person' who may bring an application to set aside a financial agreement under sections 90K or 90UM may be a bankruptcy trustee who seeks to recover property for the benefit of creditors of a party to the agreement if those creditors were forseen as reasonably likely to become creditors.

Bankruptcy trustees and their advisors who are considering bringing an application to set aside a financial agreement should consider bringing the application both pursuant to sections 120 and/or 121 of the BA as well as sections 90K(1)(aa) or s 90UM(1)(b) of the FLA.

The effect of a successful application under sections 120 or 121 of the BA on the subject property

In the event that there has been the successful setting aside of a transfer by a trustee under ss 120 or 121 of the BA, a question mark arises as to the status of the property the subject of the transfer. Two schools of thought have arisen. One school states the property becomes immediately on avoidance the property of the trustee and has not vested as at the date of bankruptcy. By extension, it is therefore not subject to any action under sections 79(1)(b) or 90SM(1)(b) of the FLA which permit the court to make orders 'altering the interests of the bankruptcy trustee in the vested bankruptcy property'. The second school states that the property reverts to its pre-transfer status and then vests in the trustee retrospectively as at the date of bankruptcy. That property may then be the subject of orders under sections 79(1)(b) or 90SM(1)(b) of the FLA.

For reasons that shall become apparent I am minded that the second school is to be preferred. It is the most equitable approach as it accords with the intent of sections 79(1)(b) and 90SM(1)(b) by making property available for claims by non-bankrupt spouses and de facto persons.

The second school is also consistent with the decision of his Honour Justice Lindgren in *Anscor Pty Ltd v Clout (Trustee)* (supra) as previously cited in this paper. In that decision, his Honour analysed the operation of earlier versions of sections 120 and 121 within the parameters of the entirety of the BA. His Honour concluded that where the bankruptcy trustee succeeds in an action under section 120 or 121 of the BA, those sections do not have the effect of vesting property in a trustee in bankruptcy. Instead, they make transfers of property void as against the trustee in bankruptcy i.e.: the transfer never occurred. The vesting of property in the trustee in bankruptcy is provided for under ss 58, 115, 116 and 5(1) of the BA.[16]

His Honour went on to state that where the property the subject of a transfer made void by section 120 or 121 of the BA exists in specie as at the date of the commencement of the bankruptcy, the property vests in the trustee forthwith upon the debtor becoming a bankrupt. From the date of the bankruptcy, the transferee as owner will have held the property in trust for the bankruptcy trustee. If the owner sells the property after the date of bankruptcy, the owner will be accountable to the bankruptcy trustee for

the proceeds of the sale had and received to the use of the trustee. If the property the subject of a transfer made void by section 120 or 121 of the BA no longer exists in specie as at the commencement of the bankruptcy but can be seen to exist as at that date in an identifiable substitute form of property, such as a fund representing the proceeds of sale of the property, that substitute property will vest in the trustee in bankruptcy forthwith upon the debtor's becoming a bankrupt. These statements are subject to protections accorded to third parties under sections 120(6) and 121(8) of the BA which protect successors in title to property where they have acquired the property in good faith and for at least the market value of the property.

The effect of this analysis is that in the event of voiding a transfer under sections 120 or 121 of the BA the property reverts to its status as at the date of transfer. Therefore, for instance in the example of Torrens system land owned by a spouse and a bankrupt as tenants in common in equal shares, the tenancy in common in equal shares as at the date of the transfer is restored. The bankrupt's property, being the 50 per cent share as tenant in common, vests in the bankruptcy trustee as at the date of bankruptcy pursuant to section 58 of the BA. That property then becomes divisible amongst creditors pursuant to s 116(1) of the BA. If the property has been disposed of by the transferee and is no longer available in specie, the transferee is liable for the monetary equivalent thereof as moneys had and received to the use of the trustee.

Assuming this analysis to be correct, the vested property may then be the subject of a claim by the non-bankrupt spouse under sections 79(1)(b) or 90SM(1)(b) of the FLA or on the basis of equitable principles.

Response by the non-bankrupt spouse or de facto to the setting aside of a transfer of property under sections 120 or 121 of the BA

To use the well worn example, pursuant to a financial agreement under the FLA, a spouse or de facto transfers his or her interest as tenant in common in equal shares to a spouse or de facto for 'Nil' consideration. The property has a market value of $1,500,000 and there is a loan of $500,000 secured by a mortgage over the land. The nett value of the transferor's property as tenant in common in equal shares in the land is ($1,500,000 – $500,000)/2 = $500,000. The transferor becomes bankrupt four years after the transfer pursuant to a debtor's petition. An application under sections 120 of the BA voiding that transfer is successful and the transferee loses her title as owner in fee simple of the land and the property reverts to its status as at the date of transfer as jointly owned by the tenants in common in equal shares. The bankrupt's interest as tenant in common in equal shares vests in the trustee as at the date of bankruptcy pursuant to sections 58 and 116 of the BA. That property is then divisible amongst creditors. The non-bankrupt spouse or de facto then has the entitlement to make a claim against the vested property pursuant to s 79(1)(b) of the FLA or, where the non-bankrupt transferee is a de facto, pursuant to s 90SM(1)(b) of the FLA.

A difficulty will emerge if the transferee and transferor were not married and not in a de facto relationship of at least two years. Pursuant to s 90SB of the FLA the courts may only make orders in respect of maintenance and property interests in a de facto relationship where the period of the de facto relationship is at least two years or there is a child to that relationship or there is a risk of a serious injustice due to substantial contributions made by a party. In the absence of jurisdiction the transferee will not be able to seek orders under sections 79(1)(b) or 90SM(1)(b) of the FLA. That person may, however, seek general relief pursuant to principles of equity where the application to set aside is determined in a court with jurisdiction in equity.[17]

It is beyond the scope of this paper to comprehensively review that entirety of the law with respect to both the resulting and constructive trusts. It is, however, worthwhile noting in shorthand that the resulting trust is a trust that exists as at the date of the acquisition of the property. The circumstances in which such trusts may arise can be grouped under two main headings. The first is where the settlor has transferred property to the trustees but has not disposed of, or has not wholly disposed of, the beneficial interest. The second is where a purchaser of property directs that it be transferred into the name of another person and there is nothing to indicate that the person should take the property

beneficially. A resulting trust will be presumed where, on purchase, the legal title to real or personal property is vested in someone other than the person who is proved to have provided the purchase money. Thus, where A purchases land from X and directs X to make a transfer to B, which X does, there is a resulting trust in favour of A.[18] This rule is certainly subject to exceptions, including where the evidence is that it was the intention of the person contributing the purchase price that both parties to the purchase should equally take title, both legally and equitably.[19]

A further equitable claim is the constructive trust. Summarily put, the constructive trust is applied by equity where one person has contributed to property and it is unconscionable for the legal owner to deny that contribution. Those contributions may be both financial and non-financial, including repayments of a mortgage.[20] To a large extent evidence of both financial and non-financial contributions in the context of establishing a constructive trust is very similar to financial and non-financial contributions in sections 79 and 90SM of the FLA. Any person claiming the benefit of a constructive trust will bear the onus of establishing contributions such that it would be unconscionable to deny those contributions. As such, clear evidence of contributions will be necessary.

Raising claims for relief under the FLA or in the alternative in equity presents problems of jurisdiction and the appropriate forum for relief. The Family Court does not have jurisdiction in respect of equitable claims or original jurisdiction to make orders under the BA save for the matters detailed in sections 35 and 35B of the FLA. Those sections provide jurisdiction where a spouse is bankrupt and a trustee is a party to proceedings or a proceeding in the Federal Court of Australia is transferred to the Family Court. Prima facie, the Family Court does not have original jurisdiction to hear an application under section 120 and 121 of the BA. The Federal Court of Australia has jurisdiction in equity and under the BA[21] but does not have jurisdiction in respect of a matrimonial cause[22] and therefore cannot exercise jurisdiction under sections 79 and 90SM of the FLA.

The only court that can exercise original jurisdiction under both the BA and the FLA and in equity is the Federal Magistrates Court. Section 14 of the Federal Magistrates Act provides that in every matter before the Federal Magistrates Court, that court must grant all remedies in respect of a legal or equitable claim properly brought forward. Section 27 of the BA provides that the Federal Magistrates Court has jurisdiction in bankruptcy. Section 30 of the BA provides that the Federal Magistrates Court has full power to decide all questions of law or fact in any case of bankruptcy and may take such orders, including equitable remedies, as are necessary for the carrying out or giving effect to the BA. The FLA jurisdiction of the Federal Magistrates Court is contained in s 39(1A) of the FLA which provides that a 'matrimonial cause' other than a decree for dissolution of a marriage may be instituted in that court.

If an application under section 120 or 121 of the BA is commenced in the Federal Court, consideration should be given to a transfer of the application to the Federal Magistrates Court to permit concurrent jurisdiction under the FLA and in equity to be exercised. I submit that the Federal Magistrates Court is the preferred jurisdiction for the transferee as that court has the following:

- general equitable jurisdiction pursuant to s 14 of the Federal Magistrates Act;
- specific equitable jurisdiction and jurisdiction under ss 27 and 30 of the BA;
- jurisdiction in respect of a matrimonial cause, including the making of property orders under s 39(1A) of the FLA.

Appeal difficulties from the Federal Magistrates Court

An unsatisfactory status of the legislation is that if there is an appeal from a decision of the federal magistrate, an appeal from a decision under the general equitable jurisdiction or the BA is to the full court of Australia pursuant to s 24(1)(e) of the Federal Court of Australia Act. In contrast, an appeal against a decision in respect of a matrimonial cause is to the full court of the Family Court pursuant to s 94AAA(1) of the FLA. The time for an appeal to the full court of the Federal Court is 21 days after the date of the order appealed from.[23] The time for an appeal to the full court of the Family Court from a decision of a federal magistrate is 28 days after the

date of the order[24]. Practitioners must therefore be cognisant as to which court the appeal process is to apply.

Conclusion

This is a very complex area of law which will create difficulties for practitioners in advising as to the creation of a financial agreement and then resisting any claim by a bankruptcy trustee to set it aside. Further, consideration must be given to the appropriate jurisdiction to conduct any litigation. Practitioners must be prepared, if the trustee is successful in setting aside a financial agreement, to conduct a cross application to either claim against the vested property pursuant to sections 79(1)(b) or 90SM(1)(b) of the FLA or in the alternative to bring a claim for equitable relief based on a resulting or constructive trust.

Endnotes

* This article is an edited version of a seminar paper delivered on 30 November 2012. On 12 April 2013, the Federal Magistrates Court became The Federal Circuit Court of Australia.

1. *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469 per Lindgren J at [43].
2. *Official Trustee v Lopatinsky* (2003) 30 FamLR 499 at [94], [96].
3. As to contractual rules of consideration, see *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189 at 193–194 and J W Carter et al, *Contract Law in Australia*, Fifth Edition, Lexis Nexis Butterworths (2007) at [6–23]
4. *Official Trustee in Bankruptcy v Lopatinsky* (supra) at [105].
5. *Roderick May Sutherland as Trustee of the Property of Barry Paul Pescosta, a Bankrupt v Jennifer Ann Byrne-Smith* [2011] FMCA 632 per Driver FM at [27], citing *Official Trustee v Lopatinsky* (supra) at [97] and *Official Receiver v Huen* [2007] FMCA 304 (16 March 2007) per Luce VFM at [31].
6. Such an approach was adopted by the bankruptcy trustee in submissions and accepted by the court in *Roderick May Sutherland as Trustee of the Property of Barry Paul Pescosta, a Bankrupt v Jennifer Ann Byrne-Smith* (supra) at [32].
7. *Cannane v J Cannane Pty Ltd (In Liquidation)* (1998) 192 CLR 557 at 566–7 per Brennan CJ and McHugh J.
8. Section 140 of the Evidence Act (Cth).
9. *P T Garuda Indonesia Limited v Grellman* (1992) 35 FCR 515 at 524; *Barton v DCT* (1974))131 CLR 370 at 374.
10. *Re Chase; Permfox Pty Ltd v Official Receiver* [2002] FCA 1504; applying *Freeman v Pope* (1870) LR 5 Ch App 538 at 541 per Giffard LJ; followed in *Noakes v J Harvy Homes & Son* [1979] 37 FLR 5 at 10–11 per Brennan J (with whom Deane and Fisher JJ agreed).
11. This section of the bill was cited by his Honour Justice Collier in *Combis, Trustee of the Property of Peter Jensen (Bankrupt) v Jensen* [2009] FCA 778.
12. *Combis, Trustee of the Property of Peter Jensen (Bankrupt) v Jensen* (supra) at [51]–[54].
13. *Combis* (supra) at [41].
14. (1991) ¶FLC 92-217.
15. *Roderick May Sutherland as Trustee of the Property of Barry Paul Pescosta, a Bankrupt v Jennifer Ann Byrne-Smith* (supra).
16. *Anscor Pty Ltd v Clout* (Trustee) (supra) at [43](h).
17. Such a case was run by the transferee in *Roderick May Sutherland as Trustee of the Property of Barry Paul Pescosta, a Bankrupt v Jennifer Ann Byrne-Smith* (supra) as the court found the de facto relationship was of less than two years duration.
18. J D Heydon et al, *Jacobs Law of Trusts in Australia,* Lexis Nexis Butterworth (2006) at [1201] and [1210]
19. *Calverley v Green* (1984) 155 CLR 242.
20. *Baumgartner v Baumgartner* (1997) 164 CLR 137, applied in *Roderick May Sutherland as Trustee of the Property of Barry Paul Pescosta v Jennifer Ann Byrne-Smith* (supra) at [49]–[53] and *Official Trustee in Bankruptcy v Brown and Anor* [2011] FMCA 88.
21. Section 22 of the Federal Court of *Australia Act 1976* (Cth) gives general jurisdiction in equity while section 27 of the BA names the Federal Court to be a bankruptcy court concurrently with the Federal Magistrates Court. Section 30 of the BA provides a bankruptcy court jurisdiction to provide equitable relief when applying the BA.
22. Section 39 of the FLA lists the courts that have jurisdiction under that Act and does not include the Federal Court of Australia.
23. Rule 36.03(1) of the Federal Court Rules.
24. Rule 22.03 of the Family Law Rules.

A miscarriage of justice waiting to happen

Anthony Bellanto QC and Greg Walsh OAM discuss the 'unworkable provisions'[1] of Part 5 Division 2 of the Criminal Procedure Act[2] – Sexual Assault Communication Privilege

It is only a matter of time before an accused is wrongly convicted because he or she has been denied access to sexual assault communications.

Section 298 of the *Criminal Procedure Act 1986* provides:

> (1) Except with the leave of the court, a person cannot seek to compel (whether by subpoena or any other procedure) any other person to produce a document recording a protected confidence in, or in connection with, any criminal proceedings.

The authors have had practical experience in many cases where access has been the subject of objection by those representing the complainant and but for the release of some of the counselling communications[3] the credit of the complainant in a relevant sense would have remained unchallenged.

In *R v Markarian* Judge Berman in the District Court of NSW strongly criticised the legislation governing sexual assault communication privilege.

> It is clear that those who instructed parliamentary council in the drafting of that legislation had no idea of how a criminal trial worked.[4]

He further said: 'The legislation is bad policy, badly implemented.'[5]

It might be argued that the trial judge has a discretion to release a document recording a 'protected confidence' in criminal proceedings.[6] However a major vice of the legislation is that the defence and the prosecution are denied access to the material prior to any decision to release some or none of it.

It is a sad reflection on the administration of justice when an accused is denied access to material that has the potential to determine his or her liberty in terms of many years imprisonment.[7]

The accused (and the prosecution) must remain mute in total ignorance while argument develops by counsel representing the complainant as to why the material should remain undisclosed.

For the purposes of such an argument counsel for the complainant has access to the undisclosed material. Counsel can flag parts that can be released and those parts in respect of which non-disclosure is maintained. Usually all of the material is the subject of objection. The material is tendered without the prosecution and defence being privy to its contents. The judge reads the material and with the assistance of submissions from counsel for the complainant makes a determination as to whether the whole or part of the material will be disclosed.

In making this determination the judge must have regard to whether the document(s) will have inter alia substantial probative value.[8]

In normal circumstances it could be reasonably assumed that a judge in making a determination would receive assistance from counsel for the defence and prosecution.

However by reason of the legislation under discussion the two principle parties to the trial are kept out of the equation.

