

THE JOURNAL OF THE NSW BAR ASSOCIATION | SUMMER 2014-15

# barnews

## **BUILDING A POSITIVE CULTURE AT THE NSW BAR**

### **PLUS:**

Appellate review of the facts

Egon Kisch and the White Australia Policy

Structuring discretion in sentencing



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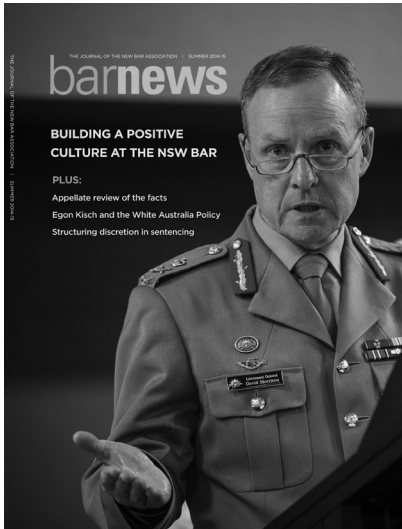
Cover: Lt Gen David Morrison at the launch of the Bar Association's Best Practice Guidelines on 8 August 2014. Photo: Murray Harris Photography.

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## Editor's note



*Bar News* is fortunate indeed to publish in this issue two recent lectures by distinguished speakers: the Sir Maurice Byers Lecture by the Hon Justice Virginia Bell, who examines the circumstances in which appellate courts review factual findings at first instance, and this year's Sir Garfield Barwick Address by the Hon Murray Gleeson AC QC.

The cover story for this issue is an address by the chief of the Australian Army, Lt General David Morrison, at the launch of the NSW Bar Association's Best Practice Guidelines.

For those barristers wondering how best to integrate the grind of daily practice with the digital age, a piece by Philippe Doyle Gray, 'The pillars of

digital security', examines a range of issues, including how to keep electronic documents secure and confidential.

Adam Butt examines various limitations on judicial discretion in sentencing. And the Bar History section includes a piece on Egon Kisch and the White Australia Policy by the Hon Keith Mason QC, together with the Hon Roger Gyles AO QC's personal recollection of the remarkable Sidney Orr case.

This being the last issue for 2014, *Bar News* takes this opportunity to wish all its readers a very restful and safe holiday season and all the best for the New Year.

**Jeremy Stoljar SC**  
Editor

## Looking forward to 2015

By President Jane Needham SC



In my last column, I outlined the matters of policy and planning which I hoped to be able to work on during my term as president. I am delighted to have

been re-elected as president for the 2015 Council. On my election as president, I made the following statement:

I congratulate all Executive office holders and Bar Councillors on having gained the confidence of our peers to govern this fine association. I am very much looking forward to leading the association with the assistance of the Executive and the Bar Council over the coming year.

It has been an interesting week. One issue – that of whether the bar should approach the government to seek the requisite legislative amendments to enable senior counsel to practise under Letters Patent as queen's counsel – has caused some controversy in the wake of last week's Bar Council

election result. That result indicates that there is interest among members in the Bar Council pursuing this issue with the New South Wales Government.

The bar faces many challenges, the resolution of the queen's counsel/senior counsel issue among them. But matters such as the continuing response of the bar to the Law Council NARS report, the implications of a national profession, the uniform practice rules, and of course our statutory regulatory functions, will also take up time and require significant and concentrated effort.

I am grateful that my leadership over the past six months has enabled this council to place in me the

confidence and trust given to me by the previous council, in circumstances of sustained debate. I will not let you down.

I would like to take this opportunity to thank the executive director and staff of the Bar Association for their devoted and unstinting service.

I am looking forward to working with the new Executive and Bar Council. I would like to express my heartfelt thanks to those members who did not return to council, whether they sought re-election or not. Each of them has served the Bar Association well. A position on council is not an easy task, and the programmes we provide would not be possible without councillors, as well as committee and other volunteers, giving their time so generously. I look forward to the new, and continuing, councillors continuing this tradition.

A Bar Council role (particularly on the Executive) involves being across many issues and often in three or four places at once. I have been invited to a number of conferences and events across Australia at which I am able to discuss and share ideas with leaders of the bar, both nationally and internationally. I am doing my best to bring the best of these home. A number of initiatives of the New South Wales Bar have been of significant interest to other bars.

In my last column I referred to Lt Gen Morrison's launch of the bar's Best Practice Guidelines on vilification, bullying, harassment, discrimination, and for flexible practice. The general's speech is included in this edition of *Bar News*, and it is an excellent one. I urge each member of the association to consider the Best Practice Guidelines and

even if – as I am told is often the case – the practices set out in them are reflected in reality, I commend their adoption.

Since the Winter edition of *Bar News*, some further advances have been made towards making the bar a better place to work. The first is the opening of the bar childcare centre in August. This is operated by a commercial operator with ten places reserved for children (and grandchildren) of members of the association, be they members with practising certificates, or class B members such as clerks or other floor staff. I have heard terrific reports of the quality of the care, and the Martin Place location is very convenient to the Queens Square justice precinct and chambers. We will review the demand and response to the centre, and keep under consideration childcare places in other locations if there is sufficient demand. I would like to thank the treasurer, Michael McHugh SC, and Megan Black, senior policy lawyer, amongst others, for their hard work in achieving this excellent outcome.

The second is the recent notification of the importance of family and other responsibilities to be taken into account in setting sitting hours in both the Supreme Court of NSW and the Federal Court. This approach will assist parents and others with carer responsibilities to plan their various responsibilities with a greater degree of predictability. I am grateful to Chief Justice Bathurst and Chief Justice Allsop in agreeing to communicate with their judges in this way.

As I said in my statement in November, there are a lot of important issues which need consideration. The engagement

*By improving work practices at the bar we can hope to broaden the appeal of a life at the bar so we can continue to attract the highest standard of advocates.*

of women and minorities, including Indigenous lawyers, with the bar is an area which is of real concern. By improving work practices at the bar we can hope to broaden the appeal of a life at the bar so we can continue to attract the highest standard of advocates. The work of the Indigenous Barristers Trust is a case in point. Since becoming president and thus a trustee I have had a better understanding of the outstanding work done in this area by Chris Ronalds SC and Justice Michael Slattery in encouraging talented Indigenous lawyers to the bar.

Please enjoy this issue of *Bar News* – as ever, filled with the contributions of our members and testament to the broad range of talent at the bar. Thanks again to the *Bar News* editorial committee who continue to produce such a high quality publication.

On a sad note, this edition has far too many obituaries – six of them. We remember Jack Slattery and Paul Flannery as fine judges, who have the distinction of being the parents of fine judges. My condolences to the families of all those commemorated, and I trust that the obituaries provide their families with additional pride.



**Back row, left to right:** Joshua Raftery, Ben Symons, Andrew Bailey, Tim Russell, Scott Roulstone, Dean Elliott, Nathan Avery-Williams, Amelia Avery-Williams, Geoff Farland, Charles Gregory, Michael Rose, Luke Chapman, Sophie Anderson. **Second row left to right:** Jacinta Reid, Lizzie McLaughlin, Yvonne Frost, Elisa Tringali, Alexander Edwards, Sharon Harris, Dan Crowe, Matt Karam, Helena Mann, Ashley Bithrey, Peter Tierney, Daniel McMahon. **Third row left to right:** Rob Davies, Michael Fantin, Manal Hamdan, Naomi Oreb, Rebekah Rodger, David Chitty, Heidi Robinson, Dewashish Adhikary, Ben Mee, Gordon Babe, David Larish, Alex Barnett, Ari Katsoulas. **Front row, left to right:** Georgia Huxley, Rebecca Sutters, Jay Lawrence, Theresa Phan, Bilal Rauf, Kevin Zhu, Victoria Cha, Michelle Giacomo, Alex Terracini, Evangeline Arulrajah, Mitchell Davis, Georgia Lewer, Razia Shafiq. Photo: Murray Harris

## Letters to the editor

### Chief justices in anecdote and fable

Sir,

May I accept, through you, the Honourable John Bryson's invitation to 'supplement, correct or challenge him', as published in the Winter *Bar News*? I note the disjunctive and advise that my contribution is at most supplementary - I would not presume to correct or challenge him.

First, regarding my hero, Sir Owen Dixon: John refers to *Jesting Pilate* (which I confess to having never read; if that excludes me from the ranks of 'real lawyers', then that, in what I recall of the words of Sellers, in response to Lord Denning's 'timorous souls' jibe, 'is a fate which I must bear with such fortitude as I can command.') but he offers neither explanation nor justification for the adjective in the title. Perhaps this may

help. In *Derbyshire Building Co Ltd v Becker*, it emerged that the trial judge ('Dooley' Brereton - a thoughtful lawyer, as a rule) had left to the jury the meaning of a written contract. 'His Honour must' said the chief justice 'have had in mind the demeanour of the document! Ho ho! The demeanour of the document! Ha ha ha!' No sound was heard in court for a good minute but Sir Owen's repetition of his jest and the accompanying giggles. My leader, Raymond George Reynolds QC, was equally delighted (it had been one of our grounds of complaint) if less audibly mirthful.

Next, Sir Garfield Barwick. Yes, I have heard many complaints about the rudeness, even cruelty, of the NSW trio, Barwick, Taylor and Kitto JJ. My

experience of them was very limited indeed, but in my very occasional appearances in that much-feared tribunal, I had nothing but kindness and courtesy from 'the little man.' Perhaps he kept his fearsome side for worthier opposition.

Then, Sir Frederick Jordan. My only appearance before him was as an applicant (represented by Mr R M Stonham, for a nominal fee of 1,00.0 Guas) for reduction of the term of my articles of clerkship, which he, presiding over the full court, duly granted. But I may be able to throw some light on The Honourable John's statement that 'his practice had been very narrow.' I am able to assure him that his Honour had appeared in at least one murder trial. How do I know that? From 1953



to 1956 I had the pleasure of sharing chambers in Lanark House with the much-loved lecturer in Roman law, T P Flattery. Admitted in 1923, and a Master of Arts and Bachelor of Laws as well as a noted cricketer and baseball player, Tom's dreadful stammer and consequent shyness proved an obstacle to professional advancement that he (unlike Arthur Rath) could not surmount. In the years that I knew him, his only court appearances were before the registrar of probates, seeking executor's commission. But, on the desk we shared, in pride of place, was a mahogany-coloured brief, so old and desiccated that one scarcely dared handle it. It was a brief to Mr TP Flattery:

'You with Mr F R Jordan QC' to appear at the Central Criminal Court to defend (unsuccessfully, as it turned out) a charge of murder.

As to the Hon H V Evatt, I will mention briefly an appeal to the full court in which Ray Reynolds led me - I think it was *Becker v Derbyshire* (supra). Ray said to me 'I am going to do some written submissions. The Doc will appreciate them'. He handed them up at the hearing, to everybody's surprise, and the members of the court took them away. The written judgment of the chief justice upheld Ray's arguments, even to the point of incorporating whole paragraphs, word for

word, though without acknowledgment - right down to the phrase: 'In our submission'!

As to the description of Sir Leslie Herron, one good nickname can be worth a hundred words. Some readers may remember that Leycester Meares J had a nickname for everyone. The one he coined for Herron C J said it all: 'The Bullfrog'! I hasten to add that it was an affectionate rather than a pejorative sobriquet.

Harry Bell

### The changing nature of the bar

Sir,

I am prompted to write by Peter Lowe's informative and entertaining account of 'The changing nature of the bar' (*Bar News*, Autumn 2014) and in particular the section headed 'Motion Day'.

Until I read Lowe's article and observed his use of the past tense - followed, indeed, by a pluperfect - I was unaware that this 'historic practice' had ceased. The practice that I remember involved the listing of 'Motions Generally' in the full court or Court of Appeal. There would, on Motion Day be a list of Motions for Hearing but in 'Motions Generally' it was permissible to move in a matter for which no originating process had been filed. These were matters of urgency and, being ordinarily *ex parte* could be expected to be short. The Bar

Table would be thronged; occupied by counsel engaged in both listed and unlisted matters. The court officer would complete a list of appearances, including initials where counsel shared a surname with a colleague. This was supplied to the associate to the presiding judge, so that he or she could work out precedence with the aid of the *Law Almanac*.

When the court sat, the associate called motions generally, calling each name as Lowe stated, in order of seniority. Thus: 'Mr X, do you move?' If Mr X was engaged in one of the listed matters, he would simply stand, bow, and silently resume his seat. If, however, he was briefed in an unlisted matter, he would announce his appearance and seek to move on an affidavit.

It was in this context that there took place the famous incident, of which you have doubtless heard, involving Ron Austin of counsel. Ron, admitted to the bar on 14 February 1947, was very large - indeed, obese: six feet tall and well over 20 stone - but nimbler mentally than physically. He was to appear in an unlisted matter and when the chief justice's associate said to him: 'Mr Austin, do you move?' Ron, as he struggled gamely to his feet, made the celebrated reply: 'With difficulty, Your Honours'.

I shan't feel offended if someone with a more accurate recollection than I gets in first on the procedure followed.

Harry Bell

Sir,

Since retiring from practice in 2009 I enjoy reading the *Bar News*. Mr Lowe's article on 'The changing nature of the bar' (Winter 2014), which I have just

received, is amongst the best features that I have had the privilege and enjoyment of reading and, as the 90 footnotes demonstrate, must have been the result of

extensive and painstaking research. Congratulations and thank you.

Roy Alloway QC

## Justice and the discretion to prosecute

By the Hon John Nader QC

The writing of this opinion was occasioned by the experience of NSW Crown prosecutor, Margaret Cunneen SC. Ms Cunneen has received unjust, adverse criticism, aptly described by well regarded journalist, Bettina Arndt as a ‘witch hunt’.<sup>1</sup>

Many of Ms Cunneen’s critics argued that because a magistrate found that there was evidence to support each of a number of sexual assault charges against a defendant, and had committed him for trial, Ms Cunneen ought to have found a bill of indictment. Many of her critics said that she failed in her duty as a Crown prosecutor by not doing so. They did not understand that it is no part of our law that a bill of indictment should be found merely because a magistrate has committed a defendant for trial.

Ms Cunneen advised the director of public prosecutions (DPP) that a bill of indictment should not be found. Her advice was accepted. Nothing has shown that advice to have been wrong in any respect.

Ms Cunneen’s duty as a Crown prosecutor (Crown) required her to decide whether the suspect should be sent for trial by jury.

In arriving at her decision, Ms Cunneen had to consider many circumstances beyond that which the magistrate was required to consider. Indeed, the fact of the magistrate’s committal was irrelevant to the question whether the defendant should be put on trial. It is no disrespect to a magistrate to point out that a committal for trial by a magistrate is usually little more than a *sine qua non* to a case coming before a Crown for consideration of finding a bill of indictment.

### The discretion to prosecute

A Crown acting according to sound and well defined principles that have evolved over many years, is very much a servant of justice.

The Prosecution Guidelines of the NSW DPP begin:

A prosecutor is a ‘minister of justice’. The prosecutor’s principal role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness.

A Crown is empowered by s 5(1)(b) of the *Crown Prosecutors Act 1986* to find a bill of indictment for an offence whether or not the person concerned has been committed for trial in respect of the offence. Where the person concerned has not been committed for trial the indictment is described as *ex officio*.

In general, Crowns appear in criminal jury trials in the District and Supreme courts.

### The Crown’s client is the entire community

In a criminal trial a Crown represents the community. The Crown’s role is to assist the court to arrive at the truth and to do justice between the community and the accused. A Crown must present to the court all of the credible, relevant evidence.

### No wins and no losses

The Crown’s role excludes any notion of winning or losing cases. It is critically important that a Crown should never lose sight of the fact that, although there are strong adversarial elements in the criminal trial process, it is no part of the Crown’s duty to *win* a case as it might be in civil proceedings.

Crowns have been seen to become seduced, as it were, by the heat of battle or by their personal belief that the accused is guilty, and to lose sight of their true role.

In *Boucher v The Queen* (1954) 110 CCC 263 at p 270 Rand J wrote:

It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.

### Servants of all yet of none<sup>2</sup>

A Crown knows that he or she is a servant of all the people. But no person or group of persons is a Crown’s client. The entire community is a Crown’s client in every trial, and stands, albeit unseen, as a party in the trial court. Consequently a Crown must remember that what fair minded members of the community demand is a just verdict whatever it may be. A Crown should never consider a verdict of conviction or acquittal as a win or a loss.

If a Crown has presented a case fairly, with appropriate vigour, skill and thoroughness, his or her duty in the service of justice has been done, whatever the verdict. In *Whitehorn v The Queen*<sup>3</sup>, Justice Deane wrote:

Prosecuting counsel in a criminal case represents the State. The accused, the court and the community are entitled to expect that ... he will act with fairness and detachment

and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.

### Determining and settling charges

Crown prosecutors also determine and settle the appropriate charges. They advise the DPP on a wide range of issues, including the question whether or not there is sufficient evidence to justify proceeding with a particular prosecution or whether the proceedings should be terminated. See *Director of Public Prosecutions Act 1986*, ss 7(2) and *Crown Prosecutors Act 1986* ss 5(3): the former confers power on the DPP which is denied to Crowns by the latter.<sup>4</sup>

### The public interest

In deciding whether to find a bill of indictment, the dominating criterion against which all factors have to be measured is the public interest. A Crown who has to decide whether to find a bill of indictment must consider what is demanded by the public interest as s/he perceives it.

Some questions are so fundamental to the public interest that they hardly need mentioning, but a reference to some of them is not out of place.

A Crown must be reasonably sure that the available evidence is likely to prove each of the essential elements of the alleged offence to the required standard. That is a fundamental public interest question, but there are other less obvious matters to be considered.

A former DPP, Mr Nicolas Cowdery QC stated in his guidelines that the factors to be considered by a Crown should include matters that he published in a check list.<sup>5</sup>

He did not, I am sure, intend that the check-list be taken to include all possible matters for consideration. He left it open to prosecutors to evaluate any other matter that might seem to be significant to the public interest. The circumstances of our lives are far too complex for all possible relevant matters to be included in a list. In fact, many of the items in the DPP's list are general enough to suggest more specific matters.

Such a check-list is useful if it is not too specific. The more specific such a list becomes, the more the Crown's discretion will be reduced.

I think it likely that Mr Cowdery was telling prosecutors that they should consider all the matters in the check-list, whatever other matters they may consider.

It would be impossible to make an *aide memoir* of every significant factor. New considerations arise from case to case, and from time to time, and prosecutors must be perceptive of them. Public attitudes change constantly.

### Sexual assault cases

The following remarks relate especially to sexual assault cases because of the sensitivities of the large number of young victims and the special need to keep the identities of concerned persons concealed. However, all indictable offences are governed by the same overriding public interest principle. Because of our ever-changing social values, crimes become more or less serious with the passing of time. Examples are not necessary to support that.

Sexual assault cases form a special category as well because of the necessity to protect sexual assault victims from additional suffering that may be caused by the forensic process itself. This is in the minds of Crowns when considering whether an alleged perpetrator of sexual assault should be sent for trial. It is manifestly a public interest question.

Victims whose evidence is not strongly corroborated, are often advised by police and Crowns that a conviction is not at all certain, and that an acquittal is possible by reason of lack of sufficient corroboration. If the Crown decides that a conviction is not a real probability, a bill of indictment should not be found: a decision commonly called a *no bill*.

### Victim distress

I put this forward as an important public interest issue. It is disturbing to be in court, perhaps as a judge, to witness the great distress reaction of a woman or girl, who at the end of a trial, hears the foreperson of a jury announce that the man on trial for sexually assaulting her is not guilty. This grief is aggravated when, as sometimes happens, the acquitted man sneers or laughs at her in the court.

A verdict of not guilty is commonly regarded as exonerating an accused person, but it can be devastating to a victim who, notwithstanding the acquittal, well knows that she was sexually assaulted by the accused. It is pointless to explain to her that the jury may have believed her but they were left with a reasonable doubt. I have never seen a satisfactory resolution of this tension.

Therefore, the decision to prosecute such cases to trial must be considered painstakingly. The suffering caused by the crime itself can be aggravated by the stress experienced in the lead up



The Hon John Nader QC, 'Justice and the discretion to prosecute'

to the trial, sometimes for many months, culminating in the disappointment of a verdict of acquittal.

The community has an interest in protecting the victim of sexual assault from further distress. It is a matter that must be considered and taken into account by Crowns in bill finding considerations.

For a similar reason, the lapse of time between complaint, investigation, and trial should be made as brief as it is possible for the prosecutor to make it.

### Justice and fairness for accused persons

Justice Deane's remarks, quoted above, are a reminder that accused persons, as members of the community, are also owed a duty of justice by the Crown. The forensic vigour to which I have referred does not permit a Crown knowingly to do or fail to do anything that might result in injustice to an accused person. The accused is a member of the community whose legitimate interests the Crown must respect.

Fairness is a quality which we all understand, but it implies much that cannot be specified, even if I were capable of doing so. But, for an example, it implies that if any relevant fact, or probable source of relevant fact, that may assist an accused, comes to the attention of a Crown prosecutor, the accused must be informed of it without delay. Delayed disclosure may minimise the value of the information to the accused: *a fortiori*, it may well result in injustice to delay the disclosure till the time of trial.

It follows from what I have already said, that the Crown prosecutor must be guided in the bill-finding process by the answer to the question, 'is prosecution required in the public interest?'

The public interest does not include events that members of the public might regard as interesting: such as the grisly details of a recently committed murder or a sexual assault.

Sir Hartley Shawcross's comments support the public interest test and were said to apply equally in NSW by Mr Cowdery QC in his guidelines.

Prosecute 'wherever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest'.<sup>6</sup>

Legal practitioners know that juries in criminal trials frequently reach unanimous verdicts for different reasons: unanimity of reasons for a verdict is not required. The 'merciful verdict' of manslaughter in a trial for murder is an obvious example. I have little doubt that two prosecutors considering the same matter might reach the same conclusion about finding a bill, influenced by different reasons but applying the public interest test as each one sees it.

It is critical that we remember that judgment is not a science; it is an art in which judges [I use the word in its generic sense] may become more skilled with experience in exercising their discretion.

As a consequence, a Crown should have considerable experience of criminal law practice before being required to consider the finding of bills of indictment.

Due to the ever increasing complexity of legal topics the executive government and heads of jurisdiction, when appointing judges who may be required, perhaps, in some executive inquiry, to evaluate the exercise of a Crown's discretion, should appoint judges or legal practitioners who themselves have had wide and relevant experience in the practice of criminal law.

### Endnotes

1. Bettina Arndt, 'Selective zealotry of the morals brigade', *The Australian* 18 July 2014, p12.
2. The motto of the coat of arms of the NSW Bar Association – included in the coat of arms by the College of Arms.
3. Per Deane J in *Whitehorn v The Queen* (1983) CLR at 663–664
4. Section 5:  
(1) The functions of a Crown prosecutor are  
(a) to conduct, and appear as counsel in, proceedings on behalf of the Director,  
(b) to find a bill of indictment in respect of an indictable offence, whether or not the person concerned has been committed for trial in respect of the offence,  
(c) to advise the Attorney General or Director in respect of any matter referred for advice by either of them, and  
(d) to carry out such other functions of counsel as the Attorney General or Director approves.  
(2)...  
(3) A Crown Prosecutor does not have the function of determining that no bill of indictment be found or directing That no further proceedings be taken against a person.
5. ODPB Prosecution Guidelines, <http://www.odpp.nsw.gov.au/prosecution-guidelines>, No.4. Note the words 'which may include the following' in the introduction to the numbered list.
6. Per Sir Hartley Shawcross QC, UK attorney-general and former Nuremberg trial prosecutor, speaking in the House of Commons on 29 January 1951.

### Refusing a *Calderbank* offer

Melissa Tovey reports on *Stewart v Atco Controls Pty Limited (In Liquidation) [No 2] 2014 [HCA] 31*

#### Introduction

The High Court recently has had cause to consider when a party will have acted reasonably in refusing a *Calderbank* offer where the principal reason for rejection is that party's confidence that it will be successful in the litigation, which confidence is, ultimately, misplaced.

#### Background

The underlying proceedings, *Stewart v Atco Controls Pty Limited (In Liquidation) [No 2] 2014 [HCA] 31*, which concerned the priority of a liquidator's lien, was summarised in the Winter 2014 edition of Recent Developments.

In brief, at first instance in proceedings brought by Atco Controls Pty Limited (Atco), the Supreme Court of Victoria (Davies J) held that the liquidator of Newtronics Pty Limited (receivers and managers appointed) (in liquidation) (Newtronics), which was a wholly-owned subsidiary of Atco, was entitled to a lien for his professional remuneration and expenses over a fund of \$1.25m held by Newtronics prior to being obliged to pay the fund to Atco. The fund comprised settlement proceeds arising from related proceedings involving other parties. Davies J also ordered Atco to pay the liquidator's costs of the proceedings (as distinct from, and in addition to, the sum secured by the lien).

Shortly after commencing those proceedings, the liquidator (Mr Stewart) had offered to Atco that he would claim only a nominal amount for his remuneration and expenses caught by the lien if Atco discontinued the proceedings (the first offer). Atco did not accept this offer. Ultimately, the quantum of Mr Stewart's remuneration and expenses exceeded the amount of the fund, such that there would have been nothing available to pay to Atco.

Atco appealed from the decision of Davies J. Before the hearing of the appeal, Mr Stewart made a further offer to Atco on the following terms (the second offer):

- Mr Stewart to retain the settlement sum (viz. the \$1.25m);
- \$55,000 paid into court by Atco by way of security for costs of the appeal be released to Mr Stewart; and
- mutual releases.

The second offer, particularly in relation to the release of the security sum, implicitly provided that the liquidator would not press any claim for legal costs of the proceedings below as ordered by Davies J. The second offer was not accepted by Atco.

Atco succeeded on appeal to the Court of Appeal, with the effect that the second offer had no work to do. However, the High Court overturned the Court of Appeal decision and, as a result, made an order for costs in favour of Mr Stewart against Atco in both the Court of Appeal and High Court proceedings.

#### Issue before the High Court

As a result of the proceedings in the High Court, Mr Stewart applied to the High Court for indemnity costs on the basis of Atco's rejection of the second offer.

As the second offer only related to the Court of Appeal proceedings, the High Court considered only the costs situation in the Court of Appeal, there being no relevant offer in relation to the High Court proceedings.

The issue before the High Court was whether, in light of the Court of Appeal decision being overturned, Atco's rejection of the second offer was such that it was appropriate for the usual rule as to costs to be displaced and whether an order for indemnity costs in relation to the Court of Appeal proceedings was warranted.

It appears that the only argument Atco raised in opposition to the indemnity order was that its conduct in not accepting the second offer was not unreasonable' in circumstances where, inferentially, Atco took the view that it was ultimately going to be successful in the appeal and was successful before the Court of Appeal.

#### Reasoning

Without deciding whether reasonableness is a factor which militates against the making of an indemnity costs order, the High Court<sup>1</sup> took the view that in this particular instance, something more than just a belief of success was required before the discretion would not be exercised in favour of indemnity costs, after rejection of a *Calderbank* offer.

In particular, the High Court took the view that since the substantive dispute concerning the liquidator's entitlement to a lien was well-established, to succeed Atco would have had to establish that the principle in *In re Universal Distributing Co Ltd (In Liq)*<sup>2</sup> did not apply. In such circumstances, it was not reasonable for Atco to have rejected the second offer.<sup>3</sup> The High Court ordered that the costs of the Court of Appeal proceedings be paid on the indemnity basis.

Melissa Tovey, 'Refusing a *Calderbank* offer'

### Comment

Atco appears to have taken the view that its chances of success in the Court of Appeal were sufficient for it to reject the second offer. Against this position were, it appears, at least two factors. First, Atco appeared not to take into account the concession by Mr Stewart that he would accept \$55,000 in settlement of any costs order made by Davies J. Although the quantum of that costs was unknown, it seems to be accepted that this was a considerable concession. Secondly, the second offer also brought with it the certainty, if accepted, that the litigation would be at an end and neither party would be at any greater exposure to costs.

The High Court's decision suggests that practitioners need to be careful about relying solely upon their views as to prospects of success in advising their clients to reject a *Calderbank* offer particularly in areas where the law is well-established and success would require that well-established law to be distinguished.

### Endnotes

1. Crennan, Kiefel, Bell, Gageler and Keane JJ.
2. (1933) 48 CLR 171.
3. At [6].

## NCAT is a 'court' from which arbitration is referred

Stephen Tully reports on *Subway Systems v Ireland* [2014] VSCA 142.

The Victorian Civil and Administrative Tribunal (VCAT) has been held to be a 'court' such that when an action is brought before it concerning a matter subject to an arbitration agreement, VCAT shall, upon request, refer the parties to arbitration. This was the conclusion made by a majority of the Court of Appeal of the Victorian Supreme Court in *Subway Systems v Ireland* [2014] VSCA 142 (*Subway*). The reasoning is likely to apply to the New South Wales Civil and Administrative Tribunal (NCAT) and to commercial arbitration acts across Australia.

### The facts and reasoning in *Subway*

Article 8(1) of the Model Law on International Commercial Arbitration (the 'Model Law') relevantly provides that a 'court' before which an action is brought in a matter subject to an arbitration agreement shall, upon request, refer the parties to arbitration.<sup>1</sup> This is replicated in s 8(1) of the *Commercial Arbitration Act* 2011 (Vic), which was the provision considered in *Subway*, as well as in s 8(1) of the *Commercial Arbitration Act* 2010 (NSW).

Subway is a sandwich bar well-known to suburban shopping centres. Subway Systems argued that matters in dispute under the franchise agreement between the parties fell within the scope of an arbitration clause in the agreement. The issue was whether VCAT was a 'court' for the purposes of s 8(1).

Under Article 2(c) of the Model Law, a 'court' means 'a body or organ of the judicial system of a State'. However, that term

is not defined in s 2 of the Victorian (or NSW) legislation. The Victorian Act defined 'the Court' (with capitalisation) as the Supreme Court and referred to the Supreme, County and Magistrates' courts as providing arbitration assistance and supervision functions (ss 2, 6).

At first instance VCAT was found not to be a 'court' for the purposes of s 8(1). This was on the basis that the Victorian Act referred specifically to the Supreme, County and Magistrates' courts and, following a comparison with the Model Law provisions, it was held to have been open to parliament to refer expressly to VCAT if that had been intended.<sup>2</sup>

Upon appeal Maxwell P and Beach JA concluded, by different routes, that the word 'court' included VCAT.

Maxwell P considered the ordinary meaning of the word 'judicial' and the substantive character of the functions VCAT performed. Maxwell P was satisfied that VCAT had a recognised adjudicative jurisdiction.<sup>3</sup> Although VCAT is not referred to as a court and its adjudicators are not called judges, it exercised judicial functions with the authority to determine the rights and liabilities of parties to commercial disputes. In Maxwell P's view, the drafters of the Model Law would have 'undoubtedly' intended Article 8(1) to apply to VCAT, and if the Victorian Parliament had deliberately wanted to depart from the Model Law, then this would have been expressly adverted to in the legislation.<sup>4</sup>



Stephen Tully, 'NCAT' is a 'court' from which arbitration is referred'

Beach JA reviewed the provisions of the Victorian Act, its object and purpose, extrinsic materials and the Model Law. Beach JA considered that the overall objective was to promote low cost, speedy arbitrations over longer, more expensive court trials and, in the interests of a uniform interpretation of the Model Law, hold those parties who chose arbitration to their bargains.<sup>5</sup> Further, Beach JA was satisfied that VCAT possessed all of the features of a court identified under the common law.<sup>6</sup>

In contrast, Kyrou AJA also applied ordinary rules of statutory interpretation to the same materials reviewed by Beach JA but concluded that VCAT was not a court.<sup>7</sup> This was because VCAT did not meet the common law criteria for a court. It was not bound by the rules of evidence, could not enforce its own decisions, some of its members are not legally qualified, it can be required to apply government policy, can offer advisory opinions and, indeed, was established to be an inexpensive, informal and speedy alternative to a court.<sup>8</sup> Furthermore, the definition of 'court' in Article 2 of the Model Law was the only definition which had been entirely omitted from s 2(1) of the Victorian Act. This had significance, because it could not be inferred that the definition was intended to apply to the legislation.<sup>9</sup> The parliament could have easily legislated that VCAT was a court, and the Model Law could have easily said that 'court' was intended to include statutory tribunals which had compulsory dispute resolution functions.<sup>10</sup>

### Contrasting interpretative methodologies

*Subway* is also noteworthy for the contrasting interpretative methodologies employed by the three judges. Although reaching different conclusions, Beach JA and Kyrou AJA adopted orthodox but slightly different approaches as to statutory construction. For Beach JA, the task of statutory construction began and concluded with the legislative text.<sup>11</sup> For Kyrou AJA, the process of statutory construction began with an examination of context.<sup>12</sup> Section 8(1) could not be considered in isolation but had to be read in light of the provisions and purposes of the legislation.<sup>13</sup>

Maxwell P took a different approach altogether. For Maxwell P, distinctive interpretative rules were engaged. The Victorian legislation had a special character because it embodied and gave effect to an international agreement. This meant that certainty and uniformity of interpretation and application between states were paramount. The rules applicable to treaty interpretation had to be applied, unconstrained by technical rules of statutory interpretation.<sup>14</sup> This meant that the working documents of the international body which had formulated the Model Law – for example, an explanatory note from the secretariat

of the United Nations Commission on International Trade Law (UNCITRAL) – could be considered.<sup>15</sup> This approach is relatively unremarkable. Indeed, s 2A(3) of the Victorian Act expressly provides that reference may be made to such documents. The High Court has also had occasion to interpret the Model Law by reference to documents from UNCITRAL working groups.<sup>16</sup>

Kyrou AJA, by contrast considered that if the Act had intended that explanatory documents relating to the Model Law were to govern its interpretation, then the parliament would have mandated that they be taken into account.<sup>17</sup>

### Conclusions

In proceedings concerning arbitration, Australian courts seek to strike a balance between the exercise of supervisory jurisdiction and party autonomy. An arbitral award will not be set aside as contrary to public policy unless, for example, fundamental norms of justice or fairness have been breached.<sup>18</sup> Now tribunals must equally support disputants resorting to arbitration. The conclusion in *Subway* is likely to be applicable to all other states and territories whose commercial arbitration acts contain materially identical provisions. For NSW, it is likely that any matter brought before NCAT which involves an arbitration agreement can be referred to arbitration upon request.