What if counsel for the complainant makes an erroneous submission on fact or law? Such counsel are often inexperienced and the firms who instruct them have a limited criminal practice. What if the judge is wrong in his or her interpretation of the material? In many documents in this area handwriting is difficult, there are obscure medical terms and drug names are often referred to.[9] What if the judge erroneously (unintentionally) withholds a document that should have been disclosed?[10]

At such an early stage of the proceedings (pre-trial) the trial judge may not have a full appreciation of the forensic issues to be argued by the defence and prosecution.

Furthermore the judge is required to consider the requirements of section 299D.[11]

On any reasonable understanding of the dynamics of a criminal trial it is plainly unjust that the defence and prosecution are denied access to the subject material in the circumstances referred to above.

In most sexual assault trials the credit of the complainant is a pivotal issue and to close the door to access and deny the main parties a role in the release of material relevant to credit is contrary to the hallmarks of a fair trial. The fundamental consideration is whether or not the trial is fair to both the prosecution and defence.[12]

In 2002 the NSW Bar Association put a submission to parliament on proposed amendments to the

legislation advocating that there should be limited disclosure to defence lawyers of subpoenaed documents which were the subject of a claim of privilege so that the trial judge may have their full assistance in determining the claim. It was suggested that confidentiality could be maintained by requiring lawyers to give strict undertakings not to disclose the documents to any other person including the accused and any breach would amount to professional misconduct.

Such a submission is sound.

There is a further problem that may arise before the matter gets to court. In addition to the requirements of notice[13] leave is required before a subpoena to produce documents that may contain a communication, can be issued. If leave is refused the defence cannot proceed further in its request for access to what it may regard as relevant material going to the credit of the complainant.

How can a judge make a decision on the issuing of a subpoena without seeing the material? And how can the defence reason towards the issuing of a subpoena when it does not know whether the document(s) contain a protected confidence?[14]

Educating the counsellors

Following amendments to the legislation in 2002 to address the issues arising out of the decision of the Court of Criminal Appeal in *R v Norman Lee* [15] a person 'counsels' if the person has:

> (a) undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm, and[16]
>
> (b) that person:
>
> (i) listens to and gives verbal or other support or encouragement to the other person, or
>
> (ii) advises, gives therapy to or treats the other person,
>
> whether or not for fee or reward.[17]

This definition is very wide and may include a person who has limited training, study or experience. In many cases such 'counsellors' are social workers and not qualified in psychology or psychiatry.

They often have no training or experience in eliciting information from a complainant and there have been numerous cases when the question was asked: 'Have you been sexually abused?' It is the experience of the authors that statements are made to the complainant such as 'accept that you have been sexually abused and the sooner you confront it the better it will be for closure.'

Therapists (and counsellors) who hunt relentlessly for a hint of sexual abuse may miss or misinterpret signs of more salient disorders requiring treatment.

The therapeutic community can and does play a significant role in shaping people's perspectives. Beyond the consulting room, therapists generate research data, self help books, media interest and a plausible set of reasons to believe in their theories. On multiple levels therapists are in a position to hurt as well as help with their beliefs. Therapists in some circumstances actively or passively encourage clients to identify themselves as victims of abuse – or to be 'politically correct' as 'abuse survivors.' These clients may be told: 'You seem to have the kind of symptoms that suggest you were abused as a child.' They often use a symptom checklist that is general enough that could apply to most of the population.[18]

In his work *Suggestions of Abuse* Michael Yapko at p 21 refers to the problem:

> Unquestionably, people can be influenced to believe things that are not true, but it is impossible to say to just what extent this is occurring in the epidemic of repressed memories of abuse. Certainly it is happening, though. At the moment, far too many unanswered, and perhaps unanswerable, questions remain about these sensitive and complex issues to say more than that with authority.
>
> Some will no doubt misinterpret my views, simply because I question the practice of those therapists who use their influence unwittingly to create more victims. That they do so unwittingly is a key point of this book. The acknowledgement that therapy can unintentionally hurt people ought not to be dismissed as a 'back-lash against feminism,' an 'inability to face the harsh reality of abuse,' or a symptom of 'denial.' *Abuse happens, but so do false accusations.*
>
> The survey data I have gathered make it abundantly clear that too many therapists threaten their clients on the basis of personal beliefs and philosophy, rather than according to an objective consideration of the facts. Too many therapist seem ignorant about the suggestibility inherent

> in the therapy process and ignorant about the workings of the human memory, *even though memory is central to the enterprise of identifying and treating survivors.*[19]

It is clear the drafters of the impugned legislation were well intended and there is an obvious need to protect victims of sexual assault. The difficulty is determining where the truth lies. In any criminal trial the search for truth is often difficult if not impossible thus the time honoured principle that an accused person is presumed innocent unless the prosecution can prove his or her guilt beyond reasonable doubt. Testing the credit and reliability of a witness through cross-examination is the way our system of justice functions. In his Sir Maurice Byers lecture 'Truth and the Law' delivered in May 2011 the former chief justice of NSW the Honourable J J Spigelman AC referred to a pioneer researcher, Elizabeth Loftus who said:

> Judges and jurors need to appreciate a point that cannot be stressed enough: True memories cannot be distinguished from false without corroboration.[20]

Under the impugned legislation there is an implied presumption that communications by a complainant to a counsellor are true. In most cases they may be – in some they may not. Filtering out the doubt is not seen as the task of the counsellor. This remains the province of defence and prosecution. The argument for release of the communications should not have to run the gauntlet of judicial discretion.

Recovered memory

There are many judicial decisions, books and papers written on recovered memory.[21] The topic of memory is complex and it is well documented that memories can be true recovered memories or honestly experienced false memories. In *R v Eishauer*[22] the court held[23] that the choice was between a true recovered memory, and an honestly experienced false memory – that is a memory which the subject believes is correct, but is in fact, incorrect. Common experience does not enable one to say that the memory of a painful event, absent for a long time and later experienced, is more likely to be a relived true memory than a honestly experienced false memory. It is not common knowledge that in the case of children memory of abuse is frequently lost and later reliably recovered.

In *Longman v The Queen*[24] McHugh J said at [107]-[109]:

> [107] The fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to 'remember' is well documented. The longer the period between an 'event' and its recall, the greater the margin for error. Interference with a person's ability to 'remember' may also arise from talking or reading about or experiencing other events of a similar nature or from the person's own thinking or recalling. Recollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine: Hunter, Memory, rev.ed.(1964), at pp 269-270.
>
> [108] No matter how honest the recollection of the complainant in this case, the long period of delay between her formal complaint and the occurrence of the alleged events raised a significant question as to whether her recollection could be acted upon safely. The likelihood of error was increased by the circumstances in which the complainant said the incidents occurred. The opportunity for error in recalling, twenty years later, two incidents of childhood which are alleged to have occurred as the complainant awoke, and then pretended to be asleep, are obvious. Experience derived from forensic contests, experimental psychology and autobiography demonstrates only too clearly how utterly false the recollections of honest witnesses can be. Certainly, some incident or accumulation of incidents seems to have affected the complainant's attitude to her stepfather. She testified that, because of his conduct towards her in sexual matters, 'I don't hate him but I do hate what he's done and the problems it's caused in my life'. However, the existence of this feeling towards the applicant increased, rather than decreased, the need to examine carefully whether the complainant's honest recollection of events concerning the applicant was not distorted by this hatred.
>
> [109] To the potential for error inherent in the complainant's evidence must be added the total lack of opportunity for the defence to explore the surrounding circumstances of each alleged offence. By reason of the delay, the absence of any timely complaint, and the lack of specification as to the dates of the alleged offences, the defence was unable to examine the surrounding circumstances to ascertain whether they contradicted or were inconsistent with the complainant's testimony.

The many recovered memory cases, articles and texts highlight the need to understand the complexity of

the task facing counsellors. More particularly the need for care in discussions with 'victims'.

Legitimate forensic purpose

This concept is not necessarily confined to claims of public interest immunity. It arises whenever a party seeks access to documents in respect of which a subpoena is issued and where objection is taken and the party is unable to show that it is at least 'on the cards' that such documents would assist his or her case. There must be no 'fishing' expedition.[25]

In *Alister v The Queen*[26] at 451 Brennan J said:

> In a criminal case it is appropriate to adopt a more liberal approach to inspection of documents by the court. The more liberal approach is required to ensure, so far as it lies within the courts power, that the secrecy which is appropriate to some of the activities of government furnishes no incentive to misuse the processes of the criminal law.

The onus is on the accused to establish a legitimate forensic purpose when seeking leave to issue a subpoena. The test proposed in *Alister* (the 'on the cards' test) rings hollow when an accused does not know and cannot know what's in the material sought to be produced on subpoena. In normal circumstances one can usually mount an argument ('on the cards') that material may be relevant to an issue. The sexual assault legislation does not permit such an approach.

Credibility and reliability of the complainant

The authors have not dealt with credibility issues as governed by the *Evidence Act 1995* ss 103 and 106. These are matters that will fall to be determined at any trial. The remarks expressed in this paper are designed to attract attention to the need for reform in the area of sexual assault communication privilege, particularly to permit access to lawyers representing an accused and the prosecution of relevant material produced on subpoena so that the exercise of any judicial discretion can be assisted by the parties who have a direct interest in the outcome of the trial as to whether a citizen is found guilty or not guilty.

Furthermore reform is required to remove the impediment in obtaining a subpoena to produce the documents so that a meaningful an informed decision can be made. The current state of the law does not permit such an approach.

Endnotes

1. *R v Markarian* [2012] NSWDC 197. Berman SC DCJ 23rd October 2012
2. *Criminal Procedure Act 1986* (NSW) ss 295–306.
3. *Criminal Procedure Act 1986* (NSW) s 294(4).
4. *R v Markarian* [2012] NSWDC 197, at [2].
5. *R v Markarian* [2012] NSWDC 197, at [5].
6. *Criminal Procedure Act 1986* (NSW) s 298.
7. The standard non-parole periods and maximum penalties for sexual assault offences under the *Crimes Act 1900* are as follows: section 61I – (sexual assault) – SNPP seven years – max. penalty 14 years. Section 61J – (aggravated sexual assault)– SNPP 10 years; max. penalty 20 years. Section 61JA – (aggravated sexual assault in company) – SNPP 15 years; max. penalty life imprisonment. Section 61M(1) – (aggravated indecent assault) – SNPP 5 years; max. penalty seven years. Section 61M(2) – (aggravated indecent assault) – SNPP eight years; max. penalty 10 years. Section 66A(1) or (2) (sexual intercourse- child under 10) – SNPP 15 years; max. penalty 25 years for 66A(1); max. penalty life imprisonment for 66A(2).
8. *Criminal Procedure Act 1986* (NSW) s 299D. See *AW v The Queen* [2009] NSWCCA 1, at [47]; *R v Fletcher* (2005) 156 A Crim R 308 at [33]; *R v Zhang* (2005) 158 A Crim R 504 at [139] and *R v Lockyer* (1996) 89 A Crim R 457.
9. See *R v Markarian* [2012] NSWDC 197, at [3].
10. In many cases the documents are contained in a file comprised of hundreds of pages.
11. *Criminal Procedure Act 1986* (NSW) ss 299D(2)(a)–(f).
12. *Dietrich v R* (1992) 177 CLR 292, at [299]–[300] per Mason CJ and McHugh J, at [326] per Deane J and at [362] per Gauldron J.
13. *Criminal Procedure Act 1986* (NSW) s 299.
14. *See R v Markarian* [2012] NSWDC 197, at [2].
15. *R v Norman Lee* [2000] NSWCCA 444.
16. *Bellemore v Tasmania* (2006) 170 A Crim R 1.
17. *Criminal Procedure Act 1986* (NSW) s 296(5).
18. Extracted from Michael Yapko PhD *Suggestions of Abuse: True and False Memories of Childhood Sexual Trauma*, (Simon Schuster, New York, 1994) p.20.
19. Ibid, p.21.
20. Elizabeth F Loftus, 'Memory Faults and Fixes: Research Has Revealed the Limits of Human Memory. Now the Courts Need to Incorporate these Findings into their Procedures' (2002) 18 *Issues in Science and Technology* 41.
21. See Elizabeth Loftus 'Remembering Dangerously' Vol 19.2, March/April 1995 *Skeptical Inquirer*.
22. *R v Eishauer* (Unreported, NSW Court of Criminal Appeal, 19 September 1997) New South Wales.
23. See *The Queen v Bartlett* (1996) 2 VR 687, at [694]–[696]. See also *John Doe 76C v Arch Diocese of St Paul and Minneapolis*, State of Minnesota in Supreme Court, 25 July 2012, 817 N.W.2d 150; 2012 Minn.
24. *Longman v The Queen* (1989) 168 CLR 79.
25. *Attorney General NSW v Stuart* (1994) 34 NSWLR 667, at [681]. See also *Roads and Traffic Authority (NSW) v Connolly* [2003] NSWSC 327 and *Susan Frugtniet v Magistrate Garbutt & Anor* [2003] NSWSC 770.
26. *Alister v The Queen* (1983—1984) 154 CLR 404.

Striking a balance: the proper operation of the sexual assault communication provisions

By Catherine Gleeson

Justice seeks to achieve balance. At the heart of the criminal justice system is the balance between the public interest in deterring criminal behavior, and satisfying the public and private needs for punishment for such behavior, against the public interest in protecting persons accused of crimes from unfair or unlawful punishment. The criminal justice system has always placed the right of the accused to a fair trial at the forefront of its procedural concerns.

That does not mean that the rights of all other participants in the criminal justice system must be defeated in order to protect the accused. Some of the participants whose rights must be balanced against those of the accused include complainants in proceedings for sexual offences.

There are several reasons why this is so. The first is that the resolution of trials for sexual offences often rests almost entirely on acceptance of the evidence of a complainant over that of the accused, so that credit becomes the central issue. Trials for sexual offences often focus on the character, motives and memory of the complainant. There is a tendency for a defence to morph into an attack on the complainant.

A second is that many complainants have or had a relationship with the accused. A frightening number are, or were at the time of the offences, children. A consequence of this is that a complainant is in a particularly vulnerable position when giving evidence in a criminal trial.

Legislation has been developed to provide procedural and evidentiary protection to complainants in sexual assault proceedings as a consequence, including provisions restricting the admissibility of evidence of sexual history, and provisions designed to avoid the repeated cross-examination of the complainant on a retrial.[1]

These provisions have not prevented the issue, almost as a matter of course, of subpoenas to persons that might have treated or counselled complainants. The legislature has recognised that the risk of counselling records being subpoenaed has an established tendency to reduce the effectiveness of the counselling process, and may also reduce the incidence of reporting of sexual offences.[2] The prospect of having the person accused of assaulting you, and his or her lawyers, reading documents recording your private thoughts, feelings, insecurities and accounts of painful past experiences, and then those lawyers putting that information to you in court is likely to exacerbate the humiliation and trauma that already accompanies cross-examination.[3] The consequence is a risk that those who suffer sexual abuse will refuse counselling, or will edit their accounts to avoid the risk of disclosure.[4]

The sexual assault communications privilege was designed to avoid these consequences where to do so did not outweigh the accused's right, and the Crown's responsibility, to adduce all evidence that may be significant to the outcome of the trial. The privilege is not absolute. It will not operate to exclude evidence where the defence can demonstrate that the documents sought by a subpoena are of substantial probative value, or where the complainant consents.

Operation of the provisions

The balancing exercise

Critics of the privilege assert that they are designed to facilitate a miscarriage of justice by presumptively withholding documents that could be used to attack the credit of the complainant, thus risking the accused's right to a fair trial. This is not the case, for a number of reasons. The first is that this is simply not how the provisions are designed. The privilege is analogous to public interest immunity in that it seeks to balance the public interests in protecting counselling communications against the public interest in admitting essential evidence.[5]

The Court of Criminal Appeal has recently considered the operation of the provisions in the context of an attack on their constitutionality. In *KS v Veitch (No 2)*,[6] the defendant requested the issue of a subpoena (without leave) to a hospital seeking medical records of the complainant over a period some three years before the alleged offence. The complainant applied to have the subpoena set aside but this was rejected by the trial judge who inspected the documents produced and indicated those that were to be disclosed to the defence. The complainant appealed and the respondent in turn sought to impugn the SACP provisions as being constitutionally invalid.

The constitutional challenge was premised on a submission that ss 298(1) and (2), together with

s 299D, are invalid because the legislative power of the states is limited by the requirement that an accused is entitled to have his or her guilt or innocence determined by means of fair trial according to law and to have the facts determined in accordance with rules and procedures that truly permit the facts to be ascertained. The impugned provisions were said to deprive the accused, in a practical sense, of the possibility of a fair trial.[7]

In the course of considering the constitutional challenge, Basten JA assessed the operation of the provisions. His Honour observed that it is ordinarily a legitimate forensic purpose for a subpoena to seek access to documents in order to formulate lines of cross-examination, either by suggesting that the applicant has made inconsistent statements to a counsellor in relation to the circumstances of the offence, or by using material in the medical records to suggest that the evidence of the applicant may be unreliable, regardless of the admissibility of the documents. Accordingly, the requirement in s 299D for the court to be satisfied that such documents have 'substantial probative value' will result in a significant reduction in the material available to the accused when counselling records are subpoenaed.[8]

Basten JA rejected a submission that s 299D operated to preclude access to counselling communications. While the balancing exercise mandated by s 299D(1)(c) is weighted against disclosure, disclosure will be permitted when the court is satisfied that the public interest in admitting evidence of substantially probative value substantially outweighs the countervailing considerations.[9] There is nothing in the definition of substantial probative value that precludes access to material going only to the credibility of the complainant.[10]

His Honour assessed the provisions in the statutory context of exclusion of other potentially highly probative evidence, such as evidence of sexual history,[11] and the power of the court to stay proceedings in the extreme circumstance that the balancing exercise required material to be withheld, but a trial conducted on that basis would be unfair.[12]

Against this background, Basten JA rejected the constitutional challenge for the following relevant reasons:

- The impugned provisions are laws relating to evidence and procedure and squarely within the power of the Parliament to regulate criminal trials. They reflect a public policy directed towards the importance of balancing the legitimate interests of the accused against the legitimate interests of victims of sexual assaults. The law is neither arbitrary nor manifestly disproportionate in its response to a perceived weakness in traditional trial procedure.[13]
- While the effect of the provisions may be to make it more difficult for an accused person in certain circumstances to defend himself, to protect the confidences as between the victim and a counsellor is not to deprive the accused of some source of information to which he is presumptively entitled. Nor is the exclusion of protected confidences a law which would tend to bring the criminal trial process into disrepute.[14]
- There are other areas of the law where public interests justify exclusion of documents or other information from disclosure in criminal or civil proceedings, such as public interest immunity and client legal privilege. This indicates the acceptance that the interest of the courts in determining proceedings, including criminal proceedings, on all available evidence must in some circumstances be qualified to the protection of other public interests. The election by the New South Wales legislature to balance the competing policies so as to accommodate the interests of sexual assault complainants should not be interfered with by the courts.[15]

The analysis of Basten JA demonstrates that the balancing exercise provided for under sexual assault communications privilege does represent an absolute restriction on access to relevant material, and nor in the context of other similar variations to traditional trial procedure does it interfere with the accused's right to a fair trial. A number of the complaints regarding the provisions relate to their practical operation, which is discussed further below.

Procedural restrictions

One of the complaints leveled at the provisions is that the requirement to obtain leave for issue of a subpoena seeking counselling records is unworkable.

In *R v Markarian*[16] Berman DCJ observed at [2]:

> Section 298 requires that leave of the court be sought before a person can issue a subpoena to produce a document recording a protected confidence, that term being earlier defined in s 296. How is the person who issues the subpoena supposed to know whether the document would contain a protected confidence? More importantly perhaps, how is the judge who is responsible for deciding whether to grant leave, supposed to know those things? And then what happens if a subpoena is issued without leave being granted? Can, as in this case, leave be granted retrospectively, that is after the documents have been produced on subpoena?

There are answers to each of these questions. The first question is resolved by that party's lawyer turning his mind to (a) the definition of protected confidences in ss 295 and 296; (b) his understanding of the documents he expects to obtain from the record holder; and (c) his common sense and experience. It is a simple proposition that if a psychiatrist, counsellor, women's refuge, hospital, or the Department of Community Services has been subpoenaed, at least some of the documents will contain records maintained by persons who have undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm, and that if the subpoena seeks records relating to the complainant, he or she is likely to be a protected confider who has consulted such a person. Moreover, if based on evidence available from the Crown brief, it is reasonable to expect that the complainant has received counselling from other sources, such as his or her school or employer, subpoenas directed at those entities should also be treated as potentially requiring leave.

The problem may also be solved by judicious drafting of subpoena categories. If a practitioner wishes to obtain counselling records, medical records, or other treatment records, it cannot be difficult to indicate this in the description of the documents sought. The court and the record holder will then be on notice as to the likelihood of a privilege claim, and the proper notice can be given to the complainant pursuant to s 299C. Conversely, if a practitioner does not wish to obtain counselling records, but merely records establishing some fact (for example, the fact of a date of admission to hospital to test the complainant's account of events) it cannot be difficult to draft the subpoena so as to catch only the documents recording that fact, and serving the subpoena with a letter advising that no counselling communications are sought.

In practice, it is the experience of the writer that the problem posed by the first question is resolved by practitioners simply ignoring the requirements of s 298(1) and the notice requirements in s 299C. There are no regulations or rules that restrict the issue of subpoenas from the District Court registry without leave in sexual assault proceedings, despite there being power to make them under s 305A of the *Criminal Procedure Act 1986* (NSW).

The remaining questions posed by Berman DCJ were later resolved by the Court of Criminal Appeal *Veitch (No 2).* The subpoena in that case was issued without leave or notice and one of the questions before the court was whether the subpoena was thereby invalid and liable to be set aside. Basten JA held that it was not. That finding turned on the construction of the three stages at which leave is required in s 298, in respect of which his Honour observed at [23], [25]:

> The tripartite structure of s 298 appears to prohibit the issue of a subpoena, the production of a document and the adducing of evidence recording or revealing a protected confidence. Where leave is granted to issue a subpoena, it would make little sense to impose a subsequent leave requirement on production in answer to the subpoena. Subsection (2) should be understood to impose a constraint on the holder of a document recording a protected confidence from producing it otherwise than pursuant to a subpoena issued with leave. Although the prohibition in subs (1) bites at an early stage, its primary purpose is to prevent any person other than the persons who are party to the counselling communication having access to the contents of the document. Subsection (3) is engaged whenever a document is sought to be tendered or evidence falling within the prohibition is sought to be adduced from a witness.

Basten JA had highlighted the problems that arise in respect of the drafting of these provisions in an earlier judgment:

> In its terms, s 298 is unequivocal in the prohibitions it seeks to impose. Unfortunately, practical considerations as to the operation of the provision are not clearly thought through. Thus, it is one thing to say a person 'cannot' do something; it is another to identify the consequences where the person evidently has done the prohibited thing.

> In the present case, not only was the subpoena issued by the Registrar, without the procedural steps necessary to obtain leave, on the application of the respondent, but the Hospital, again without leave, produced the documents to the court.[17]

Basten JA observed in *Veitch (No 2)* at [29] that determination of an application for leave to issue a subpoena or to produce a document may be undertaken by reference to the documents, which are to be produced to the court and the protected confider, but not the parties, for the purposes of the determination: s 299B. This procedural course is available even at the stage of seeking leave to issue a subpoena: s 299B(5).[18] Because the production of documents to the court could be achieved by this mechanism even at the leave stage, the issue of a subpoena without leave could only be a procedural irregularity capable of being disregarded by a Court while determining the same issue in respect of whether access to the documents should be granted.

The practical consequence of this construction is that s 298(1) is redundant. In light of the writer's experience (and the invariable circumstance in every reported case) of subpoenas being sought without leave, whether the complainant receives notice of the subpoena is then due to the fortuitous circumstance that either the Crown or the record holder raises the existence of the privilege.

The role of the parties

A further complaint in relation to the privilege is the restriction on access by the representatives of the parties for the purposes of determining the existence of the privilege and the balancing exercise.[19] To do otherwise would defeat the purpose of the privilege.[20] A number of complainants and practitioners have identified the traumatic effect of the accused's counsel reviewing their private records.[21] The Court of Appeal has recognised that this requirement is an unsatisfactory necessity.[22]

This concern is reflected in the second reading speech for later amendments to the privilege in 2010:

> The sexual assault communications privilege is designed to limit the disclosure of protected confidences at the earliest point possible: for a complainant who has gone to a counsellor to discuss the sexual assault, it is little comfort to him or her if the documents are not to be adduced in evidence at the trial if they have already unnecessarily been disclosed to the defence by an order of the court. The privilege is not just designed to prevent the unnecessary adduction of evidence of protected confidences before a jury, but is designed to prevent the inappropriate subpoena of such confidences in the first place, and then the inappropriate granting of access to them.
>
> …
>
> The defence must have some legitimate forensic purpose for seeking the issue of a subpoena for records in the first place, or the subpoena is merely fishing and can be set aside as abusive without resort to these provisions.[23]

The fact that the Crown and defence cannot have regard to the documents when making submissions on legitimate forensic purpose does not mean that they can be of no assistance in determining whether what is sought will be of substantial probative value. The accused knows the case he seeks to make. His representative is expected to know what he wishes to obtain in response to the subpoena. If he does not, the irresistible consequence is that the subpoena is a fishing expedition and is liable to be set aside independently of the privilege provisions.[24]

True it is that the complainant's representative is at a disadvantage in assisting the court as to whether the material is of substantial probative value. True it also is that the judge may well be in the dark as to the relevant issues likely to arise in the trial at the time that the subpoena is issued. It is the responsibility of the accused's representative to explain what documents are expected to be produced and how they will materially assist in the defence. Where that is done the judge will typically be in a position to identify and assess those parts of the records that contain the relevant information, often with the assistance of the complainant's representative.

The content of the accused's task does not go higher than the general law obligations imposed on a party seeking documents by a subpoena. Demonstrating a legitimate forensic purpose for the issue of the subpoena, and explaining how it is on the cards that the documents will assist the defence case, facilitates investigation of whether the material before the court is of substantial probative value. Because subpoenas are often set aside prior to production on the basis that they lack a legitimate forensic

purpose, the defence can be under no disadvantage in identifying forensic purpose without recourse to the documents.

The vice in the disposal of an application for leave under s 298 was evident in the application in *Veitch (No 2)*: Basten JA observed at [71] that the trial judge:

> ...noted that 'counsel for the accused was rather coy about volunteering information that might assist me to understand what the issues were in the trial': that coyness continued on appeal.

It appears that all that was revealed on the application was that the documents were sought for the purposes of testing 'issues of consent' to which medical records disclosing the complainant's condition capable of bearing on her behavior were relevant (at [71]). Basten JA identified three errors with the trial judge's reasoning in ordering disclosure:[25]

- first, in circumstances in which the complainant's condition had been disclosed to the police and other witnesses, the material sought could not be of substantial probative value in the context of the evidence otherwise available;
- second, in concluding that the risk of potential harm was limited due to the age of the records in this case,[26] the trial judge failed to consider the prospect of future harm having regard to the potential need for further counselling in respect of the 'highly traumatic events' to which the documents related. Further, the trial judge failed to have regard to the broader consideration of protecting counselling communications generally, and the deterrent effect if a perception is generated that counselling records are readily disclosed;
- third, the trial judge failed properly to consider whether the interest in protecting the communications was 'substantially outweighed' by the interests in making them available in the trial. A conclusion that the documents were of substantial probative value was not enough. Moreover, the description of the documents as being remote from the subject matter of the charge and otherwise uncontroversial, demonstrated that they were not of substantial probative value.

In a concurring judgment, Beech-Jones J provided an answer to complaints that the defence is at some disadvantage in seeking to overcome the burdens imposed by s 299D:

> … the apparently high threshold presented by the criteria in s 299D may not be as difficult to overcome as first appears if the relevant application was supported by evidence identifying the accused's defence to the relevant allegation, what the accused expects will be obtained from the material sought to be produced or inspected and what other documents or evidence are or are not available relating to those issues and the material sought. That is not to say that those matters must be deposed to before such an application will be granted but, as a practical matter, if they were an application for leave would appear to have much a greater chance of success. Of course the decision to disclose those matters cannot be forced upon an accused and the decision to do so would no doubt represent a difficult forensic choice. However, all forms of litigation involve difficult forensic choices and the effect of these provisions may only be to require that they be made earlier if documents are sought in advance of the trial.[27]

His Honour observed in respect of the present application that:

> In the absence of knowing any of what the accused's response is to the crown case, what it is expected that the material sought will reveal or what other documents or evidence are or are not available to the accused relating to that material I am not satisfied that the criteria in s 299D(1) have been satisfied.[28]

The second factor identified by Beech-Jones J should have been sufficient to set aside the subpoena on the basis that there was no legitimate forensic purpose for its issue.

R v Markarian was itself a case in which, after identification by the defence as to what was expected to be found in the document and why they were relevant to the issues to be determined at trial, the judge was able to make reasoned findings as to whether those documents were of substantial probative value.[29] The fact that an application may be renewed at a later stage if during the course of a trial, it becomes apparent that certain material is of substantial probative value, is another reason why the restrictions on access are not productive of substantial injustice.[30]

Qualifications of counsellors

Whether a counselling relationship is such as to give rise to the privilege is defined broadly in the *Criminal Procedure Act 1986* (NSW). In *Veitch (No 2)* Basten JA accepted that the concept of 'harm' in the definition of protected confidences in s 296(2) and (4) should be construed so as to capture documents relating to counselling prior and unrelated to the offence before the court. His Honour observed:

> The expansive provisions of s 296(2) tend to conflict with the definition of 'counselling communication' in s 296(4). The latter, with its reference to 'any harm the person may have suffered', together with the considerations identified in s 299D(2) referred to below, suggest a concern to encourage reporting of sexual assaults, without prejudice to the victim's need to obtain counselling. On the other hand, the terms of s 296(2) expand the concept of a protected confidence to include counselling unrelated to the sexual assault offence the subject of the charge, or indeed any sexual assault offence. One explanation may be that Parliament wished to avoid the victim of a sexual assault being discouraged from reporting the offence if that course might result in revelation of any other disclosures made in counselling sessions, even if unrelated to the sexual assault. That said, the broad construction (giving full effect to s 296(2)) might have greater force if it covered counselling for any condition, including disabilities, rather than 'harm', which implies damage to which one has been subjected by another.[31]

That approach was also adopted by Beech-Jones J in *NAR v PPC1*.[32] It is consistent with the expansive definition of 'harm' in s 295(1), being 'actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear)' which was introduced by the legislature to overcome the Court of Appeal's previous limitation of 'harm' to recognised psychiatric injuries: *R v Norman Lee* (2000) 50 NSWLR 289 at 295[23].

The definition of protected confidences also identifies the types of counselling relationship that attract the privilege. Section 296(5) is necessarily broad. It encompasses all persons that have 'undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm' and who 'listens to and gives verbal or other support or encouragement to the other person, or advises, gives therapy to or treats the other person, whether or not for fee or reward.' That definition is as apt to pick up people with medical training, acting in a professional capacity, as it is to pick up an experienced social worker acting voluntarily or on appointment by the appropriate authorities.

There is no basis for limiting this definition to those that might be thought 'appropriately qualified.' Nor is there any basis for a contention that, because of the fact that some counsellors have been known to suggest abuse to a patient where none in fact exists, there should be mandate for trawling through all counselling records to uncover evidence of it.

If a defence is to rest on the prospect of contamination or suggestion by a counsellor, there must be some evidentiary basis for it beyond the mere fact that the complainant saw a counsellor before the complaint was made. That evidentiary basis may emerge from the contents of the complainant's statement or interview. It may emerge from external evidence of the practices of the counsellor. If that evidence can be identified, there may well be grounds for a submission that the counselling records are of substantial probative value and the balance of public interests favours their disclosure.

The probative value of counselling records

It is wrong to suggest that the sexual assault communications privilege rests on an implied presumption that communications by a complainant to a counsellor are true. The legislation says nothing as to the inherent value of counselling records as evidence, it merely provides that they must be of substantial evidentiary value if they are to be produced or adduced into evidence.

The fact is that the nature of counselling records are such that they are often of limited probative value in criminal proceedings. As noted in the second reading speech for the introduction of the legislation:

> The primary purpose of counselling is not investigative, it is therapeutic. …. As part of the counselling process, the complainant is encouraged to release emotions and talk unhindered, and yet the complainant has no legal right to review the notes to see whether they are an accurate reflection of his/her version of the events. Nevertheless, these notes can be used to claim that the complainant has made prior inconsistent statements and has feelings of shame and guilt which are consistent with a motive to lie.[33]

The fact that communications of this nature present ripe fodder for cross-examination does not mean that they are likely to assist in uncovering the truth. In fact, putting inconsistencies or doubts expressed in counseling to a complainant in cross-examination may well serve to obfuscate the truth.

Conclusion

The sexual assault communications privilege exists in an area of the criminal law that is notoriously fraught. The provisions as presently drafted cause dissatisfaction to all participants in this area of law. However, as a matter of practice, they are designed so as to ensure to the extent possible that both accused and complainant are afforded fairness in the conduct of the trial. The provisions will work, and work well, when the representatives of the Crown, defence and complainant work together to identify and confine the issues the court must consider when determining the application of the privilege.