### Endnotes

1. United Nations (UN) Commission on International Trade Law, Model Law on International Commercial Arbitration, UN Doc A/40117, Annex I (1994).
2. *Subway Systems Australia v Ireland* [2013] VSC 550 at [30], [41].
3. *Subway Systems v Ireland* [2014] VSCA 142 at [41]–[42] per Maxwell P.
4. *Ibid.*, at [44], [45], [47] per Maxwell P.
5. *Ibid.*, at [90] per Beach JA.
6. *Ibid.*, at [86] per Beach JA. For the common law criteria, see *Shell Oil Co of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275 at 297 per Lord Sankey LC.
7. *Subway Systems v Ireland* [2014] VSCA 142 at [115] per Kyrou AJA.
8. *Ibid.*, at [96] per Kyrou AJA.
9. *Ibid.*, at [108] per Kyrou AJA.
10. *Ibid.*, at [99], [110] per Kyrou AJA.
11. *Thiess v Collector of Customs & Ors* (2014) 88 ALJR 514 at 518 per French CJ, Hayne, Kiefel, Gageler and Keane JJ.
12. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, 384.
13. *Subway Systems v Ireland* [2014] VSCA 142 at [102] per Kyrou AJA.
14. See Articles 31 and 32, Vienna Convention on the Law of Treaties [1974] ATS 2.
15. *Subway Systems v Ireland* [2014] VSCA 142 at [29] per Maxwell P.
16. Facilitated by s 17, *International Arbitration Act 1974* (Cth); see *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5 at [11], [14], [20] per French CJ and Gageler J.
17. *Subway Systems v Ireland* [2014] VSCA 142 at [109] per Kyrou AJA.
18. *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 at [55], [111] per Allsop CJ, Middleton and Foster JJ.

# Mutual trust and confidence in employment contracts

Rebecca Gall reports on *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

A five member bench of the High Court held unanimously that there is no implied term of mutual trust and confidence in employment contracts.

### Background facts

Mr Stephen Barker was employed by the Commonwealth Bank of Australia (CBA) from 1981 until he was made redundant in 2009. At the time of his termination he was employed as an executive manager in Adelaide.

On 2 March 2009 Mr Barker was informed his position was being made redundant but that it was CBA's preference he be redeployed within the bank. On that same day he was required to clear out his desk, hand in his keys and CBA-issued mobile phone and not to return to work. His access to his CBA email account, voicemail and intranet also was terminated.

Over the following weeks, CBA's recruitment consultant attempted to contact Mr Barker via his CBA mobile and email in relation to redeployment opportunities. However, having been deprived of access to these he did not receive the communications until an email was forwarded to his personal email address at the end of March. About a week later, Mr Barker's employment was terminated by reason of redundancy.

### Claim

Mr Barker brought proceedings in the Federal Court of Australia alleging that in accordance with his written employment contract and the CBA's Redeployment Policy, CBA:

- would maintain trust and confidence with him; and
- would not do anything likely to destroy or seriously damage the relationship of trust and confidence without proper cause for doing so.<sup>1</sup>

Mr Barker also alleged that CBA had breached the implied term of mutual trust and confidence and this resulted in him being denied an opportunity of redeployment and thereby being retained by CBA.<sup>2</sup>

### Issue

The question before the High Court was whether, under the common law of Australia, employment contracts contain a term that neither party will, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between them.<sup>3</sup>

### Decision

The High Court overturned the decisions of the Federal Court

and of the full court and held that a term of mutual trust and confidence was not implied by law into every employment contract as such a step is beyond the legitimate law-making function of the courts.<sup>4</sup>

In reaching this conclusion in a joint judgment French CJ, Bell and Keane JJ discussed three key issues: the concept of 'necessity', comparison with the United Kingdom and the limits on judicial law-making.

### Necessity

Central to the decision was the conclusion that the implication of a term of mutual trust and confidence is not 'necessary' in the sense that would justify the exercise of the court's judicial power in a way that may have a significant impact upon employment relationships and the law of contract of employment in Australia.<sup>5</sup>

At [37] French CJ, Bell and Keane JJ stated:

The implied term of mutual trust and confidence, however, imposes mutual obligations wider than those which are 'necessary', even allowing for the broad considerations which may inform implications in law. It goes to the maintenance of a relationship.

In relation to necessity, their Honours observed that it may be defined by reference to what 'the nature of the contract itself implicitly requires' and may be demonstrated by the futility of the transaction absent the implication but is not satisfied by demonstrating the reasonableness of the implied term.<sup>6</sup>

Justice Kiefel, who delivered separate reasons, similarly found that such a term was not necessary. At [108] her Honour concluded:

Contracts of employment are not rendered futile because of the absence of a term to this effect. To the contrary, it would not be possible for all employers to give effect to such a term. This tells against the application of such a requirement as a universal rule. It cannot be said to be 'necessary' in the sense described earlier in these reasons.

In addition, her Honour observed that such a term was not necessary in this particular case given a particular term (clause 8) in the written employment agreement.<sup>7</sup>

One aspect of her Honour's reasoning which was not present in the joint judgment was her Honour's consideration as to whether there was a legislative 'gap' which the common law can fill. Justice Kiefel considered the current unfair dismissal legislation which places restrictions on when an employee can bring a claim of unfair dismissal where the termination

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of the employment is because of redundancy. In this case, Mr Barker was unable to make a statutory claim because his wages exceeded a certain amount.

Her Honour stated at [96]:

Contrary to the respondent's contention, this does not create a gap which the common law can fill. In *Johnson v Unisys*, Lord Hoffmann noted that certain classes of employees were excluded from the protection of the legislation there in question. Yet, as his Lordship observed, it was the evident intention of the Parliament that the statutory remedy provided be limited in its application. Likewise, the Australian Parliament has determined what remedies are to be provided for unfair dismissal and it has determined who may seek them. (Footnotes omitted)

Rejection of UK approach in Australian context

The majority of the full court of the Federal Court had relied on the House of Lords decision in *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 34 per Lord Nicholls of Birkenhead in finding there was an implied term of trust and confidence referable to all contracts of employment.

However, French CJ, Bell and Keane JJ rejected such reliance on this decision and concluded that this was not an appropriate occasion for the High Court to follow the approach taken by the courts in the United Kingdom. In so finding, their Honours noted that the regulatory history of the employment relationship and of industrial relations in Australia differs from that of the United Kingdom.

At [18] their Honours said:

Judicial decisions about employment contracts in other common law jurisdictions, including the United Kingdom, attract the cautionary observation that Australian judges must 'subject [foreign rules] to inspection at the border to determine their adaptability to native soil'. That is not an injunction to legal protectionism. It is simply a statement about the sensible use of comparative law. (Footnote omitted)

### Limits on judicial law-making

French CJ, Bell and Keane JJ held that importing a term of mutual trust and confidence into employment contracts would trespass into the province of legislative action in the Australian context, which is not appropriate for the judicial branch of government. Their Honours stated that:

The complex policy considerations encompassed by those views of the implication mark it, in the Australian context, as a matter more appropriate for the legislature than for the courts to determine. It may, of course, be open to legislatures to enshrine the implied term in statutory form and leave it to the courts, according to the processes of the common law, to construe and apply it. It is a different thing for the courts to assume that responsibility for themselves.<sup>8</sup>

Another concern was that the obligation had a 'mutual aspect' to it and had the potential to apply to employees in circumstances where their conduct was neither intentional nor negligent and not a breach of their existing duty of fidelity but which caused serious disruption to the conduct of their employer's business.<sup>9</sup>

French CJ, Bell and Keane JJ concluded by making it clear that they were not to be taken as commenting on or considering the application of good faith in contracts.<sup>10</sup>

### Endnote

1. At [9] per French CJ, Bell and Keane JJ.
2. At [10] per French CJ, Bell and Keane JJ.
3. At [15] per French CJ, Bell and Keane JJ.
4. At [1] per French CJ, Bell and Keane JJ; at [108] Kiefel J agreed such a term was not necessary; at [119] Gageler J wrote a short separate judgment and agreed with the majority's reasons.
5. At [36] per French CJ, Bell and Keane JJ; at [108] per Kiefel J; at [119] per Gageler J.
6. At [36] per French CJ, Bell and Keane JJ.
7. At [109] per Kiefel J.
8. At [40] per French CJ, Bell and Keane JJ.
9. At [40] per French CJ, Bell and Keane JJ.
10. At [42] per French CJ, Bell and Keane JJ; at [107] per Kiefel J; Gageler J made no comment on this issue in his short reasons.



### More new bail law

By Caroline Dobraszczyk

The *Bail Amendment Act 2014* (the amendment Act) makes further changes to the law in relation to bail in NSW. It was assented to on 25 September 2014, *but has yet to be proclaimed*. I say 'further changes' because of course substantial changes were made this year, i.e. commencing from 20 May 2014, which in essence provided for completely new criteria to be satisfied before bail would be granted. The amendment Act makes changes which, to some extent, are similar to the law pre-20 May 2014 and also seem to make it more difficult for an accused person to obtain bail. The most significant changes are as follows.

Currently, section 3(2) states that when making a bail decision the bail authority is to have regard to the presumption of innocence and the general right to be at liberty. This is to be deleted. Instead, there is to be a preamble that states, inter alia, that the New South Wales Parliament has had regard to the common law presumption of innocence and the general right to be at liberty, in enacting the Act. An interesting deletion.

Two flow charts (which set out how to make bail determinations), are now proposed: the first one applies to 'show cause offences', which are defined as offences that are punishable by imprisonment for life, certain specified sexual offences, certain serious violence offences, certain offences under the *Firearms Act 1996* and the *Weapons Prohibition Act 1998*, offences of cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or plant under the *Drug Misuse and Trafficking Act 1985*, Commonwealth offences under Part 9.1 of the Criminal Code that involve possession, trafficking, cultivation, sale, manufacture, importation, exportation or supply of a commercial quantity of a serious drug, a serious indictable offence that is committed by an accused person while on bail or on parole, an indictable offence, or an offence of failing to comply with a supervision order, committed by an accused person while subject to a supervision order, a serious indictable offence of attempting to commit an offence as stated in the section and a serious indictable offence involving accessorial liability of an offence as stated in the section.

The second flow chart relates to all offences, other than offences for which there is a right of release, and sets out a new unacceptable risk test.

Division 1A is entitled 'Show cause requirement' and provides a new section which states that when making a bail decision for a show cause offence, the bail authority must refuse bail unless the accused person shows cause why his or her detention is not justified. There is no guidance as to what is to be considered when determining whether detention is not justified. If one

considers the fundamental principles of bail, issues such as risk of flight, strength of the prosecution case, risks to the community, and risks of any interference in the accused's case, and any special need to not be in custody in order to prepare for the criminal proceedings, would be important issues as well as maybe any health issues which cannot be met in custody. There may of course be other particular issues which are unique to an accused's case. However these are issues to be considered when addressing the new section 17 ie bail concerns. Is it proposed that these issues are to be considered twice if the accused is charged with a show cause offence? The attorney general stated in the second reading speech that 'Victoria and Queensland have show cause requirements in their bail legislation. Courts in those states have noted circumstances that may be relevant to determining 'show cause', including the strength of the prosecution case, preventable delays and urgent personal situations such as the need for medical treatment. Bail authorities in New South Wales will be informed by the approach taken in these other jurisdictions when applying the show cause provisions.' Then, if it is decided that detention is not justified, the bail authority must make a bail decision in accordance with Division 2, i.e. the unacceptable risk test (which, as stated above, applies to all offences except right to release offences). The show cause requirement does not apply if the accused person is under 18 years of age at the time of the offence.

#### The proposed unacceptable risk test

The bail authority must, before making a bail decision, assess any bail concerns. A bail concern is defined as a concern that the accused person will fail to appear at any proceedings for the offence, or commit a serious offence or endanger the safety of victims or members of the community or interfere with witnesses or evidence. Section 18 then sets out the matters to be considered as part of the assessment, which is an exhaustive list. The list includes some familiar issues but also issues which have not been part of the law before, i.e. the issues are: background of the accused, criminal history, community ties, the nature and seriousness of the offence, strength of the prosecution case, any history of violence, any history of committing a serious offence while on bail, compliance with bail conditions, whether the accused person has any criminal associations, length of time in custody if bail is refused, likelihood of a custodial sentence, if convicted the arguable prospect of success on appeal, any special vulnerability or needs including youth and health, the need for the accused person to be free to prepare for court or for any other lawful reason, the conduct of the accused person towards the victim of the offence or any family member of a victim

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after the offence, and in the case of a serious offence, the views of the victim of the offence or any family member of a victim to the extent this is relevant to the issue of safety of the victim or the community. The bail authority is also to consider under the new section 18 the bail conditions that could reasonably be imposed to address any bail concerns.

For the purpose of deciding whether an offence is a serious offence or where deciding the seriousness of an offence, section 18(2) provides guidance by specifying certain matters to be taken into account when deciding this issue: i.e. whether the offence is of a sexual or violent nature or involves possession or use of an offensive weapon, the likely effect of the offence on any victim and on the community generally, and the number of offences.

Section 19 now states that a bail authority must refuse bail if the bail authority is satisfied, on the basis of an assessment of bail concerns, that there is an unacceptable risk. Section 20A states that bail conditions are to be imposed only if the bail authority identifies bail concerns. Then, a bail authority may impose a bail condition only if satisfied that the bail condition is reasonably necessary to address a bail concern, the bail condition is reasonable and proportionate to the offence, the bail condition is appropriate to the bail concern, it is no more onerous than necessary to address the bail concern, it is reasonably practicable for the accused person to comply with

the bail condition and there are reasonable grounds to believe that the condition is likely to be complied with.

The current section 74, which is headed 'Multiple release or detention applications to same court not permitted' is to be amended to require that 'material' information was not presented to the court in the first bail application, before the same court hears a second release or detention application.

It is proposed that any amendments made to the Bail Act by the amendment act is not a change of circumstances for the purposes of the section 74(3) (c) or (4) (b).

So what is proposed is, in essence, to remove the consideration of the presumption of innocence by a bail authority. Certain serious offences are to be bail refused, unless it is shown that the detention is not justified. The current, simple, two-step process in determining unacceptable risk is to be converted into a one step process where bail concerns and bail conditions are to be considered as part of determining unacceptable risk. The additional factors of criminal associations, the conduct of the accused after the offence and the views of the victims, may be part of a bail determination. It is perhaps regrettable that after major amendments to the law of bail earlier this year, with a completely new Act, drafted in clear and precise language, the amendments seem to be a little more convoluted and potentially difficult to apply. We shall see.

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## New counter-terrorism legislation

By Caroline Dobraszczyk

The Australian Government has been busy passing and considering many new laws in relation to counter terrorism. The first set of laws, contained in the *National Security Legislation Amendment Bill (No 1) 2014* was passed by both Houses on 1 October 2014. This bill mainly amends the *Australian Security Intelligence Organisation Act 1979* (‘the ASIO Act’) and the *Intelligence Services Act 2001* (‘the IS Act’). The attorney general stated in his second reading speech for this bill that 150 Australians, both in Australia and outside Australia, are involved in the conflicts in Syria and Iraq ‘...from engagement in fighting to providing support such as funding or facilitation.’ He stated that the bill ‘...contains measures to address practical limitations in the current legislation, which were largely identified by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Report on Potential Reforms of Australia’s National Security Legislation*, as tabled on 24 June 2013. Some of the main new laws are as follows.

ASIO’s warrant based powers, to search, access computers, use surveillance devices and inspect postal or delivery articles, are amended to address some practical limitations. For example, the definition of ‘computer’ is expanded to mean more than one computer or more than one computer network. Also, the definition of ‘listening device’ is amended to mean ‘any device capable of being used, whether alone or in conjunction with any other device, to overhear, record, monitor or listen to sounds...’ An important amendment is to provide for a new ‘multiple powers warrant scheme’ which will enable ASIO to obtain a single warrant authorizing the exercise of multiple powers in relation to a target. For example, the new proposed Subdivision G provides for the minister to issue an identified person warrant in relation to a person and give conditional approval for ASIO to do one or more of the following--access records at premises, access data in computers, use one or more surveillance devices, access postal articles that are in the post and access articles that are being delivered by a delivery service provider. The subdivision then goes on to set out what ASIO can do in relation to each of these issues once it is authorized to do so by the minister or the director general. There is a stringent test for authorization, eg the minister or director general has to be satisfied, on reasonable grounds, that doing the thing or things under the warrant will substantially assist the collection of intelligence relevant to the prejudicial activities of the identified person.

ASIO will have the capability to conduct covert intelligence operations. Consequently there will be immunity for participants in covert operations. This is similar to Part 1AB of

the *Crimes Act 1914* which applies to Australian Federal Police operations.

The bill clarifies the legislative basis for certain cooperative information sharing activities of ASIO and to refer certain matters to law enforcement agencies for investigation.

There will be new offences relating to unauthorized dealings with an intelligence related record, including copying, transcription, removal and retention. These offences will have a maximum penalty of three years imprisonment.

The second set of laws are contained in the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*. The bill will amend several Acts. The attorney general in the second reading speech stated that ‘The rapid resurgence in violent extremism and the participation in overseas conflicts by some Australians present new and complex security challenges for our nation. The ongoing conflicts in Syria and Iraq are adding to this challenge and the number of Australians who have sought to take part, either by directly participating in these conflicts or providing support for extremists fighting there, is unprecedented.’ Some of the main proposed amendments are as follows:

The bill provides for the control order regime to apply to returning foreign fighters and to those convicted of terrorism offences where it would substantially assist in preventing a terrorist attack.

There is to be a new regime of ‘delayed notification search warrants.’ This will allow the AFP to covertly enter and search premises without the knowledge of the occupier of the premises and then provide notification at a later stage. The purpose of this is to keep an investigation confidential.

There are to be amendments to the *Foreign Evidence Act 1994* which prescribe great discretion to the court in deciding whether to admit evidence obtained from overseas, in terrorism related proceedings.

The bill provides for a new offence of ‘advocating terrorism’. That is, a person will commit an offence if they intentionally counsel, promote, encourage or urge the doing of a terrorist act or the commission of a terrorism offence. The offence carries a maximum penalty of five years. There does not have to be a direct link to an actual act of terrorism or violence being carried out, just advocating terrorism.

There will also be a new offence of entering a foreign country with the intention of engaging in a hostile activity; also an offence of entering in or remaining in an area declared by the



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foreign affairs minister to be an area where a listed terrorist organization is engaging in a hostile activity. The offence of entering a declared area will not apply if the person enters the declared area solely for legitimate purposes which are specified in proposed section 119.3(3). The legitimate purposes include providing aid of a humanitarian nature or making a news report where you are working as a journalist.

There are proposed new laws to allow Customs officers to detain a person where the Customs officer has reasonable grounds to suspect that the person is intending to commit a Commonwealth offence or is a threat to national security or the security of a foreign country. The attorney general stated in the second reading speech, in relation to these particular new laws that 'These amendments play a crucial role in Australia's defence against foreign fighters, as they prevent individuals from travelling outside Australia where their intention is to commit acts of violence.'

The minister for immigration will be able to cancel the visa of

a person who is offshore where ASIO suspects that the person might be a risk to security.

The minister for foreign affairs will be able to temporarily suspend a passport to prevent a person who is in Australia from travelling overseas where ASIO has security concerns about that person. ASIO will also be able to prevent persons who they have security concerns about, from going overseas to participate unlawfully in foreign conflicts.

The bill also proposes for laws to cancel the welfare payments for people about which there are security concerns. The attorney general stated in the second reading speech that 'Like the new declared area offence, my expectation is that this new power will only be used in exceptional circumstances where welfare payments are assisting or supporting criminal activity.'

Further consideration of this bill was adjourned to 27 October 2014. There is no doubt that both sets of laws are controversial yet very interesting, and clearly display the federal government's response to the incredible times we live in.

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## Structuring discretion in sentencing: mandatory sentencing, guideline judgments and standard non-parole periods

By Adam Butt<sup>1</sup>

### I. INTRODUCTION

Sentencing involves a judge balancing the protection of the community with the rights of those involved in the process (balancing act).

In the exercising of a judge's discretion there is a tension between the principles of individualised justice and ensuring consistency in punishment.<sup>2</sup> Inconsistency is a matter which concerns both individual and community interests; it offends the notion of equality before the law, and its presence can lead to an erosion of public confidence in the administration of justice.<sup>3</sup>

Recently in NSW there have been certain developments aimed at improving consistency and transparency in sentencing law.<sup>4</sup> This has been motivated to some extent by community demands or misperceptions that the law is too lenient.<sup>5</sup> The changes have included the introduction of guideline judgements, SNPPs<sup>6</sup> and certain mandatory provisions. The consequences have been the implementation of increasingly punitive and complex laws, with mixed levels of success, and different effects for the balancing act.

### II. JUDICIAL DISCRETION - TRENDS

Sentencing involves the weighing of overlapping, incommensurable and often contradictory objectives: protection of the community, deterrence, retribution and rehabilitation.<sup>7</sup> Judges must reconcile all relevant factors in a case and reach a value-judgment decision through '*instinctive synthesis*'.<sup>8</sup> The existence of multiple objectives in sentencing permits a range of variation between individual judges, but there are limits beyond which inconsistency constitutes an injustice.<sup>9</sup>

In modern times judicial discretion can and has been affected by NSW courts and parliaments in three broad ways as follows.

#### Broad discretion

Spigelman CJ elucidates that centuries of practical experience establish that the multiplicity of factors involved in sentencing require the exercise of a broad discretion, which is best conferred on trial judges. A broad discretion is 'central to the ability of the criminal courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders.'<sup>10</sup>

Notwithstanding this proposition the trend in NSW has been to increasingly 'structure' discretion to enhance consistency and transparency, predicated on the notion that judicial intuition alone may not meet community expectations for

more serious punishment.<sup>11</sup> Concurrent with this trend has been the strengthening of the view that the promulgation of new structures should not be inconsistent with a sentencing discretion,<sup>12</sup> lest injustices ensue. Thus we see the evolution of a preference for 'guidelines' over 'mandatory minimum provisions' or 'grid sentencing',<sup>13</sup> and in the High Court's interpretation of the SNPP regime in *Muldrock* in a manner consistent with McHugh J's approach in *Markarian*,<sup>14</sup> which led to NSW legislative amendments clarifying SNPPs as 'guideposts' rather than as having determinative significance.<sup>15</sup>

#### Removing discretion

Judicial discretion may be removed or fettered due to parliament's intention for deterrence or consistency. This intervention is widely considered to be undesirable for serious offences.<sup>16</sup> While mandatory provisions may not be constitutionally invalid,<sup>17</sup> they may do harm to the rule of law and to a court's ability to do justice to an accused.<sup>18</sup> In NSW mandatory provisions are also at odds with certain aspects of the CSPA,<sup>19</sup> for instance s5(1) conveying that imprisonment is a last resort option, and s21A, providing for the consideration of aggravating, mitigating and other factors. Furthermore, substantial evidence suggests that mandatory sentencing provisions are unsuccessful in achieving deterrence.<sup>20</sup>

Mandatory sentencing has been described as the 'antithesis of just sentencing'.<sup>21</sup> This is all the more so when the penalty, not the minimum, is mandated.<sup>22</sup> Mandatory systems tend to 'collapse under the weight of ... injustices'.<sup>23</sup> This has occurred in NSW. *The Criminal Law Amendment Act 1883* created a sentencing structure with five distinct steps or categories and minimum and maximum sentences. Judges were compelled to pass sentences which they considered to be excessive. This led to injustices and the system was abandoned a year later.<sup>24</sup> In 1996, s 431B, CA,<sup>25</sup> provided mandatory natural life sentences for murder and certain drug offences, where an offender's culpability level was extreme.<sup>26</sup> The provision has since been re-enacted<sup>27</sup> and has been scarcely used.<sup>28</sup> Instead, judges have proceeded to impose life sentences under traditional tests and provisions.

In 2011, a provision unique to NSW,<sup>29</sup> s 19B(1), was inserted into the CA,<sup>30</sup> mandating life sentences for the murder of police officers in certain circumstances. The provision would appear to unduly favour police victims, or unduly burden offenders, because:

- police victims are already protected in s 21A(2)(a), CSPA;

- there is no apparent need for reform;
- any deterrent value of the provision is doubtful;<sup>31</sup>
- there is a social cost in the unnecessary, preferential treatment for certain victims.

Cowdery QC writes that it would be rare for any case to enliven s 19B(1), thus the provision may not be overly significant.<sup>32</sup> If it did apply, however, there would be no offer of a guilty plea, which would prolong anxiety for victims' families and for others.<sup>33</sup>

There has been more recent action. In 2014, a new offence of assault causing death when intoxicated (minimum eight years) was implemented.<sup>34</sup> The government also proposed mandatory laws for violent assault offences where the offender is intoxicated by drugs and/or alcohol.<sup>35</sup>

The injustices of mandatory sentencing have been highlighted in people smuggling cases. In *Ambo*,<sup>36</sup> an Indonesian offender was sentenced to three years imprisonment in NSW under the Migration Act,<sup>37</sup> for facilitating the bringing to Australia of 53 non-citizens. The passengers had each paid boarding fees of A\$8,000–10,000 over a long journey. Knox SC DCJ lamented the requirement to order a non-parole period of three years<sup>38</sup> for a mere 'facilitator' who was only active at the journey's end, and whose circumstances included being illiterate, poor and paid a 'pittance' (A\$217), and being as desperate as the people he transported.<sup>39</sup>

## Structuring discretion

### Guideline judgments

Guideline judgments have been one method to achieve greater consistency and transparency, with certain success.<sup>40</sup> They were developed when it was possible that the NSW Parliament would adopt statutory methods to respond to community expectations of increased penalties, which may have been unpalatable for judges.<sup>41</sup>

The scheme commenced in *Juriscic*<sup>42</sup> (dangerous driving case) in 1998 by the NSWCCA of its own motion, following precedent in England and Wales. Spigelman CJ considered that guideline judgments strike a preferable balance between individual justice and consistency.<sup>43</sup> The scheme was later reinforced by supportive legislation enabling the attorney general to apply for a judgement.<sup>44</sup> The second reading Speech emphasised, *inter alia*, the encouragement of upward trends in sentencing as an aim of the regime.<sup>45</sup>

A sentencing judge must take a guideline into account as

a check, indicator or guide - not as a rule or presumption<sup>46</sup> - with a requirement to address the guideline and articulate reasons for its applicability or inapplicability in a given case.<sup>47</sup> Guideline judgments tend to be 'numerical',<sup>48</sup> stating a range of appropriate sentences, or 'qualitative',<sup>49</sup> defining relevant factors to be taken into account.

Guideline judgments remain somewhat controversial.<sup>50</sup> Some High Court members view them as an intrusion into judicial discretion,<sup>51</sup> and concerns include a risk of uncritical adherence by judges and a difficulty of reconciling guidelines with common law and other statutory requirements. At least four other states have the power to issue guideline judgments yet only NSW courts appear to have done so.<sup>52</sup> Judgments have now been issued in various areas.<sup>53</sup>

In 2013 the LRC praised the utility of guideline judgments as follows:

guideline judgments have proved valuable in encouraging greater consistency in sentencing, in correcting inappropriate levels of sentencing and in giving guidance to courts, both in providing numerical ranges and in stating overarching principles.<sup>54</sup>

Empirical evidence suggests that guideline judgments are achieving their purpose. The Judicial Commission's research into three judgments reveals the following improvements in consistency:

- *Dangerous driving*:<sup>55</sup> full-time custodial sentences increased from 49.47 per cent to 67.94 per cent.
- *Armed robbery*:<sup>56</sup> reduction in systemic excessive leniency and inconsistency in sentencing.
- *High range PCA*:<sup>57</sup> reduction in use of s10 non-conviction orders and corresponding increase in offenders who were disqualified from driving receiving longer disqualification periods; substantial decrease in use of penalties less severe than a community service order, particularly fines.<sup>58</sup>

Evidently, the increase in consistency was accompanied by harsher penalties.

Alternatively (and accepting traditional links between punishment and deterrence) the scheme may be said to maintain the rule of law, enhance public confidence in criminal justice, aid deterrence by increasing the transmission of knowledge about sentencing,<sup>59</sup> and lower the number of appeals.<sup>60</sup>

There are more specific benefits. The *Thompson* guideline, for example, which gives offenders pleading guilty a sentence discount of up to 25 per cent, is an identifiable parameter



which Justice McClellan states has had 'enormous benefit for the administration of criminal justice,'<sup>61</sup> particularly with respect to murder cases in the Supreme Court given the length of those trials.<sup>62</sup> In addition, the value of guideline judgments may be evident when comparing the difficulties of identifying appropriate penalty ranges in Commonwealth matters, in which no guideline judgments exist.<sup>63</sup>

In 2008 Spigelman CJ noted that guidelines ceased to grow because of SNPPs, covering virtually all offences that were capable of being subject to guidelines.<sup>64</sup> However in 2013 the LRC has indicated a desire to broaden guideline judgments and to expand the Sentencing Council's involvement in the process,<sup>65</sup> increasing the type of information that the NSWCCA should consider by including victim impact data, offender demographics and key stakeholder views.<sup>66</sup> The LRC recognises that considerable resources are required to prepare cases in the NSWCCA, thus it is not practicable in the short term to replace the SNPP scheme.<sup>67</sup>

## SNPP regime

The SNPP regime was introduced in early 2003<sup>68</sup> to provide statutory guidance to sentencing courts for what were 24 offence categories (now 30).<sup>69</sup> The intention was to increase the applicable NPPs<sup>70</sup> and ensure greater consistency and transparency. The regime has been heavily criticised<sup>71</sup> for being arbitrary, complicated and punitive. Many consider that the regime was founded on a flawed premise that the community expected higher penalties for serious crimes.<sup>72</sup> Nevertheless, the LRC sees value in the scheme's guidance and has supported its retention, conditional on certain amendments<sup>73</sup> and a review by the Sentencing Council<sup>74</sup> to clarify appropriate offences and SNPP levels.<sup>75</sup>

SNPPs are provided for designated serious offences.<sup>76</sup> SNPPs aim to reflect the 'middle of the range of objective seriousness' for each offence.<sup>77</sup> A 'middle range' reference point was a novel concept, intended to further guide judicial decision-making.<sup>78</sup>

The scheme affects the balancing act. SNPPs are *significantly* higher than previous median NPPs, generally becoming at least double the median NPPs between 1994 and 2001, and in cases of sexual offences and supplying a commercial quantity, becoming triple the size.<sup>79</sup>

Judicial Commission research from 2010 indicates that sentence levels have generally increased under the scheme, in terms of both NPPs and head sentences<sup>80</sup> (particularly violence offences). The greater the proportion of the SNPP to maximum penalty the greater sentences have increased. For aggravated

indecent assault (which has a high SNPP ratio) the increase was from 37.3 per cent to 59.3 per cent and for aggravated indecent assault to children under 10, the increase was from 57.1 per cent to 81.3 per cent. Sentences have become relatively more severe on offenders pleading not guilty.

The research also shows that the number of offenders pleading guilty under the regime increased from 78.2 per cent to 86.1 per cent, it would appear to benefit from a sentencing discount.<sup>81</sup> Such an outcome is applauded by the LRC. It remains to be seen whether this effect, and others, will taper off after *Muldrock*, which ostensibly weakened the scheme's application.<sup>82</sup>

In relation to consistency, where the scheme has not significantly affected sentencing severity, sentences appear to have become more uniform. Yet the Judicial Commission indicates that it is not possible to tell if the consistency being achieved is 'benign' consistency, that is, whether cases which are both similar and *dissimilar* are complying with the scheme in an unjust sense. The consistency often sought is *consistency in approach* rather than *consistency in outcome*, although as Spigelman CJ emphasises consistency in outcome is important in that similar cases should lead to similar results,<sup>83</sup> and this notion is inherent in the structuring of discretion which has been implemented.

The SNPP scheme has certain deficiencies. First, it is unclear how the scheme's offences were selected.<sup>84</sup> Not all serious offences are covered by the regime but these expanded to cover most serious crimes with a relatively high volume.<sup>85</sup> Secondly, numerous offences have identical maximum penalties, but with different SNPPs.<sup>86</sup> Ordinarily parliament conveys a message about the seriousness of crimes by reference to a maximum penalty. Here there is no discernible ratio for the SNPPs which range from 21.4 per cent to 80 per cent of maximum penalties, introducing 'new concepts' to sentencing.<sup>87</sup> Stakeholders criticise the lack of transparency behind the SNPPs.<sup>88</sup> Thirdly, aggravated indecent assault offence SNPPs are so close to the maximum penalty (71.4 per cent/80 per cent) so as to make the scheme's application illogical because it treats offences in the middle range of objective seriousness as close to the most serious range. These types of issues are being addressed in a review by the Sentencing Council.<sup>89</sup>

*Muldrock* has caused significant cost to NSW albeit that it has triggered a simplification of the SNPP regime.<sup>90</sup> In essence *Way* gave primary significance to a SNPP in interpreting the former CSPA provisions, asking whether an offence fell in the middle range of objective seriousness, and if it did, to inquire if matters justify a longer or shorter period<sup>91</sup> (two-staged). Instead, *Muldrock* held that the correct approach was to factor in all relevant sentencing considerations mindful of two legislative

guideposts, the maximum sentence and the SNPP. The High Court removed the mandatory element of SNPPs which *Way* considered was intended by parliament, re-emphasising the instinctive synthesis approach, with potentially positive effects for individualised justice over consistency. Various issues were left unclear after *Muldrock*, however, which were the subject of amendments in late 2013.<sup>92</sup> Confusion over *Muldrock* has caused significant cost to NSW. Legal Aid has reviewed some 3,000 cases to determine if 'Muldrock error' affected earlier sentences, and the NSWCCA has decided over 30 cases on the issue, with mixed findings.<sup>93</sup> Although the LRC sees value in retaining the scheme, for the guidance it provides to new judges and generally, the initial complicated drafting and apparently punitive intention resulted in inconsistency and major cost to state resources.

### III. DETERRENCE AND COST CONSIDERATIONS

The developments referred to above have contributed to an increase in the numbers and lengths of sentences regarding serious crime, a matter criticised by many jurists concerned about the scale and cost of incarceration in NSW, emphasising that recent changes are not justified by an increase in serious crime rates.<sup>94</sup> This criticism has substance. Between 1993 and 2007 the use of imprisonment in NSW led to a 50.3 per cent increase in the prison population, reaching peak levels in 2009.<sup>95</sup> NSW's imprisonment rate is twice that of Victoria.<sup>96</sup> Moreover, per capita crimes rates have been trending down for violent crime since 2003 and for property crime since 2001.<sup>97</sup> Changes in prison population due to SNPP increases are also relevant. An example of the increase in prison population for upward changes in the NPP of break enter and steal is provided in *Ponfield*.<sup>98</sup> Ultimately, while the media often portrays NSW Courts as increasingly lenient, the evidence suggests otherwise.<sup>99</sup> In addition, the evidence suggests that increasing the duration of prison sentences 'exerts no measurable effect at all' on crime reduction, whereas increasing the risk of arrest or the risk of imprisonment does.<sup>100</sup>

This calls into question some of the motivation for increasingly punitive laws, i.e. with respect to deterrence and leniency. In *Henry*,<sup>101</sup> Spigelman CJ did not dispute that general deterrence 'operates at the margin,' but preferred to emphasise that in increasing penalties - 'some people will be deterred.'<sup>102</sup> His Honour did not dispute that increasing the risk of detection may have a greater deterrent effect than increasing punishment. But the two concepts are related, he says, and the criminal justice system should not abandon the proposition that 'punishment deters and, within limits of tolerance, increased punishment has a corresponding effect by way of deterrence.'<sup>103</sup> Spigelman

CJ also highlights that just because allegations of systematic leniency in sentencing are often not well-informed, that does not mean that there are occasions when the criticism is well-informed, as the NSWCCA detected in *Jurisc* and *Henry*.<sup>104</sup>

Minds will differ as to whether harsher custodial penalties really address the fears and concerns of the community. The evidence shows it is difficult to gauge informed public opinion.<sup>105</sup> Bathurst CJ refers to considerations which can leave the general community with the misperception that the legal community is soft on crime, but, he states, when the community is properly informed people mostly think that criminal judges make good decisions.<sup>106</sup> Jury surveys confirm this broad notion.<sup>107</sup>

The costs for an accused and NSW are substantial if the courts are striking the wrong balance between deterrence/retribution and rehabilitation. In 2012, the daily cost to NSW per prison offender per day was \$293, more than 10 times the costs per offender of supervised community-based sentences.<sup>108</sup> The social costs of an increasingly punitive society are also important.

Guideline judgments and SNPPs tend to be targeted at offences which are usually dealt with in higher courts.<sup>109</sup> In *Attorney-General's Application No 2*<sup>110</sup> the NSWCCA declined to make a guideline judgment in respect of assault police,<sup>111</sup> referring to the court's lack of direct experience of sentencing the offence and the low rate of Crown appeals against sentence.<sup>112</sup> Similarly the SNPP scheme does not apply to offences dealt with summarily.<sup>113</sup> Relevantly, while NSW has moved towards imposing harsher penalties at the higher end of sentencing, there is also an increased use of non-conviction orders at the lower end and a shift towards improving prison alternatives to facilitate rehabilitation and reduce the risk of harm to the community. This is important because recidivism rates in all courts are significant,<sup>114</sup> and imprisonment may increase recidivism.<sup>115</sup> Targeting recidivism will reduce costs,<sup>116</sup> which the LRC recognises in its reports. A key benefit of judicial guidelines over mandatory sentencing is the flexibility of the former to enable judges to serve the objective of rehabilitation, as well as deterrence and retribution.<sup>117</sup>

### IV. CONCLUSION

This paper has discussed three main facets of judicial discretion as it affects the balancing act in NSW. While a broad judicial discretion is a key starting point to striking a preferable balance, the trend is to structure discretion for the significant benefits which that affords in terms of consistency and transparency.

Mandatory regimes enable parliament to achieve a certain level of consistency, at a cost to individual justice and the rule of law,

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shifting discretion from judges. The potential consequences of such regimes include the avoidance of the provisions, undue complexity, and the imprisonment of offenders with associated societal costs.

The preferred approach in NSW appears to be to adopt guidelines/guideposts to structure discretion as appropriate, although striking an ideal balance may be complicated somewhat by, *inter alia*, the discrepancy between public perception and actual sentencing practice. Guidelines may help to bridge that gap and may continue to improve through research and tasks undertaken by relevant bodies including the Sentencing Council.

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## Endnotes

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2. *R v Jurisic* 1998 45 NSWLR 209 at 216 per Spigelman, J; *R v Whyte* (2002) 55 NSWLR 252 at 276–282, [147]–[189] per Spigelman J; Spigelman, J. 'Consistency and Sentencing', (2008) 82 ALJ 450, at 450.
3. *Lowe v The Queen* (1984) 154 CLR 606, at 610–611 per Mason CJ.
4. See Legislative Assembly, 23 October 2002 at 5813 per Mr Debus.
5. See generally Bathurst, T. Speech on 'Community participation in criminal justice', 30 January 2012, Sydney; Warner, K. 'The Role of Guideline Judgments in the Law and Order Debate in Australia.' (2003) 27 Crim LJ 8; Cowdery, N. 'Contemporary Comments: Criminal Justice in New South Wales Under the New State Government,' March 2012, *Current Issues in Criminal Justice*, Vol 23(2), 447–457, at 449; Yehia, D. 'The New South Wales Public Defenders,' Winter 2011 *Bar News*, 89–94, 94.
6. Standard non-parole period (SNPP).
7. *Veen v The Queen* (No 2) (1988) 164 CLR 465, at 476 per Mason CJ, Brennan, Dawson and Toohey JJ. These are referred to as 'guideposts' to an appropriate sentence.
8. *McHugh J in Markarian v R* (2005) 228 CLR 357 [51], endorsed in *Muldrock v The Queen* [2011] HCA 39. A judge will also sometimes articulate arithmetic components of a sentencing calculation, such as for a discount for a guilty plea or for an offender's assistance to authorities: *Markarian v The Queen* [2005] 228 CLR 357, per Kirby J at [138], and at [39] per Gleeson CJ, Gummow, Hayne and Callinan JJ.
9. See *R v Jurisic* 1998 45 NSWLR 209 at 221 per Spigelman CJ; *Wong v The Queen* (2001) 207 CLR 584 at 591 per Gleeson CJ.
10. *R v Jurisic* 1998 45 NSWLR 209 at 221 per Spigelman CJ.
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17. Cf *Kable v Director of Public Prosecutions* (1997) 189 CLR 51. Constitutional invalidity arguments based on *Kable* have generally been unsuccessful: See e.g. *Palling v Corfield* (1970) 123 CLR 52; *Wynbyne v Marshall* [1977] 117 NTR 11; *Hinds v R* [1977] AC 195; *Gere v Director of Public Prosecutions* (1986) LRC (Crim) 3. The High Court (majority) recently confirmed the constitutional legitimacy of people smuggling provisions (*Migration Act 1958* (Cth)): *Magaming v The Queen* [2013] HCA 40.
18. See e.g. Cowdery, N. 'Mandatory Life for Cop Deaths', Winter 2011 *Bar News*, pp 43–45, at 43. Such provisions may deprive accused persons of protection from arbitrary punishment and a right to a fair trial: *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 107 per Gaudron J; *Dietrich v The Queen* (1992) 177 CLR 292.
19. *Crimes (Sentencing Procedure) Act 1999* (CSPA)
20. Gray, A and Elmore, G. 'The constitutionality of minimum mandatory sentencing regimes,' (2012) 22 JJA 37, 38. See also Martin, W. 'Sentencing Issues in People Smuggling Cases', Federal Crime and Sentencing Conference, 11 February 2012.
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22. Cowdery, N. 'Mandatory Life for Cop Deaths', Winter 2011, *Bar News*, 43–45, at 43.
23. Spigelman, Hon JJ. 'Consistency and Sentencing', (2008) 82 ALJ 450, at 454. See also Cowdery, N. 'Mandatory Life for Cop Deaths', Winter 2011 *Bar News*, pp 43–45, at 43, noting that mandatory sentencing provisions have had a 'sorry history' in NSW.
24. Referred to in Spigelman, J. 'Sentencing Guideline Judgments,' Dec 1999, ALJ, Vol 73, at 876–7.
25. *Crimes Act 1900* (CA).
26. *Crimes Amendment (Mandatory Life Sentences) Act 1996*.
27. Re-enacted as s 61 of the *Crimes (Sentencing Procedure) Act 1999*.
28. Writing in 2011, Cowdery noted that the provision had never been used in any form. Cowdery, N. 'Mandatory Life for Cop Deaths', Winter 2011 *Bar News*,

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- 43–45, at 44. Cf, *R v Dean* [2013] NSWSC 1027; *R v Marsh* [2012] NSWSC 208; *R v Walsh* [2009] NSWSC 764.
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32. Cowdery, N, 'Contemporary Comments: Criminal Justice in New South Wales Under the New State Government,' March 2012, Current Issues in Criminal Justice, vol 23(2), 447–457, at 450. Nb - at least one person has been sentenced under the provision so far: *R v Jacobs* (No 9) [2013] NSWSC 1470.
33. Cowdery, N, 'Mandatory Life for Cop Deaths', Winter 2011 *Bar News*, 43–45, at 45.
34. Inserted into CA as ss 25A(2) and 25B; see also *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (No. 2 of 2014).
35. Mandatory sentencing laws have also been raised in debates about child sex offenders and regarding 'bikie' gangs.
36. *R v Ambo* [2011] NSWDC 182 (Ambo). See also *R v Dokeng*, Supreme Court of the Northern Territory, unreported, 2 December 2010.
37. Section 233C of the *Migration Act 1958* (Cth) (Migration Act).
38. [2011] NSWDC 182 at [23]–[24], per Knox SC DCJ.
39. [2011] NSWDC 182 at [30]–[31], per Knox SC DCJ.
40. 'Sentencing Report 139' NSW Law Reform Commission, July 2013, at xxiii and Ch18, at 383 onwards. Spigelman, Hon JJ, 'Consistency and Sentencing', (2008) 82 ALJ 450, at 455; Spigelman J, 'Sentencing Guideline Judgments,' Dec 1999, ALJ Vol 73, 876. See McClellan P, 'Sentencing in the 21<sup>st</sup> Century,' Crown Prosecutors' Conference, Pokolbin, Hunter Valley, 10 April 2012, 31, at 10, fn 30
41. McClellan P, 'Sentencing in the 21<sup>st</sup> Century,' Crown Prosecutors' Conference, Pokolbin, Hunter Valley, 10 April 2012, 8; NSW Sentencing Council Report, 'How Best to Promote Consistency in Sentencing in the Local Court, June 2004, at 19.
42. *R v Jurisic* (1998) 45 NSWLR 209 (Jurisic).
43. At 220C.
44. Sections 37 and 37A, CSPA. Since 2001 the NSWCCA has had the power under the CSPA to give guideline judgments in sentence appeals for NSW offences on the application of the attorney general or of its own motion. See also Part 8, *Criminal Procedure Act 1986*.
45. The Hon Bob Debus, attorney general, Hansard, Legislative Assembly, 30 November 2001 at 9298.
46. *R v Whyte* (2002) NSWCCA 343 [113] (*Whyte*).
47. *Whyte* [73], [114].
48. See *Whyte*.
49. See *R v Ponfield* [1999] NSWCCA 435. This is suitable where there is significant diversity in the circumstances in which the offence can be committed.
50. Spigelman, Hon JJ, 'Consistency and Sentencing', (2008) 82 ALJ 450, at 455.
51. See *Wong v The Queen* (2001) 207 CLR 584.
52. See 'Sentencing, Report 139' NSW Law Reform Commission, July 2013, at 385–386.
53. Including armed robbery (*R v Henry* (1999) 46 NSWLR 346 (Henry)), breaking, entering and stealing (*R v Ponfield* (1999) 48 NSWLR 327 (Ponfield)), dangerous driving (Jurisic, reformulated in *Whyte*), driving with high range PCA (attorney general's application under s 37 of the CSPA (No 3 of 2002) (2004) 61 NSWLR 305 (A-G's Application No 3)), guilty pleas (*R v Thomson & Houlton* (2000) 49 NSWLR 383 (Thompson)) and former offences (attorney general's application under s 37 of the CSPA (No 1 of 2002) (2002) 56 NSWLR 146).
54. 'Sentencing Report 139' NSW Law Reform Commission, July 2013 at 390.
55. See *Jurisic*.
56. See *Henry*.
57. See AG's application No 3.
58. 'Sentencing Report 139' NSW Law Reform Commission, July 2013, at 384–385.
59. Spigelman J, 'Sentencing Guideline Judgments,' Dec 1999, ALJ, Vol 73 p 879–881. Henry at [204]–[211]; 'Sentencing Report 139' NSW Law Reform Commission, July 2013, at 47.
60. NSW Sentencing Council Report, 'How Best to Promote Consistency in Sentencing in the Local Court, 2004, at 36.
61. McClellan P, 'Sentencing in the 21<sup>st</sup> Century,' Crown Prosecutors' Conference, Pokolbin, Hunter Valley, 10 April 2012, at 17.
62. 'Sentencing Report 134 - Interim Report on Standard Non-parole Periods', NSW Law Reform Commission, May 2012, at 24.
63. Consider *DPP (Cth) v De La Rosa* [2010] NSWCCA 194; *Hili and Jones v The Queen* [2010] HCA 45; *R v Holland* [2011] NSWCCA 65.
64. Spigelman, Hon JJ, 'Consistency and Sentencing', (2008) 82 ALJ 450, at 455.
65. 'Sentencing Report 139' NSW Law Reform Commission, July 2013, at 389–393.
66. 'Sentencing Report 139' NSW Law Reform Commission, July 2013, at 389.
67. 'Sentencing Report 134 - Interim Report on Standard Non-parole Periods', NSW Law Reform Commission, May 2012, at 47.
68. Division 1A, Pt 4, CSPA, ss54A–54AD.
69. See NSW Sentencing Council, 'Standard Minimum Non-Parole Periods – Questions for Discussion', September 2013, at 3.
70. See Carr, R 'Premier Carr releases plan for tougher and more consistent sentences' News Release 4 Sep 2002; McClellan P, 'Sentencing in the 21<sup>st</sup> Century,' Crown Prosecutors' Conference, Pokolbin, Hunter Valley, 10 April 2012, 19.
71. See 'Sentencing Report 139,' at 180. See more generally 'Sentencing Report 134,' and NSW Sentencing Council, 'Standard Minimum Non-Parole Periods – Questions for Discussion', September 2013. See also Warner, K, 'The role of guideline judgments in the law and order debate in Australia,' (2003) 27(1) Crim LJ, at 8–22; Johnson, P, 'Reforms to New South Wales Sentencing Law: *The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, (2003) 6 TJR, at 314–351.
72. NSW Sentencing Council, 'Standard Minimum Non-Parole Periods – Questions for Discussion', September 2013, at 7.
73. See *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Bill 2013*. This clarifies matters in light of confusion caused by and the High Court ruling in *Muldrock*. The amending Bill implemented the LRC's recommendations in its Interim Report on Standard Minimum Non-Parole Periods of May 2012.
74. NSW Sentencing Council, 'Standard Minimum Non-Parole Periods – Questions for Discussion', September 2013.
75. 'Sentencing Report 139' NSW Law Reform Commission, July 2013, at 389, at 181.
76. See Table in Division 1A, Pt 4, CSPA. There are now 30 offence categories.
77. Section 54A(2), CSPA.
78. Legislative Assembly, 23 October 2002 at 5813. See also Attorney General's Application under s37 *Crimes (Sentencing Procedure) Act 1999* No 2 of 2002 [2002] NSWCCA 515 at [16].
79. Carr, R, 'Premier Carr releases plan for tougher and more consistent sentences' News Release 4 September 2002, 3–4; 'Sentencing Report 134 - Interim Report on Standard Non-parole Periods', NSW Law Reform Commission, May 2012, e.g. at 4. See Johnson, P, 'Reforms to New South Wales Sentencing Law: *The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, (2003) 6 TJR 314–351, at 331.
80. Poletti P and Donnelly H, 'The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales, Research Monograph 233, Judicial Commission of NSW, 2010, at 57. See 'Sentencing Report 139,' NSW Law Reform Commission, July 2013; see also NSW Sentencing Council, 'Standard Minimum Non-Parole Periods – Questions for Discussion', September 2013 at 4–5; Yehia, D, 'The New South Wales Public Defenders,' Winter 2011 *Bar News*, pp 89–94, at 94. 'Sentencing Report 134' p15–17.
81. Poletti P and Donnelly H, 'The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales, Research

- Monograph 233, Judicial Commission of NSW, 2010, p 19.
82. See Basten J in *R v Koloamatangi* [2011] NSWCCA 288, [18]–[19].
83. Spigelman, J. 'Reasons for Judgment and the Rule of Law', paper delivered at the National Judicial College, Beijing 10 November 2003, and The Judge's Training Institute, Shanghai, 17 November 2003 <www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman\_031110> at 1.
84. See 'Sentencing Report 139' NSW Law Reform Commission, July 2013 at 180; 'Sentencing Report 134 - Interim Report on Standard Non-parole Periods', NSW Law Reform Commission, May 2012, [2.87]–[2.110].
85. 'Sentencing Report 134 - Interim Report on Standard Non-parole Periods', NSW Law Reform Commission, May 2012, at 6.
86. E.g.: offences carrying a maximum of 25 years imprisonment have SNPPs ranging from 7–15 years. That is, Items 4, 11 and 13 (7 years), Items 2 and 3 (10 years), Item 10 (15 years).
87. See Johnson, P. 'Reforms to New South Wales Sentencing Law: The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, (2003) 6 TJR, 314–351 at 335.
88. See 'Sentencing Report 139' NSW Law Reform Commission, July 2013 at 180; 'Sentencing Report 134 - Interim Report on Standard Non-parole Periods', NSW Law Reform Commission, May 2012, at [2.5], [2.34]. The Second Reading Speech said that the SNPPs took into account matters such as the offence's maximum penalty, sentencing trends, and community expectations that appropriate penalties will be imposed.
89. See NSW Sentencing Council, 'Standard Minimum Non-Parole Periods – Questions for Discussion', September 2013. According to its website the Sentencing Council has submitted a report to the A-G which will be released once it is approved.
90. *Muldock v The Queen* (2011) 24 CLR 120, [26].
91. *R v Way* (2004) 60 NSWLR 168, [117]–[119].
92. For instance, whether a sentencing judge may classify an offence by reference to a certain range of objective seriousness, and the relevance of matters personal to an offender as they relate to the objective seriousness of an offence. See *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Bill 2013*.
93. McClellan P, 'Sentencing in the 21<sup>st</sup> Century,' Crown Prosecutors' Conference, Pokolbin, Hunter Valley, 10 April 2012, at 23. For a sense of the number of cases see: 'Sentencing Report 139' NSW Law Reform Commission, July 2013, 179; Hulme, R. 'After Muldock: Sentencing for Standard Non-parole period offences in NSW,' April 2013, Law Society Journal, 56–59, 57. Sentencing Report 134 - Interim Report on Standard Non-parole Periods', NSW Law Reform Commission, May 2012, at 19.
94. Cowdery, N. 'Contemporary Comments: Criminal Justice in New South Wales Under the New State Government,' March 2012, *Current Issues in Criminal Justice*, vol 23(2), 447–457, at 449. See also Yehia, D. 'The New South Wales Public Defenders,' Winter 2011 *Bar News*, 89–94, 94
95. 139.9 inmates per 100,000, adult population: 'Sentencing Report 134 - Interim Report on Standard Non-parole Periods', NSW Law Reform Commission, May 2012, at 3.
96. 'Sentencing – Patterns and Statistics', NSW Law Reform Commission Companion Report 139-A, July 2013, at 28; Yehia, D. 'The New South Wales Public Defenders,' Winter 2011 *Bar News*, 89–94, at 90; 'Why Does NBSW have a Higher Imprisonment Rate Than Victoria?' BOSCAR 2010.
97. 'Sentencing – Patterns and Statistics', NSW Law Reform Commission Companion Report 139-A, July 2013, 3; referring to D Goh and S Moffat, *NSW Recorded Crime Statistics 2011* (NSW Bureau of Crime Statistics and Research, 2012)
98. *Ponfield* at [33]–[36].
99. Yehia, D. 'The New South Wales Public Defenders,' Winter 2011 *Bar News*, 89–94, at 91.
100. See 'Sentencing, Report 139' NSW Law Reform Commission, July 2013, at 31, citing Wan, W, Moffatt S, Jones, C and Weatherburn, D. 'The Effect of Arrest and Imprisonment on Crime,' *Crime and Justice Bulletin* No 158 (NSW Bureau of Crime Statistics and Research, 2012), 15–16.
101. See [204]–[211]; see also *Jurisc*.
102. *Henry* [205].
103. *Henry* [208]. See also *Jurisc*, at 221E–F.
104. Spigelman, J. 'Sentencing Guideline Judgments,' Dec 1999, ALJ, Vol 73, at 879–880.
105. NSW Sentencing Council, 'Standard Minimum Non-Parole Periods – Questions for Discussion', September 2013, 6.
106. Bathurst, T. Speech on 'Community participation in criminal justice', 30 January 2012, Sydney, at 3.
107. 'Public judgment on sentencing: Final Results from the Tasmanian Jury Sentencing Study,' Warner et al Australian Institute of Criminology, No 407, February 2011; Yehia, D. 'The New South Wales Public Defenders,' Winter 2011 *Bar News* pp 89–94, at 94.
108. 'Sentencing – Patterns and Statistics', NSW Law Reform Commission Companion Report 139-A, July 2013, at 3.
109. NSW Sentencing Council Report, 'How Best to Promote Consistency in Sentencing in the Local Court, 2004 37.
110. Attorney General's Application under section 37 of the *Sentencing Procedure Act 1999* No 2 of 2002 [2002] NSWCCA 515.
111. Section 60(1), CA.
112. At [52]–[53].
113. Section 54D, CSPA.
114. Focusing just on higher courts, depending on the method of calculation recidivism is roughly 44 per cent to 58 per cent in the last 11–20 years. 'Sentencing – Patterns and Statistics', NSW Law Reform Commission Companion Report 139-A, July 2013, at 11–12.
115. 'Sentencing – Patterns and Statistics', NSW Law Reform Commission Companion Report 139-A, July 2013, at 46.
116. 'Sentencing – Patterns and Statistics', NSW Law Reform Commission Companion Report 139-A, July 2013, at 15.
117. *Jurisc*, at 221A per Spigelman CJ.



## Appellate review of the facts

The Hon Justice Virginia Bell delivered the Sir Maurice Byers Lecture on 20 August 2014.

It is an honour to be invited to deliver the 2014 Sir Maurice Byers Lecture. Sir Maurice was the outstanding appellate advocate of his generation. His unrivalled appellate practice was of the kind that rarely required him to trouble the court with the facts. So it may seem rather pedestrian to select the subject of 'Appellate Review of the Facts' in a lecture delivered in his honour.

When Sir Maurice reflected on the changes that he had witnessed over nearly 50 years of practice at the bar, prominent among those changes was the increase in complexity and cost of litigation. He favoured radical procedural changes to reduce delays and cost.<sup>1</sup> The Hon A M Gleeson AC QC when delivering this Lecture last year identified the abolition of most forms of civil jury trial as an obvious cause of that increase in cost and complexity.<sup>2</sup> The loss of the practical finality that accompanies the jury's verdict opened seemingly limitless opportunities for appellate challenge to the trial court's findings of fact. These remarks were not new to readers of Gleeson CJ's judgments in which his Honour on more than one occasion deprecated the view of the trial as merely the first round in the forensic contest.<sup>3</sup> They are remarks that direct attention to the principles that govern appellate review of the trial court's factual decisions.

Any system that lays claim to administering civil justice must make provision for the correction of error. Appellate review under s 75A of the *Supreme Court Act 1970* (NSW) (and the equivalent provisions in the other Australian jurisdictions<sup>4</sup>) is by way of re-hearing on law and fact. The difficulty faced by the appellate court in determining that a challenged finding of fact is a wrong finding is reflected in the principles of restraint that apply to the review of fact.

Appellate review of the kind provided in s 75A is traced to the *Judicature Acts 1873–1875* (UK). The principles applied to an appeal by way of re-hearing were stated in 1898 by Lindley MR, delivering the judgment of the Court of Appeal (Lindley MR, Rigby and Collins LJ) in *Coghlan v Cumberland*.<sup>5</sup> His Lordship's statement is in language that remains familiar. In summary, Lindley MR said that it is the duty of the appellate court: to re-hear the case; to reconsider the materials before the trial judge together with such material as the appellate court may have decided to admit; to make up its own mind, not disregarding the decision below, but carefully weighing and considering it; not to shrink from overruling the decision if it is wrong; to be sensible of the great advantage of the trial judge in seeing and hearing the witnesses and, when the decision turns on which witness is to be believed, the appellate court must be guided by the impression made on the trial judge; but

circumstances quite apart from manner and demeanour may show whether a statement is credible and may warrant the appellate court differing from the trial judge.<sup>6</sup>

The principle of restraint is not without its critics. It is argued that the statute conferring the jurisdiction to determine appeals on law and fact provides no warrant to confine review of the latter by deference to the trial judge's findings. Considerations of finality and of the capacity of well-resourced litigants to exhaust the reserves of less well-resourced opponents on this analysis are misplaced. It is an approach that invokes Lord Atkin's statement 'finality is a good thing, but justice is a better'<sup>7</sup>. That pithy statement was made in the context of determining the appeals of a number of men who had been convicted of murder and sentenced to death following a trial at which a juror did not understand English, which was the language in which the trial had been conducted. The demands of justice were not difficult to identify in that case.

The demands of justice may take on a different complexion when considering appellate review of an action that has been determined following a fair trial at which the parties have had a full opportunity to present their respective cases and in which the trial judge has decided disputed questions of fact in a reasoned judgment that is not evidently attended by error.

Sir Thomas Bingham, writing extra-curially in the mid-1980s at a time when he was master of the rolls, suggested that a respectable rule would allow that 'every litigant should be entitled to a full contest on the facts at one level only and that the facts should be open to review thereafter only if some glaring and manifest error could be demonstrated'.<sup>8</sup> In the event, concern about the cost and complexity of civil litigation in England and Wales has led to a more radical curtailment of the right to appellate review.

It is conventional to justify the restraint applied to findings that are substantially dependent on the assessment of credibility by reference to the trial judge's advantage in having seen and heard the oral evidence. The assumption underpinning this understanding has been questioned for more than a quarter of a century in light of psychological research casting doubt on the ability to discern truthfulness from an individual's physical presentation.<sup>9</sup> Acknowledgment of the strength of this body of research has led some commentators to question the foundation for the application of differing standards of review of findings of fact.

Even if it were accepted that the trial judge enjoys no advantage in the assessment of the oral evidence, it would remain to consider whether the value of finality warrants restraint in any

event. Sir Thomas Bingham suggested that his 'respectable rule' be squarely sourced in finality and not in deference to the trial judge's supposed advantage.<sup>10</sup>

The principles stated by Lindley MR have been adopted and applied by the High Court in decisions commencing with *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 2)*.<sup>11</sup> Although, as the joint reasons in *Fox v Percy* neutrally observed, in the circumstances of particular cases the principles have been given differing emphasis.<sup>12</sup> The force of that observation is illustrated by the separate reasons of McHugh and Callinan JJ in *Fox v Percy*.

In that case, it will be recalled, the New South Wales Court of Appeal overturned Herron DCJ's finding, based upon his acceptance of the evidence of Ms Fox and her witness, that Ms Percy's car was on her incorrect side of the road at the point of the collision.<sup>13</sup> The court did so because skid marks on the road (about which there was no contest) incontrovertibly established the contrary.<sup>14</sup> The fact that 11 years after the collision the High Court should have been poring over the evidence of the skid marks, in Professor Luntz's view, is a 'disgrace' to the administration of justice.<sup>15</sup> This is because, in Professor Luntz's analysis, intermediate appellate courts should not be subject to any principle of restraint in reviewing the trial court's factual findings.<sup>16</sup> Trial judges in his view are as likely to get the facts wrong as the law and restraint may occasion practical injustice.

Professor Luntz is not alone among distinguished commentators in considering that appellate courts should unshackle themselves from the restraints conventionally accepted as arising from the trial judge's advantage in seeing and hearing the evidence.<sup>17</sup> In an account of the work of the English Court of Appeal, Professor Drewry, Sir Louis Blom-Cooper QC and Charles Blake argue that the deference accorded the decision of the lower court's credibility-based findings should be understood as the product of Victorian cases decided before the invention of photocopying, word-processing and tape-recording. In the context of modern litigation, in which much evidence is documentary, they suggest that this long line of authority is in need of re-examination.<sup>18</sup>

Some colour is lent to Professor Luntz's criticism of the grant of leave in *Fox v Percy* by the circumstance that, on the hearing of the appeal, there was no challenge to the principles enunciated in the Victorian cases and affirmed in the trilogy of decisions culminating in *Devries v Australian National Railways Commission*.<sup>19</sup> The High Court was unanimous in upholding the decision of the Court of Appeal given that no deference to

Herron DCJ's assessment of credibility could stand in the way of the skid marks.

Justice Callinan, while content to decide the appeal in the way it had been argued, took the opportunity to state his view that *Devries* imposes an 'emphatically high test' that pays insufficient regard to the jurisdiction conferred by s 75A<sup>20</sup>. The same view had been earlier expressed by Kirby J in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)*.<sup>21</sup> Justice Kirby considered Lindley MR's statement of the principles as reflective of nineteenth century judicial disdain for the messy business of fact-finding.<sup>22</sup> He was particularly critical of Lord Sumner's restatement of the principles for introducing the concept of the 'palpable misuse of the trial judge's advantage'<sup>23</sup> into the discourse. The phrase, redolent of judicial misconduct, Kirby J saw as imposing an unduly demanding requirement for the demonstration of error; a requirement not justified by the text of s 75A or the concept of 'appeal' itself.<sup>24</sup>

The belief in the oracular power of the judge to divine the truth has been out of vogue for as long as I have been a judge. In my experience, trial judges are alive to the importance of contemporary materials and are inclined to weigh the probabilities in light of those materials. Nonetheless, it still occurs that in some cases disputed facts fall to be resolved by the acceptance or rejection of oral evidence. In these cases, is the appellate court right to continue to be guided by the impression made on the judge who saw and heard the evidence?

The Hon David Ipp AO QC has argued that the principle of restraint should be relaxed: appellate courts should regard demeanour-based findings, which are contrary to the probabilities, as raising appellable error absent adequate reasons for them.<sup>25</sup> Such a rule, he suggests, would enhance the administration of justice by setting aside the 'virtually untrammelled power of trial judges' to make what amount to final decisions based on the judge's assessment of the witness' physical reactions in testifying.<sup>26</sup> The restraint currently applied is, in his view, 'an anachronism in a system of justice that prides itself on objectivity and rationality'.<sup>27</sup>

This view finds support in Callinan J's analysis in *Fox v Percy*. His Honour observed that few decisions can be said truly to turn on a mere 'gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence'.<sup>28</sup> No doubt most trial judges would agree that it is a rare case that turns on a mere gesture. But many might acknowledge that the impression formed by seeing and hearing the evidence plays an important part in the determination of some disputed questions of fact. David Ipp says that in his experience a judge 'cannot help but develop antennae sensitive to *deliberate* untruths'.<sup>29</sup> The

psychologists may tell us that this puts it too high. It remains that a judge, alive to his or her limitations in ascertaining truth, may nonetheless assess that no reliance could fairly be placed on a witness's account of events.