Endnotes

1. Part 5, Divisions 1, 3 and 4 of the *Criminal Procedure Act 1986* (NSW).
2. *Evidence Amendment (Confidential Communications) Bill 1997* (NSW Hansard, Legislative Council, 22 May 1997); M McPhedran 'The legal assault on physician-patient privilege' (1995) 153(10) *Canadian Medical Association Journal* 1502.
3. *O'Connor v The Queen* (1995) 130 DLR 4th 235 at 288; A Cossins and R Pilkinton, 'Balancing the Scales: The case for the inadmissibility of counselling records in sexual assault trials' (1996) 19(2) UNSWLJ 222 at 225; ALRC Report 102, *Uniform Evidence Law* (2005) at [15.78]; Dawson, 'Production of Therapeutic Records to the Defence: Emerging Principles' (1998) 5(1) *Psychiatry, Psychology and Law* 63 at 67.
4. *R v Osolin* (1994) 109 DLR (4th) 478 at 496; A Cossins and R Pilkinton, 'Balancing the Scales: The case for the inadmissibility of counselling records in sexual assault trials' (1996) 19(2) UNSWLJ 222 at 225.
5. *Criminal Procedure Act 1986* (NSW) s 299D(1)(c).
6. [2012] NSWCCA 266.
7. *Veitch (No 2)* [2012] NSWCA 226 at [10]–[11]. A further submission was made premised on the procedural guarantees required by state courts as repositories of federal judicial power, which will not be considered here.
8. *Veitch (No 2)* [2012] NSWCA 226 at [31]–[32].
9. *Veitch (No 2)* [2012] NSWCA 226 at [36].
10. *Veitch (No 2)* [2012] NSWCA 226 at [37].
11. *Criminal Procedure Act 1986* (NSW) s 293; see also *NAR v PPC1* [2013] NSWCCA 25 at [29].
12. *Jago v District Court of New South Wales* (1989) 168 CLR 23; *Dietrich v R* (1992) 177 CLR 292: *Veitch (No 2)* [2012] NSWCA 226 at [37]–[38].
13. *Veitch (No 2)* [2012] NSWCA 226 at [64]; cf *Williamson v Ah On* (1926) 39 CLR 95 at 117 per Isaacs J.
14. *Veitch (No 2)* [2012] NSWCA 226 at [65]; referring to *Nicholas v R* (1998) 193 CLR 173 at [162] per Gummow J.
15. *Veitch (No 2)* [2012] NSWCA 226 at [66].
16. (2012) 15 DCLR (NSW) 98.
17. *KS v Veitch* [2012] NSWCCA 186 at [25].
18. see also per Beech-Jones J at [84]-[85]; *NAR v PPC1* [2013] NSWCCA 25 at [25], [73].
19. *NAR v PPC1* [2013] NSWCCA 25 at [3]–[4] per Adams J; *R v Markarian* (2012) 15 DCLR (NSW) 98 at [24].
20. *Criminal Procedure Act 1986* (NSW) s 299B(3).
21. See note 3 above.
22. *R v Norman Lee* (2000) 50 NSWLR 289 at [14] per Heydon JA.
23. *Courts and Crimes Legislation Further Amendment Bill 2010* (NSW) (Legislative Council, 24 November 2010, 28065).
24. *Commissioners for Railways v Small* (1938) 38 SR (NSW) 564 at 575; *R v Saleam* (1989) 16 NSWLR 14 at 18; *Carroll v Attorney-General for New South Wales* (1993) 70 A Crim R 162 at 181; *Principal Registrar of the Supreme Court of New South Wales v Tastan* (1994) 75 A Crim R 498 at 504-506; *Ran v The Queen* (1996) 16 WAR 447 at 453; *Attorney General (NSW) v Chidgey* (2008) 182 A Crim R 536 at [5].
25. *Veitch (No 2)* [2012] NSWCA 226 at [75]–[79]
26. In this respect Basten JA observed that 'in circumstances where none of the documents related to contemporaneous counselling or counselling with respect to the offences the subject of the charges, it was appropriate to conclude that the potential harm to the applicant was limited.' With respect, this will not always be the case. Seriously traumatic events in respect of which a complainant has received counselling may, even they took place many years ago, have the effect of retraumatising a person if disclosed. An example is records of harm suffered by small children: much of the material contained in treatment records may concern events that the child does not remember or has since suppressed. Revelation of that material as a consequence of an unrelated complaint of sexual assault may well be productive of significant trauma. This circumstance can be dealt with when relevant by a confidential harm statement pursuant to s 299D(3).
27. *Veitch (No 2)* [2012] NSWCA 226 at [86].
28. *Veitch (No 2)* [2012] NSWCA 226 at [87].
29. (2012) 15 DCLR (NSW) 98 at [21] and [22].
30. *NAR v PPC1* [2013] NSWCCA 25 at [60]–[62].
31. *Veitch (No 2)* [2012] NSWCA 226 at [86].
32. [2013] NSWCCA 25 at [22].
33. See further The Use and Abuse of Counselling Records in Sexual Assault Trials; Reconstructing the 'Rape Shield'? S Bronitt and B McSherry, at pp.263-264; Balancing the Scales: the Case for the Inadmissibility of Counselling records in *Sexual Assault Trials* A Cossins and R Pilkinton, pp.227–228, 236–238.

Anecdotes of the old divorce law

By John P Bryson

The *Family Law Act 1975* came into effect and the Family Court of Australia began to operate on 5 January 1976. Enough time has passed for there to be many lawyers who do not know how far-reaching a reform that was, and how odd and strange was the earlier divorce law. Whoever is dissatisfied with the present divorce law can be assured that the previous law was much worse. My main concern is the ground on which a marriage may be dissolved. Under the Family Law Act this is the simple concept that the marriage has irretrievably broken down. A better reason for dissolving a marriage would be hard to imagine.

The previous law about the grounds for divorce had a complex history, and some of its rules had a strange air even in their own times. In the days before 1975 an elderly barrister explained to me that the divorce law was based on a compromise between two principles. The first principle was that divorces are extremely unsatisfactory events, affronts to God, religion, the sanctity of marriage and the order of society, and cause great unhappiness and disruption. The second was 'I might want one.' This explanation went a long way to explain the law. There were many strange rules and requirements, not perhaps strange when they entered the law, but certainly strange in the perception of modern people. But a person who acted carefully, had good advice, and had some kind of ground for having a marriage dissolved could usually steer a way between the rocks.

Before 1976 I had some small acquaintance with divorce law. It was a small part of my practice as a solicitor and later as a barrister, and I was never deeply involved. The great majority of divorce petitions were undefended, and very junior barristers were often briefed for undefended petitions. They were not necessarily simple, as there were pitfalls here and there. I also had a little to do with cases where custody, alimony and property settlements were in issue. These were the only cases which were likely to be vigorously defended, and when the dissolution of the marriage was opposed, that was usually because of some economic implication. After 1975, with a new court and new or largely restated principles and procedure I saw a fortunate opportunity to remain ignorant and stay away. After all, I did not really understand what was going on. The party I thought was the worse rotter usually won, so I was not hearing the right drummer or marching in step.

After 1976 I only went to the Family Court twice, rescue missions where what the litigants were fighting over was not theirs: once a state ward and once a green Rolls-Royce. I have no acquaintance with the Family Court building at the far end of town. I told my friends that I was going to stay away and never learn the new principles. Unfortunately the gods of Olympus heard me say this. When I was on the bench they jested with me by sending many cases, on other principles, between de facto partners who had not married at all. They slay us for their sport.

... it gave means by which his lordship might not fail to get his divorce through minor lapses with forward chambermaids.

I will give a little potted history of the earlier grounds for divorce in New South Wales and where they came from. If you want real history, read a historian. These are anecdotes. Ignoring one and a half millennia, I pick up the law of marriage and divorce in England when the Reformation began. In English law the courts of the church decided cases about validity of marriage; the royal courts did not. No one, king, court or pope, had power to dissolve a marriage. Henry VIII did not want a divorce and did not get a divorce, and it would have been life-threatening to let him hear you say that he had. He wanted an annulment on the ground that he had married his brother's wife. The difficulties related to the effectiveness of Catherine's marriage to Henry's elder brother Arthur and of a papal dispensation for her marriage to Henry.

The courts of the church could decide that a marriage was void and annul it. The usual grounds were that the marriage was within prohibited degrees, meaning that the parties were too closely related for the marriage to be lawful, or that some earlier betrothal or arrangement constituted a valid marriage, rendering a later marriage void. The prohibited degrees as defined by the church were very wide. The reformed churches in England and elsewhere redefined the prohibited degrees back to Leviticus, so there were far fewer circumstances in which parties were too closely related and could

get an annulment. The Roman Catholic Church at the Council of Trent adopted well-defined formal requirements for a valid marriage, greatly limiting room for contest about whether informal arrangements constituted an earlier marriage. Two centuries passed before English legislation caught up with this with the passage of Lord Hardwicke's Marriage Act in 1745.

In many countries, including Scotland, reform rulers and reformed churches allowed a marriage to be dissolved on the ground of adultery. It was thought that there was authority in the Gospels for this (although this is far from clear.) Not so in England. The marriage service in the Book of Common Prayer means that marriage is indissoluble. Henry VIII obtained a report of a commission of eminent clergy favouring dissolution on the ground of adultery, and the government of his son Edward VI obtained a similar report, but neither was enacted into law. The projected legislation was taken up but not passed during the reign of Elizabeth I. She practised studied ambiguity in many things and no one clearly knew whether she favoured a divorce law or not. In view of what had happened to her mother the whole subject was rather touchy.

For about forty years the courts of the Church of England, or some of them, purportedly dissolved some marriages. It is unlikely that there were many such decrees, as any bishop or diocesan chancellor who understood the law must have known that reports by royal commissions did not change the law, and some eminent clergy said so. There were divorces, at least in a few cases, until Foljambe's case (1602) established definitively that there was no power to dissolve marriages in this way.[1]

Before and after the reformation the courts of the English church made decrees, in modern times called judicial separation, in those times called divorce a mensa et thoro, from bed and board. The grounds available were adultery, cruelty and desertion.

After Foljambe's case and until 1858 no court in England dissolved marriages. Courts of the Church of England decided claims for annulment of marriage and for divorce a mensa et thoro, and other matrimonial causes. They gave such protection as women had against desertion, cruelty, faithless husbands, and withholding means of support. The means of enforcement were defective, as many people were not much concerned if they were excommunicated and refused Holy Communion, and many people were not members of the Church of England at all.

In theory the English laws of marriage and divorce were introduced to New South Wales in 1788 on settlement, and received again as they were in 1828. Until 1873 no court in New South Wales had jurisdiction in matrimonial causes. That power was carefully left out of the legislation and charter which created the Supreme Court, and was not effectively given to the Archdeacon's Court of the Church of England, which was not an established church in New South Wales. In the early days the magistrates enforced or tried to enforce obligations to maintain deserted wives, and this was given a legislated basis in 1840, augmented in 1858.

Although no court could dissolve marriages in England, they could be dissolved by legislation, an Act of parliament dealing specifically with only one marriage and the parties to it. In 1551 a nobleman obtained just such an Act, although the Parliament of Mary I repealed it one or two years later. In the seventeenth century there was much discussion but little action. Milton published a call for a divorce law, but friends reconciled him with his wife, so that he had two handmaidenly daughters to look after him when he was blind, and to write down Paradise Lost at his dictation. Late in the seventeenth century there were a few more Divorce Acts, probably fewer than five, and some did not clearly dissolve the marriage, but authorised the petitioner to enter into another one. In the eighteenth century it became routine for the British Parliament to pass Private Acts for divorces. A royal commission in 1853 found that there had been 357, almost all in the last 150 years; two or three a year. Petitions for private Acts were treated as if they were judicial business before the House of Lords. A committee of the House of Commons heard evidence and reported on the petition. If the petitioner had already obtained a divorce a mensa et thoro and judgment for common-law damages against the adulterer the lords passed the petition and the Commons assented. Not many petitions were opposed, but if they were the House of Lords committee heard evidence and decided what should be done. Until about 1800 only husbands obtained

divorces and only on the ground of adultery. From about 1800 a small number of petitioner wives succeeded. Lord Eldon opposed this with great vehemence but without success. The whole process, involving three lawsuits, was ridiculously expensive and so only available to petitioners who were aristocrats or otherwise very rich. The most famous petitioner was George IV who wanted his marriage with Queen Caroline dissolved, and suffered the indignity that the House of Lords did not effectively agree.

The wife as the angel in the house was to show forbearance and forgive her husband's weakness and lapses. The husband was the just and stern ruler of the family, and his minor lapses were excused for the burden he bore.

Of course none of this was of any use if you lived in New South Wales. Willis J had obtained a divorce in this way in 1833 before he came to New South Wales. He had married the daughter of an earl and she had run off with an army officer, which may partly explain his bad temper and dislike for moustaches. The Legislative Council once passed a bill for an annulment in a particular case: it was sent off for royal assent, which was eventually given.

The many reforms of English law which began in the 1830s eventually reached the courts of the church, and new civil courts were set up to deal with probate and divorce, leaving the church courts with little to do. The Court for Divorce and Matrimonial Causes came into existence in 1858, staffed by common law judges. Doctors' Commons, the separate profession of civil law advocates, drifted out of existence. Within a year or two the new court had dissolved more marriages than had ever been dissolved before. The Colonial Office circulated the Australian colonies and suggested they enact divorce legislation, but this was not done in New South Wales until 1873. The English legislation was closely followed and dissolution of marriage was available to husbands and only on the ground of adultery. Wives had to prove the husband's adultery with aggravating circumstances, such as incest, bigamy, rape, sodomy, bestiality or cruelty. The wife as the angel in the house was to show forbearance and forgive her husband's weakness and lapses. The husband was the just and stern ruler of the family, and his minor lapses were excused for the burden he bore. Divorce a mensa et thoro now called judicial separation continued to be available on grounds of adultery, cruelty and desertion. In England the need for wives to show aggravating circumstances continued until 1923, but in New South Wales wives were given much the same grounds as husbands in 1881, after a difficult parliamentary campaign and resistance from the Colonial Office.

Sir Alfred Stephen retired as chief justice in 1873 at about the same time as the legislation came into effect. He then had a long career in the Legislative Council advocating liberalising reforms. Stephen's bête noire, Hargrave J, became the judge in divorce. It was a strange choice in view of his reputation for hostility to women, starting with his wife, who had had him locked away as a lunatic, although brief notes of the first four years of his decisions published in 1878 do not bring out any noticeable hostility.

In the early years judicial expressions and comment by lawyers and others seem imbued with ideas highly adverse to dissolving marriages at all. Discussion was redolent with suspicion and alarm, and with fear that the process was adverse to religious values and to respect for the institution of marriage, and was susceptible to manipulation by parties who were colluding together to bring about a dissolution. Divorce was perceived as socially dangerous. In the early years defended cases were heard by juries, who showed no enthusiasm for making findings of adultery. There was vigilance against inappropriate advantage being taken of the court.

After almost 20 years additional grounds of dissolution were enacted: different lists for husbands and wives, but to much the same effect. After his retirement from the court Stephen exhausted himself in parliamentary campaigns in the interests of ill-treated wives, against severe, sustained and ingenious opposition by parliamentary manoeuvre and from community leaders, among whom the Anglican archbishop was very prominent. The view that divorce, or divorce without adultery, was an affront to the Christian religion motivated much

opposition. The legislation had to be sent to London for royal assent, as it was beyond the governor's authority, and the colonial secretary temporised, precipitating further rounds of parliamentary manoeuvre. In the midst of all this the colonial secretary was raised to the peerage and chose to call himself Lord Knutsford. Stephen exhausted himself and retired from parliament when almost 90, but the legislation passed within two more years.

The additional grounds enacted in 1893 continued in force until the federal law covered the field in 1959. The additional grounds for wives were

(a) desertion without just cause or excuse for three years and upwards;

(b) the husband had, during three years and upwards, been a habitual drunkard and habitually left the petitioner without means of support, or alternatively habitually been guilty of cruelty towards her;

(c) the husband had been in prison for not less than three years and still was, under sentence for capital or other serious crime;

(d) the husband had within five years undergone frequent convictions for crime and been sentenced in the aggregate to imprisonment for three years or upwards and left the petitioner habitually without means of support;

(e) within the year before the petition the husband had been convicted of having attempted to murder the petitioner or having assaulted her with intent to inflict grievous bodily harm; and

(f) that during one year previously the husband had repeatedly assaulted and cruelly beaten the petitioner.

Those who opposed the legislation presumably thought that wives should put up with these sorts of thing. If women had had the franchise this reform would have faced less opposition. The grounds for divorce in England were not extended in similar ways until 1937.

All these grounds had technical outliers. There was nothing so simple as cruelty, or habitual drunkenness. To dwell on ground (f), there had to be repeated assaults, there had also to be repeated beatings, the beatings had to be cruel, and all this had to happen within one year before the petition. It was not enough to knock her about a bit. There had to be a series of real pastings, and every 18 months or so was not enough. Or to dwell on ground (b), if the husband had been habitually drunk and cruel for two years, she had only one more year of putting up with this to go! Judges varied in their interpretation of cruelty, and to some an assault which did not require the wife to send for the doctor was not enough to be cruel.

Parties to a marriage must keep their spouses under adequate supervision.

Ground (a) desertion was supplemented in that failure to comply with a decree for restitution of conjugal rights meant that the respondent was deemed guilty of desertion without reasonable cause, and dissolution on the ground of desertion was available without waiting out three years. If no other ground of dissolution was available this course, involving two successive proceedings, could be taken, subject to the hazard that the delinquent might comply with the first decree and come back. Few did, but the risk was there. Most were happy to be divorced.

The legislation applied to the dissolution of marriage the bars which existed in the church courts against claims for divorce a mensa et thoro. Connivance at adultery, collusion in it, and conduct conducing to it were absolute bars, and the petitioner had to verify a denial that there had been such conduct. Parties to a marriage must keep their spouses under adequate supervision. A lapse of vigilance could be conduct conducing to adultery. These absolute bars made all communication perilous and prevented negotiation and agreement over ancillary issues. The fear was that without vigilance, parties would make agreed arrangements to bring about a divorce, with the horrifying aspect that they would arrange for adultery to happen or to tell perjured lies about it.

The legislation made the adultery of the petitioner himself (or herself) a bar to dissolution, but not an absolute bar. There was a discretion to dissolve the

marriage notwithstanding it. It is hard to follow why this bar was discretionary, but it gave means by which his lordship might not fail to get his divorce through minor lapses with forward chambermaids. If anything, adultery committed by the petitioner seems worse than connivance in adultery by somebody else. In the early years this discretion had little influence. It is not mentioned in the cases briefly noted in a publication in 1878 of Hargrave J's decisions of the first four years. As time passed, in England as in New South Wales, favourable exercises of discretion began to appear, more frequently after about 1920 with a culmination in *Blunt v Blunt* [1943] AC 517 (HL). The House of Lords stated the chief considerations that should be weighed, and said that it was of primary importance to consider the interests of the community at large in maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which made it contrary to public policy to insist on the maintenance of a union which had utterly broken down. Both parties in *Blunt v Blunt* had committed adultery, and each obtained favourable exercise of discretion on the adultery on which the other succeeded. This decision signalled perception that what was involved was less maintenance of religious values and the sanctity of marriage than recognition that the marriage had utterly broken down and the petitioner wanted divorce so as to enter into another marriage. A person who did not respect the sanctity of marriage would not have bothered to ask. The courts had made a transition from religious to secular values.

After *Blunt v Blunt* exercises of discretion against dissolving a marriage practically disappeared. In my early years at the bar about half of all undefended hearings reached a point where counsel said to the judge, in a grave tone just above a whisper, 'There is a discretion statement, your Honour,' the associate handed the judge a brown envelope which the judge unsealed, opened up and read to himself. He said 'Dear me' or adopted a facial expression of distaste and then he said, also in a grave tone, 'I exercise the discretion in favour of dissolution.' There seemed to be no limit to the wildness of the adulterous careers depicted in the statements, by commercial travellers, pop musicians and many others, and the worse the petitioner's behaviour had been, the stronger the reasons for ending the marriage. There is no point in looking for these discretion statements for historical research, because they were all pulled out of the files and burnt as soon as the Family Law Act came into effect, in accordance with a regulation made by Senator Murphy which was later held to have been invalid, after the smoke had gone up.

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There had been a complete revolution in social attitudes between the enactment of divorce legislation and 1943. In nineteenth century values, the perception that if a marriage had utterly broken down it should be dissolved was revolutionary. If nineteenth century parliaments had been told that that was what they were doing they would not have passed the legislation.

While I worked in the Crown Solicitor's Office from 1955 to 1959 there were occasional interventions to set aside decrees nisi, usually prompted by referrals from judges who had encountered something irregular or by information, sometimes anonymous, from members of the public who wished the litigants ill. This function of the crown solicitor was usually spoken of, not accurately, as the queen's proctor. Two elderly solicitors, of no great vigour or ability, did the work of the queen's proctor, assisted by two old police sergeants broken in health and on the verge of their pensions. They investigated these cases and sometimes sought reversal of decrees nisi before they came absolute. They were not very effective, and it seemed obvious that the government did not want them to be. In my years there was only one

instance where they succeeded in having a decree reversed. The queen's proctor paraded the order triumphantly around the office and showed it to everybody, probably wishing to repel the idea that he never did anything.

The federal law in 1959 largely continued the previous grounds, gathered together the variations in the laws of the states and restated the grounds in more simple terms. The most significant changes were that the period of desertion came to be two years, and there was an altogether new ground, separation for five years. This was the first fault-free ground. It was the subject of much comment, debate and opposition before it was enacted. Looking backward, it was recognition that complete breakdown of the relationship was a ground for dissolution. The period of five years now seems remarkably long.

In my early years at the bar undefended petitions under the federal Act proceeded through the Supreme Court in many thousands. If handled carefully they almost always succeeded. The court room was always open and the public could know everything. Newspapers printed weekly lists of decrees nisi. The main problem was that there were not enough judges to hear these petitions. Sometimes acting judges were appointed to sit through vacations and attack the backlog. Judges must have found this routine business extremely tiresome, and sometimes their demeanour showed this.

One would think that, on the balance of probabilities, adultery could be proved from circumstances fairly readily if, say, a husband left his wife and lived for some time in a flat otherwise occupied solely by one woman who was not his mother or his sister. A few sightings of the circumstances in which they lived should lead to a ready inference on the probabilities. However, the shadow of *Briginshaw v Briginshaw* (1938) 60 CLR 336 hung heavily over this, and it was not wise to rely solely on circumstantial evidence unless it was corroborated, for example by a written confession (which many were glad to sign), or by photographic evidence of a divorce raid.

Private enquiry agents made divorce raids their business. They were seedy and unscrupulous characters, sometimes with a background of police service in Shanghai or hot sticky outposts of the British Empire. They raided and photographed domestic scenes in a cloud of torts, entering dwellings without permission, breaking locks, splintering doors, throwing aside blankets and flashing cameras with no regard to privacy or decency, and took graphic photographs of primary human behaviour, surprisingly often missing heads, faces or other identifying features, or photographing suspicious bumps under carpets instead of people. The photographs accompanied the brief in a brown envelope, and they could be startlingly graphic. Sometimes these incursions were not unwelcome, and an air of 'What kept you?' hung over the events. These raids were so frequently successful in arriving at a flagrant moment as to generate suspicion that they were staged by agreement. In very nasty cases husbands sometimes went along for the raid and beat up people whose conduct they did not approve of. In a case which attracted much attention in its time, the husband had repeatedly warned the co-respondent against associating with the wife, and had threatened violence; but he persisted, in the grip of his destiny. Selby J said 'At this point the dramatic theme shifted from Greek tragedy to French farce.' During the raid there was some photography of violent pugilism in which the co-respondent was naked and his virility was manifest, but the facts as found were that no adultery had yet taken place. The raid was too early and the petition was dismissed.

All this seems to have ended in 1976. The dramas faded away and the photographs and discretion statements disappeared with them.

Endnotes

1. See 1 Holdsworth HLR 623: see too *Porter's Case* 3 Cro. Car.461, 79 E.R.1000

Associate Justice Macready

On 20 February 2013 Associate Justice Macready retired, after more than twenty years on the bench. On his Honour handing down his final judgment there was an informal retirement ceremony in Court 7D. A large number of barristers and solicitors were present. Willmott SC spoke on behalf of the bar and Mr Salier spoke on behalf of solicitors. The following is an extract from the speech by Macready AsJ.

There are many different periods of a judicial career that one can look back on and reflect about. I still clearly recall the first early years and the many uncertainties that attended that time. Life as a judge started out with a private swearing in at 9.30 a.m. in the morning; my first case was listed at 10.15 a.m. Some person took me in tow and marched me down one of the back corridors in the court here and said, 'That's the door you go in Sir. Shall we go in?' In those days there was no baby judge's school or any preparatory work. One simply started without any initiation.

Normally it takes a couple of years to settle into a job and one then gets some confidence in one's own abilities and one can settle down and enjoy the court process with all its ups and downs. At that period, and perhaps in the early and middle part of your career, you become confident and may be even overconfident at times but the Court of Appeal certainly knocks that out of you. Occasionally what the High Court does is change the law on you from what it was when I heard the case. I think one person I see sitting here today persuaded them to do just that. Many reversals are, of course, nothing more than another person seeing something in a slightly different light to the trial judge. Minds differ and one should not take it as a criticism. There is, of course, the odd occasion when it is pointed out clearly that one has made a mistake and that certainly tends to bring you back to reality.

As one approaches retirement you have a bit more time to reflect on what it is all about. It is not about the exercise of power over parties. You realise that as a judge you have a far more important role, namely, that of a trustee or a guardian of the institution of which one is part. Even if one has been here for 20 years (which to me seems a very long time) it has to be seen in the context of the long history of this court since 1823. Twenty years is merely a small part of something which will continue for a long time after I have left. Hopefully this court and the service it provides the community will be here in the future for as long as it has been in the past. I am truly thankful for having had the chance to preserve the institution which fulfils such an important part in our society. Without that institution and the rule of law society would rapidly decay.

Meanwhile, in Nauru

Steven Bliim, barrister at Ada Evans Chambers (pictured on right) took up the position of solicitor general of Nauru on 19 November 2012.

NSW v Victoria barristers hockey match

By Andrew Scotting

On 27 October 2012 the NSW and Victorian Barristers Hockey teams met in Sydney to play their annual match for the prize of the Rupert Balfe – Leycester Meares Cup.

In this year's fixture we were soundly beaten, resulting in 'the Cup' heading south for the first time in a number of years.

I would like to think that we were nothing but hospitable to the Victorians, providing a glorious day, a fine venue and a few extra players. Regrettably, neither the weather or the venue affected the final result, but the decision to provide the Victorians with a few extra players, notably one in particular, did.

In recent years I have seen enough rugby league, rugby union and AFL players doing the TV 'mea culpa' interview to know how it goes. In my many years of hockey, I have never come across such a phenomenon, so I believe that this may be a first. Here goes, reading from a prepared statement:

> I have let myself, my team, my family, Shagger Meares and Bunter Johnson down by my actions. The decision to let a skillful, agile and youthful Irishman play for the Victorians was a decision that I alone made. I hope that in the future the fans of the NSW Bar Hockey team can forgive this indiscretion. I would ask the media to respect my privacy whilst I undergo extensive counselling.

The Victorian and Irish collaboration were spectacular on the day and all credit to them as they played some champagne hockey resulting in a 7-0 whitewash.

Cintra Hockey Complex at Concord has not previously had the honour of 'the Cup', but it was certainly up to it, as was demonstrated by the hospitality of the canteen staff after the game if nothing more.

The game was followed by an entirely pleasant dinner at Dolcisimo at Haberfield with the Victorians. I would like to thank the Victorians and in particular their convenor, Stuart Wood SC, for making the continuing effort to hold the fixture.

The barristers in the New South Wales team were David Pritchard SC, Bruce McManamey Geoff Warburton, Andrew Scotting, David Jordan, Bill Nield and Gary Hill, with special mention to Mim and Tim Pritchard and Sirena Scotting. Thanks also to Ganasan Narianasamy and all of the other ring-ins who played on the day.

The decision to let a skillful, agile and youthful Irishman play for the Victorians was a decision that I alone made. I hope that in the future the fans of the NSW Bar Hockey team can forgive this indiscretion.

NSW Bar XI v QLD Bar X1 2012

By Lachlan Gyles SC

On 27 October 2012 the New South Wales Bar cricket team played against the Queensland Bar on the Old Boys ground at the King's School, Parramatta. NSW were holding the Callinan Trophy after a good away win in Brisbane in 2011, and the visitors were keen to make amends.

The wicket looked hard and quick, and Egan the Queensland skipper won the toss and batted.

Botsman and Docker opened the bowling for the home side, and Botsman removed the dangerous Johnstone in the 3rd over, beautifully caught at 2nd slip by 'the Iceman' Chin. Docker then took Steele's off stump with a brute of a ball, and when Taylor was given out LBW of Docker, Queensland were 3/13 off six overs. A great opening spell for NSW.

Anderson and Katter then steadied the ship and took the score to 30 before Naughtin and the Iceman were introduced into the attack with immediate success when Anderson went. McLeod joined Katter and they took the score to 88 in the 22nd over before Kahn had McLeod trapped LBW for 24. Pararajasingham then came on and bowled the fastest over seen in this fixture for very long time. He had Katter caught superbly by Docker at 1st slip for a well made 35, and bowled Egan in the same over, and at 7/97 Queensland were in real trouble. Some lusty hitting by Williams however rallied the troops and, after Pararajasingham came on and mopped up the tail, Queensland were all out for 142.

Bilinsky and Carroll made the perfect start for New South Wales, taking 33 off the first five overs before Carroll was caught in the deep. Bilinsky was not perturbed and continued to play beautifully through the off side in a stylish knock, and looked as though he might make the total on his own before falling for 43. Pararajasingham provided good support, before Docker took up the baton from Bilinsky and took the Queensland attack apart. Stowe came and went, but Khan provided some good support before Gyles and Docker saw the home side over the line. Docker finished with 52 not out, and with a great catch to remove Katter and 2–13 off five overs, was a deserving man of the match.

The match was followed by a great dinner at the East Village Hotel, where the triumphs and failures of the day were dissected and workshopped. Naughtin made a futile case for a move from no 11 in the batting order, and plans were made for revenge in the next match.

Next year is the 40th anniversary of this fixture, the first match being played in Brisbane in 1973 between teams captained by Callinan QC and Gyles QC respectively, and has been played every year since, with the honours fairly even over that time. It is hoped that a few of the former greats might make a trip down memory lane and come to the 40th match next year. In the meantime, the Callinan Trophy sits safe on this side of the Tweed.

Wentworth Wombats emerge from burrow

By WG Grace

The 22nd annual tussle for the Lady Bradman Cup between Eleven Wentworth (trading as the Wentworth Wombats) and Edmund Barton Chambers took place beneath threatening skies at Bradman Oval, Bowral on Saturday, 6 April 2013.

In addition to Paul Cutler and John Clifton from his chambers, the redoubtable Thos Hodgson, legend of the family law bar, long standing skipper of Edmund Barton Chambers, recent sexagenarian and acknowledged cricket tragic, managed to recruit a number of potential barristers to his team: potential, in the sense that they had not yet left school (although they had qualified to play in various regional and state representative cricket teams) to support and add muscle to the Edmund Barton team. Those recruits did not disappoint and, together with the evergreen Phillip Wood (another potential barrister of many years standing), saw Edmund Barton through to a highly competitive 152 from 33 overs.

The Edmund Barton score would have been much higher were it not for the remarkable agility of Ireland QC as custodian behind the wickets. His ability effortlessly to move his paws to the ball without moving either foot, thereby conserving energy, was a sight to behold. When he did move, however, there appeared to be something of a spring in his step.

Poulos QC did not achieve any runs but still troubled the scorers.

Although fiery redhead Stephen Free went wicketless from his four overs, he nevertheless did early damage. That damage, unfortunately, was inflicted on his teammate, Jonathan Clark in the nets before the game. Clark's broken knuckle saw him as a most worthy recipient of the 'Thanks for Coming' award which was duly presented during the luncheon adjournment on his return from Bowral Base Hospital. Other notable bowling performances included that of Griffiths J (as he now is) who, as J Griffiths (as he then was) was described in these pages more than ten years ago as a 'legendary but ageing firebrand'. Age has not wearied him (much) nor the years condemned.

Speaking of age not wearying him, Poulos QC was called upon to bowl 'at the death' when Edmund Barton's batsmen were hitting out. Poulos demonstrated that the laws of physics dictate that the slower the delivery and the lower its trajectory, the more difficult it is to despatch the ball to the boundary, let alone over it. This represented a significant development in his bowling technique with consequent, happy results. Philip Durack rolled back the years with an excellent display of leg spinning causing many to wonder why he was not called up on the recent Indian tour.