An impression that testimony is unworthy of belief will almost certainly be the subject of an express finding. However, not every impression formed by the trial judge in the course of seeing and hearing the evidence will form part of the reasons. Lord Hoffmann made the point in *Biogen Inc v Medeva plc*<sup>30</sup>:

The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.

The trial judge's conclusion as to the reliability of oral evidence based on his or her impression of the witnesses, may not be failsafe but it may not be irrational to prefer it to a conclusion based on an assessment of the probabilities disclosed in the record of the trial.

Mr Diprose's claim in equity to set aside his gift of the Tranmere property to Ms Louth succeeded notwithstanding that King CJ, the trial judge, rejected a critical aspect of Mr Diprose's evidence. Important to King CJ's conclusion, that Mr Diprose was subject to Ms Louth's influence, was his impression of Mr Diprose as a 'strange romantic character'.<sup>31</sup> In the full court, Matheson J in dissent, considered that he was in as good a position as King CJ to draw inferences from the undisputed facts and that King CJ had wrongly concluded that Mr Diprose had been emotionally dependent on Ms Louth.<sup>32</sup> If one puts aside King CJ's impression of Mr Diprose's strange romantic character, it is easy to see the force of Matheson J's assessment of the probabilities. Mr Diprose was a 48 year-old solicitor of some years' standing. Applying the 'Ipp rule', King CJ's conclusion, that Mr Diprose's professional qualifications and experience counted for nothing when he made the gift<sup>33</sup>, was against the probabilities and for that reason indicative of error. King CJ's assessment of Mr Diprose's character would not constitute an adequate reason supporting acceptance of his conclusion, since to find that it was sufficient would be to restore the trial judge's 'untrammelled power', which it is the purpose of the rule to remove.

Adoption of the 'Ipp rule' would provide a stimulus to appellate activity. Whether that activity would result in superior decisions is another matter. Chief Justice King's estimate of Mr Diprose's character may have been wrong. However, it is not self-evident that Matheson J's assessment based on the probabilities, without the benefit of seeing Mr Diprose and Ms Louth, should be thought more likely to be right.

In the High Court in *Louth v Diprose*, Dawson, Gaudron and McHugh JJ observed in their joint reasons that King CJ's finding turned not so much on the assessment of credibility as on the assessment of character.<sup>34</sup> Their Honours said that it is precisely because different people may come to different conclusions as to character, credit and disputed matters of fact that findings as to those matters are entrusted to the trial judge in accordance with rules that guarantee a considerable measure of finality.<sup>35</sup> It is a statement that recognises the element of judgment that is inherent in much fact-finding.

Courts find historical fact by acceptance that a disputed event occurred if the occurrence of the event is more probable than not. In theory, it may be said that there is a correct answer to the question of whether a fact has been proved. Fact-finding, however, is not a science and in the resolution of conflicting evidence there may be scope for legitimate differences of view about what facts have been proved.<sup>36</sup> Findings that are substantially dependent upon the assessment of the credibility of the witnesses are no longer, if they ever were, immunised from appellate challenge.<sup>37</sup> Nonetheless, the restraint applied before overturning them has not been shown to be misplaced either by the results of psychological research or today's enhanced means of recording evidence. The measure of finality to which Dawson, Gaudron and McHugh JJ adverted is not inconsistent with doing justice to the parties.

The duration and cost of litigation were the drivers behind the Woolf reforms in England and Wales.<sup>38</sup> The need for certainty, reasonable expense and proportionality are said to have informed the introduction of the requirement of permission to appeal to the Court of Appeal.<sup>39</sup> The decision of the 'appeal court', whether a circuit judge or a High Court judge, is in most cases now final.<sup>40</sup> It is no longer possible to pursue an appeal to the Court of Appeal because the appeal is 'properly arguable' or has a 'real prospect of success'.<sup>41</sup> Where permission to appeal is granted the court must make its own assessment of the inferences. However, where an inference involves an element of judgment, the court will not interfere unless it is satisfied that the trial judge's conclusion lay outside the bounds within which reasonable disagreement is possible.<sup>42</sup> A more



demanding standard, akin to that adopted in the United States and Canada, applies to the determination of Scottish appeals.<sup>43</sup>

The Federal Rules of Civil Procedure, which govern appellate review of facts in federal courts in the United States, provide that findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous.<sup>44</sup> A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.<sup>45</sup> The Supreme Court of the United States has rejected the division of facts into categories and, in particular, the division of findings into those dealing with 'ultimate' as distinct from 'subsidiary' facts.<sup>46</sup> This reflects the text of the rule and is not a rejection of the soundness of the distinction.<sup>47</sup>

The stringency of the rule is illustrated by the statement of the Supreme Court of the United States in *Anderson v City of Bessemer City, NC*<sup>48</sup>:

If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.

White J, delivering the opinion of the court, explained that the rationale for restraint is not limited to the trial judge's superior position in the determination of credibility. His Honour said<sup>49</sup>:

The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one: requiring them to persuade three more judges at the appellate level is requiring too much.

Similar observations were approved by the majority of the Supreme Court of Canada in *Housen v Rural Municipality of Shellbrook*<sup>50</sup>:

The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.

The standard of 'palpable and overriding error' is applied to appellate review of fact in Canada.<sup>51</sup> It is a standard that applies to all findings regardless of whether the finding depends upon the assessment of credibility, whether it is of primary or inferred fact or a global assessment of the evidence.<sup>52</sup> A conclusion that the judgment below contains 'palpable and overriding error' it would seem might equally be expressed by a finding that it is 'clearly wrong'.<sup>53</sup> Either formulation expresses the same idea, which is that the appellate court will not interfere with the trial judge's factual findings unless it can plainly identify the imputed error and that error is shown to have affected the result.<sup>54</sup>

In the leading Canadian decision on the topic, *HL v Attorney General of Canada*, Fish J, giving the majority reasons, cited with approval Professor Zuckerman's summary of the principles<sup>55</sup>:

[I]f the appeal court cannot conclude that the lower court's inference from the primary facts was wrong, in the sense that it fell outside the range of inferences that a reasonable court could make, the appeal court should allow the lower court's decision to stand. The nature of the appellate evaluation of the lower court's decision will vary in accordance with the type of judgment that the lower court was called upon to make. But whatever the nature of the issues and however wide or narrow is the room for disagreement, the test remains the same: was the lower court's decision wrong. ...

A decision will be wrong if ... it was based on a plainly erroneous factual conclusion. ... Put another way, as long as the lower court's conclusions represent a reasonable inference from the facts, the appeal court must not interfere with its decision.

The Canadian approach treating all findings of fact as subject to the same degree of restraint is one justified by finality expressed more particularly as the need to limit the cost of litigation and to value the autonomy of the trial process.<sup>56</sup>

The Canadian and American standards of fact review are reminiscent of the standard proposed by Barwick CJ and Windeyer J in decisions that culminated in *Edwards v Noble*.<sup>57</sup> In short, it was Barwick CJ's view that, even in cases in which the trial judge's finding did not depend upon the credibility of witnesses, that finding should only be disturbed if the appellate court was satisfied that it was wrong; even if the appellate court would have drawn a different inference, were it trying the matter itself, it should not overturn the inference drawn by the trial judge absent clear error.<sup>58</sup> In *Da Costa v Cockburn Salvage and Trading Pty Ltd*, Windeyer J proposed that the decision of the trial judge on the question of negligence should be treated by the appellate court as the equivalent of the verdict of the

jury.<sup>59</sup> These views were controversial at the time. Hutley JA in an article published in the *Sydney Law Review* did not take a backward step: the Barwick/Windeyer test for appellate review was an aberration.<sup>60</sup>

*Warren v Coombes* settled the controversy by affirming the principles stated in *Coghlan* and in the many of decisions of the High Court that had adopted and applied them.<sup>61</sup> The joint reasons encapsulated the principles as they apply to the review of inferential findings, stating<sup>62</sup>:

In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it.

*Warren v Coombes* affirmed that it is the duty of the appellate court to form an independent judgment about the proper inferences to be drawn from established facts.<sup>63</sup> Given this obligation, a question arises as to the content of the respect and weight that is to be given to the conclusions of the trial judge. Some have dismissed it as little more than politesse.<sup>64</sup>

However, there is no reason to conclude from the joint reasons of Gibbs ACJ, Jacobs and Murphy JJ in *Warren v Coombes* that the injunction to give respect and weight to the conclusions of the trial judge is to be understood as an empty gesture. Before his appointment to the High Court, Jacobs J when president of the New South Wales Court of Appeal, declined to follow the Barwick CJ/Windeyer J approach to review of the conclusion of negligence in *Cashman v Kinnear*.<sup>65</sup> His Honour expressed a preference for the views of Walsh J in *Edwards v Noble*.<sup>66</sup> His analysis of the approach to review of the conclusion of negligence is extracted with approval in the joint reasons in *Warren v Coombes*.<sup>67</sup> Relevantly, his Honour's reasoning was as follows. Even though a finding of negligence is open on the evidence, the question remains whether the conclusion, that there was negligence, is right or wrong. It is at this initial stage that the appellate court applies restraint, according 'great weight' to the trial judge's conclusion in deciding whether it should come to a different conclusion. If, notwithstanding that consideration, the appellate court determines that the trial judge's conclusion is wrong, there is no question of further restraint; the court must give effect to its determination.<sup>68</sup> His Honour explained the difficulty of characterising the trial judge's conclusion of negligence as a 'wrong' conclusion in this way<sup>69</sup>:

If the appellate mind ultimately takes a different view of the conclusion, then, for the purposes of the litigation, that conclusion is right and the conclusion of the court below is wrong. In turn a higher appellate tribunal may find the conclusion of the intermediate court of appeal

wrong, so that the conclusion of the trial judge is right in that litigation. But only in the limited sense to which I have referred are any of the judges at any level absolutely right or absolutely wrong in their conclusion, because ex hypothesi the question is one on which judicial minds may properly differ.

Jacobs P equated restraint at the initial stage of the appellate court's consideration with a lack of overweening certainty in one's opinions.<sup>70</sup> Kathryn Griffith, in her account of the work of Judge Learned Hand, tells us that he believed man's happiness was dependent upon his ability to overcome the natural instinct to suppress all ideas and opinions that differ from his own.<sup>71</sup> At each level of the appellate hierarchy the exercise of restraint in the manner suggested by Jacobs P may serve as a brake on that tendency.

In their monograph on the English Court of Appeal, Drewry, Blom-Cooper and Blake distinguish the review and the supervisory functions of appellate courts, the former function being concerned to rectify error in the instant case and the latter function with the maintenance of 'systemic quality control' in the administration of justice.<sup>72</sup> It is a useful analysis. Many of the cases that consider the principles to be applied in the review of inferential findings have been concerned with the correctness of the ultimate inference of negligence or no negligence. The requirement of reasonable care is a matter about which reasonable minds may differ. Nonetheless the administration of civil justice requires that like cases are treated alike. The appellate court's determination of the correctness of the conclusion of negligence properly takes into account the need for consistency and predictability in the determination of claims.<sup>73</sup> In this respect, paraphrasing the statement of Lord Somervell of Harrow, extracted in the joint reasons in *Warren v Coombes*, the appellate court must be free to consider whether the trial judge has applied the standard of the reasonable man or that of a man of exceptional care and prescience.<sup>74</sup>

In a review of the decisions of the High Court in negligence in the years to 2003, Professor Luntz detected a shift from decisions that were pro-plaintiff to decisions that were pro-defendant. He was critical of that trend. An alternative view, acknowledging the existence of the trend, is that over the course of the preceding three decades Australian courts had drawn the inference of negligence too readily with the consequence that parliaments in all the jurisdictions had been moved to legislate to address the 'insurance crisis'.<sup>75</sup> With hindsight, it may have been preferable had the pro-plaintiff trend been arrested rather earlier.

Professor Luntz's criticisms were largely directed to the role of

the High Court in the conduct of a second tier review of the facts in negligence cases. The correct application of principle to findings that support the ultimate conclusion, that a defendant was or was not negligent, may be controversial. Recognition of this difficulty explains the characterisation of the conclusion of negligence in Canada as a question of mixed law and fact and causation.<sup>76</sup> Whether the High Court was being invited to conduct a second tier review of fact, or to correct a wrong application of legal principle, was one question on which opinion was divided in *Roads and Traffic Authority of NSW v Dederer*.<sup>77</sup> Another question on which opinion was divided in that case was whether the 'concurrent findings principle'<sup>78</sup> is sound. Acceptance of that principle places the obligation of ensuring consistency squarely on the intermediate appellate court. That this is the proper function of the intermediate court might be thought to follow in any event having regard to the volume of appeals with which intermediate courts deal.

Gleeson CJ adhered in *Dederer* to his view that it is not the function of the High Court to give a well-resourced litigant a third opportunity to persuade a tribunal to take a view of the facts favourable to that litigant.<sup>79</sup> Kirby, Callinan and Heydon JJ all doubted the existence of the principle although there were differences of emphasis in the approach of each. Kirby J agreed with Heydon J's reasons respecting the jurisdiction and power of the High Court to give effect to contrary factual conclusions notwithstanding concurrent findings below.<sup>80</sup> Nonetheless, in light of the functions of a final court, Kirby J considered 'a clear case of error is needed for interference in concurrent findings of fact'.<sup>81</sup> His Honour's customary careful review of the advantages and disadvantages of the policy informing the concurrent findings principle included a salutary reason for caution on the part of the final appellate court: the absence of provision for further appeal in the event that errors of fact are revealed for the first time in the final court's reasons for judgment.<sup>82</sup>

Callinan J took issue with the thinking that links finality with equality before the law. In his Honour's analysis, the duty of the appellate court is not to deny any litigant, whether rich or poor, the recourse to the court that the Constitution and the relevant legislation say the litigant should have.<sup>83</sup> As neither the Constitution nor the Judiciary Act distinguish between questions of fact and law in appeals to the High Court, his Honour favoured the view that an error of fact is just as amenable to correction by the High Court as an error of law.<sup>84</sup> His Honour observed that an error of fact is as capable of causing an injustice whether it is characterised as 'plain', 'manifest' or 'gross'.<sup>85</sup>

The association between finality and equality before the law was made by Deane J in *Waltons Stores (Interstate) Ltd v Maher*<sup>86</sup>, in which his Honour observed:

In a context where the cost of litigation has gone a long way towards effectively denying access to the courts to the ordinary citizen who lacks access to government or corporate funding, it is in the overall interests of the administration of justice and of the preservation of at least some vestige of practical equality before the law that, in the absence of special circumstances, there should be an end to the litigation of an issue of fact at least when the stage is reached that one party has succeeded upon it both on the hearing before the court of first instance and on a rehearing before the court of first appeal.

Deane J reiterated these views in *Louth v Diprose* and he identified three propositions embodied in the concurrent findings principle: the principle applies to findings of primary fact and inferences drawn from those facts<sup>87</sup>; the principle applies regardless of whether the conclusions are based on different reasoning<sup>88</sup>; and the principle applies regardless of whether there has been a dissentient in the first appellate court.<sup>89</sup>

Heydon J was critical of the two last-mentioned propositions in his discussion of the concurrent findings principle in *Dederer*. His Honour pointed out that a difference in reasoning supporting an inference is apt to undermine any assumption as to its correctness. And he queried why the principle should apply in a case in which the dissentient judge sits in the intermediate appellate court and not where the dissentient was the trial judge. The likelihood that the judges below have reached a correct conclusion is greater where they are unanimous and reduced if there is a dissentient. The interests of the administration of justice, in his Honour's analysis, are that judges reach correct conclusions and if their conclusions are wrong that they are corrected on appeal.

Concurrent findings of fact that are plainly wrong may justify the grant of special leave having regard to the interests of justice in the particular case.<sup>90</sup> Absent demonstrable error of that kind, consideration of a litigant's entitlement to have the High Court pass on the correctness of fact-finding below may rather overstate matters.

The duty of finding the facts is conferred on the trial judge under a hierarchical system that provides for appellate review. The concept of 'appeal' including by way of re-hearing is of a procedure that is concerned with the correction of error.<sup>91</sup> The intermediate appellate court when reviewing challenged conclusions of fact is required to give respect and weight to the

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conclusions of the trial judge. That process, where it results in a majority of the appellate court agreeing with the trial judge's conclusion, is to be distinguished from the outcome of the same process where the appellate judges agree that the trial judge's conclusion is wrong. That is so notwithstanding that in each case only three of four judges were agreed in the conclusion.

In the context of appellate review of fact, the concept of justice to the litigants has more than one dimension. Some members of this audience might consider there is force to Thomas J's observation that<sup>92</sup>:

Most experienced counsel will on one or more occasions have endured the experience of having had an appellate Court 'remake' the facts of the case on appeal and felt distinctly uncomfortable at the outcome, a discomfiture which may be shared with the parties. Such a reformation of the facts on appeal can lead to an inherently unfair situation in that ... there is no effective appeal on any point of law based on the 'new' version of the facts as found by the appellate Court.

Consistency and predictability of decisions are important values in the administration of civil justice. Those values may be promoted, as *Warren v Coombes* explains, by the appellate court taking no narrow view of its function in correcting a conclusion that a defendant was or was not negligent.<sup>93</sup> In other contexts they are values that are served by appellate courts at each level of the hierarchy paying appropriate respect to the findings below. Litigants and their advisers should not be encouraged to view the trial as a preliminary round with the prospect of successfully recrafting the case on appeal.

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## The Barwick approach

The fifth annual Sir Garfield Barwick Address was delivered by the Hon Murray Gleeson AC QC on 20 August 2014.\*

It is now just on six years since I ceased to be chief justice of Australia, but when Sir Garfield Barwick<sup>1</sup> was my age he was still vigorously discharging the responsibilities of that office. He retired at the age of 77, as had his predecessor, Sir Owen Dixon. For most of the twentieth century, Justices of the High Court of Australia were appointed for life, as federal judges in the United States, including Justices of the Supreme Court, always have been, and still are.

In 1977, the Australian Constitution was amended so as to require federal judges, including members of the High Court, to leave at the age of 70. I say 'leave' rather than 'retire' because I cannot think of anyone in the last 20 years who, upon leaving the High Court, entered into complete retirement. Sir Anthony Mason, who followed Sir Garfield's successor, Sir Harry Gibbs, as chief justice, left the High Court at 70 and, almost 20 years later, was still an active and influential participant in the work of the Hong Kong Court of Final Appeal. I am sure that most of those who have left the court since 1977 would have remained at least to the age of 75 had that been constitutionally permissible.

On balance, I support the idea of a compulsory retiring age for judges, but I think it was a mistake to fix the age of 70 in the Constitution, which is notoriously difficult to amend. It would be better left to parliament to fix by legislation, as in the Australian states. That way parliament could respond to changing demographic and social circumstances.

When the Constitution was enacted, it was normal for judges of superior courts to be appointed for life (or, more accurately, during good behavior and without any age limit). In the early part of the twentieth century, compulsory retirement for state Supreme Court judges was introduced, and, in New South Wales, the age was fixed at 70. It was related to considerations of physical and mental capacity. At that time, average life expectancy was much lower than at present, and very few people contemplated the possibility of working beyond 70. (Judges, however, included some notable examples of longevity. Sir Frank Gavan Duffy was appointed chief justice of Australia at the age of 80, and Sir George Rich was still sitting on the High Court at the age of 87). Thirty seven years on from the change to the federal Constitution, the number 70 looks slightly old-fashioned! It is already out of line with the corresponding number for many state judges. In another 37 years it is likely to appear incongruously low, at least if its rationale is still related to physical and intellectual capacity. On the other hand, if it were to be given a new rationale, such as the desirability of turnover, then perhaps it should be 60 or 65. Either way, it would have been better dealt with by being committed to legislation than

by being frozen in the Constitution. However, there it is, and as a result lawyers are becoming accustomed to the fact that there is life after retirement, even, or perhaps especially, for senior judges.

Since experience remains a quality that is very useful to a lawyer, this is of practical importance. Sir Garfield Barwick was a prime example of that quality. He was, for many years, the leader of the Australian Bar. I once read of commentary written by a law teacher who said he made his name as a leading counsel for the banks in the *Bank Nationalisation Case*<sup>2</sup>. Such an observation fails to take account of the realities of professional life. A barrister who has yet to make his or her name does not get a brief like that. He was briefed to represent the banks in their legal fight for survival because he was regarded as the best, not because he was seen as someone with promise. Briefs of that kind are not delivered as a form of encouragement. He was leading counsel for the banks because he had already made his name in the profession. After he entered federal politics, he was Commonwealth attorney-general for six years. Then he was chief justice of Australia for 17 years.

Sir Garfield had left the bar before I entered practice, but I appeared in many cases before him. One of his characteristics was the breadth of the legal knowledge and the depth of legal understanding that came from his experience; an experience that continued to accumulate throughout his long term of office. This was obvious, not only in constitutional cases, but also in civil and criminal cases of all kinds. The work of the court held no surprises for him. The scale and scope of his immense practice as an advocate equipped him well for judicial office, and he continued to build on that experience as attorney-general and chief justice.

As a presiding judge, Chief Justice Barwick engaged closely with counsel in argument. He regarded his time during a hearing as active working time, and not mere time for patient listening. He often delivered ex tempore judgments, and even where judgment was reserved he made it clear that, by the end of argument, he would have made up his mind. I am sure that, had it suited the convenience of the other members of the court and the circumstances of the case, he could have delivered his judgment immediately following argument in any case on which he sat. This was partly because of his temperament and his intellectual sharpness. Principally, however, it was because of his vast experience. As a barrister, over many years, a day in court would be followed by a succession of conferences at which he was expected to deliver, on the spot, legal advice on important and difficult matters covering the whole range of legal problems. In court, he conducted cases touching all

aspects of public and private law. He continued to build on his knowledge and expertise until his very last day on the court. His judgments were not the products of scholarly reflection upon novel issues. Rather they were the opinions of a practical lawyer who had developed, over a professional lifetime, and continued to develop, a close understanding of legal history and principle, and an intimate working knowledge of adjectival and substantive law.

This can be illustrated by reference to his judgments on some specific issues. I have selected these simply because they appear to me to reflect an approach to the law that was characteristic of Chief Justice Barwick and that reflected his professional background.

#### Contrast between Australian and United States Constitutions

Most judges regard themselves as orthodox. Beware of those who do not. An unorthodox lawyer is a contradiction in terms. The law is orthodoxy, and judges commit themselves to justice according to law, not according to their personal preferences. It is difficult to think of any form of intellectual activity in which there is a greater pressure to conform. The best evidence of this is the technique by which judges set out to justify their decisions. By the standards of most forms of intellectual endeavor, that technique is intensely conservative. The institutional pressures for conformity include the obligation to give reasons, appellate review of those reasons, the doctrine of precedent and collegiate decision making. Even so, someone who has judged at the highest level for 17 years is likely to develop certain themes, or emphasise certain ideas, often building upon views formed in earlier encounters as an advocate or a legal advisor.

There are a number of such themes that appear in the constitutional judgments of Chief Justice Barwick. I have selected one, which concerns a form of comparative jurisprudence, involving a comparison between two federal Constitutions: that of the United States and that of Australia. I will give two practical illustrations of this theme.

As a matter of history, the framers of the Australian Constitution were powerfully influenced by the model of the federal Constitution of the United States. Our doctrine of the separation of powers is based upon the form and structure of our Constitution, which the framers took in part from the United States model. At the same time, there are differences. The most obvious is that Australia is a monarchy and they are a republic. Another is that we follow the Westminster model of responsible government, whereas they have an executive that is outside, and separate from, the legislature.

In both countries, governmental functions, including legislative power, are divided between the central authority and the states, which from time to time contest the boundaries formed by that division. The term 'federal balance' is sometimes used to describe the current state of that contest. It would be better for lawyers to leave that term to the politicians. There is a risk that constitutional divisions of power, established in a very different social, economic, and international context, will be ossified. The Constitution will be regarded as an heirloom to be conserved in a sealed case and preserved from external influences. More specifically, there is a risk that the balance originally struck in the United States will be regarded as that to be maintained here, come what may.

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lawyer is a contradiction in terms.*

An early example of this approach was the view of constitutional interpretation, involving concepts of reserved state powers and immunity of instrumentalities, that prevailed in the first years of the High Court. This view was based on United States authority. It was rejected, somewhat brutally, (the term commonly used is 'exploded') in the *Engineers Case* in 1920<sup>3</sup>. In his retirement speech<sup>4</sup> Chief Justice Barwick said:

The Constitution gives the Commonwealth certain powers, legislative powers. It describes those powers briefly in words by reference to subjects. It gives to the States the residue of power after the Commonwealth power is defined and exercised. So the problem for the Court always is to decide on the extent of Commonwealth power. The Constitution decides the State power by providing for it to have the residue.

...

Earlier, the first judges thought the way to interpret the words was to say you interpret them against powers reserved to the States. But in the *Engineers Case* that was departed from and it was pointed out . . . you take the words, you decide on the Commonwealth power and you do not decide on the Commonwealth power looking over your shoulder as to what effect your decision will have on State power. The Constitution will take care of that.

In constitutional polemics a number of terms have been used to describe this approach. It is often described as centralist. I would call it unsentimental.

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In his judgment in the *Payroll Tax Case*<sup>5</sup> the chief justice explained:

The Constitution granted by the Imperial Act was 'federal', not in the sense of a union of previously existing States surrendering powers to that union but in the sense that the powers of government were distributed, some by nomination of subject matter and others as residues. Therefore analogies drawn from situations in the United States of America and from judicial conclusions and observations upon the Constitution of that country must, in my opinion, be used, if at all, only with a clear realization of the basic distinction between the constitutional position of the two countries. Thus, though by their union in one Commonwealth, the colonists became Australians, the territorial boundaries of the former colonies were retained for purposes of the distribution of governmental power and function. The constitutional arrangements of the colonies were retained by, and subject to, the Constitution as the constitutional arrangements for the government of those portions of the Commonwealth to be known as States. These, though coterminous in geographical area with the former colonies derived their existences as States from the Constitution itself: and being parts of the Commonwealth became constituent States.

The chief justice referred back to this passage in the *Concrete Pipes Case*<sup>6</sup>. Windeyer J trenchantly expressed similar views in both cases. I was one of the junior counsel for the Commonwealth in both those cases. I recall vividly the reception the court gave to a reference by a state attorney-general to 'the sovereign State of Victoria'. Before 1901 there was no State of Victoria. There was a colony of Victoria, which was manifestly not sovereign. (Unlike its American counterparts it had not fought and won a War of Independence). It became a state, upon federation, by virtue of the Commonwealth Constitution and its powers are defined by, and subject to the Constitution. No-one reading the Constitution could think those powers were sovereign. It is easy for commentators, and even some lawyers, to fall into the error warned against in the passage just quoted. It is especially easy if the language of constitutional discourse in the United States is applied uncritically to Australia. Like some other politico-legal topics, federalism has developed its own rhetoric. Some of that rhetoric is based upon an historical confusion.

A quite different area of constitutional law in which Chief Justice Barwick warned against misunderstandings based upon lack of familiarity with history concerns the matter of human rights. When Americans talk, as characters in popular entertainment often do, of their 'constitutional rights', they are almost always referring to a series of Amendments to the United States Constitution made over a lengthy period after

its adoption. These amendments covered various kinds of civil rights. In the latter part of the twentieth century, other Western nations also promulgated formal instruments declaring various human rights. The United Kingdom became party to a European instrument of that kind. That represented a major departure from the British legal tradition that applied when the Australian Constitution was framed in Australia and enacted in the United Kingdom. Now, early in the twenty-first century, many people assume that any Constitution worthy of the name must contain a comprehensive statement of human rights. They are dismayed to find how few of those there are in the Australian Constitution of 1901.

In *Attorney-General (Cth); Ex rel McKinlay*<sup>7</sup> Barwick CJ said:

37. [T]he Australian Constitution was developed not in antagonism to British methods of government but in co-operation with and, to a great extent, with the encouragement of the British government. The Constitution itself is an Act of the Imperial Parliament which, except for a significant modification of the terms of s 74, is in the terms proposed by the Australian colonists and accepted by the British Government. Because that Constitution was federal in nature, there was necessarily a distribution of governmental powers as between the Commonwealth and the constituent States with consequential limitation on the sovereignty of the Parliament and that of the legislatures of the States. All were subject to the Constitution. But otherwise there was no antipathy amongst the colonists to the notion of the sovereignty of Parliament in the scheme of governments.

38. Also it is well known that the Constitution of the United States would not have been accepted except on the footing that it would be amended to include a Bill of Rights. It is very noticeable that no Bill of Rights is attached to the Constitution of Australia and that there are few guarantees. Not only are the powers given to the Parliament plenary but there is a large number of provisions in the Constitution which leave to the Parliament the power of altering the actual constitutional provisions. In other words, unlike the case of the American Constitution, the Australian Constitution is built upon a system of confidence in a system of parliamentary Government with ministerial responsibility.

As he was pointing out, our Constitution was not the result of a war, or a revolution, or a struggle against oppression. It was drafted by people who regarded themselves as British, and admired British institutions and legal culture, which in 1901 included a preference for leaving it to parliament to define and protect human rights.<sup>8</sup>



### Title to land

One of Australia's most important, and under-rated, contributions to legal science is the system of Torrens title.

The security, transparency, and marketability of title to land are fundamental to our economy. A free and efficient market, according to the capitalist theory by which we order our economic affairs, ensures that land will be held by those best able to exploit its potential, and that in turn creates wealth. It is typical of poor societies that land is not readily transferable and remains for extended periods in the hands of people who are unable to realise its potential. The marketability of land depends upon transparency and security of title. The Torrens system, which is a legal development we have successfully exported, serves this purpose. One aspect of that system is the indefeasibility of registered title.

Chief Justice Barwick wrote some important judgments on this topic. They display a clear appreciation of the wider economic issues at stake. They also display an easy familiarity with the structure and the intricacies of the Real Property Act, which he gained as a practitioner.

A famous judgment is that in *Breskvar v Wall*<sup>9</sup> where he said:

The Torrens system of registered title of which the [Real Property] Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void.

The confidence with which a purchaser of land may deal with a registered proprietor on the faith of what appears on the register, as the chief justice well understood, depends upon the principle of indefeasibility of registered title. He went on to make an important point of policy:

'I have thus referred under the description, the Torrens system, to the various Acts of the States of the Commonwealth which provide for comparable systems of title by registration though these Acts are all not in identical terms and some do contain significant variations. It is I think a matter for regret that complete uniformity of this legislation has not been achieved, particularly as Australians now deal with each other in land transactions from State to State.'

*One of Australia's most important, and under-rated, contributions to legal science is the system of Torrens title.*

A recognition that the market for land in Australia is not subdivided by geographical boundaries corresponding with the political boundaries of the various states and Territories does not brand someone as a centralist. It may be that, for markets in some kinds of goods or services, there are compelling reasons why regulation is state-based and potentially variable. Sometimes those reasons are based upon historical consideration, the convenience of working through long-established regulatory structures, and the inconvenience of dismantling those structures. Pragmatism has a legitimate role in policy, as does a proper respect for tradition. However, Australians now expect economic policy to be managed by the central authority, and Sir Garfield Barwick was in tune with that way of thinking.

### Interpretation of commercial contracts

Australian appeals to the Privy Council, in which Sir Garfield Barwick made so much of his reputation as an advocate, and which were still an important part of the legal scene when I was at the bar, were abolished gradually and by a rather messy legislative process. The abolition was 'grandfathered', so that cases in the pipeline retained the possibility of such an appeal.

The last appeal that went from the High Court to the Privy Council was in 1980. It was from the decision of the High Court in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd*<sup>10</sup>. I was counsel for the appellant in the Privy Council. I had not appeared in the case in the High Court, which decided the case by a majority of 4 to 1. The dissenter was Barwick CJ. The Privy Council allowed the appeal and upheld the reasons in his dissenting judgment.<sup>11</sup>

The case concerned the meaning and effect of a clause, sometimes called a Himalaya clause, in a bill of lading which is, of course, an archetypal commercial contract. The bill of lading contained provisions limiting the liability of the carrier for loss of or damage to the goods the subject of the contract of carriage. The Himalaya clause was included for the commercial purpose of extending the benefit of that limitation of liability to servants and agents of the carrier. That in turn affected insurance arrangements. The servants and agents were not parties to the contract of carriage, but the clause provided that the carrier contracted as agent or trustee for their benefit. The

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effectiveness of such a clause had previously been upheld by the Privy Council in a New Zealand appeal, but the majority in the High Court distinguished that decision and adopted a different approach. It may be wondered whether they appreciated that the case, which was in reality a dispute between the insurers of the stevedores who claimed the benefit of the clause and the insurers of the consignee whose goods were stolen from the wharf, had been around for so long that an appeal to the Privy Council was, at least theoretically, available. I say theoretically because the greatest difficulty from my point of view was to persuade the Privy Council to give leave to appeal at a time when appeals from the High Court had long ceased to be available in most cases. Once having granted leave, the Privy Council had no difficulty in allowing the appeal, preferring the reasoning in the High Court dissent.