Pike and Bell strode to the crease pessimistic both as to the weather holding out (a matter over which they had no control) and as to their prospects of chasing down the total (a matter over which they also had little control). With a smattering of good luck, however, they put on 56 for the first wicket and on this platform P Durack, his son Tim and Griffiths J built with scores, respectively, of 30 not out, 25 not out and 21. Free completed a wholly unsuccessful day - bowled for a duck with an agricultural swing. Poulos QC did not achieve any runs but still troubled the scorers. Scruby sat out the match in Manly, confident that it was taking place on the following day.

Thus it was that the sleepy Wentworth Wombats emerged from their burrows and comfortably reeled in the total with a number of overs to spare. Cricket, as ever, was the winner on the day.

Bench & Bar v Solicitors Golf Day

By D M Flaherty

On 24 January the annual Bench & Bar v Solicitors Golf Day returned to the recently revamped Many course after an absence of some years. Some described Manly as the 'spiritual home' of the event but for the Bench & Bar team it was a place where hopes of a victory again in 2013 (after winning in 2012 at Elanora) were left dead and buried. There was nothing 'spiritual' about it except the bonhomie and fun amongst all participants that the event never fails to generate.

The solicitors were the winners of the team event (7 games to 4) and thus gained the right to hold the Sir Leslie Herron mace (suitably engraved) until 2014.

Other results were as follows: -

Winners: 44 points – James Antonenas and David Sparks (solicitors)

Runners up: 44 points – Phil Bannister and David Shannon (solicitors)

(on a count back)

1st nine: 22 points – Judge Robert Toner and Col Heazlewood

2nd nine: 23 points – Chris Crawley and Glen Coyne

Because of an 'administrative error' there was no nearest to the pin or 'longest drive' awards this year. That will be remedied next year.

Judge Robert Toner SC (the captain of the Bench & Bar team for the day) graciously handed over the Sir Leslie Herron mace to the president of the Solicitors Golfing Society, Mr John Newnham and promised a return to glory for the Bench & Bar team in 2014.

Swimming

The Ground Floor Wentworth Gropers entered the 2013 Naiman Clarke Lawyers Challenge on 22 February 2013 and outshone teams from some of the leading law firms. The Gropers, comprising:

- Roland Matters
- Janet McDonald
- Anthony Kaufmann
- Bradley James
- Chris Peadon
- Louise McBride
- Roger Marshall
- Michael Bramble
- Christine Bailey
- Mark Maconachie

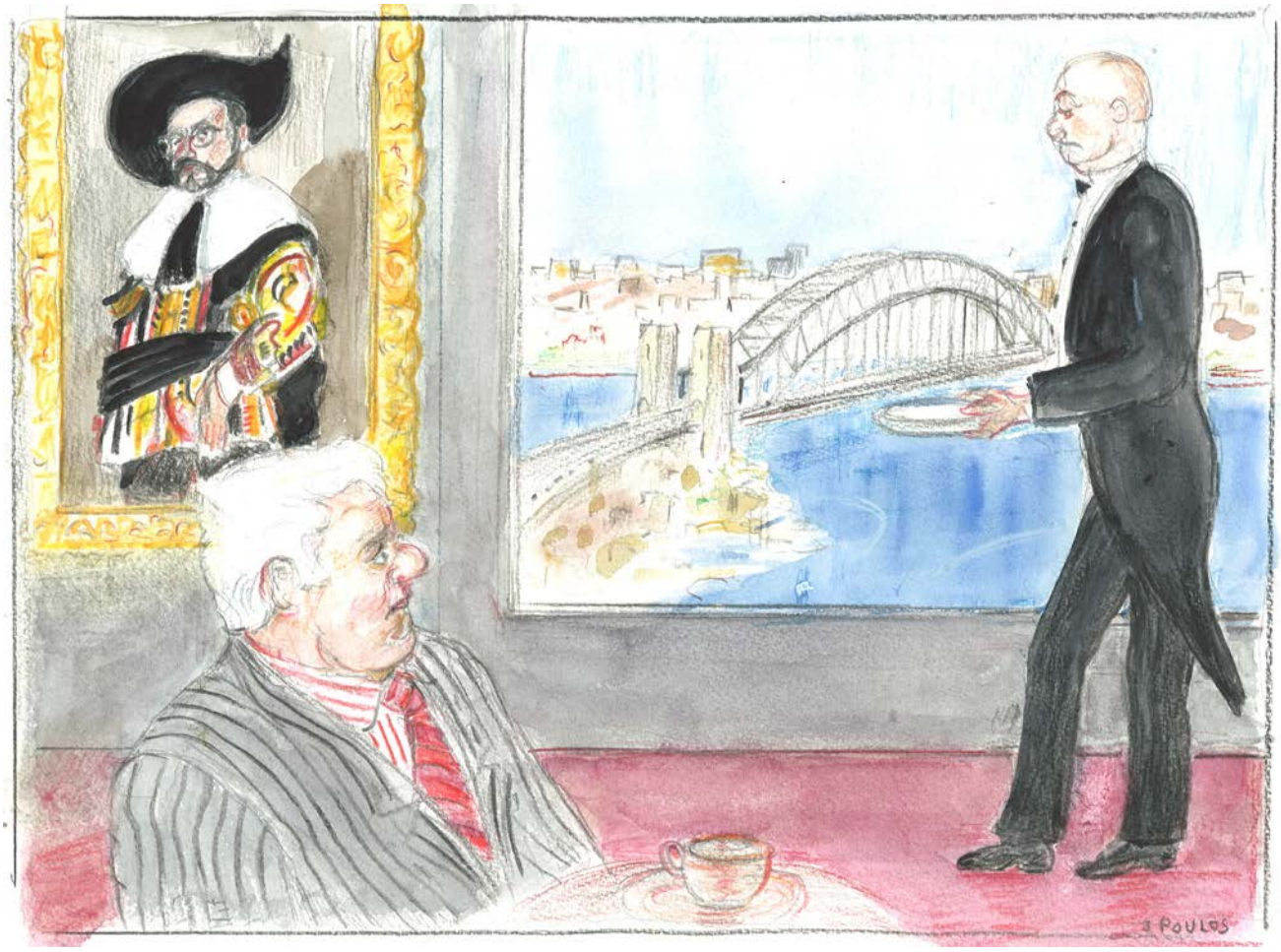
put in solid performances in every event, such as the mixed 500m freestyle relay, in which the Gropers took third place.

Combined team scores

1. Ground Floor Wentworth Gropers	295	2. Bartier Perry Stingrays	249
3. Bartier Perry Dolphins	243	4. Freehills A	233
5. Kemp Strang	213	6. Clayton Utz	200
7. Corrs a Splash	194	8. Swaab Attorneys	159
9. Bartier Perry Sealions	110	10. Gilbert & Tobin	86

Bullfry gets to yes

By Lee Aitken



'Wall to wall black granite over half a floor – mirrored walls and old Masters – a view of the Heads.' Illustration by Poulos QC.

'I must be careful', thought Bullfry, as he slowly entered the main portal of the Megalopitan Tower at the Paris end of Castlereagh St. 'We don't want a repeat of last time!'

What a catastrophe that had been. It was very hard to explain later to the chief judge why the Commercial List summons should be struck out. Had anyone ever heard before of setting aside a settlement reached after a day-long colloquy because of 'actual duress/violence manifested by the plaintiff's counsel'? Still, that was probably a little better than obtaining a result for his client by bursting into tears and imploring his opponents 'to give something, anything to this broken down old man'.

These mediations had gone too far – and the mediators! Just the other day Bullfry had surprised a distinguished former federal jurist who was heaving a large trolley out of 'HV Evatt' – each conference room at the firm was named, adventitiously, after a famous judge to give the firm a patina of learning. When questioned, the latter had muttered something about 'defined benefit' and the 'Costello surcharge' – references which left Bullfry even more perplexed than usual.

Well, here we are – 'AB Piddington'? – was that a good omen?

A uniformed flunky entered.

'What can we offer you today, sir? Iced coffee, tea – pekoe, oolong, green, *English Breakfast*, *Earl Grey* – *Bonox, Milo*, a milkshake?'

Bullfry was about to suggest a brandy and dry, or a single malt, but thought better of it. No wonder these mega law firms were all in trouble. They had five

hangers-on for every fee earner. There was wall-to-wall black granite over half a floor, mirrored walls and old Masters and a view of Sydney Heads and the park. But on the other side of the 'barrier' senior partners worked in an 'open plan', or in a 'dead cat (rat)' office, gazing forlornly at the smog settling slowly over the outer reaches of the west of the Emerald City. Where is Bossley Park? How would the London and Sydney 'draws' equate when the dollar went back through the floor?

In the old days a barrister would never visit a solicitor's office. Now the bar was the firm's to command. There, was of course, a very large danger in this for the bar. The essence of a mediation was to reach a result which pleased no one by not knowing or analysing the relevant legal rules – oh no – a lachrymose appeal to what was 'fair' (an acquired Bullfry specialty), or resort to emotional violence. Those were the stock in trade of the participants.

Where did that leave the years of learning, and the exquisite Equity Division points on demurrer? In a real court, at some stage of the game, the judge would say: 'Mr Bullfry, that last submission was nonsense. What is your next one?' Rules of evidence and procedure applied. You had to make a reasoned argument and relate it to the facts

None of this was relevant to a mediation. It did not matter if your opponent had no idea of the underlying legal principles at all. In fact, it assisted her case since she could assert with a straight face that the whole transaction was *nudum pactum*, or that 'tacking' did not apply, or that an Equity Division judge would never disbelieve a thrice-convicted swindler. The process encouraged in certain more asinine opponents a Molotov approach to resolving issues: sitting at Stalin's behest on a block of ice until Hell itself froze over. 'Nyet! Not a cent more than $30,000' etc, etc. What need of any legal training if you could simply make it up as you went along without ultimate sanction? An ignorance of any legal nicety meant there was no incentive against adopting a *kamikaze* approach to the entire process.

The reason we have courts is so that a highly trained jurist can opine objectively and with detailed reasons on centuries of jurisprudence as applied to ascertained facts. If the whole matter was reduced to 'the vibe' then one might as well study advanced shamanism, and acting, as waste any time on complex legal doctrines.

A mediation, as well, could destroy potentially thousands of hours of gainful court preparation and trial work to the great cost of the junior bar. Who could forget the devastation wrought by a mediation in his youth? Many younger colleagues deployed drafting witness statements and other esoterica as two large 'telcos' fought out some legally mundane dispute (involving tens of millions) over their respective bills *inter se* – what an absolute feast! Boys and girls taking instructions day-after-day and billing fortnightly. And then, overnight, a mediation for a few hours when the respective CFOs had resolved matters over a coffee. Oh, the wailing and gnashing of teeth.

And frequently, in smaller matters, the conduct and management of the cadet branch of the profession rendered a matter 'unsettleable'. How could one possibly resolve a dispute over $250,000 when the solicitors had already run up $180,000 in WIP on the clock?

Enter the mediator. He was a former floor colleague of Bullfry's: on his uppers, his practice all gone as he had outlived his instructing solicitors, now attempting to 'reboot' via accreditation as a 'trained mediator and conciliator', and a slightly mendacious website.

'So, Jack, how long will this take? Can we settle before lunch so that I can get to Royal Sydney? And have you got my cheque?'

Bullfry wondered whether the *ex parte* communication rule applied to a mediator. Was there any Code of Conduct, or was it, like a 'court' in a federal statute, only a small 'c' code?

'It'll have to run past 2.00pm so that I can justify a full day's brief fee – but we should be able to wrap it all up shortly thereafter. What time do you want to tee off?'

All professions involve a conspiracy against the laity.

Bullfry put on a magnificent act – crying, shouting, pleading, referring to Lord Tenterden's Act and many other irrelevancies. His opponent, for the secured lender, was already on the money. What did she care? By creeping up in careful $5,000 increments and achieving a generous reduction in the 'red ink' on the 'unauthorised lending rate' honour all around was satisfied.

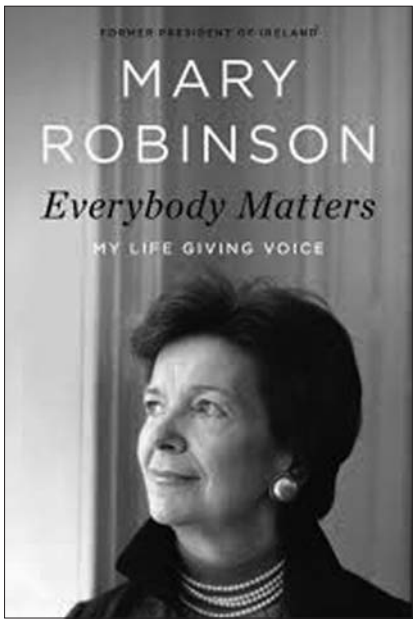
Bullfry got to 'Yes'. On reflection, something he was achieving with increasing rarity domestically!

The lender avoided *A Current Affair* – known to many a mediator as 'Bullfry's last gambit'. Possession was to be given with a sale to follow, with enough left in the equity for the client to commence life afresh at Yamba (the mediator thinking of his Niblick). Bullfry's effort was good for a day's brief fee.

Was there any easier way in the whole wide world of drinking coffee and making a sum which, to any honest nursing sister, aged-care provider, or child-minder, would have seemed a king's ransom?

Everybody Matters: A Memoir

By Mary Robinson | Hodder & Stoughton | 2012



This very readable memoir traces the stellar career of Mary Robinson. Born in 1944, she studied law at Trinity College Dublin and Harvard University, was appointed Reid Professor of Constitutional and Criminal Law at Trinity College in her 20s and went to the bar.

At the bar she was active in cases involving travellers (who faced significant discrimination in Irish society) and other discrimination and human rights matters. Notably, she was briefed in a case involving a woman who sought a judicial separation from a violent and alcoholic husband (from whom there could be no divorce in Ireland). The case succeeded in the European Commission of Human Rights. This resulted, in Robinsons' view, in the Irish government introducing free legal aid in family law cases and setting up less bureaucratic procedures and tribunals to deal with family law cases.[12]

Robinson was also elected to Dublin City Council in 1979 and subsequently to the Irish upper house as a senator. Whilst a senator, issues on which she campaigned included the legal availability of contraception, right of women to sit on civil juries, right of women not to have to resign from the civil service upon marriage and the decriminalisation of homosexuality. She actively encouraged Ireland's membership of the European Union, having taught (then) EEC law at Trinity. She became a European member of the powerful Trilateral Commission.

Nominated for the presidency of Ireland by the Labour Party and supported by several other minor parties, she was elected as the seventh president of Ireland and first woman to hold the post, serving from December 1990 – 12 September 1997. She revitalised the office, visiting Northern Ireland a number of times and meeting with politicians of all persuasions (including Gerry Adams), visiting Queen Elizabeth II at Buckingham Palace and accepting visits from British royalty and relating more closely with trade unions, women's and other community groups in Ireland. She was generally acknowledged as being more available to the public than her predecessors had been (perhaps similarly to Sir William Deane as governor-general of Australia).

The Irish government supported her bid for the office of United National high commissioner for human rights, which she took up on 12 September 1997 and held until 12 September 2002. The memoir details the lack of resources for the office. In light of that, part of her strategy in the position became visitation to countries in the midst of crisis, including Albania, Bosnia, Rwanda, Sierra Leone, Chechnya[3] and Tibet[4]. She spoke with people from all sides of conflicts, conducted private talks with national leaders, sometimes addressed public meetings and provided reports to the United Nations in order to highlight such situations. She reflects that:

> I made 115 trips to 70 countries over five years, almost always with the idea of helping to amplify the voices of victims, helping them to feel that somebody was listening. It brought home to me the power of the act of bearing witness…Even though I held a UN title, I had nothing tangible to offer victims who were expressing their direct witness of torture, how their families had been killed, how they had been deprived of their land, their homes. They needed our action, not our tears; our practical, downright, problem-solving help, not our wordless horror. Yet I felt that to listen, bear witness and respect the humanity of those I was listening to and report back to a jaded world was a start. I wanted to nurture a sense that that the UN understood that those voices mattered.[5]

She thought laterally and used what 'space' she had to bring pressure to bear when needed. For example at the height of the East Timor referendum crisis, in 1999, she was not permitted by the UN to fly to Dili, due to safety concerns, so she interviewed people in Darwin and flew to Djakarta to talk with (then) President Habibi about the gross and systematic violations that had been reported to her. She

also reported to the UN Security Council in September 1999, the first time that a Human Rights Commissioner had done so.[6]

Robinson describes her Australian colleague Brian Burdekin's work on developing national human rights institutions as 'innovative.'[7] She asked him to help establish a truth and reconciliation commission in Sierra Leone, among other tasks.[8]

Acting as secretary-general to the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and related intolerances earned her the intense ire of the United States under George W Bush, the Israeli government and its supporters, who saw conference draft and final documents as being anti-Ïsrael. The memoir catalogues why and how the conference became, on one view, a political debacle. Robinson was clearly blind-sided by the vehement political agendas and vitriolic anti-semitic language of some nations, especially Iran. The politics of a free-wheeling, world-scale conference with such a broad agenda span out of control and she and was heavily criticized for not 'managing' the process more effectively. This was clearly one of the most difficult and confronting experiences in her time with the UN.[9]

She says that 9/11 was a 'game-changer' with the potential to set human rights back many years. She used her position to battle the excesses of post 9/11 counter-terrorism legislation and actions such as rendition, the opening of Guantanamo Bay and lack of due process in the treatment of people held there.[10]

After leaving the UN, she established, Realizing Rights, a New York-based NGO focussing on implementation, of social and economic rights such as health, decent work, corporate responsibility and women's roles as peace-builders, especially in Africa.

Her membership of a group called Elders, including Graca Machel, Nelson Mandela, Archbishop Desmond Tutu, Jimmy Carter and Mohammed Yunus was also an opportunity to try to 'bring our experience and collective moral authority to bear, to urge the values of reconciliation, of good governance, of respect for human rights, of equality and non-discrimination, of fair processes and even-handed administration of justice'.[11] They intervened in relation to situations including North Korea's nuclear program and relations with South Korea, Ivory Coast, child marriage in Ethiopia and other issues.

She now lives in Ireland and continues such work in the Mary Robinson Foundation, whilst teaching at Columbia University and other institutions. She is chancellor of the University of Dublin.

The picture that emerges of Robinson is of a courageous, committed woman of great intellect and compassion, who knows the meaning of hard work. She has been prepared, perhaps at personal cost in terms of position, to name human rights violations by the powerful, whether that be the NATO forces in the Balkans (as well as being critical of Serbian forces)[12] , China in Tibet or Russia in Chechnya. Sometimes she has criticized violation of human rights whilst a leader was on the same platform as she, as occurred in Zimbabwe with Robert Mugabe.

Robinson only had one term as UN High Commissioner for Human Rights. Her preparedness to 'speak truth to power' may, in part be the reason for that. This preparedness was also a hallmark of her legal and political career in Ireland, where the causes for which she lobbied were not necessarily popular at the time, though they have since become more accepted.

She has been able to reach across inter-faith and inter-cultural divisions, whether with gay, lesbian and transgender people in Ireland or warring communities in the Sudan and to work with those of various faiths or none.

There is a sense in the memoir that Mary Robinson values people from all walks of life and seeks to remind us of the value of each person, hence the title of the book. The memoir is fascinating as a tale of our times as well as being a tale of a personal journey as lawyer, politician and human rights advocate. She comes across as a warm human being who can laugh as well as think.

Reviewed by Mandy Tibbey

Endnotes

1. pp. 106–112.
2. pp. 235–241.
3. pp. 219–227
4. pp. 228–9.
5. p.233.
6. p.217.
7. p.232.8. pp246–263.
8. p.268.
9. p.306.
10. pp.229–231.

The Byers Lectures 2000 – 2012

Nye Perram and Rachel Pepper (eds) | Federation Press | 2012

Sir Maurice Byers, Tom Hughes obituarised, was 'the quintessential barrister, unmarred by any rough edges of character or by any narrowness of vision'. That obituary (and a eulogy by Sir Anthony Mason AC KBE) fittingly appear at the conclusion to this superbly edited volume.

The Byers Lectures 2000 – 2012 collects all twelve lectures given to date as part of the annual series instituted by the NSW Bar Association in honour of Byers. It is a collection rich with tribute to this 'distinctive personality and distinctive advocate' and true to the largeness of his vision.

The lectures appear in chronological order. Each is preceded by an introduction from the editors. With the right amount of brevity these commentaries give context to each lecture and continuity to the series. The commentary also helpfully extends to an analysis of how the ideas expressed in the lecture have travelled in the intervening years. While that approach provides currency to even the earliest of lectures, it also reinforces their timelessness: this is a series of big topics addressed by big thinkers the appeal of which does not lie in the extent to which the ideas expressed may, or may not, now be authoritative.

The list of topics the subject of the series is expansive. Topics range from the ethical and practical challenges for the modern advocate (Brennan CJ) and the consequences for practitioners, draftsmen and judicial officers of the just law with unjust applications (Bennett QC), to the centrality of statute law (Gummow J) and the relevance of international dialogue and exchange between courts (The Rt Hon Dame Sian Elias, chief justice of New Zealand; Lord Phillips of Worth Matravers KG, president of the UK Supreme Court).

However Constitutional law is the clearly favoured topic. Byers spent a decade as solicitor-general for the Commonwealth. Even after his retirement he remained pivotal in some of the most significant of Constitutional cases, successfully envisioning and advocating the Constitutional implications that were determinative of the result in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. The speaker list is dominated by many who shared his passion for this area of law.

For those that have chosen to concentrate on Constitutional law, the lectures provide insight on topics of perennial relevance to practitioners in the field. Both Leslie Zines AO and Heydon J address issues of constitutional interpretation. McHugh J and DF Jackson QC consider Constitutional implications. Gageler J provides a personal 'version of our story', a 'vision of the structure and function of the Constitution'. This last piece, an engaging and deeply thoughtful analysis, seeks to provide one way in which we might place the thousands of constitutional cases 'within a larger narrative and to give them some sense of purpose'. It is a powerful contribution to the scholarship in a field with which Byers name and legacy is so permanently connected.

Finally, something should be said about dialogue. Sir Anthony Mason AC KBE has commented how 'discussion with Maurice on an argument in court could be as enjoyable as conversation with him out of court'. Reading this volume as a whole, one notices that that sentiment has been incorporated into the series itself. This series of out of court discussions is full of the insight, edginess, good humour and creativity that marks the best of conversations. Mason P asks 'What is wrong with top-down legal reasoning?'; Spigelman CJ challenges both Bacon and Dixon's re-envisioning of scriptural truth ('Truth and the law'). A reader gets the feeling of being a listener to a long-running dialogue that has (happily) not yet reached its conclusion. For their part in editing and publishing the dialogue so far, the editors ought be congratulated. The volume is a testament both to the significance of the ideas it records, and the advocate whose memory brought it forth.

Review by Fiona Roughley

Justice in Society

By Belinda Carpenter and Matthew Ball | Federation Press | 2012

The title of this book is misleading. It might more accurately have been entitled 'Thinking about Justice', which in fact is the title given to Part 1 of the book. Perhaps the book's publishers worried that fewer people would read the book if it were not for its punchy and ambitious title. But, with the greatest respect to its authors, I don't think this would necessarily be a bad thing.

Justice in Society is best described as an introductory examination of some of the ways in which we think about justice, rights and equality. The book will be useful reading for law students or students of other disciplines, who are looking for a concise introduction to some of the dominant issues of social and criminal justice in Australian society. Those readers may well enjoy the introduction of competing ways of thinking about sexuality via the apparently infamous claim by Cynthia Nixon (the actress who played Miranda in *Sex and the City*) that she was bisexual by choice, versus pop artist Lady Gaga's fatalistic single *Born This Way*. However, in my view, the book's smattering of pop-culture references, including the reference to Tom Hanks' comedy, *The Terminal*, as a means of introducing the plight of asylum seekers, was a little grating.

The strength of *Justice in Society* is undoubtedly its focus, in Part 2 of the book, on particular groups of people within Australia affected by or experiencing social and legal injustice, namely, the poor, women, Indigenous Australians, the gay community and young people. In these chapters the authors first deconstruct the ways in which we have justified the inequality experienced by these groups, for example, by pointing to purported racial differences as the cause of injustices experienced by Indigenous people, or biological differences between the sexes as an explanation for the inequality experienced by women. The authors then expose the assumptions and limitations inherent in the approaches taken by certain disciplines to remedy the injustices experienced by these groups, for example, the limitations in some of the theories proffered by liberal and socialist feminists, or the fact that the theories about sexuality propounded by Lady Gaga and Cynthia Nixon (among others) overlook the fact that sexuality is historically and culturally contingent. Finally, the authors posit possible alternative ways of both thinking about and achieving justice in relation to these groups of people.

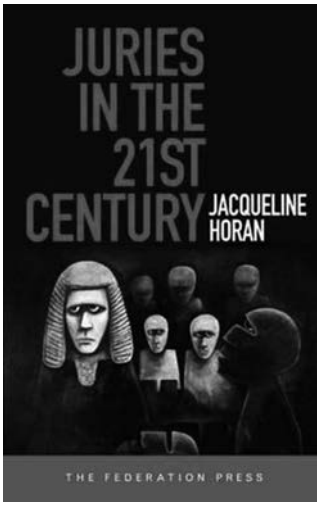
While the book is clearly written and well researched it is a little simplistic and formulaic in its approach. For the majority of the chapters, the authors take the approach outlined above, identifying two dominant yet divergent 'stories' told about a particular issue, taken from the disciplines of political philosophy and sociology, exposing the uniting flaw in these stories, then offering an alternative way of understanding and addressing that issue. This approach gets a bit stale by the tenth chapter. However, the book does address some important points. For example, in Chapter 4 the authors point to the need to recognise the varying forms of power that maintain poverty (connected to cultural, symbolic and social capital) in order to address properly the injustice of poverty. In Chapter 5 the authors discuss the way women who commit violent crimes are frequently viewed as suffering from a psychological impairment, which can create greater injustice for women who are violent offenders but do not conform to accepted stereotypes.

For my part, *Justice in Society* has equipped me with some useful statistics. On the question of the sexual division of labour in the home: forty years of research has found that women continue to do the majority of unpaid labour in the home, regardless of their employment status. On the question of 'queue jumpers': in 2010, 6800 asylum seekers arrived in Australia by boat, a very small number when compared to the 53,900 'visa over stayers' estimated to be already residing in Australia at that time. I am also indebted to the authors for a renewed appreciation of the talents of Lady Gaga, who provided the soundtrack to the writing of this review.

Reviewed by Juliet Curtin

Juries in the 21st Century

By Jacqueline Horan | Federation Press | 2012



The original *Guinness Book of Records* came about as a result of an unresolved dispute at a shooting party in County Wexford, Ireland in 1951. Sir Hugh Beaver, who was then the managing director of Guinness Brewery, wanted to know which was the fastest game bird in Europe. Despite heated arguments and a search of the host's extensive library, the answer could not be found. And so Beaver, realising that similar disputes must be happening in pubs and clubs around the world, set about creating a definitive collection of the world's superlative facts. The first edition of the *Guinness Book of Records* was published in 1955, and within six months it was a number one bestseller in the UK.[1]

The innovation of written language and the invention of the printing press are two of the most significant watershed moments in the history of our relationship with information. However, that timeline is also peppered with smaller moments that nonetheless reflect fundamental changes in our assumptions about, and expectations of, information. The publication and rapid popularity of the *Guinness Book of Records* is one such smaller moment. It was by no means the first attempt to collate types of information into a single volume. To take just one example, dictionaries in various forms have been around for millennia. Nevertheless, the popularity of the *Guinness Book of Records* from 1955 reflects a shift towards a cultural interest in and expectation that an increasing number of classes of information - in this case, world superlatives - are knowable, useful, and above all, accessible.

The advent of the internet is a watershed moment in the history of information closer in scale to the introduction of written language or movable type. It has changed our relationship with information radically and irrevocably. Nevertheless, its influence shares characteristics with the introduction of the 1955 *Guinness Book of Records*: it has exponentially grown the public's expectation that more and more classes of information will be knowable, useful and easily accessible. As Professor Horan explains, our expanding expectations have significant implications for the modern jury.

Applications like search engines, GPS enabled maps and social networks make us expect and feel entitled to information immediately, in direct response to our inquiries. In addition to feeling entitled to information, we expect it to be intelligently tailored to our needs. Search engines filter results according to past searches, surfing histories and geographic location. Social networks identify our friends and work associates before we've searched for them. Maps provide directions, estimate travel times, and give real time traffic updates and public transportation timetables. We are thus expected to do less work to retrieve relevant information, and have far less patience for questions that go unanswered. This shifting relationship with information is also reflected in our education system, which increasingly emphasises the ability to identify necessary information and then obtain and analyse it, over the ability to simply retain and regurgitate information.

However, this way of being is, in Professor Horan's words, 'fundamentally at odds' with a central concept of the jury system: that jury members confine themselves to the evidence and law presented in court. Legal directions delivered orally, and often at length, evidence presented orally and not in chronological order, and prohibitions on independent research create an environment more at odds with the learning and information expectations of jurors than ever before. Thus, the 21st Century jury faces unique challenges, ripe for exploration and analysis.

I come now to say something about this particular publication, which attempts to do just that.

'Timely' is a word often applied to newly published legal research; however, in this case 'timely' is inadequate to express the value of this work and the unique

challenges that were faced in bringing it to fruition. A better word is needed.

To begin with, juries are a notoriously difficult area of study. They are, by their very nature, secretive and sacrosanct. They are also nearly impossible to replicate 'in the lab' for the purpose of observation. A work which comprehensively profiles the contemporary Australian jury and its environment can therefore be described as 'accomplished'. But this is merely the start.

Professor Horan then sought out a second, even more fraught, area of study: social and technological change in the 21st Century. Committing printed words to paper in a time of such rapid change, in order to commentate on that change no less, would in many other hands have been a fool's errand. The word 'foolhardy' may have applied. However, Professor Horan manages to tackle the impact of technological innovation and social media on the jury system in a manner that will remain relevant through the years of change to come.

I fear I have no choice, therefore, but to resort to superlatives in describing this work. This book is the most timely, accomplished and not-at-all-foolhardy contribution to the study of juries in Australia this century. Perhaps Guinness will take notice.

From the Foreword by Chief Justice T F Bathurst

Endnotes

1. Guiness World Records, 'About', www.guinessworldrecord.com

The Parable of the Two Sons

By Christopher Bevan | Goanna Press | 2012

Christopher Bevan's novel *Parable of the Two Sons* is set during the course of a week-long family provision trial in the New South Wales Supreme Court.

Ken Wainwright was for many years the master of classics at Sydney Grammar School. For much of that time he was a sole parent, his wife having died in a car accident when his two sons were still in primary school. Killed in that same accident was the wife of Ken's best friend, Brent Fiske.

The men remain close after the death of their wives - Wainwright saves Fiske more than once from financial catastrophe; years later Fiske has moved in with Ken, and nurses him during his slow death from emphysema.

When Ken dies, leaving his estate in equal shares to his now adult sons Fabe and Augie, they are confronted by a claim from Fiske for a large portion of the $2million that has been left to them. More shocking to the sons is the basis of the claim – Fiske alleges that he and Ken were not only friends for many years, but also lovers, and had been since shortly after the death of their wives. Ken's sons dispute that their father had a homosexual relationship with Fiske, and the focus of the trial is to resolve whether Fiske is a man so desperate for money that he is prepared to say anything for a share of the estate, or whether he truly was the deceased's lover and de facto.

The chapters and scenes alternate between the sons' points of view, and the real strength of this novel is the way the author skillfully explores each of the brothers' search for the 'truth'. Fabe and Augie Wainwright are vastly different people, with contrasting perspectives about their father and opposing motivations, and their struggle to both find and accept the truth is both sensitively and compellingly told. As the evidence unfolds, especially from Fiske, more than once they forget what a scholarly, civilized and generous man their father was.

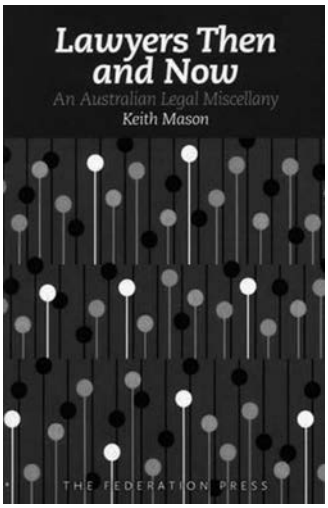
The sons are helped in their struggles by the Hon Mr Justice Errol Robertson, the presiding judge at the trial, who by telling the court of his own unique way of examining the evidence, and of his own struggle to determine the 'truth', leads them to the paths of acceptance and of resolution – with themselves, with their late father, and with his best friend.