In that dissent, Barwick CJ stressed the evident commercial purpose of the Himalaya clause, and said a court should strive to give effect to that purpose rather than frustrate it. He said<sup>12</sup>:

Their Lordships' decision in [the New Zealand case] was of great moment in the commercial world and, if I may say so, an outstanding example of the ability of the law to render effective the practical expectations of those engaged in the transportation of goods. It is not a decision of its nature to be narrowly or pedantically confined.

He also said:<sup>13</sup>

It is apparent . . . that, in order to facilitate the practical course of cargo handling some arrangement for the removal of the goods from the place on the wharf where they rest after release from the ship's tackles must be made before the ship's arrival. Therefore the carrier . . . engages a stevedore to remove, sort and stack the cargo when it is free of the slings. . . . The commercial expectation is that . . . provision to cover carrier and stevedore is effected by or through the bill of lading.

The judgment is an excellent example of an approach to the interpretation of a commercial contract informed by a close understanding of the practical and commercial context. Of course, containerisation has now overtaken some of the factual background, but, in a situation where the argument is

ultimately about who is to bear the cost of insuring the goods at a certain stage after transportation but before delivery, it is the understanding and expectation of the parties as to how the goods will be handled and moved that throws light on the purpose of their contacts. The judgment is a fine working example of purposive construction of a commercial document, and the importance of both text and context. I may now be one of the few people who have read it, and I was paid to do so, but if I were a teacher of contractual interpretation I would make it compulsory reading. It is the easiest judgment I ever had to support in a court of final appeal.

### Criminal intention

Another example, in a quite different field, of the breadth of Sir Garfield Barwick's experience and knowledge, and of his sure grasp of legal principle, relates to the mental element in crime, and the requirement for criminal culpability that the act of the accused be voluntary.

The law is a normative science, which, in the field of criminal justice, imposes standards of behavior and provides sanctions for breaches of those standards. It proceeds upon an assumption that accords with, and as a matter of history is based upon, the theoretical underpinnings of our moral code. Criminal justice is not completely coextensive with morality, either in the subjects it addresses or the standards it applies, but there is a large overlap. If our criminal laws did not reasonably reflect our moral precepts they would not be acceptable to the public. Although there are philosophers and psychiatrists who would challenge this assumption, many of the basic moral precepts by which we live assume free will. That is the foundation of personal responsibility. As a practical matter, it is not easy to see how it would be possible for the law to create and apply general standards of behavior, enforced by criminal standards, without starting from the assumption that, in general, people are individually responsible for their actions because their actions are the result of personal choices. There is, however, a difference between saying an act is willed, and therefore exposes a person to criminal liability, and saying the person wanted to do the act, or desired the result it produced.

Judges who have to explain the law to juries are often confronted with situations that involve nuances as to voluntariness. In *Ryan v The Queen*<sup>14</sup>, a man accused of murder had participated in an armed hold-up at a service station. In a confrontation with the attendant his weapon discharged and killed the attendant. The man was charged with murder. Manslaughter was the possible alternative verdict. It was not the defence case that there should be a verdict of not guilty. In a statement to the police the accused said the gun went off 'accidentally'. Chief Justice Barwick said that in the circumstances that could have meant a number of different things. It might have meant simply that he intended to shoot at, but not to kill, the attendant. That would not have helped the accused (because of the concept of 'felony murder') or it might have meant that he pressed the trigger because of a reflex or convulsive movement. It could have had other shades of meaning. Describing an event as an accident often requires further explanation. The expression 'accident', the chief justice said, was 'most ambiguous'.

The importance of the judgment of Barwick CJ is in his careful examination of the various shades of meaning of the idea of a willed act in its application to a relatively common, and apparently uncomplicated, human situation, and what would now be described as the way he 'unpacked' an assertion that the death of the victim was accidental.

### Conclusion

As an advocate, Sir Garfield Barwick was a towering figure, nationally and internationally. In his 17 years as chief justice of Australia he brought the full force of his knowledge, experience and personality to his work. As the presiding judge in appeals to the High Court he was a formidable presence, often intervening in and directing the course of argument. Even in cases where he dissented, no advocate could afford to take him lightly. The other members of the court were all people with their own

opinions, and they never deferred to his views, but at the same time they were well aware of his unequalled experience and his intellectual capacity. He tended to be dismissive of arguments with which he disagreed, and there was very few, on the Bench or at the bar, who would care to engage him in a confrontation. His judgments, on a great variety of topics, are regularly cited in argument in the High Court. They appeal to practitioners more, I think, than to law teachers, partly because his eminence was squarely based on practical achievement and experience. His style is more that of an advocate than of a scholar. But it is not only a question of style. His whole approach to the solving of legal problems reflected his professional background. There is a continuity about his long career in the law which is essential to an understanding of his life's work.

### Endnotes

\* The Hon Murray Gleeson AC, chief justice of New South Wales 1988–1998, chief justice of Australia 1998–2008

1. The Rt Hon Sir Garfield Barwick AK, GCMG, attorney-general of Australia 1958–1964, chief justice of Australia 1964–1981
2. *Bank of New South Wales v Commonwealth* [1948] HCA 7; (1948) 76 CLR 1
3. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129
4. (1981) 148 CLR v
5. *Victoria v Commonwealth* [1971] HCA 16; 122 CLR 353 at [21]
6. *Strickland v Rock Concrete Pipes Pty Ltd* [1971] HCA 40; 124 CLR 468
7. [1975] NCA 53; (1975) 135 CLR at [37] to [40]
8. See *Mulholland v Australian Electoral Commission* [2004] HCA 41; 220 CLR 181; *Roach v Electoral Commissioner* [2007] HCA 43
9. (1971) 126 CLR 376 at 385
10. [1978] HCA 8; (1977) 139 CLR 231
11. (1980) 144 CLR 300
12. At [45]
13. At [51] and [52]
14. [1967] HCA 2; (1967) 121 CLR 205.

## Building a positive culture at the New South Wales Bar

Chief of the Australian Army, Lt General David Morrison, delivered the following speech at the launch of the Bar Association's Best Practice Guidelines in the Common Room on 8 August 2014.



Lt Gen David Morrison, chief of the Australian Army, addresses those gathered to launch the Best Practice Guidelines. Photo: Murray Harris Photography

It is a pleasure to be invited to address you today at the launch of the New South Wales Bar Association's Best Practice Guidelines.

There are many who shared my time as a law student in the 1970s who would find it both ironic and incongruous that I here speaking with you today. I did not complete my degree, much to the relief of my lecturers. You can be assured that while I recently had the opportunity to speak to Australia's supreme and federal court judges about the impact of legislation and judicial interpretation of Chapter III of our Constitution on the application of military justice in the ADF, I will be staying well clear of anything that pertains to the exercise of civil law in NSW, or the nation for that matter. All that said, as someone who has religiously watched every episode of *Rake*, I feel I know my audience and I am ready to contribute!

I am delighted that the NSW Bar Association is committed to creating a better workplace. In that we have much in common. The acceptance and implementation of these guidelines can only increase the efficiency and cohesiveness of that workplace,

contributing as it will to building the morale and productivity of those who work in the legal profession, most especially of course the bar.

I am in the final year as the chief of the Australian Army. It has been a challenging and at times difficult appointment. In the last three years we have completed successful military commitments to Timor Leste and the Solomons and we are now drawing down our involvement in our longest war, Afghanistan, leaving behind a legacy that I trust will endure in supporting a secure and developing nation.

Your army is also well postured for what it will possibly have to face in the future. We are very well equipped and trained, peopled as we are with some of our finest Australians.

And yet, when most of my fellow citizens think of their army, it is increasingly focused on issues around culture and behaviour. I find it somewhat surreal that for all of my 36 plus years in the army it is a three minute video, encapsulating a message to my workforce about the treatment of women that will probably be most remembered.



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So in launching the Bar Association's Best Practice Guidelines, I thought it both opportune and hopefully of some value to you, to offer a perspective about culture and its importance to not just developing a profession, like the military or like the law, but how making tangible improvements to that culture and most particularly being seen to improve it, is critical to attracting the men and women who will be that profession's future.

Now I need to offer several caveats at the outset. I am no anthropologist. I have no sociological qualifications. Indeed, as an Anglo-Saxon, heterosexual male, raised in a liberal middle class family I have never been the victim of discrimination.

Nonetheless, I have been involved, as the leader of one of our great national institutions, in trying to come to grips with what constitutes our army culture, how it sustains us in the most dire of circumstances and yet how, in the hands of some, it can be used as a tool of exclusion to destroy careers and, in some cases, lives.

There was a start point for this – a Saul on the road to Damascus revelation if you like. I was asked early in my term, by none other than Australia's sex discrimination commissioner Elizabeth Broderick, what I drew from the many recommendations made in 13 separate reviews into Defence culture in the last 15 years and to the fact that despite all of our efforts the participation rate for women in our army had never risen above 10 per cent of our total workforce.

I had no ready answer, but the fact is that there is a unifying theme to these reviews, and for women's propensity to serve in our ranks – it was that there are systemic problems with our culture that cannot be ignored - indeed must be faced if real improvement is to take place.

That realisation was not achieved with a simple shrug of the shoulders. I have been in and around the army all of my life. My father joined in 1945, and his 36 year service overlapped mine briefly. Between us we have served the nation every day for almost 70 years. I have seen soldiers meet head-on the most daunting of challenges. I have seen the deadly consequences of sacrifice made in the nation's name and I have shared the pride that comes with wearing the slouch hat and the rising sun badge.

Yet, at the same time I was not comforted by the cliché that a 'few bad apples' were undermining the great work of the vast majority. We in the ADF occupy a special constitutional role. We train for mastery of military force and are entrusted and sanctioned by the government to employ extreme violence in support of national interests.

*... I was not comforted by the cliché that a 'few bad apples' were undermining the great work of the vast majority.*

That monopoly on violence and the particular place we occupy in our national psyche, demands that we must earn and maintain a high level of trust among our community. They are entitled to expect more of us than other institutions. This places a very great burden on us, which warrants zero tolerance towards those who violate that fragile community trust.

The army is part tribe, part family, but above all it is a reflection of our society. Those who are soldiers know they are contributing to one of the big stories in Australian life. They know that every small step they take can leave a footprint in our national history. All of us carry the weight of the achievements and sacrifice of those who have gone before. Indeed, for this reason, many feel drawn to our culture and our ethos of service long before they join us.

And so in determining that I needed to take a very public stance on matters that go to the heart of how we define ourselves as an institution, I was deeply conscious that my approach must be constructive, inclusive and focused on what improved us as an army. When you speak for generations of soldiers whose dedication and sacrifice have shaped Australia, and speak to the serving soldiers of today who have shown similar commitment to the ideals of service in places like Timor, Iraq and Afghanistan, you need to be very respectful and collegiate in order to help fashion the army of tomorrow.

*I was deeply conscious that my approach must be constructive, inclusive and focused on what improved us as an army.*

Because culture counts. I have been at the forefront of leading cultural change and I think I only now understand just how much it does. It shapes our perspective of who we are: as Australians, as members of a particular profession, as supporters of a sporting team. It is often intangible: a sense of identity, a shared but often unspoken alliance with others of our group. Indeed it is so intangible at times, it defies ready definition and wilts when examined forensically. When it is made tangible it is often through totems – a badge, a slouch hat, a barristers wig, a national flag. It is bolstered by the stories we tell each other and

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herein lies culture's great strength and weakness. Let me give you an example of what I mean.

The marking of the centenary of the Great War this week and the 100th anniversary of the Gallipoli landings next year will thrust Anzac, and what it ought to mean to us, into the foreground of our public debate. That may be a very good thing. Anzac looms large in the Australian psyche. For better or worse, and in this room I suspect there may be some who incline to 'worse', the Anzac story has become one of our dominant national foundation myths.

I choose the term myth deliberately. Myths perform vital roles in communities from tribes through to nations and associations like yours here today. The best of them contain enough truth to confer longevity if not immortality on them. Likewise, the best of them are a summons to live out noble universal human values. Anzac has this potential for our army. But the mythology that is so often entrenched around professions such as yours and mine was by definition created in a different era and often under different societal norms. The hyper-reality built up around the myth can in the hands of some exact a toll of exclusion rather than inclusion.

In that regard the Anzac legend – as admirable as it is – has become something of a double-edged sword.

For the army, the most pervasive distortion about what really happened in Turkey in 1915 is that many Australians now have an idealised image of the Australian soldier as a rough hewn country lad – hair gold, skin white – a larrikin who fights best with a hangover and who never salutes officers, especially the Poms. In the Australian psyche every soldier is Mel Gibson in *Gallipoli*.

This is a pantomime caricature, and frankly it undermines our recruitment from some segments of society and breeds a dangerous complacency about how professional and sophisticated soldiering really is.

Lest I be misinterpreted, be assured that I, like every single Australian soldier, am fiercely proud of Anzac. It defines our values of courage, teamwork, initiative and respect for one another.

But if Anzac is to fulfill its mythical role effectively we must seek to interpret it in an inclusive way. Those who use their service to bludgeon conformity to a narrow ideal of what an Australian, especially an Australian soldier, should be, deliver harm not homage to Anzac. I hope the Anzac myth can be

reinterpreted by modern Australians in a manner that means it offers intangible but utterly universal inspiration to all Australians.

I am unreservedly convinced that the culture of a team that is defined through the exclusion of any member of our society has to change. It has to stop for both altruistic and pragmatic reasons. I like to think I am as altruistic as the next person but my motives are essentially pragmatic. Organisations with high levels of what can be termed as 'social capital' are more effective, both in their performance and ability to retain their highly skilled personnel much longer.

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I have set tangible goals against which I am willing to be judged in this matter. Ultimately, though, true and enduring progress will only be achieved through the collaborative efforts of women and men. There is a need, in my view, for some men to be reminded by male leaders and champions of change that discrimination of any kind is never acceptable and that all their colleagues deserve their trust and respect.

That is why I stated to the Australian people that we have a systemic problem in our army culture. To pretend otherwise, after so many repeated scandals and so much adverse scrutiny, is simply dishonest and self-delusional. It takes courage for an organisation to engage in rigorous self-examination.

The Australian Army belongs to the nation. We are funded by their taxes. We recruit from their families and ultimately we prosper, or we wither away, dependant on their ongoing trust and support. That is integral to our contract with the nation.

We are also a national institution. Our ranks are open to every person whose allegiance is to Australia regardless of their race, their gender, their sexual preference or by what name they call their God.

Much like the NARS report was the catalyst for the NSW Bar Association development of Best Practice Guidelines,

Lt Gen David Morrison, 'Building a positive culture at the New South Wales Bar'



L to R: Megan Black, Julia Baird SC, Jane Needham SC, Lt Gen David Morrison, Fiona McLeod SC, Mary Walker, Kate Eastman SC. Photo: Murray Harris

we also sat down and completed a reassessment of our career management agencies and how their - conscious or unconscious - bias impacted on the career progression of women and other groups. The end result was a new, enhanced, career model that we continue to improve upon.

The new model remains gender neutral; provides greater choice and flexibility, calibrated to potential, to best enable merit progression. In doing so it places much more value on the broad range of skills a modern army needs; and indeed is expected to have. The new model delivers this through greater flexibility afforded to any officer or soldier in terms of the delivery and sequence of professional development, acknowledgement of broader experience and ensuring that there is no detriment to career progression due to breaks in service.

*Through these Best Practice Guidelines, the New South Wales Bar Association is also clearly looking to build and sustain a relevant, positive organisational culture into the future.*

Ultimately, those who do not meet the normal 'linear' career milestones, but who have commensurate experiences, now have the opportunity to compete for more senior and demanding appointments. Through the maintenance of the extant merit-based selection process, the model gives everyone a fair go but in no way sacrifices army's professional standards or breaches our contract with the nation.

The Australian Army understands that cultural change is a long term process that requires commitment, diligence and continual evaluation. We are in sight of concluding our commitment to the longest war we have ever fought, and we are scaling back after 14 years of uninterrupted operations in a number of theatres. This will present different, but in some ways more complex, challenges for the future. Certainly the competition for labour will be fierce. Much like yourselves, the army requires a diverse and inclusive group of strategic leaders with the skills necessary to lead army into this uncertain future.

Through these Best Practice Guidelines, the New South Wales Bar Association is also clearly looking to build and sustain a relevant, positive organisational culture into the future. The framework it lays out provides guidance and assistance on the prevention, management and resolution of matters such as harassment, discrimination, vilification and victimisation and ensures that you are keeping step with the expectation contemporary society levies on you.

It will embody the essence of your contract to the nation. It is guidelines such as these that will undoubtedly engender a mutual respect between your members and the people they serve. The guidelines will also offer an example to other institutions in the broader Australian society. To my eyes, it cements your status as a first class, modern association which has a clear view of the significant advantages that are accrued through an inclusive and diverse workforce. I salute you and wish you well.

## Judicial Q&A

By Talitha Fishburn

A cool and dreary August evening provided an opportune occasion for the cosy setting of the *2014 Judicial Q&A*, held in the Common Room. This annual event, now in its fourth year, is aimed at the junior bar. The seminar involves discussion by a panel of three judges about some pressing issues faced by the junior bar.

This year's judicial panel comprised the Hon Justice Melissa Perry (Federal Court of Australia), the Hon Justice Lucy McCallum (Supreme Court of New South Wales) and his Honour Judge David Frearson SC (District Court of New South Wales). Collectively, the panel comprised more than sixty years of legal experience and wisdom.

Kicking off the topics was one that immediately inspired interest among keen members of the junior bar; what are the typical features of junior barristers who display 'excellent oral advocacy'. The panel shared the view that 'thorough case preparation' is the absolute bedrock of excellent oral advocacy.

Justice McCallum also noted that effective advocacy relies on a high degree of 'intellectual honesty'. This, she said, enables the advocate to gain the court's confidence by, for example, 'not pressing meritless points'. Another key feature of an excellent advocate, she commented, was their ability to answer questions from the bench 'straight off', and if not, providing a logical explanation in support of the question's deferral.

Justice Perry remarked that excellent oral advocacy requires an advocate to develop a discernibly clear structure that forms the backbone to their legal reasoning and case theory. For advocates who are dealing with the operation of legislation, she observed that the stand out advocates have a grasp of the entire statutory framework relevant to their case, rather than the one or two statutory provisions in issue. She commented that this is particularly helpful for the 'labyrinthical provisions' and effective advocates know a statute's intricate pathways and are well equipped to respond with ease to questions on the statute at large.

Judge Frearson opined that excellent advocates demonstrate the ability to carefully listen to and directly address questions from the bench. He also stated that if an advocate says, 'I will come back to that point,' the effective advocate will do so and will not require a reminder from the bench. He suggested making a note of all the instances of verbal aside (particularly in a longer trial) and ensuring that all questions are fully addressed prior to closing.

The panel also considered the thorny issue of whether and how a junior barrister should 'stand up' to a judge in the face of a somewhat blustering judicial breeze. All panelists agreed that advocates, even very junior barristers, should have the confidence to (politely) 'stand up' to a judge and proverbially 'hold their ground'. Justice Perry stated that this is particularly important if it involves a highly relevant point that needs to be put. She stated that advocates ought to think of themselves as 'Teflon-coated', and in other words, robust in their case delivery, despite what might appear to be a degree of judicial reticence to articulating certain points. Justice Perry provided several reasons in support of this approach. For instance, laying the groundwork for a potential appeal as well as demonstrating to the client that you are advocating their case with strength and resilience. However, in doing so, the advocate should bear in mind judicial cues to avoid labouring points, whether good or bad, and against running a smorgasbord of points, including very weak points.

*... stand out advocates have a grasp of the entire statutory framework relevant to their case, rather than the one or two statutory provisions in issue.*

The panelists were asked to reflect on their process of judicial engagement as a case unfolds, including the extent to which their thought processes developed or changed during a hearing. Justice Perry acknowledged that during the course of a hearing, her views often vary, but that in some cases the result is pretty clear from the outset and remains so throughout. Conversely, she admitted that she might be ultimately persuaded to an entirely different outcome than her initial views earlier in the hearing. Justice McCallum commented that the extent to which judicial engagement changes or develops is probably forum specific. For instance, in an appellate jurisdiction such as the Court of Criminal Appeal, most of the materials are available for a judge to read prior to the hearing such that the hearing itself is an opportunity for the judge to test issues already partly formulated. In contrast, in a trial, the judge is persuaded by evidence as it unfolds. Accordingly, thought processes are very much contingent on the day-to-day ebb and flow of evidence being adduced. On the topic of the 'judicial breeze', Judge Frearson helpfully stressed that if a judge asks a question, it



*Justice McCallum emphasised that there is no ‘invisible wall’ between the bar table and the bench and perspicacious judicial officers will detect sledging and squabbling at the bar table.*

does not necessarily indicate the judge’s thinking or leaning on a particular issue. Rather, often it is the judge’s method of fleshing out the issues or testing a particular point.

The panel was asked to opine on whether there is a difference between ‘jury advocacy’ and ‘judge-alone advocacy’. This elicited polarised views. Judge Frearson stated that the two styles of advocacy have very distinct and important differences. For instance, many jury members are unfamiliar with courts and a simpler mode of communication may be more effective for deliveries to juries. By contrast, Justice McCallum considered that the ‘biggest mistake’ advocates make is thinking that jury advocacy and judge-alone advocacy is different. The reason, she said, is simple – both types of advocacy depend on the same essential features, such as ‘ditching rubbish points, being intellectually honest and being sensible’. She conceded though that Jury members are often very practical in their focus such that a barrister’s ‘clever’ points will not always resonate with the jury.

The panel also shed light on certain undesirable practices and habits to avoid. The panel agreed that the number one habit to avoid is sledging opponents. Justice McCallum emphasised that there is no ‘invisible wall’ between the bar table and the bench and perspicacious judicial officers will detect sledging and squabbling at the bar table. As to bad habits, Justice Peny recommended being aware of subconscious distracting habits

(such as having hands in pockets) and taking active steps to iron them out and seeking feedback from colleagues in the junior years.

The panelists were asked to cast their minds back to the start of their own careers at the bar, and with hindsight, give advice to new barristers on how to approach their advocacy. A common theme arising from this topic was the importance for junior barristers to accept that there is not one particular barristerial style, and advocates should embrace a self-developed bespoke style. Justice McCallum reflected that as a ‘baby barrister’, she sometimes thought that she was not ‘cut out’ for the job because she perceived her advocacy style as very different to that of her opponents, most of whom were often much more senior male barristers. However, over time, she realised that she didn’t need to be ‘that barrister’. Justice McCallum debunked the myth of there being one ‘barrister look and style’. Rather, she emphasised that the bar is a collective of individuals and this should give way to different styles of advocacy. Justice McCallum stressed: ‘Be yourself. Be confident in you’. Justice Perry agreed that being genuine is the most effective style of advocacy and ultimately the most persuasive. Although she admitted that it takes courage to develop a unique style. Judge Frearson agreed that advocacy style is individualistic, but in developing one’s approach, he recommended that newer advocates try to see as much advocacy in action and identify how effective advocates operate and adopt techniques that work for you.

In conclusion, the panel members were asked to identify what they missed most about being a barrister. For Justice McCallum, it was the ‘forensic excitement of knowing the material back to front’. For Justice Perry, it was the ‘buzz and roller coaster of legal practice’ as well as working with excellent juniors. Judge Frearson missed the ‘excitement of being in the case’.

## The saga of Egon Kisch and the White Australia Policy

By the Hon Keith Mason QC<sup>1</sup>

The new Commonwealth Parliament was dominated by spokesmen for White Australia and its first great debate involved the *Immigration Restriction Act 1901*<sup>2</sup> and the *Pacific Island Labourers Act 1901*. Support for restrictive measures was overwhelming and nakedly racist. For example, Alfred Deakin spoke of 'the desire that we should be one people and remain one people without the admixture of other races',<sup>3</sup> although he added that: 'It is not the bad qualities but the good qualities of the alien races that make them dangerous to us'.<sup>4</sup> Another speaker (George Pearce) retorted bluntly that 'The chief objection is entirely racial'.<sup>5</sup> Isaac Isaacs declared that 'I am prepared to do all that is necessary to insure that Australia shall be white, and that we shall be free for all time from the contamination and the degrading influence of inferior races'.<sup>6</sup>

There was, however, disagreement about ways and means. Some speakers favoured the honesty of exclusion of non-white immigrants in specific terms. But the policy that would prevail involved a 'dictation test', following a model first used in Natal in 1897 and already current in New South Wales, Tasmania and Western Australia. This stemmed partly from an independent desire for amicable relations with Asian countries and partly from sympathy with the wish of the British Government (based on its Asian commitments) that such a system be used in preference to an expressly racist basis of exclusion.<sup>7</sup> This latter argument was very much a two-edged sword given the strength of sentiment that the new Commonwealth should not bow to British influence.

As finally enacted, the officer administering the test was authorised to choose any passage in any European language. This outcome was achieved by defining 'prohibited immigrant' to include 'any person who fails to pass the dictation test: that is to say, who, when an officer... dictates to him not less than fifty words in any prescribed language, fails to write them out in that language'.<sup>8</sup> The procedure thus became 'merely a polite method of exclusion at the discretion of the government'.<sup>9</sup> No one passed the dictation test after 1909. This is hardly surprising given the lengths to which officials went. For example, a Japanese fisherman who entered Australia illegally in 1915 and was discovered fourteen years later was set a test in Greek, administered by a local Greek restaurateur.

One thing was, however, entirely clear from the debates and the choice of 'European' as the basic language criterion: it was aimed at non-Whites. Accordingly, there was an outcry when a test (in Italian) was administered to an Indian-born, white woman who was a British subject and distantly related to the English Lord Chancellor Viscount Cave. Mabel Freer's real problem was that she intended to marry her Australian travelling companion, a

Lieutenant Dewer, who was still married but seeking to divorce his Australian wife. It seems likely that members of the Dewer family got the ear of Minister Paterson, persuading him that she was 'undesirable' on a scattergun of grounds that were never substantiated. The true reason for her exclusion was that her entry threatened to lead to the dissolution of a 'perfectly good Australian marriage'.<sup>10</sup> Despite the backing of the *Daily Telegraph* which funded unsuccessful High Court *habeas corpus* proceedings before Evatt J, Mrs Freer was bundled out of the country. By keeping Mrs Freer on board the ship as it steamed towards New Zealand the family managed to crush the shipboard romance. By the time she got back to Australia there was no opposition to her return, but no engagement to marry either.<sup>11</sup>

*His story shows how (in contrast to some nations) Australian courts can respond extremely promptly if they are required to quell a controversy involving personal liberty. It also shows that prolonged litigious drama can focus criticism and ridicule upon the Executive government when it fails to get its way.*

One of the last sustained defences of the White Australia Policy came from Sir John Latham, who had retired as chief justice of the High Court in 1952. His paper 'Australian Immigration Policy' was published in *Quadrant* in 1961.<sup>12</sup> The dictation test was repealed in 1958 but the White Australia Policy was not officially dismantled until 1973. During its currency it produced a lot of litigation, none more engrossing than the saga involving a white, quintessentially European, Egon Kisch.

Kisch 'achieved celebrity during a visit to Australia of less than six months, chiefly because of the government's failure to prevent it'.<sup>13</sup> His story shows how (in contrast to some nations) Australian courts can respond extremely promptly if they are required to quell a controversy involving personal liberty. It also shows that prolonged litigious drama can focus criticism and ridicule upon the Executive government when it fails to get its way. The saga would pit the youthful Robert Menzies, then attorney-general, against Herbert Vere Evatt, then in his youthful judicial prime.

Kisch was Czech, Jewish and a communist. In Nazism's early days, he was gaoled and then expelled from Germany for his

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anti-fascist writings. Left-wing groups in Australia decided to organise a rally in Melbourne against fascism and to invite Kisch to be a principal speaker. The rally was designed as a counterpoise to a function promoted by the conservative Melbourne establishment to celebrate the city's centenary, with the Duke of Gloucester as the guest of honour.

The federal government under Prime Minister Lyons decided to keep Kisch from landing by invoking the *Immigration Act 1901*. This was at a time when Australian public opinion still trusted the Fascists in Europe more than the Communists. Robert Menzies KC had just come to office as attorney-general of the Commonwealth and his enthusiastic defence of Lyons' policy would prove a baptism of fire. (Following the outbreak of the Second World War, Menzies found it necessary to distance himself from the controversy by claiming that Interior Minister Thomas Paterson was responsible since he had made the initial order to exclude Kisch.)

The first mechanism invoked by the authorities was the power of the minister for immigration to declare someone to be 'undesirable as an inhabitant of, or visitor to, the Commonwealth'. The minister purported to make such a declaration on 18 October 1934 (three weeks before Kisch's ship arrived in Perth) stating that 'in his opinion from information received from another part of the British Dominions through official channels' [Kisch was] 'undesirable as an inhabitant of or visitor to the Commonwealth'.

Kisch, who sailed to Australia on the *Strathaird*, planned to disembark in Perth and cross the continent by train. The captain, Mr Carter, prevented his landing because a customs official told him that the minister for immigration had made such a declaration. Carter kept Kisch on board the ship as it progressed via Melbourne to Sydney despite his unwilling passenger making considerable legal and practical attempts to disembark, as we shall see.

When the ship got to Melbourne, Kisch's growing body of supporters sought *habeas corpus* for his release. The application was refused by 'Iceberg' Irvine, the chief justice of Victoria, on the basis that habeas corpus was not available to protect aliens, a proposition that had been denied by the Supreme Court of New South Wales in 1888<sup>14</sup> and that would be shortly disavowed by Evatt J in the High Court.

Kisch then took the law into his own hands, as was his right (if, as was to be shown, he was being unlawfully restrained).<sup>15</sup> He literally jumped ship at the Melbourne dock, in the presence of a large crowd of enthusiastic supporters, falling six metres and breaking his leg. The amusing account about his adventures



Egon Kisch addresses a crowd in Sydney's Domain on the dangers of Hitler's Nazi regime, 17 February 1935. Photo: Sam Hood.

in Australia was punningly entitled *Australian Landfall*. Kisch wrote that 'the high jump from deck to dock was looked upon as a sporting performance by this sport-mad continent.'<sup>16</sup> Kisch's claim that he was entitled to be taken before a court following arrest on shore was ignored. Instead, he was bundled onto a stretcher and put back on board by the police. Before the *Strathaird* sailed, anti-fascist demonstrators stuck labels onto the ship's side: 'Kisch, deported by Hitler, 1933 – by Lyons 1934. Kisch must land.'

By the time the ship got to Sydney, Kisch's supporters had retained AB Piddington KC as his leading counsel. Piddington was by this time in his seventies and no great shakes as a barrister, but this would definitely be his finest hour. He would have made a substantial contribution to the law as a High Court judge if he had weathered the storm surrounding his appointment.<sup>17</sup> He later achieved distinction first as chief commissioner of the Inter-State Commission, then as a Lang-appointed member of the Industrial Commission of New South Wales. He would retire from this office as a matter of principle in protest against the dismissal of Lang by the state governor in 1932 very shortly before he would have qualified for a pension.

Kisch (still trapped on board) moved the High Court for a writ of *habeas corpus* directed at Captain Carter. The Commonwealth intervened in support of Carter, also filing an affidavit with a fresh ministerial declaration under the hand of the new minister, Menzies. While Captain Carter had relied on the earlier declaration made a month earlier and before the ship came into Australian waters, the defendant now pointed

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to a declaration dated 13 November 1934, ie two days before the hearing in Sydney. But when Piddington moved to cross examine Menzies on the new declaration, the fresh affidavit was withdrawn and Captain Carter's legal advisers had to fall back upon the original declaration. In the upshot, the defendant and the Commonwealth offered no evidence to show that there was any information received from the government of the United Kingdom.

Kisch's lawyers relied principally on the argument that the legislation was unconstitutional, but Evatt J would ultimately reject this proposition. Before doing so, he had a quiet word to Piddington's junior and suggested that a different line of argument would be more persuasive, as it turned out to be.<sup>18</sup> In ordering Kisch's release, Evatt rejected Irvine CJ's view that *habeas corpus* was unavailable to an alien.<sup>19</sup> Evatt J also ruled that the ministerial declaration that had been relied upon by Carter (though in statutory form) did not satisfy the requirement that the person to be excluded should be someone 'declared by the minister to be in his opinion, from information received from the government of the United Kingdom ... through official or diplomatic channels, undesirable as an inhabitant of, or visitor to, the Commonwealth'.

After winning the Sydney *habeas corpus* proceedings, the still injured Kisch was carried ashore by stewards. But he was met on the wharf by police who took him straight to Central Police Station where the Commonwealth authorities tried a completely fresh tack, invoking the dictation test. A police inspector directed Kisch to write down a passage in Scottish Gaelic read to him by a Constable McKay. The passage was read twice, according to Kisch sounding differently the second time around. When Kisch declined to proceed he was arrested and charged with being an immigrant who failed to pass the dictation test who was found within the Commonwealth.

As indicated, this test presented itself as a mechanism for ensuring that would-be immigrants to Australia held minimal educational standards. But it had been designed to keep non-Europeans from entering these shores. Kisch was European to the bootstraps but such was the state of literalist statutory interpretation at that time that no one<sup>20</sup> dreamed of arguing that applying the test to White Europeans was ultra vires because it was foreign to the evident purpose of the original legislation.

A few days later Kisch was carried into a crowded Court of Petty Sessions. He was granted an adjournment and bailed over the protests of the prosecution that argued (contrary to

the laws of gravity) that his ship-jumping showed him to be a flight risk. To the further consternation of the authorities, release on bail enabled him to attend a large protest meeting in the Sydney Domain arranged by the Australian Anti-War Congress attended, on some reports, by over twenty thousand people. Kisch was introduced to the crowd by the elderly Rev Albert Rivett, who had just spoken passionately about the rise of fascism. Rivett thereupon collapsed and died on the spot. After a decent interval Kisch addressed the crowd, telling them, on his own published account, that 'my English is broken, my leg is broken, but my *heart* is not broken: for the task, which I was given to do by the anti-fascists of Europe, is fulfilled when I speak to you, the anti-fascist people of Australia'.<sup>21</sup>

*Kisch was introduced to the crowd by the elderly Rev Albert Rivett, who had just spoken passionately about the rise of fascism. Rivett thereupon collapsed and died on the spot.*

At the trial, Piddington cross-examined Constable McKay about Scottish Gaelic, a language he had last spoken twenty years ago. Piddington also took the point that Scottish Gaelic was not a European language within the meaning of the Act. A retired police inspector, John McCrimmon was then called to prove that McKay spoke correct Scottish Gaelic. He averred this most emphatically but the proceedings lurched into high farce when McCrimmon mistranslated a Scottish Gaelic passage shown to him by the cross-examiner. He translated the sentence: 'As well as we could benefit, and if we let her scatter free to the bad', adding that it was 'not a very moral sentence'. Piddington then gleefully pointed out that what he had shown the witness, with the last word ('Amen') covered up, was the passage from the Lord's Prayer 'Lead us not into temptation, but deliver us from evil.'

Kisch was nevertheless convicted and sentenced to the maximum penalty of six months hard labour. He appealed directly to the High Court which, by majority, ruled that Scottish Gaelic was not 'an European language'.<sup>22</sup> This conclusion so enraged various Scottish residents that angry letters were published in the *Sydney Morning Herald*. One of them was penned by the chancellor of the University of Sydney, Sir Mungo MacCallum,



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under the nom de plume 'Columbinus'. He wrote:

Some of us may have supposed the Immigration Act was meant to provide a test whereby, even if in a quibbling and pettifogging way, undesirable aliens might be excluded, and that an alien forbidden to land in England might be considered undesirable here. Now we know better. It behoves us to bow down before the court's confident pronouncement: 'We are dictators over all language and above linguistic facts.'

This allowed Kisch to move onto the attack with a charge of contempt by scandalising that almost succeeded. In *R v Fletcher; Ex parte Kisch*,<sup>23</sup> Evatt J dismissed an application to have the editor of the *Sydney Morning Herald* punished for contempt in publishing these letters, although the paper was required to pay the legal costs. Dixon wrote Evatt an approving and reassuring letter.<sup>24</sup>

A second contempt proceeding did result in a conviction when another High Court litigant launched a prosecution against the editor of the *Sun* who was fined for an article that, among other things, asserted that the law which was intended to keep Australia white was in a state of suspended animation owing to the ingenuity of 'five bewigged heads' who had managed to discover a flaw in the Immigration Act. The writer had stated that 'to the horror of everybody except the little brothers of the Soviet and kindred intelligentsia, the High Court declared that Mr Kisch must be given his freedom.'<sup>25</sup>

Menzies made a further declaration of undesirability, relying on updated information that Kisch was banned from entering Britain 'on account of known subversive activities'. A fresh charge was laid in the Court of Petty Sessions. It resulted in a conviction but not before Piddington had protested that counsel for the prosecution, H E Manning KC should not be permitted to appear because, as attorney general for New South Wales, he was the employer of the presiding magistrate. Once convicted, Kisch lodged an appeal to the High Court and was granted bail in the meantime. This allowed him to continue attending political rallies, 'waving his crutches in the air as he spoke of the gathering storm in Europe'.<sup>26</sup> Eventually, as all parties tired of the legal/political battles. A compromise was reached. Kisch would leave Australia voluntarily, legal costs paid and his passport returned. Shortly before his departure he attended a torchlight procession in Melbourne to mark the anniversary of the Reichstag fire.

## Endnotes

1. This is extracted from Keith Mason's forthcoming *Old Law, New Law A Second Australian Legal Miscellany* (2014) The Federation Press.
2. The Act was renamed the Immigration Act in 1918. In 1958 the legislation was replaced by the *Migration Act 1958*. The broad purpose remained the same, despite the three significant name changes.
3. *Commonwealth Parliamentary Debates*, 12 September 1901, p 4804.
4. *Ibid*, p 4812.
5. *Ibid*, p 7160.
6. *Ibid*, p 4845.
7. See Geoffrey Sawer, *Australian Federal Politics and Law 1901-1929*, Melbourne University Press, 1956, p 23.
8. *Immigration Restriction Act 1901*, s 3. No languages were ever prescribed. In 1905 the Act was amended by stipulating that 'an European language directed by the officer' was deemed to be prescribed. In *Potter v Minehan* (1908) 7 CLR 277, one reason why the prosecution of Minehan (who had assumed his mother's name but whose reputed father was Chinese) failed was that the officer omitted to dictate the passage, choosing instead to read the passage slowly and offer to read it again. Minehan had been handed a pencil and paper, but when he announced that he could not write the passage, he was not given the opportunity to do so by having it slowly dictated to him.
9. Sawer, *loc cit*. In *The King v Carter; Ex parte Kisch* (1934) 52 CLR 221, Evatt J said (at 230) 'as we all know, the dictation test was a means devised in order to confer a discretion upon the authorities concerned with the administration of the Act.'
10. F K Crowley, *A New History of Australia*, William Heinemann, Melbourne, p 448.
11. See Kel Robertson with Jessie Hohmann and Iain Stewart, 'Dictating to One of 'Us': The Migration of Mrs Freer' (2005) 5 *Macquarie Law Journal* 241.
12. Sir John Latham's paper is largely reproduced in A T Yarwood, *Attitudes to Non-European Immigration*, Cassell Australia, 1968, pp 132-6. For other political interventions by Latham, see Keith Mason, *Lawyers Then and Now*, pp 99-100.
13. *Oxford Companion to Australian History*, 'Kisch, Egon', p 366.
14. *Ex parte Lo Pak* (1888) 9 NSWLR (L) 221; *Ex parte Woo Tin* (1888) 9 NSWLR (L) 493.
15. As Darley CJ reminded Sir Henry Parkes in *Ex parte Woo Tin* when he warned that the blood of any slain police officers would be on Parkes' head if they chose to obey the Premier despite repeated rulings of the Supreme Court ordering habeas corpus.
16. *Australian Landfall*, p 108.
17. See Keith Mason, *Lawyers Then and Now*, p 85 as to his early resignation.
18. Peter Crockett, *Evatt: A Life*, OUP, 1993, pp 84-5 (describing Evatt's conduct as 'neglect[ing] his judicial responsibilities').
19. *R v Carter; Ex parte Kisch* (1934) 52 CLR 221.
20. Not even Evatt J whose views about the scope of administrative law were well ahead of his time.
21. Kisch, *Australian Landfall*, pp 87-8. According to Judge Fricke, *Libels, Lampoons and Litigants*, p 164, Kisch's words inspired the young Wilfred Burchett to take part in his first political demonstration, escorting Kisch from the Domain. The next day Burchett spent time at the public library learning about Kisch. Burchett's later experiences in Nazi Germany consolidated his radicalism. When a magazine asserted that Burchett was a paid agent of Communist governments Burchett launched a famous libel case: see *Burchett v Kane* [1980] 2 NSWLR 266.
22. *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234.
23. (1935) 52 CLR 248.
24. Fricke, *Judges of the High Court*, p 132.
25. *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434.
26. Nicholas Hasluck, *The Legal Labyrinth, The Kisch case and other reflections on law and literature*, Freshwater Bay Press, 2003, p 13.

### A postscript to 'The Orr Case Revisited'

By The Hon R V Gyles AO QC

One of the Tasmanian stories recounted in Peter Heerey's *Excursions in the Law* (The Federation Press 2014) is 'The Orr Case Revisited'. The *Orr Case* was a cause celebre of the 1950s. Sidney Sparkes Orr was the professor of philosophy at the University of Tasmania. He was dismissed on 16 March 1956, on the principal ground that he had seduced a female student. He sued for wrongful dismissal. The case was rejected by the Supreme Court of Tasmania, upheld by the High Court of Australia in May 1957. Controversy continued. Orr had many supporters and many detractors. Families were split. Academics blackballed appointment to the chair of philosophy at the university. Orr did not receive another academic appointment. I can add a piece of trivia and some substance to 'The Orr Case Revisited'. First, the trivia.

In 1960 Malcolm McLelland, Jeremy Badgery-Parker (both to become Supreme Court judges) and I visited the University of Tasmania in Hobart to represent the University of Sydney at the interstate moot competition for that year. As it happened, Peter Heerey was one of the law student hosts. The chancellor of the university invited the assembled mooters to a welcoming reception. The *Orr Case* was known to law students in Sydney but more because of the salacious content than for any legal principle. As will appear, it is not clear that the same was true north of the Tweed.

I found myself in a circle of students together with the chancellor (strongly anti-Orr, although his son was strongly pro-Orr) and Reginald (Reggie) Wright QC, a Commonwealth Senator and a leading Tasmanian counsel, who had appeared for the university against Orr (although his brother was one of Orr's leading supporters). One of the Queensland mooters said: 'What's this Orr case all about?' Even the other mooters had picked up the fact that this was, to say the least, a sensitive topic in Hobart. There was a lengthy silence. Reggie Wright, in his unusual voice – which was a cross between a Somerset farmer and a town crier – said: 'Did you mention that man Orr? I have a farm on the north-west of this island. I visit that farm most weekends. I set traps for rodents. I go around the traps and collect the rodents. Every one of those rodents is better than that man Orr!' Even the Queenslander was silenced.

Now as to substance. Peter Heerey says 'Finally in 1966, shortly before Orr's death, a financial settlement with the university was achieved and the black ban lifted.' I can provide some background to that sentence.

In 1958, the vice-chancellor of the university, one Isles, wrote and published a booklet entitled *The Dismissal of SS Orr by the University of Tasmania*. It was defamatory of Orr. If published only in Tasmania, it is likely that the matter would have ended there, as the view in the legal profession at the time was that any case brought by Orr against the university in the courts of Tasmania would be bound to fail. However, the author was incautious enough to cause or permit the booklet to be published outside Tasmania, including in New South Wales.

*The Orr Case was known to law students in Sydney but more because of the salacious content than for any legal principle.*

By then, Orr was living in Sydney and had become a client of solicitor Donald Champion of the firm of WS Kay, Davies & Champion of Parramatta. Don regularly briefed Robert Ellicott, later to become a leader of the bar, Commonwealth solicitor-general and attorney-general and (briefly) a Federal Court judge. Publication of the booklet in New South Wales came to their attention. Between them, they devised the strategy of suing on the publication of the booklet in New South Wales which would lead to a jury trial in Sydney. Sydney juries were notoriously generous in awarding damages for defamation. The booklet had been published not long before the 1958 NSW Defamation Act had come into force, and the defendant Isles pleaded (in addition to justification) defences of fair comment and qualified privilege under the common law and under the 1958 Act. This added a complication to the already complicated field of defamation pleading. Orr moved to strike-out the defences of fair comment (as pleaded) and qualified privilege. If successful, this would leave the defendant to prove the truth of the defamatory imputations and that it was for the public benefit that they should be published. No easy task.

I was fortunate to be reading with Bob Ellicott at the time. He had by then persuaded CLD Meares QC, one of the leaders of the common law bar and later a Supreme Court judge, to lead him. Bob took me along to the hearing of the strike-out application as a second junior.

The application was heard by Gordon Wallace J on 17 and 18 August 1964 – I had been admitted to the bar less than one

month previously. We were opposed by Thomas EF Hughes QC leading David Hunt (later to become the chief judge at Common Law in New South Wales). Both had formidable reputations as defamation pleaders. Tom Hughes later became attorney-general of the Commonwealth, and after returning to the bar, developed one of the leading practices in Australia in many fields, including defamation.

On 9 September 1964 Wallace J delivered judgment striking-out all of the defences which had been attacked – *Orr v Isles* (1964–5) 82 WN (NSW) Part 1 103.

The defendant did not take this lying down. He appealed to the full court of the Supreme Court of New South Wales. The appeal came on before Walsh, Ferguson and Taylor JJ on 3, 4 and 5 May 1965. Counsel were the same as at first instance except that Bob Ellicott had by then taken silk and disappeared into a long intellectual property case before the fearsome Freddie Myers J. Judgment was delivered on 3 June 1965 (*Orr v Isles* (1965) 83 WN (NSW) Part 1 303). The appeal was allowed in relation to the plea of fair comment (with Walsh J dissenting), and rejected in relation to the qualified privilege pleas.

*About a week before the hearing was to commence, I received the following call from Meares: 'Hello son. You're about to get the chance every junior dreams of.'*

The division of opinion on the fair comment plea was of significance for the trial. The plea allowed by the full court permitted the defamatory matter to be defended as fair comment, although the factual material upon which the comment was based was not justified. That could have made the difference between success and failure at the trial. Emboldened by the dissent of Walsh J, a highly regarded judge who was appointed to the High Court not long afterwards, it was decided to seek leave to appeal to the High Court. On 6 August 1965 a court consisting of Barwick CJ, Kitto and Owen JJ granted special leave to appeal.

The appeal was fixed for hearing for 13 December 1965. Ellicott was still tied up with Freddie Myers. Meares had an exceedingly busy jury practice. Thus, by default, preparation devolved upon me. If not entirely out of my depth (because the issues had been argued twice), I was certainly gasping for air.

About a week before the hearing was to commence, I received the following call from Meares: 'Hello son. You're about to get the chance every junior dreams of.' When I politely enquired what he meant, he said: 'I'm jammed on the Broken Hill circuit and will not be able to get back for the hearing. It is up to you.' That was the end of the conversation. It did cross my mind that the fact that the Orr case was virtually pro bono and the Broken Hill circuit was very lucrative may have had an impact upon events. Ellicott was still jammed, and there was no time or money to engage anyone else.

I did the best I could against the formidable Tom Hughes, primed by the indefatigable David Hunt, in a hearing that lasted 13, 14, 15 and 16 December before Barwick CJ, McTiernan, Kitto, Menzies and Owen JJ. As a raw junior, I received a sympathetic run from the bench, particularly Chief Justice Sir Garfield Barwick and his friend, the great Victorian judge Sir Douglas Menzies. Judgment was reserved and nothing was heard in the early months of 1966.

Then, Sidney Orr was diagnosed with a terminal illness. He was anxious that steps be taken to secure the position of his wife as best as could be done. That led to settlement discussions with the university which culminated in a deed of settlement between the university and the parties to the litigation – Orr and Isles. Judgment was never delivered. On 23 May 1966, a court comprising Taylor, Windeyer and Owen JJ ordered the appeal be struck out with no order as to costs. Sidney Orr died on 15 July 1966.

Later that year, Sir Douglas Menzies sought me out at a bar function. He told me that all the judgments had been written well before the settlement, save for one judge who was dragging the chain – with at least a hint that that judge was McTiernan J. From the demeanour and body language of Sir Douglas and the fact that he had approached me, I received a strong impression that Orr would have succeeded in the appeal. But perhaps that was wishful (or wistful) thinking on my part.

## Bullfry looks down the barrel

By Lee Aitken

The vernal sun shone down brightly on the Domain. The air was alive with the scents of newly-cut grass and gorse; the sky a mezzotint of fighter contrails against the azure – both of Bullfry's knees were, unusually, working effectively in unison as he strolled towards the Art Gallery. (This was far better indeed than slumbering on the Madame Recamier.) Was it worth having the recommended arthroscopy? The last acquaintance to do that was now limping permanently with the uncertain aid of a stick, unable to bend the infringing right leg which had undergone, perforce, a permanent arthrodesis after a virulent post-operative infection had set in. Leave well enough alone – *primum non nocere* – Bullfry's usual preferred approach to matters personal, and forensic.

How often was masterly inactivity permitted in legal practice? All too rarely – this was invariably because a firm of solicitors, large or small, could only 'service' a file by doing something time-consuming and expensive in relation to it – making a five 'unit' phone call to the other side to check that documents had arrived; instructing three 'senior associates' on how they should comport themselves when instructing counsel; loading up six trolleys' worth of archived files to deliver! And even less so in court was silence golden. Clients (whatever their level of sophistication) were usually naïve observers of a forensic performance – *Drang und Sturm* was often much more appreciated, and highly rated, in the 'bet-the-company-men' than the quietly composed and understated performance – the berserker with his broadsword was preferred to the Florentine with his stiletto. Bullfry

recalled in his youth watching a master advocate in action before a dyspeptic Full Federal Court which urged the speaker to more fulsome and florid oration – 'It won't get any better if I say it again' he rasped, and sat down. Weaker counsel were often quite content for a matter to drag on and on, eking out the daily brief fee for fear of there being nothing remunerative to follow it.

At last, the Art Gallery – he had modestly refused a request to 'sit' for this year's Archibald – the literalness of a loincloth depiction would have unsettled any observer – as a former paramour had once remarked, undraped he normally evoked in the onlooker feelings of both horror and compassion. He turned in quickly to the Pre-Raphaelites and his favourite Waterhouse – 'Diogenes in his barrel' – that said it all – walking up and down Phillip Street with a lamp looking for an honest man – Bullfry supposed at least that there was more likelihood of success there, as opposed to Bond Street, or the lower reaches of Martin Place. And the sheer nonchalance of requesting favours from no-man – the Cynic's famous 'Bondi Beach' response to Alexander the Great when the latter had asked, as the most powerful man in the world, what he could do for the naked sunbathing philosopher – 'Why, stop blocking my sunlight, of course'.

But a desire for absence of care seemed far from the aspirations of the many tired ex-jurists Bullfry saw daily whose wan and weary faces trickled by each morning. What were they doing? And why were they doing it? On a recent foray to Umina, Bullfry had confronted an esteemed, and long retired jurist, outside the bottleshop.

*On a recent foray to Umina, Bullfry had confronted an esteemed, and long retired jurist, outside the bottleshop.*

'I suppose you are still keeping up with the cases?'

'What? You must be mad – as soon as I left the bench I gave all that up, and now I just read history and poetry, drink red wine, and sleep in the afternoon!'

Almost what one might call the 'Sir Adrian Knox syndrome'. There was Knox, in durance vile, grafting away as the senior judge of the Commonwealth (subject, always, to section 23 of the Judiciary Act), travelling out to the AJC as judicial business all too infrequently permitted him – then, like a Lotto win, out of the blue, an old friend dies, and leaves Sir Adrian a huge chunk of a residuary estate – within a week or two, his polite letter of resignation is into the G-G. No wonder Dixon CJ, going slowly mad in Hawthorn, feared that Knox was an 'intellectual man but without any intellectual interests'. (But of course, Knox enjoyed the leisure, and the income, for another two years at the St Ledger).

But what drove the present group of outside toilers? It couldn't be for the money, could it? How much could a man (or a second wife) spend in a lifetime when his, and her, basic necessities were already defrayed from a 'non-contributory' fund? Perhaps it was the relevance deprivation – the fear that the telephone would no longer



*The second Mrs Bullfry  
frequently reproved  
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the television expose of  
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meretricious of the  
television programmes.*

ring? Or, that one's opinion was no longer relevant at all to anybody. But that is the common lot of humanity – surely, *sub specie aeternitatis*, contemplation of the former judicial mind should turn to the higher realm, and the Four Last Things.

Perhaps it is simply a question of aping Lear – one is tied to the stake, and one must stay the course. In one sense, the study of law was a complete vocation so that it was well-nigh impossible once one had acquired a trained reflex to facts to avoid seeing every situation in its purely legal aspect. Bullfry, himself, had trouble to avoid thinking constantly on whether an easement or a contractual licence existed in a particular property context, and if it did, how it might be urgently enforced in the Equity Division. The second Mrs Bullfry frequently reproved him for his shouting at the television expose of some celebrated notional injustice on the more meretricious of the television programmes.

The constitutionally-mandated retirement age was also a ridiculous waste of resources – on the Court of

Appeal the 'Handley-dispensation' might see the jurist 'prorogued' for an extended period – and what good value each AJA represented! Thirty-plus years of expertise for a few hundred dollars and sandwiches (vouchsafed daily) and the doubtful appanage of 'AJA', even when (as often) writing the main judgment. The feds had it even worse – there you were compulsorily shuffled off at 70. What a loss of expertise to the judicial system – if you could only understand equity when you had reached 40, you certainly needed another 30 years to master the intricacies and arcana of other areas of the law in detail.

As well, the great free-masonry of a learned profession meant that it was difficult to absent oneself entirely from the coffee shops and the revels, the hilarity and wassail of the Bench and Bar Dinner, the camaraderie of a 'Fifteen Bobber', and the celebrity roast it always inspired. It is a large thing to remove oneself from the legal scene to the quieter watches of the night on the Central Coast. And yet so it must be! Eventually the PSA, or some other harbinger of doom, would reach a critical level.

He limped slowly back across the park into the westering sun – he was looking down the barrel now in every sense. Was it time for him to consider a 'transition' but if so, to what ultimate destination? Surely it was to the Epicureans, not the Cynics that one ought first to look: 'Unborn tomorrow and dead yesterday, why fret about them if today be sweet!'

## Poetry

### Judicial error, corrected

This barrister has no idea!  
His words just don't make sense  
Perhaps I should provide some help--  
My own munificence?

'Forgive me please, young Mr Smith  
But could it be you mean  
That if one tries it this way round  
The answer can be seen?'

'Your Honour is of course correct  
That sublime thought's quite right  
There's nothing more that I could say  
My mouth is now shut tight.'

Well, first impressions can be wrong  
I should not judge with speed  
This barrister is very wise!  
And knows the law indeed.

Poem by Orbiculus

## NSW Bar FC: A year of triumphs and near triumphs

By Anthony Lo Surdo SC and David Stanton

### Introduction

The NSW Bar Football Club (NSW Bar FC) is open to barristers, members of the judiciary, clerks and employees of the Bar Association regardless of gender, level of ability or fitness. It currently boasts some 78 members including 10 women drawn from diverse practice areas.

### New members

In 2014, NSW Bar FC welcomed new members Hament Dhanji SC, Thomas Buterin, Nicole Compton, Tiffany Davy, Oshie Fagir, Sebastian Hartford Davis, Hugh Morrison, Geoff O'Shea, Sorrel Palmer and David Winterton.

### Bar FC rule the DSL

NSW Bar FC competed for the sixth successive year in the Domain Soccer League competition, which was held at lunchtime between April and September in the Domain. NSW Bar FC dominated the leaderboard for much of the home and away series but after a few disappointing draws and losses finished the series in third place, booking itself a sudden death semi-final berth for the second consecutive year.

In a history making performance, a gritty and determined NSW Bar FC toppled second-placed Announcer FC on 1 September 2014 to secure its inaugural and rightful place in the DSL Grand Final.

The first half saw Morrison and Lang leading the charge with a series of well-timed incursions into enemy territory. Captain (John) Harris maintained his characteristic composure under fire and will be remembered for the brilliant one handed block of the rocket heading to the top left hand corner which earned him the best on field gong. Other standout



Captain John Harris lifts the silverware in the DSL.

*At the half-time break, Manager David (Sir Alex Ferguson) Stanton characteristically reminded his talented charges of the need to take the chances that were offered.*

performances in the first half were turned in by Compton, Vickers, Griscti and O'Shea.

With the score level at nil-all at half time, Bar FC Manager and supreme strategist David (Sir Alex Ferguson) Stanton reminded his charges of the need to be true to the game plan and to each other and to continue the Barcelonaesque football that typified the first term.

The second half saw Lang, Hartford-Davis, Jonathon Clark, Ben Phillips and Morrison combining well in the middle of the park resulting in a penalty being awarded for hand ball. Deftly converted by Lang, NSW Bar FC set about defending the narrow but all-important lead. The combined efforts of Magee, Simon Philips, Vickers, Covell, Gyles SC and Fordham SC saw off the threat and resulted in a 1-0 victory. All that stood between the NSW Bar and DSL glory

was the Grand Final with defending premiers Treasury United FC on 9 September 2014.

The NSW Bar FC squad for the Grand Final consisted of Anais D'Arville, David Winterton, Michael Fordham SC, Hugh Morrison, Matt Vickers, Adrian Canceri, Colin Magee, Angus Lang, Jonathan Clark, Sebastian Hartford Davis, John Harris (c), Ben Phillips, Simon Philips, Lachlan Gyles SC and Stephen Free.

A crowd of some 50 supporters gathered in the Domain for what was to be an entertaining display of football prowess. Both teams had plenty of chances in the first half. The ever-capable Captain (John) Harris deftly defeated an early foray by Treasury United which could have put a very different complexion on the contest. The best chance for the bar in the first half from Sebastian Hartford Davis was cruelly thwarted by the cross-bar.

At the half-time break, Manager David (Sir Alex Ferguson) Stanton characteristically reminded his talented charges of the need to take the chances that were offered. Play resumed with the score at nil-all. A clever and well-timed pass from Free to Canceri's left foot three yards inside the edge of the 18 yard box was punished with a blistering shot which was again denied by the cross-bar. However, moments later the ball was gifted to an unmarked Free standing a few yards shy of the penalty arc. It was converted with such ferocity that the first notice Treasury United had of the delivery was when it slammed into the back of the net!

The hard-working backline of Fordham SC, Vickers, Gyles SC, Magee, (Ben) Phillips, (Simon) Philips and D'Arville proved a mostly impenetrable force repelling repeated Treasury United sorties. Lang and Free combined seamlessly in the mid-field to ensure pin-point ball distribution to Hartford Davis, Clark and Winterton on the wings and Canceri and Morrison in the forwards.

In the end, a well-deserved 1-0 victory and an inaugural premiership!

#### 4<sup>th</sup> Annual Sports Law Conference

On 20 September 2014, over 60 barristers convened at the Inns of Court in Brisbane to attend the Fourth Annual Sports Law Conference chaired by the Hon. Judge Wayne Cochrane of the Land Court.

The keynote address 'Intersections of Sport and Law' was delivered by the Hon. Justice Patrick Keane of the High Court of Australia. Delegates were then regaled by stories and accompanying video footage from Graham Turnbull SC (NSW) in his presentation 'Football and Probative Value'. The conference concluded with an informative chat from Michael Blucher, sporting mentor and

author of 'Inside the Sporting Bubble – the complex world of the professional athlete.'

A special thanks to Judge Cochrane, Justice Keane and to each of the speakers who gave generously of their time to ensure the success of the conference and to all those who attended.

#### Bar football 'State of Origin'

Immediately following the Sports Law Conference, over 60 barristers drawn from Queensland, Victoria and NSW met at the picturesque grounds of Brisbane Boys College at Toowong to take part in the Seventh Annual Suncorp NSW Bar v Vic Bar Annual Challenge Cup and the Fifth Annual Suncorp NSW Bar v Victoria Bar v Queensland Bar Annual Football Challenge Cup.

A depleted but courageous NSW Bar FC touring side comprised Adrian Canceri, Rohan de Meyrick, Hugh Morrison, John Harris, Geoff O'Shea, Simon Philips, Greg Watkins, Gillian Mahony, Anais d'Arville, Colin Magee, Graham Turnbull SC and David Patch. It was a side that, like past years, combined youth, experience and enthusiasm together with a determination to defend the Holy Grail of Bar Football, the Suncorp Annual Football Challenge Cup.

The first game was against a somewhat youthful Victorian team whose ranks had been reinforced by a number of solicitors. Having found ourselves up 2-0 at half time, the Victorians used their recently acquired youth and pace to advantage winning the game 3-2. Disappointed with the result, NSW regrouped to play a very polished QLD under the steady guidance of Captain Selfridge who put in a match winning performance in defence. Down 1-0 at half time, NSW found that the QLD tactic of having NSW play back to back games with only two substitutes worked a treat with QLD

finishing the game winners at 4-0, a score that did not reflect the contest. The team should be congratulated for its super human effort. Special mention should go to best and fairest recipients Graham Turnbull SC and Anais D'Arville and to Captain John Harris for a stupendous knock in goals.

Thanks also to Marshall SC and Lo Surdo SC for officiating at the games (ably assisted by de Meyrick (Jnr)). They did so with impartiality and aplomb.

On a final note, many thanks to those whose support made the conference and the games possible. Special mention should be made of Tony Klotz from the Victoria Bar, Johnny Selfridge of the Queensland Bar and David Stanton of the NSW Bar for organizing the teams and to Johnny for all his fine work in putting together a successful and informative conference. Thank you also to the Bar Association of Queensland for its hospitality including for making available the Gibbs Room for the conference. The Sports Law Conference and the State of Origin series head off to Melbourne in 2015.

#### Acknowledgements

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

#### The future

Like all good football sides, NSW Bar FC will be recruiting heavily in the off-season. We look forward to welcoming new members to the squad in 2015. If you are interested in joining the team please email David Stanton (d.stanton@mauricebyers.com) to join the mailing list. If you would like to attend or speak at the 5<sup>th</sup> Annual Sports Law Conference to be held in Melbourne in 2015 please email Anthony Lo Surdo SC (losurdo@12thfloor.com.au).



### The Hon Justice Helen Wilson

The Hon Justice Helen Wilson was sworn-in as a judge of the Supreme Court on 3 November 2014. President Jane Needham SC spoke on behalf of the New South Wales Bar.



As a young law student at the University of Sydney, Justice Wilson volunteered to work at the Redfern Community Legal Centre, where she answered phones, helped solicitors with legal research and took instructions from clients needing assistance. At that time Virginia Bell was principal solicitor, and her colleagues at that time included Simon Rice and Andrew Haesler, now Judge Haesler of the District Court.

Her Honour was admitted as a solicitor of the Supreme Court of New South Wales in December 1989. Her first role was as a solicitor in the Criminal Division at Legal Aid, between 1990 and 1992. The next seven years of her Honour's career were spent in the Office of the DPP, where she served as a senior solicitor between 1992 and 1995; then managing lawyer at the Campbelltown branch from 1995 to 1997 before rising to the rank of trial advocate.

Her Honour began practising at the bar in April 1999, initially as an acting Crown prosecutor before attaining a permanent appointment in 2001. In 2005 she moved to the Newcastle Crown Prosecutors Chambers and from there her career progressed from strength to strength. She prosecuted a number of child sexual assault cases, some quite high profile, including the trial of Milton Orkopoulos in 2008.

Her Honour took silk in 2013 and in the ensuing months she appeared in a succession of cases in the Court of Criminal Appeal. In the two years prior to her appointment to the District Court she appeared in nearly 40 appeals before the CCA.

As recently as April 2014 her Honour was sworn-in as a judge of the District Court. Speaking on behalf of the New South Wales Bar, President Jane Needham SC noted the rapid elevation from one court to another:

Justice Wilson, your spell on the District Court bench was all too brief. One wag said to me: 'We did but see her passing by'. Yet I'm told that your Honour made an immediate impression on those at the bar table: that from day one you presided with an air of authority and composure. One example relayed to me was your decision to hand down a non-custodial sentence in a recent matter concerning an Australian soldier suffering from PTSD. By all accounts, your weighing of the service record of the accused and the likelihood of treatment and rehabilitation produced a just and fair outcome.

Justice Wilson joined ten other female judges on the Supreme Court Bench, which Needham SC observed 'rounds out a Women's First XI on this bench'. The president of the Bar Association continued:

It's safe to presume that all judicial appointees in this state are learned in the law and have a wealth of experience in private practice. The people of this state are fortunate that chief justices and attorneys-general, past and present, have a deep pool of talent from which they can draw when the need arises.

Naturally, the bar welcomes today's appointment of a former Crown prosecutor with a formidable breadth and depth of experience in criminal law and a reputation for being a daunting cross-examiner. But of equal assurance to the community, and to the legal profession in particular, are the various qualities collectively known as 'judicial temperament', encompassing a strong ethos of public service and common sense, not to mention courage.

Speaking in reply, Justice Wilson thanked her many well-wishers.

As a regional lawyer and more recently, a regional judge, I generally assume that no one knows who I am - and many do not of course - but even those who do not know me have been, from this bench, kind and generous in their welcome and offers of assistance, gratefully received from all civil judges and, from the profession, who have been warmly positive about my appointment. It has made me feel both very grateful and very humble.



## District Court appointments

### Her Honour Judge Julia Baly SC

Judge Julia Baly SC was sworn-in as judge of the District Court on 1 September 2014.

Her Honour's career has encompassed prosecution and defence, as well as domestic and international criminal law. She graduated from the University of Sydney with a Bachelor of Arts in 1985 and Bachelor of Laws in 1987. She was admitted as a solicitor of the Supreme Court of New South Wales in December 1987. During her legal studies she worked as a research officer at BOCSAR, the Bureau of Crime Statistics and Research. In 1988 she worked as a solicitor at the Grafton office of the Aboriginal Legal Service, and instructed counsel in the Royal Commission into Aboriginal Deaths in Custody.

In May 1989 her Honour moved to the Office of the DPP in Sydney, where she prepared District Court matters. In November of that year she commenced work at the Newcastle office, appearing in short matters. In November 1990 she was appointed as a senior solicitor there, instructing Crown prosecutors in District and Supreme Court trials and appearing on behalf of the Crown in short matters.