The Parable of the Two Sons is available through bookstores, and on-line at www.bideenapublisingco.com

Reviewed by Richard Beasley

Lawyers Then and Now: An Australian Legal Miscellany

By Keith Mason | The Federation Press | 2012



In the preface to this book, the author states that the primary aim of the work was to collect, arrange and preserve illustrative stories about Australian law and lawyers from written and oral legal history, case law and the statute book. That aim has been accomplished in a work that is well-researched and easily readable.

True to the word 'miscellany' in the title, the book contains an assortment of legal facts, tales and anecdotes divided into 12 chapters.

The author states that the idea for the work emerged over many years in conversations with Leslie Katz, to whom the book is dedicated. Both men were, in succession, solicitor general of New South Wales. It is appropriate, therefore, that in the part of Chapter 7 ('Lawyers with Attitude') that discusses Crown law officers, the author relates an amusing story told to him by Katz to the effect that while Katz was solicitor general, an officer from the Attorney-General's Department asked permission to leave a pile of papers on the solicitor general's desk. The officer said that he would inform the solicitor general what the papers were about later in the day. Later that day, the officer collected the papers from Katz. As the author relates it, Katz subsequently found out that 'a question had been asked in parliament on a matter of urgency and that the House had been told: 'At this very time the file is on the desk of the solicitor general'.'

There are many anecdotes and stories about judicial and other lawyers' behaviour from the nineteenth and early twentieth centuries. Some are better known, however, the majority are likely to be new to most readers. Many derive from Queensland which fact appears to cause the author some delight. Thus, in Chapter 4 ('Judicial Appointments and Disappointments'), after remarking that, other things being equal, the longest serving judge at any point of time will assume the mantle of senior puisne judge, the author states that 'Other things are never equal in Queensland as we shall see'. In Chapter 7 ('Lawyers with Attitude') the author comments that 'Queensland as usual decided to take a different tack in dealing with unpalatable and inconvenient legal advice from its attorney general. For much of the twentieth century it simply got by with a non-lawyer in that office'.

Queensland is not, however, the home state of the majority of persons who appear in Chapter 3 ('Squabbling Jurists'). In this chapter, the author discusses various topics including instances of lawyers as litigants, duels between lawyers, rudeness and other unfortunate behaviour by judges and examples of judges as pedants or, perhaps, as purists depending on one's viewpoint.

The author writes in a clear, concise manner with an undercurrent of humour. However, that undercurrent does not limit his ability to express stronger views. In Chapter 5 ('Judicial Shenanigans') the author discusses instances where judges have become involved, in varying degrees, in political issues including as follows: 'Parts of Sir John Latham's dissent in the *Communist Party Case* read more like an historical diatribe than a piece of judicial reasoning'.

Unsurprisingly, a large proportion of the book concerns judicial figures in one way or another. Notably, Chapter 6 ('Judges: The Good, the Bad and the Sacked') includes a description of 11 judges about whom the author states that it would be hard to overlook in any list of Australia's worst judges. Happily for current and recently retired members of the judiciary, each judge to whom reference is made is from the nineteenth century. However, the book also focuses on other players in the legal world. Thus, Chapter

8 ('Layfolk in the Law') contains various stories which involve vexatious litigants, witnesses and jurors.

Chapter 10 ('Literature and the Law') includes instances of judgments as literature and judicial references to classical allusions, Shakespeare, Dante, Lewis Carroll, Dickens and the Psalms and other scripture. Further to the latter, the author discusses the involvement of religion in the law and various decisions which concerned religious disputes in Chapter 12 ('Law and Religion'). The decisions referred to include *Scandrett v Dowling* (1992) 27 NSWLR 483 in which the New South Wales Court of Appeal dismissed an application which sought to restrain an Anglican bishop from ordaining women as priests. The author notes that two of the judges 'were named 'Priestley' and 'Hope', so the writing was on the wall for the plaintiffs from the outset'.

This comment by the author alludes to his earlier analysis of well-named and not so well-named judges in Chapter 2 ('Just Folks'). That chapter also identifies various instances where one relative has appeared in the same case as or before another relative and numerous examples of judicial humour and extra-judicial interests and learning.

Chapter 13 ('Law and Sports') contains anecdotes of disputes which concern sports or sports players, sporting metaphors in judgments and, more seriously, decisions which emphasise that litigation, and justice more generally, is not analogous to sport or some type of game. In the latter category, the author refers to the successful appeal by an accused following a trial judge's explanation to a jury that the standard of beyond reasonable doubt 'worked in practice in the same way as when a batsman was given the benefit of doubt following an LBW appeal'.

No miscellany of Australian law would be complete if it did not refer to the late RP Meagher. There are several references in this work to his judgments. In addition, in Chapter 9 ('Legal and Judicial Academics') the author refers to Meagher's forward to the 1990 reprint of Pollock and Wright's *An Essay on Possession in the Common Law*. In that forward, Meagher makes it clear that the Pollock who co-authored the work was not 'Sir Ernest Pollock, later Viscount Hanworth MR, who had the honour to be, apart from Eve J, the stupidest and least distinguished English judge of the twentieth century'. Meagher features also in Chapter 11 ('Law and the Artist') both in the author's summary of the Dobell trial (Meagher judged the re-enacted trial held as part of the 175th celebrations of the Supreme Court of New South Wales) and, more particularly, in relation to the controversy concerning the portrait of 'an untitled Renoiresque lady' by Geoffrey Proud which Meagher presented to the New South Wales Bar Association in 1975.

In the final chapter, Chapter 14 ('Fallible All'), the author concludes the book by setting out mistakes, moments of *faux pas* and other slip-ups made by judges (both in and out of court), other lawyers and litigants. A charming tale is told of a trial before of Dwyer CJ in Western Australia in which an Italian contractor was suing for the cost of his services clearing certain land. The chief justice, whom the author describes as 'fairly cantankerous' at the best of times was becoming angry since the contractor who was giving evidence did not seem to understand what he was being asked including the question 'How did you clear the land?'. The judge repeated the question 'How did you clear the land, … did you use tree fellers?' The witness's face lit up and he replied 'No, Your Honour, four fellas'.

Keith Mason is to be commended for distilling more than 200 years of Australian legal miscellany into such an appealing book.

Reviewed by Daniel Klineberg

By Julian Burnside

Dressed up to the Nines

It's an expression not so often heard these days, but my parents' generation often referred to a person who was conspicuously well turned out as ''dressed up to the nines'. The expression emerged in about 1850 and became increasingly widely used until it began to fall into decline in about the late 1960s. The variant 'dressed to the nines' emerged as a casual alternative in the 1890s and came into increasing use throughout the twentieth century.

What is curious is that the origin of the expressions is hotly debated. No; that overstates it. There is no heat in the debate. Its origins are uncertain. There are various rival theories.

One theory is that it refers to the Muses, of whom there were nine. This has the stamp of ludicrous opportunism about it. Apart from any other consideration, 'dressed up to the nines' is a colloquial expression, and it is not likely that it captures a reference to classical learning.

Another theory is that it is a reference to the standard of purity of gold. Gold is 'nine nines fine', when it reaches 99.9999999 per cent purity. If you count them, there are nine nines there. It's a nice idea, but it has the hallmarks of folk etymology and special learning.

One theory which has attracted a lot of support has an odd Australian connection. In 1824 in Edinburgh the 99th Regiment of Foot was raised. In 1832, it received its county title, and became known as the 99th (Lanarkshire) Regiment of Foot. It had several nicknames, including (predictably) 'The Nines'. It is a little surprising that the nickname had not already been attached to other regiments designated 99th, including the 99th Regiment of Foot (the Jamaica Regiment), and the 99th Foot which was later renamed the 100th Regiment of Foot.

In the 1830s and 1840s the Nines spent much of their time in the Pacific. The first detachments arrived in Australia (along with a cargo of convicts) on the *North Briton*. The convicts were sent to Van Dieman's Land (it did not become Tasmania until 1856). The Nines were sent to Sydney in 1842. There, they quickly earned 'an unsavoury reputation'. Given that the Rum Rebellion was a matter of living memory, they must have behaved quite badly. On Australia day 1808, the Rum Corps deposed William Bligh, the governor of the Colony of New South Wales. This NSW tendency, which was replayed in 1932 and is echoed in regular bad behaviour in that state, must have seemed quite striking in the nineteenth century. To develop 'an unsavoury reputation' in the shadow of the Rum Rebellion was no small achievement.

Whether in admiration or censure, the Nines were repatriated and, stationed at Aldershot between 1856 and 1859, they became known for their drill and their dress. One strong theory, then, is that *dressed up to the nines* is a reference to the sartorial style of the 99th Regiment of Foot. That is the origin suggested by JC Hotten *Dictionary of Slang* (1863) and asserted one hundred years later by NCE Kenrick in *The Story of the Wiltshire Regiment* (1963).

But the expression 'to the nine(s)' goes back a long way: before the formation of The Nines.

> Robert Burns, 1787: 'Twad please me *to the nine*'.
>
> In 1863 Reade wrote: 'Being clad in snowy cotton and japanned to the nine.'
>
> And in 1893 he wrote: 'Thou paints auld Nature *to the nines*'.

The OED2 also gives the following examples:

> 1821: 'He's such a funny man, and touches off the Londoners *to the nines*!'
>
> 1836: 'Praisin' a man's farm *to the nines*.'

Although *to the nines* predates the formation of the 99th Regiment of Foot, so far as I can find there is no example of the full expression *dressed up to the nines* before they became famous for their elegant dress. Kenrick does not deal with the earlier, shorter, expression *to the nines* by itself, and neither does Hotten. Both discuss only the phrase *dressed up to the nines*.

The fact that *to the nines* predates the formation of the 99th Regiment at once raises an obstacle, but also suggests an answer.

One theory is that the expression *to the nines* comes from *eyne*: the Old English plural for *eyes*. To be *dressed up to the eyne* would naturally blur to

dressed up to then eyne ... *dressed up to the neyne*... *dressed up to the nines*. It is certainly the case that *eyne* was the early plural of *eye*. It was cognate with the Germanic plural: in German, the word for eye is *Auge* , plural *Augen*.

So it seems reasonable to assume that *to the nine(s)* comes from the Old English plural for *eyes*. We have a similar construction *up to my eyes in debt* (etc) and the parallel construction *thrilled to the back teeth*. As a metaphor of completeness, reference to something near the top of the head makes perfect sense. The fact that the expression *to the nine* (singular) exists lends force to the idea that it is a corruption of *to then eyne*.

Incidentally, the expression *dressed to the nines* naturally calls to mind the similar expression *mutton dressed as lamb*. As a child I found this puzzling: the idea of clothing on sheep did not seem sensible. This sense of *dress* dates back to 1440. OED2 defines it this way: 'To array, attire, or 'rig out', with suitable clothing or raiment; to adorn or deck with apparel; in later use often simply, to clothe'. The 'later use' of simply putting on clothes, which is now the dominant sense, only dates to the mid-eighteenth century. Until then, it had an overtone of proper dress or finery.

This is because *dress* has a more fundamental sense 'To make straight or right; to bring into proper order; to array, make ready, prepare, tend.' In the military, the troops *dress by the right* (etc), that is, they align themselves in straight rows when on parade. This use dates back to the early 18th century. The Nines undoubtedly perfected the art of dressing in this sense also.

The verbal noun *dressing* has the same connotation of making right or making ready. *Dressing* a thing made it ready; conversely, a *dressing down* is a chastisement calculated to make a person's later behaviour proper.

Dressing a joint of meat simply means trimming it and making it ready for the oven. A *dresser* is 'A sideboard or table in a kitchen on which food is or was dressed;...' (OED2). *Mutton dressed as lamb* is meat from an old sheep trimmed so as to appear like lamb. Since the expression is often (perhaps exclusively these days) used in criticism of a woman's clothing sense, the connection with attire is reinforced, and the sense of correctness recedes to the shadows.

POETRY

By Trevor Bailey

A public service

Judge, taste these little cheesy things -
I whipped them up myself;
And let me top you up with drinks -
For *you* they are top shelf.

How lovely looks dear Mrs Judge -
Your kids are handsome too;
Now do you like my brand of fudge?
I've *plenty* more for you.

Your latest judgment's very wise,
If not so well received;
You ruled against my glib advice,
But gosh! I am relieved.

You blackened my best client's name,
Thus helped to prove this rule:
Despite the fact I sank his claim,
My rise will still be cool,

Yes, give my side a dressing down!
For that's OK with me;
I'm measured for a dressing gown
to do the same with glee

Mason's miscellany

Some pitfalls of testacy and intestacy

Keith Mason's *Lawyers Then and Now: An Australian Legal Miscellany* was published by Federation Press in November 2012. This extract will appear in a companion volume intended for publication next year.

Disputes over estates can be particularly bitter when the malice or oversight of testators encounters the devastation, delusion or disappointment of would-be beneficiaries or their willingness to carry family feuds from one generation to another.

Burt CJ urged the parties to a probate suit to reach a compromise 'otherwise the lawyers would make themselves heirs-by-law of the whole of the property'.[1] Gallop J once observed that:[2] 'These appeals demonstrate the truth of the old aphorism that 'where there's a will, there's a relative''.

A similar message was conveyed by Justice Frank Hutley's aphorism that 'a fair sized estate should never be wasted on beneficiaries'.[3]

Being a lawyer does not exempt one's estate from controversy. Indeed, distinguished jurists have departed this earth leaving their estates in disorder. Despite almost thirty years as primary judge in Equity, Molesworth J left a will that had to be brought to court for interpretation.[4] Powell J once regaled his invariably chastened readers with some English examples as well:[5]

> When one is about to deplore the lapse in the standard of the art of drafting Wills among latter-day members of the legal profession, it is perhaps as well to remind oneself that, in the past, proceedings in Chancery were occasioned by the obscurities, and infelicities, in the Wills of such legal luminaries as Holt CJ...Eyre CJ...and Lord Westbury LC....

Problems will also be encountered if next of kin cannot easily be ascertained or located. The Public Trustee of New South Wales (now called the NSW Trustee and Guardian) administers estates great and small, often when no one else is willing to do so. In the days when testamentary gifts were often in favour of 'the issue of' X and when the laws of intestacy divided estates minutely amongst remote relatives and their issue, the trustee had to conduct detailed inquiries to construct a family tree.

Some years back an officer of the trustee compiled a list of 'absolutely authentic' howlers extracted from letters received from desperate would-be beneficiaries or confused recipients of general inquiries.[6] They include:

> I cannot get sick pay. I have 6 children, can you tell me why this is so?
>
> This is my eighth child. What are you going to do about it?
>
> Mrs Brown has no clothes for a year and has been regularly visited by the clergy.
>
> I am glad to say that my husband who was reported missing is now deceased.
>
> Sir, I am forwarding my Marriage Certificate and my two children, one of which is a mistake as you will see.
>
> I am writing to tell you that my baby was born two years old, when do I get the money.
>
> Unless I get my husband's money I shall be forced to lead an immortal life.
>
> I am sending my Marriage Certificate and 6 children, I had 7 and one died which was baptised on half a sheet of paper by Rev Mr Thomas.
>
> Please find out for certain if my husband is now dead as the man I am living with won't eat or do anything until he knows for certain.
>
> I am very annoyed to find that you have branded my eldest son illiterate. Oh! It's a dirty lie because I married his father a week before he was born.
>
> My son has been put in charge of a Spittoon, do I get more money.
>
> In answer to your letter I have given birth to a boy weighing ten pounds. I hope this is satisfactory.
>
> You have changed my little boy into a girl, will it make any difference.
>
> Please send my money at once as I need it badly, I have fallen in errors with my landlord.
>
> I have no children yet, my husband is a bus driver and works day and night.
>
> In accordance with your instructions I have given birth to twins in the enclosed envelope.
>
> I want my money as quickly as you can send it. I have been in bed with the doctor for a week and he doesn't seem to be doing much good. If things do not improve I shall have to send for another doctor.

Endnotes

1. J M Bennett, *Sir Archibald Burt*, p.56.
2. *Re Herbert* (1990) 101 FLR 279 at 281.
3. Hutley taught succession to a generation of Sydney students (myself included) before becoming a judge of appeal in 1973. He is reputed to have advised a client, in the presence of his instructing solicitor, that the client's only recourse was to sue that solicitor. When explaining how difficult it is to prove undue influence in probate, Hutley said that only once in his career at the bar had a judge been persuaded by him to accept the argument, 'and he was wrong to have done so!'.
4. Forde, *The Story of the Victorian Bar*, p.287.
5. The Estate of Cecil David Brisbane, Powell J, unrep, Probate Division, Supreme Court of New South Wales, 19 June 1992, citations omitted.
6. Thanks to Richard Neal of Teece Hodgson and Ward for providing this.