Her Honour began practising at the bar in August 1995. She read with Peter Harper in Church Street Chambers, Newcastle and did her criminal reading with Liz Fullerton in Sydney. For a while she remained at the Newcastle Bar, before taking a room in Forbes Chambers. She appeared in complex and

serious criminal trials in the District and Supreme courts, as well as Court of Criminal Appeal and High Court cases.

In 1999 her Honour took leave from the bar to serve as a trial attorney at the International Criminal Tribunal for the Former Yugoslavia. As part of her work with the tribunal she was assigned to a number of cases, the most notable being in connection with frequent, horrendous violations of human rights at a camp in the town of Prejidor, where ethnic cleansing and rape were used as weapons of war.

In 2002 her Honour returned to Australia, whereupon she was appointed as a crown prosecutor. In 2005 her Honour returned to Europe when she was appointed as an international prosecutor to the Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina in Sarajevo.

In 2008 her Honour worked as an attorney for the Office of the Prosecutor, as co-counsel to prosecutor Brenda Hollis, at The Special Court for Sierra Leone, where former president Charles Taylor was tried for sponsoring atrocities in that country's bloody civil war. When not prosecuting war criminals her Honour was a deputy senior Crown prosecutor in country NSW, based in Lismore and handling the full range of criminal matters. Her Honour took silk in 2013.

### Her Honour Judge Jane Culver

Judge Jane Culver was sworn-in as a District Court judge on 29 October 2014. Her Honour graduated with a Bachelor of Arts and a Bachelor of Laws from the University of New South Wales in 1989, and she was admitted as a solicitor of the Supreme Court in December of that same year. For two years she was employed as a solicitor at Mallesons Stephen Jaques and in 1991, when she accepted a position at the New South Wales Crime Commission. In 1996 she moved to the Office of the DPP and became a trial advocate. Her Honour was called to the bar in 2002 whereupon she practised as a Crown

prosecutor. In August 2004 her Honour was appointed as a magistrate of the Local Court, and subsequently as a children's magistrate and coroner. Six years later she was elevated to the position of deputy chief magistrate. One of her Honour's key responsibilities in that role was continuing education and there is widespread praise for the work she did, such as in the deployment of information technology in the Local Court, including iPads for magistrates.

### Deputy Chief Magistrate Chris O'Brien

Magistrate Christopher O'Brien was sworn-in as a deputy chief magistrate on Monday, 3 November 2014. As a solicitor, his Honour served with distinction on the Law Society's Criminal Law Committee for many years. His Honour was appointed as a magistrate of the Local Court in February 2007. Since then, he has sat in most local courts in the outer

Sydney metropolitan area, such as Liverpool, Camden and Campbelltown as well as in the Parramatta Children's Court. In April last year he was appointed coordinating civil magistrate in the Downing Centre.

## The Hon John Slattery AO KGCSG QC (1918–2014)



Inside each one of us we carry an image, an image of my father, John. Every one of those images is subtly different. Some of our images are of his laughter, some reflect the warmth of his friendship with us, some convey his good judgment, courtesy and fairness on the bench, some reveal his unforced humility and compassion for others, and some his extraordinary memory.

But I am sure we all have one image of John in common: it is what happened when he met each one of us. He would light up and he would ask and talk about us, about our lives, our families, our careers, and our interests. He always wanted to know more about us and to celebrate the milestones in our lives, before we could ever ask about his. His natural generosity of spirit was always uplifting. He made us feel better about ourselves.

The events that brought my father to legal Sydney would be impossible in some societies. But they are for us a recognisably Australian story: a story of a fair opportunity given which he turned to advantage by his good character, by his hard work and by his faith in God and man.

John Slattery was born at home in Lambs Valley on the Hunter River, near Lochinvar on 4 August 1918. His father John Thomas Slattery a dairy farmer and his mother Alice were both of Irish descent. Dad was the eldest of four children, with younger siblings Patricia, Kevin and Lily. His father's family had settled in the Hunter Valley as refugees from the Irish potato famines after 1848, near Branxton, a district reminding them of home. His mother's family, the Morans, were descendants of Irish convicts who had settled in the 1830s, not far away at Hinton near Morpeth.

By the time of his death dad was a remarkably modern 96-year-old. He could use email, internet banking and accessed his favourite old movies on Apple TV. But the Hunter Valley of dad's birth was a very different place. He rode his horse from home to a one-room primary school at Stanhope, two miles away. He studied by kerosene lamp until electricity was locally connected during his primary school years. But he loved the land and people of the Hunter and constantly returned there throughout his life to be with them and later to administer justice to them. And John was a special last link to that Irish Heritage he so cherished. He always remembered one of those original 1848 immigrants, his great-great Aunt, Catherine Hogan, who died in 1928 when he was 10, and after whom he named my late eldest sister, Catherine.

Being born on a dairy farm is not the most obvious starting point to becoming the Supreme Court's chief judge in Common Law. But three remarkable steps changed the course of dad's life to allow that to occur. The first occurred within his family. His mother and her twin sister Lily Moran were the last of a nineteenth century family of thirteen children. The genius of this large family

was that the older siblings took semi-parental responsibility for the younger ones. One of Alice's older sisters Janet Tidy was a teacher. She and her husband recognised that this boy born on the farm had a special intellect. So in John's late primary school years she persuaded John's mother Alice to allow him to go to Waverley College in Sydney. Alice's own generosity of spirit and her faith in the judgment of her older sister allowed her to let him go. Family folklore is that he hid under the bed and had to be prised out, for the journey into his new life.

*By the time of his death dad was a remarkably modern 96-year-old. He could use email, internet banking and accessed his favourite old movies on Apple TV.*

But Alice's older sister was right. Dad lived with his aunt Lily in Bondi Junction and attended school at Waverley, where he flourished as a student and keen rugby and cricket player. But in order to earn a living he had to leave Waverley only with the Intermediate Certificate. At this moment he was given his second opportunity. The Christian Brothers at Waverley offered to coach him at night for the Leaving Certificate, whilst he worked during the day. He was grateful throughout his life to Brother Lacey, a senior brother at the school whose personal coaching allowed him to matriculate. He always maintained his affection for the school. On matriculation he decided to study law.

Then his third great career opportunity arrived. In 1942 a friend retired as the associate to the then chief justice, Sir Frederick Jordan. He recommended

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dad as his replacement and Sir Frederick accepted him. But if dad had any doubts about his career before 1942, the next three years spent watching Sir Frederick's Mozartian legal intelligence at work put any such doubts to rest. He had great affection for Sir Frederick.

But Sir Frederick was also lieutenant-governor. In mid-1944 the then state governor left Australia and was not replaced for about the last fifteen months of the war. So Sir Frederick became acting governor. Thus the boy from the Hunter dairy farm, as well as being an associate, was appointed as the principal private secretary to the lieutenant-governor of New South Wales.

His time at Government House changed John further. Firstly it gave him respect for protocol and ceremonial dignity that was evident throughout his whole judicial career. A remarkable feature of his career on the bench is that no one can ever recall him losing his composure. And he had absorbed from Sir Frederick a powerful sense of the independence of the judiciary, and judicial courage, so evident later in his life.

But more importantly, this period also brought him to our mother Margaret. Dad and mum always remembered their introduction on a White City tennis court on a Sunday afternoon in 1944. The matchmakers were Margaret's older sister Rita and her husband, Tom Burke an old Waverley boy. John and Margaret were married on 9 May 1946, founding an extraordinary partnership of love, demonstrable affection, powerful mutual respect and mutually reinforcing energy, a partnership that has benefited everyone of us, and which reached its 68<sup>th</sup> anniversary.

But it is perhaps a wonder they ever married. What mum perhaps didn't realise at first is that dad's wonderful sense of humour was inherited. He came

from a family of Irish practical jokers: yes, the kind of family that welcomed out-of-town visitors by putting frogs in their beds - just to get a reaction. And on her first trip to Lambs Valley to 'meet the family' that's just what they did to mum.

Between 1948 and 1956 mum and dad had we four children Catherine, Helen, Susan and me. We each have our own early childhood memories. Mine are of enduring happiness within a disciplined 1950s and early 1960s household. Whatever his work obligations were, dad always managed to juggle everything to be home for dinner, to take mum to the races on Saturday, and then on Sunday take the family to Mass, have a family BBQ and play games. And he was always calm and focussed on the family. Perhaps because of their first courtship meeting, tennis became the default family sport. We children remember endless beach holidays with the black and white television on, and somehow always showing Australia winning the Davis Cup.

But marriage coincided with another great change in 1946. Dad left Sir Frederick for the uncertainty of the bar. He soon developed a wide common law practice. From 1946 to 1970 he practised successfully from Chalfont Chambers and later from 3<sup>rd</sup> Floor Wentworth Chambers. He maintained an enduring affection for jury trials. Not surprisingly, from what we know of him he related naturally to juries, both as a barrister and then later as a judge. He could project empathy across a courtroom, just as he did in his friendships with us. But he travelled on circuit often and on Friday nights we little ones often joyfully met his Fokker Friendship in our pyjamas at the single building that was then Kingsford Smith airport, before going for a treat of fish and chips.

Dad dwelt upon one case from his years

as a barrister: *Mace v Murray*. He was closely attached to his memory of it and it stands as a testament both to his generosity and his tenacity. Joan Murray was a bus conductress who had a child out of wedlock. In what is a very modern story, adoption authorities pressured her to consent to adopt out the child – a boy. The Maces were the adoptive parents. Joan could not afford a lawyer. So dad acted for her pro bono to try and set aside her consent to the adoption. He failed at first instance. But by then the case had become a cause celebre, with the *Daily Telegraph* intervening to support the Maces and the *Truth* supporting Joan Murray. Later led by Jack Shand QC, dad won the case in the New South Wales full court but lost it in the High Court and Privy Council. But importantly dad's original volunteer legal work meant that Joan Murray's son always knew who she was and that she still wanted him back. Dad was very happy when he discovered long afterwards that the adult son had been reunited with Joan.

Dad chuckled about one issue on his appointment. Before 1970 a Catholic had not been appointed to the Supreme Court bench for years. Amazing as it might seem to us now the government had received complaints about this. In 1969 the then attorney general famously declared his future judicial appointment intentions in parliament, 'The next one will be a Catholic', he said. And so he was. But over the next eighteen years by their professional excellence and personal integrity dad and the judges of the court from his and many other faiths helped quell such debates. He was delighted in 1988, the year he retired and when the state's first Catholic chief justice, Murray Gleeson, was appointed, that the issue had completely disappeared.

But despite that my father's faith and weekly religious practice were a

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mainspring of his life. He loved the church and he loved this church where he and mum attended Mass and prayed for 38 years and where many of their grandchildren were baptised. He helped lead the liturgy here, took the Eucharist to the sick and served on parish pastoral councils, as he had done in his and mum's previous parishes, of Chatswood and Wahroonga.

He was a proud founding member of the St Thomas More Society of Catholic Lawyers. He was the last surviving attendee of its first meeting in August 1945. He served as its president throughout the 1970s and provided leadership to the society for years afterwards. He attended virtually every opening of Law Term Red Mass from the early 1940s, the last being earlier this year, with his grandsons William and Edward.

But mum and dad's religion was not unquestioning. More than one Jesuit priest remembers being asked at home dinners to debate issues such as the future possibility of women priests in the church.

1970 was a remarkable year for mum and dad. As the photo on the back of today's order of service shows, when he went to the bench the family had almost all left school. Dad then wanted mum's own extraordinary talent to shine too. So with his clear encouragement, about the same time mum soon launched her own public career. He delighted in her successes in promoting through the Australian Parents Council the rights of children attending independent schools and the rights and wellbeing of women through the Women's Action Alliance. His judicial restraint kept him well out of her political limelight. She met prime ministers, education ministers and opposition leaders through the 1970s and 80s, while he happily made Dennis Thatcher jokes about himself.

But behind the scenes he helped her with advice, for example, to tweak proposed legislative amendments, including one which added the well-known words 'contribution in the capacity of homemaker and parent' to s 79 of the Family Law Act, so as to ensure that stay-at-home parents were fairly treated in divorce financial settlements.

Dad flourished as a judge, especially in the criminal law. Most Fridays from 1974 to 1988 he could be seen sitting with his good friend Sir Laurence Street in the Court of Criminal Appeal. Together they delivered *ex tempore* oral judgments, disposing of the lists within the day, something that is almost unthinkable now. But his forte was in trial work and with juries.

Dad's judicial style was simple: he applied a veritable forcefield of courtesy and reason to subdue the anger, the greed, and the various forms of barbarism and negligence that bring people into courtrooms.

But John's judicial courtesy could never be mistaken for weakness. One man on trial for murder of his wife found this out. He escaped custody and tried to physically attack dad in the courtroom during a break in proceedings. Now this was not a very smart idea. He was later convicted of murder, and given 20 years. Then dad added on an extra three years for attacking the trial judge.

Dad never joked in court. He saved his impish sense of humour for outside the courtroom, where we could all enjoy it. He closely followed current controversies of state and federal politics, which were often the occasion for his jokes. Only in April this year on being invited to a family function, when he was told we would be serving him Grange Hermitage, he thoughtfully paused and said 'I will accept nothing less than the year 1959'.

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One of dad's murder trials stood out. After he returned to the court as an acting judge, he tried the two murderers of Dr Victor Chang. Getting this particular trial right worried him and typically he discussed the facts of the case with family, so at the end he could explain it all to the jury with complete clarity. Like all judges he was troubled by both the loss of talented human life in such cases but equally anxious to ensure a fair trial for the accused, which in that trial he certainly achieved.

How does humility show itself in one who rose as high as dad? The answer is: in extraordinary ways. Let me give you just two examples. In 1984, the position of chief judge at Common Law fell vacant on the death of Justice Colin Begg. The then Labor government wanted to appoint dad to replace him, ahead of another more senior judge, Jack Lee. Dad did not want to accept any appointment that would cause future rancour within the court. So he went to Jack Lee and told him what the government proposed and asked him 'Did he mind the appointment?' Jack Lee waved him forward graciously. No one was happier than dad when on his retirement in 1988 Jack replaced him as chief judge.

The other example of dad's humility is the way he treated everyone who worked with him. In the 1970s and 80s he knew both by face and name all the court's



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many associates, tipstaves and Sheriff's officers. He knew the names of his court cleaners, and their spouses and the names and ages of their children. And he celebrated in his chambers the admission to legal practice of their children. He did all of this simply because of his affection for people, his affection for us. He turned his prodigious memory to that end. And prodigious it was. Let me just share with you: there is nothing quite like being reminded by a 95 year old of something you have forgotten.

Apart from his trial work dad became a constant figure helping to investigate and solve this state's occasional political, criminal and corruption problems. He sat as the state's court of disputed returns for all its electoral disputes between 1971 and 1991. He headed a special commission of inquiry into allegations of corruption against Rex Jackson a corrective services minister, which led to Jackson's later conviction. His 1991 royal commission report laid to rest public anger about the psychiatric treatment of deep sleep therapy at Chelmsford Private Hospital, and which led to sweeping reforms to the practice of psychiatry in Australia. He found there was no reason to disturb Andrew Kalezich's conviction for the murder of his wife, Megan. Amazingly he heard his last public inquiry at the age of 85: an ICAC inquiry, into corruption at Liverpool Council, allegedly involving members of the Obeid family.

But behind all his judicial gravitas dad was having plenty of family fun. The children all married: Catherine to Robert Francis, Helen to Peter Sjoquist, Susan to Bill O'Hare and I to Melissa Walsh. John and Margaret soon had fourteen grandchildren and two great grandchildren. He loved their company and was a constant favourite to play 'What's the time Mr Wolf?' As they grew up he amazed them in different ways. They all remember going to sporting

events with him. He and mum were constant providers of food to the little ones, earning the nicknames that the O'Hare's children recall, 'Mr BBQ' and 'Mrs Ham Sandwich'. But they all delighted when he winked and waved at them, as he left the bench. David Francis remembers visiting him during the Kalezich inquiry. Although he sat solemnly on the bench he invited them into chambers during an adjournment, took off his judicial robes, gave them all flavoured milk and played games. Philippa Sjoquist remembers dad, piper-like, leading a procession of little grandchildren up to the local school with their tricycles, and playing on the swings, and then, when she asked a question he seated the little group of elves in a circle and carefully explained to them the difference between the mental elements in the crimes of murder and manslaughter. Geoffrey O'Hare who had his buck's party at Rosehill Racecourse recently, remembers John was so familiar with current racing form that his tips secured many winners on the day.

John encouraged his younger grandchildren to call him by his first name and so they did. This caused some amusing moments. Dad loved to tell the story, that when Melissa's and my daughter, Sarah, was in chambers with him one day, a solicitor came in and the solicitor addressed John as 'judge'. Sarah turned to the solicitor and said 'Don't you know his name is John'.

John was always used to doing extra work in his career. During his judicial years he served as chairman of the Parole Board and was a director of the Langton Clinic Rehabilitation Centre for Victims of Drug Abuse. But after retirement he served on the Sentencing Council and became chairman of the Croc Festival to assist the work of Peter and Helen Sjoquist. In the latter role he travelled throughout northern Australia to encourage Indigenous students to

*So well-known was his good health within the profession that when I was appointed to the court in 2009 the then chief justice quipped to his fellow judges at the announcement, saying 'The government has just appointed Slattery to the court – Michael, not Jack'.*

attend school regularly, to make healthy life choices and achieve their potential. He loved the work and became a natural ambassador for reconciliation in this country.

Finally, although mum and dad carried such things fairly lightly, they each hold high honours or commissions through both the Australian and the Papal honours systems, and from Her Majesty Queen Elizabeth II, an achievement as a couple that is perhaps unique in Australia. This simple observation is perhaps its own testament to the inclusiveness and creativity of their great partnership.

Dad's good health was legendary. And the legend was true. He was born at home. He had no childhood ailments or surgery. His first overnight stay in hospital was only in 2011, at the age of 93. His cholesterol level was so low that doctors checked results for computer error. He attended every Bench and Bar Dinner until he was 94. We were all perhaps tempted to think he would always be here with us. So well-known was his good health within the profession that when I was appointed to the court in 2009 the then chief justice quipped to his fellow judges at the announcement, saying 'The government has just appointed Slattery to the court – Michael, not Jack'.

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Dad was born in the same year and only two weeks after Nelson Mandela. In dad's later years he watched the tolling of that great man's years with his own. But in recent months dad had increasing weakness of the heart. Fortunately, until only days before his death his great mind was entirely unaffected.

He was conscious of death. But just as you would expect, he joked about it. Typically, using sporting analogies, he described his outlook in recent years as being 'in the nervous 90s'. And when his knees began to swell in hospital, he looked down at them and said 'Oh well,

I suppose they'll put me in the forwards now'. Only two weeks ago his son-in-law Peter saw him reading a paper in hospital and asked him 'What are you reading John?' he looked up and said 'The death notices'. Then John paused and added 'Just checking I'm not there'.

But he was thinking of mum right until the end. By sheer force of will he maintained his health long enough to be discharged from Royal North Shore Hospital, so they could both settle into Pathways the aged care facility, where he died last Friday in the very best of care.

Like the Saint he so much admired, Thomas More, John was born for friendship. With our mother Margaret he made a rare contribution to Australian public life. But for us most of all he was a wonderful husband, father, grandfather, great grandfather, brother, uncle and friend. He graced our history. And for those of us, who knew and loved him, he graced our lives.

By the Hon Justice Michael Slattery

### Billy Purves (1933–2014)



Billy Purves died at the Sacred Heart hospice in Darlinghurst, a hand-up brief's throw from the Central Criminal Court and not much further from Kings Cross and the ABC radio newsroom where he worked as a subeditor while taking his law degree part-time at UNSW almost forty years ago.

It was at Darlinghurst that Billy achieved his greatest fame: he was prosecuting a former policeman for a significant drug supply conspiracy, with Don Stewart

DCJ presiding. Judge Stewart was irritated that, on occasion, the Crown prosecutor (who was, to be fair, a little hard of hearing) was not displaying the zeal the judge expected and, finally, he discharged the jury, claiming that the Crown was unable to conduct the matter because he couldn't hear the oral evidence as it was given. The judge ordered that the trial would have to begin again, with a different Crown. The aborted trial became famous (as did Billy) when the *Herald's* street poster declared: JUDGE PASSES DEAF SENTENCE.

The DPP, to his eternal credit (it was then Reg Blanch QC), made it clear that any re-trial would be prosecuted by Mr Purves. As it was, and the accused was duly convicted in front of another judge.

Born in Glasgow, Billy Purves never lost his Scots accent, though it diluted and mellowed over the years into a gentle burr that charmed juries. When he visited friends in Scotland, he complained, they thought the accent was

very Australian. Nothing wrong with that – Billy had the greatest affection for his adopted country, which he didn't doubt had been generous to him: he escaped the austerity of postwar Britain (although his youth there wasn't without its exciting moments, such as when Billy engaged in hours of conversation with an American in a London pub, theorising about great literature, only to learn the next day that he had been haranguing Orson Welles), migrating first to New Zealand where he worked on provincial newspapers and the *Auckland Star* and then Perth and on to Longreach, working as bookkeeper on a cattle property. In western Queensland, probably Camooweal, he used his training as a featherweight boxer to accept the 'round or two for a pound or two' challenge at Jimmy Sharman's boxing booth, and walked away unscathed and with three quid in his hand. On to newspaper journalism in Sydney, where *inter alia* he covered federal parliament for *The Sun* newspaper. His next employer was ABC Radio News

Billy Purves (1933–2014)

*Billy engaged in hours of conversation with an American in a London pub, theorising about great literature, only to learn the next day that he had been haranguing Orson Welles...*

in Sydney, and whatever his assignment, any story's accuracy was greatly aided by Billy's faultless Pitman's shorthand. It served him well as a barrister, too - court reporters would invariably check their outlines with Billy at the first possible adjournment.

In the 1970s, Gough Whitlam gave Billy a free tertiary education, and once his law degree was awarded, he went straight to the bar – a rare course, and a brave one for a new graduate with no solicitor contacts whatever. Thirty-five years ago, barristers' clerks looked after personable readers (Billy read with John Szabo and worked closely with his friend Ernie Byron QC), and he fell into criminal defence, including many successful

briefs from the Western Aboriginal Legal Service. One of his notable trials, in which his clients – two Aboriginal boys – were convicted of manslaughter at Bourke, went on to establish, on appeal, a high-water mark for the mandatory exclusion of improperly-obtained confessions.

As a defender, Billy Purves exploited what Rod Madgwick (then) DCJ described as an 'insidious style', particularly in a trial with several accused: 'Billy would get up and ask a couple of apparently innocuous questions after everyone else, establishing that no witness had much to say about his client. He'd then sit down, thanking the witness. Kept doing just that. By the end of the Crown case and without anyone noticing, he'd extracted his client from the group of guilty ones, like a pickpocket.'

Perhaps the most significant case he did in his career was *Regina v Chin*, where Billy established a precedent in the Court of Criminal Appeal, later confirmed by the High Court, that prevented unscrupulous Crowns from ambushing an accused who had been enticed into the witness box to be confronted with cross-examination on crucial evidence that had to that point been held back, unfairly.

Eventually, he took the queen's shilling, joined the Crown, and greatly enjoyed it, particularly when running trials at Campbelltown where, he used to say, the prosecutors were able to avoid the constant scrutiny of the DPP's head office.

Whether prosecuting or defending, the things that mattered to Billy Purves were fair trials, Charles Dickens, *The Times* crossword, long-distance running, English first-division soccer teams with Scottish strikers, and golf; but none was so important as his family. Billy married Linda Howley in 1972, and they had two daughters – Gemma and Diana, of whose careers Billy was quietly very proud. What he told very few people, indeed it took him 30 years to tell one of his close friends, was that he was brought up, with his older brother, in a Scottish orphanage at Aberlour in the 1940s. He was the first boy from the orphanage ever to be enrolled at the village school, but that didn't mean he was ever invited into a village house, even by a classmate. It was little wonder that he identified with Australia.

By Stuart Littlemore QC

### Correction

The Hon Mervyn David Finlay QC (1925–2014)

The Winter 2014 edition (page 77) featured an obituary for the Hon Mervyn Finlay QC. It mentioned, among other things, that he practised in Papua New Guinea and his room on 12 Wentworth Chambers was a double room. *Bar News* has learned that these points are incorrect. A corrected version of the obituary has now been published on the Bar Association's website: <http://www.nswbar.asn.au/for-members/bar-news>. *Bar News* apologises for any confusion that might have been caused.

### Tony Richard Edwards (1954–2014)



Tony Richard Edwards of Newcastle Chambers died suddenly of a heart attack on 21 June 2014, aged 60.

Tony was a well known and proud Novocastrian, having lived in Newcastle all his life. The eldest child of Don and Gloria Edwards (Don sadly passed away very shortly after Tony's death), Tony attended Newcastle Boys High School before commencing his legal career with Bruce O'Sullivan, Fox & Walsh under the tutelage of Max Fox, with whom he developed a close personal, professional and sporting association. Indeed, Max's daughter introduced Tony to his wife, Judy.

Tony was quickly appointed a partner in Bruce O'Sullivan, Fox & Walsh and remained a partner until going to the bar in 1991. Whilst Tony's achievements as a solicitor might now be a distant memory, there is a permanent reminder of Tony in the District Court at Newcastle. On one occasion in his younger days (appearing against no lesser advocate than that other well known Novocastrian, Larry King SC), Tony was appearing in the District Court when a customer of the court, who had recently been sentenced by the judge,

barged into the court brandishing an implement said to be an axe and moved towards the judge. Without regard for his own safety, Tony crash tackled the offender, colliding heavily with the old fireplace in the court cracking it in the middle. The cracked fireplace still sits in the District Court as a reminder of the days before security in the court and now of one of Newcastle's most determined advocates, in more ways than one.

At the bar he developed a varied practice with an emphasis on personal injury work or perhaps more accurately an emphasis on representing workers in a wide range of legal issues. In tributes to him in the *Newcastle Herald* after his death he was described as a fierce advocate for his clients. He knew how to achieve a result in even the most difficult cases and was often heard to say that sometimes it is necessary to save clients from themselves. He was prepared to represent all and any who sought his expertise and there are many workers in the Newcastle and country areas who benefited from his determined approach to obtaining a favourable result for them.

He spent five years representing one such client in various jurisdictions, including defending criminal proceedings, applying for reinstatement in industrial proceedings, pursuing appeals all the way to the leave stage of the High Court and finally seeking compensation. That client was there at his funeral at the overflowing Newcastle Cathedral.

He was held in high regard and liked by not only his clients but also by those insurers and their representatives with whom he regularly battled. Typical of Tony, he was last seen in the Workers Compensation Commission in Sydney two days before he died placing the solicitor for the insurer in a headlock demanding that he pay more money to his client. The WCC was reported to be a sombre place on the Monday after his death.

In his last ten years at the bar, Tony became one of the counsel of choice for the New South Wales Police Association, particularly representing police officers seeking benefits for total and permanent disablement.

Tony had a keen intellect and an expansive mind. This was also demonstrated most recently in his unfinished attempts to argue and overcome complex legal problems relating to jurisdiction and the use of declaratory powers in the IRC for the benefit of a group of police officers seeking payment of TPD Benefits from the relevant trustee and insurer. He did not shy from pursuing complex legal arguments or appearing in difficult cases. Perhaps typical of the requirements of barristers practising in regional areas, he liked to say if there's a book about it then I'm an expert in it.' Of course as his colleagues in chambers have informed



Tony Richard Edwards (1954–2014)

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me he went out of his way to undersell his legal ability and expertise. He never needed to or liked to extoll his own virtues.

Tony spent many years as a member of Newcastle Chambers. He used to tell me of the advantages of working in Newcastle and his chambers and in particular the support he received from his staff as well as his colleagues such as Harben SC who emphasises the assistance and support he and other members of the chambers received from Tony over many years.

While Tony worked hard, his work might be best described as a sideline to his main interests which were his wife Judy, his children and in recent years, his grandchildren, and all things associated with sport. Tony was an accomplished soccer and basketball player but his main talent was on the cricket field. He played First Grade for Northern Districts and also played representative cricket, including representing Northern New South Wales against the West Indies and England. He played county cricket in England. He was part of a New South Wales country team which included cricketers such as Gary Gilmore and Bob Holland. There may not be another non-test wicket keeper who can claim to have

stumped Viv Richards, Alvin Kallicharan and Colin Cowdrey in representative games.

In the match against the West Indies, which included many famous names in the West Indies Team, he scored 81 of a total of 162 in the second innings.

After retiring from cricket, Tony spent a considerable time on a voluntary basis as a cricket and basketball administrator, as well as often providing advice on a voluntary basis to sports people and sporting teams. He served on the Newcastle Cricket Association Judiciary. He also represented A-League soccer players in disciplinary proceedings. He was always generous with his time and money in supporting so many voluntary and indeed professional associations. His passion for cricket was best demonstrated by his annual occupation of the back row of one of the Members Stands at the SCG with some of his friends as they watched the whole of the Sydney test match.

As both his close friend Jerry Tombleson and his son Alex said at his funeral, Tony was a dedicated family man who remained first and foremost dedicated to his wife Judy. His main delight in recent years was spending time with his four

adult children, Michael, Alex, Matthew and Jessica, his three daughters-in-law, Alicia, Fiona and Alyssa and, more recently, his two grandchildren, Charlie and Liam. He developed a passion and a talent for photography (he liked to tell a good story and he claimed it started in the old matrimonial causes days) which he used to great effect on the regular trips and holidays that he undertook with Judy in the years before his death.

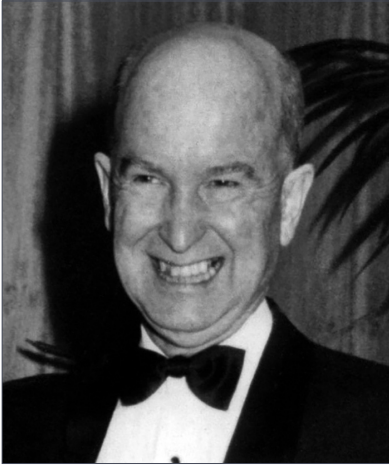
Tony was known for his wit, irreverence and dislike of all things politically correct. He was widely known and liked in so many different circles in Newcastle. The Newcastle Cathedral could not hold all those who attended his funeral. He was a familiar figure every morning as he firstly undertook his morning walk along the beaches of Newcastle, waving to or stopping to chat to people along the way and then as he rode his Vesper to work. For many years he occupied the front table at a coffee shop close to his chambers in Newcastle from where he greeted everyone as they walked by.

As my brother-in-law, Tony moved my admission as a solicitor in 1982 and introduced me to some of the solicitors that he knew (and insisted they give me work!) when I came to the bar in 1998. I benefited greatly from his advice and experience in my early years at the bar.

He is no doubt a great loss to the Newcastle legal fraternity and wider community and will be missed by his wife Judy, his mother Gloria, his family, including all of the extended Cavanagh family, and his many friends.

By Richard Cavanagh

## Paul Francis Flannery QC (1913–2014)



Paul Flannery died on 5 September 2014 when he was in his 84<sup>th</sup> year. He was born on 7 March 1931, the elder of two sons born to Rita O'Driscoll and Jack Flannery. Both of his parents were pharmacists and for many years of his younger life they conducted a pharmacy in Oxford Street, Paddington. Paul had only one sibling, Max, who spent his life as a teacher in the Christian Brothers order. Max is two years Paul's junior. He and Paul were very close throughout their joint lives.

Paul and his brother grew up in Randwick. They both attended Waverley College. Paul was a good student and very keen on cricket.

He attended the University of Sydney from 1948 to 1953. He completed a BA in 1952 and in 1954 he graduated with an LLB with second class honours. He worked part time in the Mark Foy's womens' store at the corner of Elizabeth and Liverpool Streets while he was a student. His area was ladies' slippers. He was an unusual combination of men, being at once unworldly, modest, gentle, charming, erudite, a joker, and a powerfully committed Christian. Those close to him often speculated about how such an unworldly man managed to deal

with the intimacies of fitting a slipper onto the stockinged foot of a female customer.

At the time he attended university it was customary for students to work part time for a law firm, usually for a nominal wage, completing a form of apprenticeship long since gone in NSW, called articles of clerkship. Paul worked for two firms, one of which was Freehill, Hollingdale and Page. At that time there was a religious division in the law firms of Sydney, with some having a strongly Protestant bent and others a strongly Catholic one. Flannery's Catholicism helped him to fit into the then strongly Catholic Freehills office, which employed (mostly men) who had attended one of the better Catholic schools and/or lived at St Johns College.

It was then, and is still, unusual for a law graduate to start practice at the bar without first working as a solicitor. Paul never worked as a solicitor. Instead he spent a year after he graduated working as an associate to a Supreme Court judge, Sir Cyril Walsh, who was later elevated to the High Court of Australia.

Paul Flannery was called to the bar on 30 November 1956.

At that time NSW barristers benefited greatly from the wartime tenancy legislation, which helped to keep tenants protected in significant ways. Much litigation was generated from this legislation, with landlords trying to evict bad or inconvenient tenants and tenants trying to resist their efforts. Paul developed expertise in this field and spent much of his early years at the bar appearing for tenants or landlords. One of his frequent opponents at that time was the late Peter Clyne, who was ultimately disbarred.

In his early months at the bar Paul had chambers in an old terrace house in Chifley Square, where the Wentworth Hotel was later built. One of his fellow chambers members was Keppel Enderby QC, who was later to become Commonwealth attorney-general and then a justice of the Supreme Court of NSW. Another fellow floor member was the late John Foord QC who was later appointed to the NSW District Court and who, like the late Justice Lionel Murphy, later stood trial on charges of attempting to pervert the course of justice, and at whose trial, as he was at Murphy's trial, Flannery was one of the principal prosecution witnesses.

After his time in Chifley Square, Flannery was invited to join the fourth floor of Wentworth Chambers. There, some of his fellow floor members were Murphy, Neville Wran QC (later premier of NSW) and Peter Clyne. (After Clyne was disbarred, Paul bought his room). In his early years there Paul shared a room with the late Joe Ford, later Joe Ford QC, who was, as was Flannery, later appointed to the NSW District Court. Flannery's practice there flourished. In later years he tended to concentrate on accident cases, usually appearing for insurers, often holding briefs in several courts and suburbs on the same day. Amongst his colleagues he enjoyed a reputation as a charming and highly intelligent and wily fighter, who used his charm and legendary sense of humour to great effect, whether when persuading a witness to make a concession, or a judge to adjourn a case so he could finish another one in the court next door, or perhaps an hour's train ride away. He had an unusually good memory for names, and knew the names of all the court officers and the judges' associates, which stood him in good stead when, as was

Paul Francis Flannery QC (1913–2014)

often the case, he needed an indulgence. Although most of his work was in the insurance field he did some criminal trials, including murder trials, in which he was usually successful. He was invariably good humoured. He was described recently by a friend as incorrigible. Whilst he was at the bar he had a friend, a solicitor, who briefed him to settle an affidavit. The affidavit was sent back with the solicitor's name slightly altered. Instead of Adrian Leopold Belmore, it appeared as Adrian Loophole Belmore.

In 1980 he returned to study at the University of Sydney, graduating with an LLM, his thesis being a study of the doctrine of attainder, whereby a prisoner serving a sentence for a capital felony could not sue at common law, a doctrine brought to modern attention by a defamation case brought by the late Darcy Dugan against the publishers of the *Daily Mirror*.

Paul always maintained a great faith in his religion. He was a man of small stature. He always wore a hat or a cap. He enjoyed many nicknames at the bar, but the one which stuck was 'the Pope's Jockey'.

Paul married Rosemary Woodbury on 26 December 1957. They met at university through the Newman Society. They later had four children, Anne, Leonie (who later became a barrister, senior counsel and a District Court judge, this being the first time in Australia father and daughter had been appointed to a court), Christopher and Philippa. Paul always referred to Rosemary as 'my first wife'. He was a devoted father and husband.

Paul did not drive. Nor was he a handyman. He probably never picked up a screw driver or a hammer in his life except as exhibits in court cases he was appearing in. Nor was he a gardener. His interests were his career, his family and his God.

*Paul and Rosemary Flannery went to dinner at the Murphys' Darling Point unit on the Saturday night before the trial began. They were the only guests. The trial was not mentioned, but a legal issue highly relevant to the Ryan case was raised by Murphy. Paul said to Rosemary on the way home: 'He's trying to nobble me.'*

He left the fourth floor of Wentworth Chambers in 1973 and joined the eighth floor. He took silk in 1980. His first case as a silk was in the Privy Council. He had won the case in the District Court, then lost it in the NSW Court of Appeal. The Privy Council overturned the decision of the Court of Appeal, five to nil. The case is reported as *Burnes v Trade Credits Ltd* [1981] 1 NSWLR 93. One of those sitting on the Privy Council for the case was Lord Diplock, whose stature was similar to that of the five foot four Flannery. Paul sometimes remarked how comforted he had been to see that Diplock was short, and thought it probably gave his client a head start.

In late 1982 Paul was appointed to the District Court of NSW. He served on the court for 18 years. For a large part of his time he sat in courts in the Downing Centre, the same building which had housed Mark Foys all those years ago where he had assisted women with their slipper purchases. When he was sworn in as a judge the then president of the Law Society of NSW, the Honourable Marla Pearlman AM, spoke of his honesty and moral integrity, his sparkling sense of humour, hard work, sense of justice and fair play. In the course of her speech, speaking of his departure from the bar, she said: '[A]nd yet for us it is a sad time for we are about to lose our tricksy spirit. It is no exaggeration, it is no poetic licence, to assert as I do that the mere mention of your name in conversation

among lawyers was enough to unfurrow the most lowering brow and to introduce an atmosphere of sweet reasonableness into the deliberations. It has been simply impossible to harbour ill natured feelings towards you'.

It can fairly be said that Paul maintained throughout his long career on the bench that atmosphere of sweet reasonableness. Female barristers especially, found him a delight to appear before, and so different from many of his colleagues. It is rare for it to occur when a judge, let alone a judge of the District Court, retires, but when he retired in 2000 the bar held what has become known as a 'swearing out' for him. On that occasion a number of eminent senior counsel gave glowing testament for the high regard in which he was held as a judge. The court room was packed out, with standing room only.

If his first case as queens counsel was significant for him, one of his first criminal trials as a judge was seminal. In 1981 a Sydney solicitor, Morgan Ryan, was charged by Commonwealth authorities with the crime of conspiracy to break certain immigration laws. The facts alleged were that he had conspired with others to use false evidence of trade qualifications so that some people of Korean origin might obtain Australian residency. Ryan was convicted, and later granted a new trial, although the Crown never put him up again. What occurred leading up to that trial and in the course

Paul Francis Flannery QC (1913–2014)

of it was to influence Paul Flannery's life and that of his family for as long as he lived.

Although Flannery and Lionel Murphy both practised from Fourth Floor Wentworth Chambers, and they enjoyed a floor friendship, they never socialised outside legal functions. Murphy, a High Court judge since 1975, was a long standing friend of Ryan. In July 1983 Flannery was listed as the trial judge in Ryan's trial. A few days before the trial began, and totally out of the blue, Flannery received a phone call from Murphy inviting him to dinner. Paul and Rosemary Flannery went to dinner at the Murphys' Darling Point unit on the Saturday night before the trial began. They were the only guests. The trial was not mentioned, but a legal issue highly relevant to the Ryan case was raised by Murphy. Paul said to Rosemary on the way home: 'He's trying to nobble me.'

As the Ryan trial proceeded one of Flannery's fellow judges, John Foord, also a close and long standing friend of Ryan, spoke to Flannery in such a way as to suggest to him he also was trying to influence the trial's outcome. But at that stage Flannery did not go to the authorities. He was a very junior judge and he was in a difficult position, especially since Foord was a District Court colleague and a long standing friend.

In the late 1970s a group of NSW police tapped the telephones of citizens without any legal authority. One of the citizens was Ryan. In the early eighties journalists began writing articles about the contents of the tapes. In November 1983 the *National Times* had a story dealing with what it described as 'secret surveillance reports that give fascinating insights into relations between a lawyer, an organised

*Murphy and Foord were popular figures at the bar, and in some Labor circles Murphy was iconic. Some who had been Flannery's friends before he gave evidence ceased to be so. There was a division on his court between those friendly with Murphy and Foord and those not so. These things saddened him.*

crime figure, police and a judge'. The *Age* published articles about what was said to be in the tapes and on 6 February 1984 an *Age* editorial referred to the stories which, it claimed, 'disclose a pattern of behaviour that is improper and unworthy of someone holding high judicial office'. The *Age* articles had serious errors in them about what was said by the participants and the *Age* apologised. But Murphy was then exposed as the judge whose calls had been intercepted.

When it became known in the community that a High Court judge was the subject of the tapes there was a great deal of community disquiet. The then president of the Law Council of Australia, Ian Temby QC, was commissioned as a special prosecutor to prepare a report on the tapes. Then a Senate committee was appointed to enquire whether the tapes were authentic and if so whether they revealed misbehaviour which could be sufficient ground for Murphy's removal from the High Court. At that stage the then chairman of stipendiary magistrates of NSW, Mr Clarrie Brieese, brought to the committee's attention information suggesting that Murphy had tried to influence him to help Ryan when Ryan's case had been at the committal stage. In the middle of 1984 the committee reached inconclusive findings. A new committee was set up. In the meantime Brieese was excoriated by public figures such as Neville Wran QC, at that time still the NSW premier, and a close

friend of Murphy, for what he had said to the authorities. Flannery then felt he had to go to the authorities about his suspicions. He gave evidence at the second Senate enquiry about Murphy's dinner invitation. In late 1984 the members of the second Senate committee by majority concluded Murphy could have been guilty of misconduct such as to justify his removal from the High Court. In 1985 Murphy was tried before a jury in the Supreme Court of NSW where he faced two counts of attempting to pervert the course of justice, first by trying to influence Brieese, and secondly by trying to influence Flannery. He was acquitted of the count involving Flannery but convicted of that involving Brieese. That conviction was later set aside on appeal and he was acquitted on the retrial.

Foord was charged for his approach to Flannery and for an approach he had made to Brieese. After a lengthy trial (which followed the first Murphy trial), Foord was acquitted. Foord, who had stood down from the District Court after he was charged, then returned to take up his duties on the District Court alongside Flannery.

Those years from 1982 to 1986 were long ones for Flannery, who went on with his judicial duties, interrupted as they were from time to time by the need to give evidence. He became a well known figure, the cartoonists having a field day with his small stature and



Paul Francis Flannery QC (1913–2014)

colourful nickname. Sadly, those close to him observed that he became a different man after those experiences. He was always kind and polite to all but he was no longer the 'tricksy' man who had been so warmly welcomed to the bench. Murphy and Foord were popular figures at the bar, and in some Labor circles Murphy was iconic. Some who had been Flannery's friends before he gave evidence ceased to be so. There was a division on his court between those friendly with Murphy and Foord and those not so. These things saddened him. In 1999 the late Jim McClelland died. He had been a close friend of Murphy and had given the somewhat anodyne evidence at the Murphy trials that Murphy had asked him to speak to the chief judge of the District Court to see if Ryan could have an expedited trial. After McClelland's death, evidence emerged that Murphy's request to him had been far more sinister than the approach he had given evidence of, but that he had kept back this evidence through loyalty to Murphy. This revelation received much press publicity at the time and Flannery was greatly chuffed by it, feeling vindication. Following that revelation several people who had been unfriendly to Flannery since the first Murphy trial apologised to him.

Flannery did not entirely lose his sense of humour throughout these travails. In the

midst of the Murphy committal he was cross examined by the late Alex Shand QC for Murphy to the effect that he, like Murphy, was a gregarious man, also just the kind of man who would ring up someone out of the blue and invite him to dinner. There was this exchange:

Shand: You do have a picture of yourself... as gregarious?

Flannery : I don't know Mr Shand. Sometimes I am and sometimes I'm not. I wouldn't think I was as gregarious as [Murphy].

Shand: Good natured?

Flannery: I don't think I should admit to [that]. Like everyone else I'm tainted by original sin Mr Shand...

Shand : This is certainly not meant to be a confessional Judge.

Flannery: You needn't worry Mr Shand. I might go elsewhere.

Throughout his adult life Flannery invariably addressed married females by their maiden names. He loved to be outrageous. He would sometimes sign his name 'Elvis Flannery' or 'Elton Flannery', on quite official documents. Because of his somewhat small stature he would sometimes sit on the knees of females of his acquaintance at parties. When his daughter Leonie was a public defender he would follow her trials with great interest.

*Paul retired in 2000. He used his retirement to read novels, help in his church, and spend time with his many friends and his family.*

On one occasion a Sydney newspaper had a headline 'Defence counsel grills witness'. That weekend Flannery left a message on Leonie's message machine saying he wanted to speak to the 'griller'.

He kept his faith throughout all those years, attending mass sometimes seven times a week, often popping in to an early morning service on his walk from Wynyard Station up to the legal precinct.

Late in his life he was made a knight of the Order of St Lazarus of Jerusalem and a life member of the Thomas Moore Society.

Paul retired in 2000. He used his retirement to read novels, help in his church, and spend time with his many friends and his family. He is survived by his devoted wife, Rosemary, his brother, his children, his nine grandchildren and his five great grandchildren.

**By His Honour Judge S L Walmsley SC**

## Chandra Chithravelu Sandrasegara (1936–2014)



There was a lot of overlap between Chandra's life as a barrister and his life as a cricketer. That's not just because for many years he was a keen member of barristers' cricket teams, playing for the Australian Bar against the English and Irish bars and for the New South Wales bar against the Queensland and Victoria bars, neither of which he would have suggested was equivalent to wearing the baggy green or the baggy blue. The real overlap was different. It was to do with talking or speaking.

In the type of semi-social cricket Chandra played for the last 20 or so years before hanging up his boots only about a decade ago, there was a lot of after game chat and quite a few speeches, and for better or worse barristers spend a lot of their time speaking.

Not every client after the case is over would say that his barrister was a good

talker, but no one would have denied that Chandra was a good mouthpiece, and when it came to making speeches he was always a very funny and very gracious speaker. It's a pity that he can't give a eulogy to himself. He wouldn't have big noted himself but he would have made us laugh. Several members of the Queensland Bar cricket team have been in touch since his death to say how funny his speeches were, and one of them, Roger Traves, a former president of the Queensland Bar Association and former Sheffield Shield player, recalled tears of laughter running down his cheeks during one of Chandra's speeches.

He studied in Sri Lanka and later in England where he was a student at London University. He practised as a Crown advocate in Sri Lanka and that job took him all over the country and gave him both fun and satisfaction. As Doug has told us, he came to Australia

in 1974 and began practice at the bar in Sydney and he was still in active practice when he died a mere 40 years later. That in itself is a great achievement. He had a wide range of work in that time including criminal cases, family law cases and latterly mainly personal injury cases. He was a natural champion of the underdog, full of feeling and sympathy. One rule of law he was certain existed, even though it was not to be found in a text book, was that the underdog should always win. By that he meant his underdog. He always tried hard but he was as much compassionate as passionate. That coupled with his friendly courteous manner made him enormously popular with judges and colleagues. It is no bad thing in a tough competitive profession to be well liked.

*He studied in Sri Lanka and later in England where he was a student at London University. He practised as a Crown advocate in Sri Lanka and that job took him all over the country and gave him both fun and satisfaction*

Chandra played most of his serious cricket at school in Sri Lanka, at university and in England, and back in Sri Lanka with his beloved Tamil Union Club in Colombo, whose home ground was the old test match ground. He went there whenever he was in Colombo and

## OBITUARIES

Chandra Sandrasegara (1936–2014)

maintained his membership to the end. In Australia he played a bit of serious cricket but settled into city and suburban one day games first with the Cricketers Club and then with Paddington. He could be classified as an all rounder because he wasn't a bad bat but his forte was his left arm slow bowling, sending down his deliveries and taking a lot of wickets with what some people described as an 'intriguing action'.

For Chandra the cricket community was not confined to the playing field and dressing sheds. He was a great supporter of satellite cricket organisations, particularly charitable ones and he was active in the Primary Club the LBW Trust and the Australian Cricket Society.

Rory has said that he died the way he would have wanted to die having just seen a tense Bledisloe Cup game. That

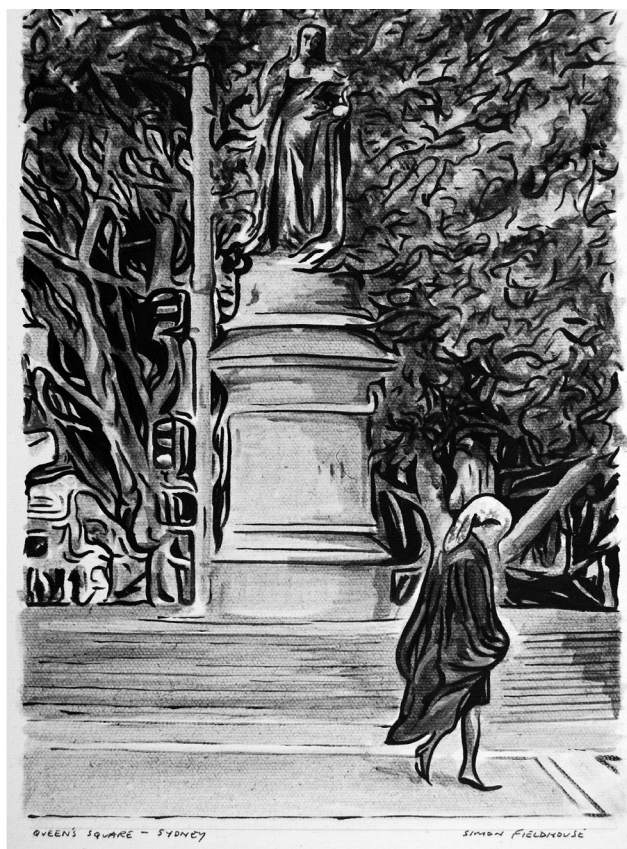
might be right, but it's doubtful. Harry Solomons sent many of us an email giving a fond and accurate picture of Chandra at the SCG whenever a match was in progress. Kindly man that he was, he'd have wanted to say his goodbyes to family and friends, and if he couldn't surely his real preference if it had to happen would have been for it to happen on a sunny day, as he stood on the lawn behind the member's stand, a cigarette in one hand, a beer in the other, telling his companions that Murali was not really a chucker.

I'll finish with a story about Chandra that I cherish and that I know he liked to recall involving his old club. In 1982 his great friend Roger Gyles, with whom he had a curry the night before he died, put together an Australian Bar Association world cricket tour. At Chandra's insistence Sri Lanka was the

last stop. He organised a game against his old club at the Tamil Union ground. He had the ground dressed with ceremonial flags as for a test match. He arranged for the kitchen and bar to operate at full steam and for the Australian High Commissioner to turn up and watch for a couple of hours.

By common consent he was made captain for the game. Before play began he delivered a tongue in cheek rabble rousing speech in the dressing room saying that he would raise the standard of captaincy and if the team responded, victory would be achieved. Then during the after-match formalities he made another speech. It was a very funny and very gracious speech, given as the losing captain.

By Larry King SC





## Chris Holt (1947–2014)



Chris Holt co-founded and ran The Federation Press for most of his life. He was a publisher who made a huge and lasting difference in legal, scholarly and educational publishing in this country. He published the first books of many Australian authors, including many which otherwise would not have been published at all, and many written or contributed to by members of the New South Wales Bar Association.

Christopher Appleby Holt was born on 12 September 1947 in Buriton, England, the first son of Richard Anthony Appleby (always known as Bimby) Holt, a solicitor, for many years chairman of the Hutchinson Publishing Group, and a first-class tennis player and cricketer, and Daphne Pegram, the daughter of a vice-admiral who saw active service in two world wars. Holt attended Harrow, where he excelled at cricket, rugby and squash. He read law at Cambridge. He moved to Sydney shortly after graduating, and followed in his father's footsteps as a publisher.

Holt worked in legal publishing, first at Butterworths and then Law Book Company, in the 1970s and 1980s. He was promoted rapidly in both companies becoming head of department at

Butterworths at age 28. Very early in his career at Butterworths he was directly involved in publishing the first edition of *Equity: Doctrines and Remedies*, written by a leading silk and two partners of the firm then known as Allen Allen and Hemsley: Roddy Meagher QC, Bill Gummow and John Lehane. Much more importantly, while at Butterworths Holt also met, courted and married his life-long love Jo. I learned at his funeral that he gave Jo a bunch of white lilies every Sunday for the rest of his life.

The British group of which Law Book Company was a part of was acquired by a larger North American international publisher in 1987. The prospect of working in such a large organisation was unattractive to Holt and two colleagues, Diane Young and Kathy Fitzhenry. They mortgaged their homes, borrowed from family and friends, and formed The Federation Press. They did so at a time when other publishers, as well as universities and law firms, were racing to merge and attain scale, and university presses around the country were closing. However, Holt saw that there were large opportunities. There were many new law schools with students who needed books, and academics who needed to publish. The number of Australian practitioners had also significantly expanded. And there was also a new – albeit belated – approach to the distinctive nature and worth of Australian law and legal scholarship in its own right. As recently as 1977, Sir Anthony Mason had railed against Australian law being described as 'a mere appendage to the corpus of English law' and said:<sup>1</sup>

Our knowledge and our thinking have been conditioned by what textbook writers have had to say about the law of the United

Kingdom. Overseas authors have given scant attention to judicial decisions in Australia and New Zealand and none at all to Australian statute law. The dearth of an authentic textbook of local origins has not only led to an inadequate recognition of our contribution to the law, it has handicapped its development.

The new company flourished. Over the next 27 years, the Federation Press under Holt published hundreds of Australian books, in all areas of the law. Many are now standard practitioner and student texts, in their fifth, sixth and seventh editions. Others are scholarly works and collections of essays, with smaller print runs, but which nevertheless made a lasting contribution to Australian law. He dealt with authors personally, patiently nurturing them, and had an enormous skill in bringing out their best. He also recognised manuscripts of lasting worth, and published many books whose immediate commercial viability was uncertain, and which would not otherwise have been published in a market dominated by multinational publishers. These included works of the highest scholarship, which larger publishers chose to let go, including new editions of legal classics such as Leslie Zines' *The High Court and the Constitution* and Sir Zelman Cowen's *Federal Jurisdiction in Australia*.

There were also books of especial interest to the New South Wales Bar. Recent examples are *Constituting Law: Legal Argument and Social Values*,<sup>2</sup> *The Byers Lectures*,<sup>3</sup> Keith Mason's *Lawyers Then and Now*,<sup>4</sup> *Key Issues in Judicial Review*,<sup>5</sup> and biographies of Michael Kirby<sup>6</sup> and Murray Gleeson.<sup>7</sup> There was also a long tradition of publishing works of legal



Chris Holt (1947–2014)

*He dealt with authors personally, patiently nurturing them, and had an enormous skill in bringing out their best. He also recognised manuscripts of lasting worth, and published many books whose immediate commercial viability was uncertain, and which would not otherwise have been published in a market dominated by multinational publishers.*

history, including two volumes of the *Historical Foundations of Australian Law*,<sup>8</sup> and a series of biographies of colonial chief justices (now in 13 volumes) including Sir Francis Forbes and Sir Alfred Stephens by Dr J M Bennett.

Holt travelled widely, but invariably returned to the United Kingdom to make regular visits to his mother. He enjoyed art, natural beauty, wine and good conversation. He was extraordinarily well-read. He was deeply unconcerned by cant, correctness in any of its varieties and, it must be said, the condition of his hair and clothes. Holt's school-master from Harrow wrote in a report that 'he does give this curious impression of being loose-limbed, a little sloppy, and not anxious to appear very hard working'.

That description held true for the rest of his life. Yet Holt had a vision for independent legal publishing, and the courage to see it implemented, which made a lasting difference that will survive his untimely and sudden death on 4 September 2014.

When last we spoke – over lunch on 4 September – he was in excellent spirits, as usual, and bursting with vitality. We talked at length about two new book proposals, and the history of free trade in the nineteenth and twentieth centuries, and what we had been reading, but most of all about his pleasure from a recent holiday with one of his daughters. I remember now the time I first met him, at a careers day at Sydney Law School a quarter century ago, standing behind

a stall in the large Phillip St lecture theatre explaining, with a prescience I failed to appreciate at the time, how much more there was to the practice of law than working for the law firms who were offering summer clerkships in the neighbouring stalls.

Chris Holt is survived by Jo, their two daughters Camilla and Louisa, his granddaughter Laura, his mother Daphne and other members of his extended family.

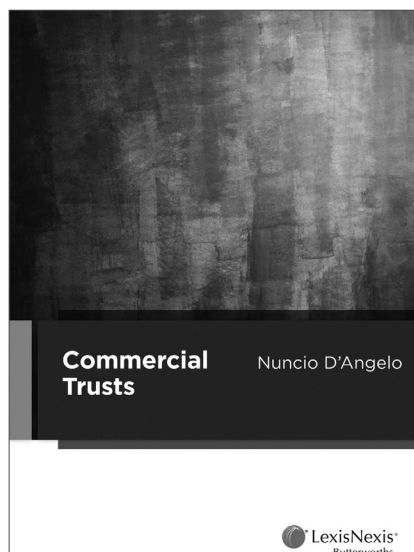
By Mark Leeming

## Endnotes

1. In the foreword to D Pearce, *Delegated Legislation in Australia and New Zealand* (Butterworths, 1977).
2. Edited by Justin Gleeson SC and Ruth Higgins in 2011.
3. Edited by Justices Perram and Pepper in 2012.
4. Published in 2012.
5. Edited by Neil Williams SC in 2014.
6. A J Brown, *Michael Kirby: Paradoxes and Principles* (2011).
7. M Pelly, *Murray Gleeson – The Smiler* (2014).
8. Edited by Justin Gleeson SC, James Watson, Ruth Higgins and Elisabeth Peden in 2013.

## Commercial Trusts

By Nuncio D'Angelo | LexisNexis Butterworths | 2014



As others would doubtless observe, this book is concerned with the normative rather than the doctrinal. Dr D'Angelo's hypothesis is that the trust device has evolved from the role of a guardian to become a vehicle for entrepreneurial activity. However this evolution has been imperfect, with the result that participants are exposed to serious risks of which they are often unaware. The book is concerned with the legal risks involved in commercial trusts.

The style of the book is practitioner focussed. Chapter 1 sets out the author's purpose, methodology and taxonomy as well as the historical and statutory context of the commercial trust. This will be useful to those unfamiliar with the field, but the author's style is sufficiently intuitive that moderately well informed readers need not dwell. Chapter 2 contains an interesting and easily read historical account of the evolution of the trust and equity's achievements along the way. The trust morphed from a device for the disposition of real property into one chosen for the entrepreneurial aggregation and commercial deployment of capital. The ingenuity of commercial

lawyers saw the trust instrument expand the trustee's powers by contract and generally mimic the desired features of a corporate structure (but without the maintenance of capital doctrine).

As the author notes, the extent of use of the trading trust is peculiar to Australia, due in large measure to preferable tax treatment. The author's central point is that trust law did not keep pace with this normative change in the use of trusts and that the commonplace notion that a corporate structure and a trust structure are interchangeable is hopelessly naive. Quite apart from sub-optimal advice, it might be thought that this parity myth has been encouraged by creeping and broadly parallel regulation of trading trusts through amendments to successive company law statutes.

The fragility of the trading trust essentially comes down to the fact that it has three features which were never envisaged at the conception of the trust notion: an equity investor, a corporate trustee and a lender. Hence the central analysis of the book is within separate chapters devoted to the legal risks inherent in the trading trust structure from the perspective of each of them.

Starting with the investor, the author directly challenges the widely held assumption that the investor acquires limited liability through a web of careful drafting in the trust instrument. He contends that the investor may incur personal liability to a creditor directly, where the trustee/investor relationship has acquired the character of agency, through either rights or acts of control of the trustee by the investor. The theoretical basis of this is not really controversial, although whether that ought to be regarded as a shortcoming of trust law is questionable, since it is

essentially a common law question of agency and privity of contract. Those common law principles apply equally to corporations and trusts. It is precisely because a shareholder has no proprietary interest in a company's assets, has the statutory limitation of liability and (by the replaceable rule in section 198A and its predecessors in the 'Table A' articles of successive company law statutes, unless modified) no power of management or control, that the agency principle is less likely to be enlivened with a shareholder. It is the absence of these basal characteristics in a commercial trust, that increases the risk of agency principles being enlivened. What the author carefully makes clear, is that this is a risk of uncertain dimension for commercial trusts because of the absence in the authorities of any clear articulation of a control test for trusts.

Secondly, the author contends that such personal liability may result from a creditor being subrogated to the trustee's right of indemnity from the investor beneficiary personally. This is somewhat more uncertain territory, given that many of the cases where a personal indemnity has been found have given weight to what could also be regarded as control questions. At the least, some form of adoption of the trust by the beneficiary must be involved since it cannot be the case that the first a beneficiary under a secret trust might hear of it, is when the trustee who has properly leveraged the fund and suffered from a swing in the market, calls for indemnity. The author demonstrates that precisely what more is required is unclear in the authorities. In practice this avenue of liability is less of a problem for commercial trusts, since the personal indemnity from the investor is usually negated in the trust instrument. As to subrogation,

*The chapter dealing with the risks for creditors ought to open eyes in banking houses throughout Australia; although it probably won't.*

the author demonstrates that there is little clear authority on this question. He advocates a dual function for the well drafted limitation clause in loan or contract documents: limit recourse to the trust property and have the counterparty expressly waive any rights to pursue the investor personally (just as trustees are always assiduous to secure for their own benefit).

Moving to the corporate trustee, the author carefully points out the many pitfalls for a commercial trustee and how these may be ameliorated in the trust instrument and third party contracts. He issues the perennially necessary reminder to commercial trustees, that they have an irreducible obligation to act honestly and in good faith for the benefit of the beneficiaries, regardless of the breadth of the trust instrument. Very close attention is given to the language and effect of various common forms of limitation, which vary in quality.

The chapter dealing with the risks for creditors ought to open eyes in banking houses throughout Australia; although it probably won't. As the author points out, the priorities which flow under the statutory regime for companies, can be inverted in some circumstances with commercial trusts: equity holders can enjoy priority over unsecured lenders. The risks include the absence of an indoor management rule and the risk of accessorial liability for breach of trust. Perhaps the least appreciated risk is that the only access which an unsecured creditor of an insolvent trustee has to the trust fund is by subrogation to the

rather fragile trustee's right of indemnity / power of exoneration. Misconduct by the trustee, even without participation or knowledge by the lender, may impair the right and power and thus the creditor's only avenue to recovery. The application of the rule in *Cherry v Boulton* in relation to the power of exoneration is subject to particular and reasoned criticism by Dr D'Angelo. One question which is not considered is whether these problems could be overcome by a trust instrument which elevated the interests of the class of prospective lenders to that of a priority beneficiary in certain circumstances. Hence the corpus could be held on trust to pay debts properly incurred by the trustee and then for the unitholders; much like an old fashioned Will trust.

There is a separate chapter on the particular problems of insolvent trusts, which is a little repetitive, but serves to crystallise what is probably the key contribution of the book. While it is a legal truism that there is no such thing as an insolvent trust, the author points out that there is real practical utility in demonstrating 'practical insolvency', not least in relation to when an application might be made for the trustee to wind up an MIS. However there is no clear authority as to how this is properly demonstrated and the author canvasses the authorities and possibilities.

The main body of the book concludes with a thought provoking chapter on possible reforms. At one level, it could be argued that what the author identifies as the most commercially pernicious risks of the commercial trust, arise directly from

the central genius of the trust notion: the creation of a separate beneficial and proprietary interest in someone other than the legal owner of the property. Would the result of the many possible reforms which are discussed, merely be to create a form of tax preferred, 'regulation light', corporation? It would hardly be the first time in commercial history that the prize of a lesser tax impost has caused business people to turn a blind eye to the risks involved. This book is a salutary reminder and detailed analysis of those risks. However it is probably unfair to pin the blame entirely on preferential tax treatment. From an informed investor's point of view, the oft described 'coterie of rights' comprised in a company share looks rather pale beside the proprietary interest which a trust confers. Equally, from an entrepreneur's perspective, it is hard to match the flexibility to issue and redeem interests as units, which the common unit trust offers. Certainly those interested in the question of law reform, as well as in the comparative advantages and disadvantages of the commercial trust structure, will benefit from the book.

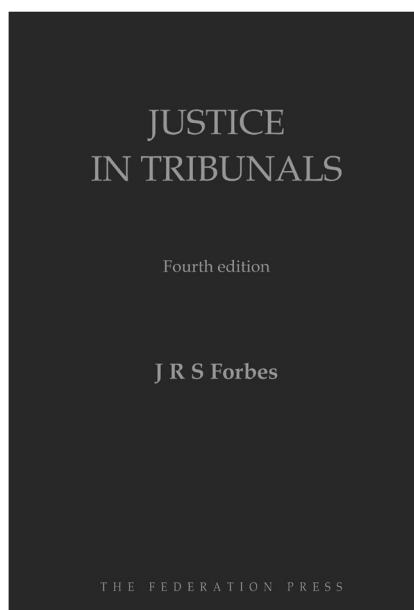
There is also a substantial body of appendices with not only useful reference material, but a significant body of template clauses and a checklist designed to address specific risks highlighted in the book. This is sufficiently practical to cause the publisher to include a specific disclaimer and exclusion.

While the style of the book is unashamedly practical and compendious, it is extensively referenced to existing authority and scholarship, which will render it a useful companion for barristers and solicitors alike.

Reviewed by Wayne Muddle SC

## Justice in Tribunals (4th ed)

JRS Forbes | Federation Press | 2014



Forbes on tribunals has become a classic text, at times directly noted by courts. The latest edition gives confidence that status will be maintained.

The structure of the work is the same as that of the preceding 3<sup>rd</sup> edition in 2010. Chapter 1 is a conspectus with introduction to primary terms and concepts. Chapter 2 outlines the techniques of judicial review of public tribunals. Chapter 3 examines the limited bases of curial intervention in the operation of private decision-makers when economic interests are not affected by the decision.

Chapter 4 discusses the expansion, through the doctrine of restraint of trade applied to private organisations in *Buckley v Tutty* (1971) 125 CLR 353, of judicial review of the rules, as well as their application, of private organisations and their domestic tribunals whose decisions affect livelihood or other economic interests. Chapter 5 points to the intrusion of statutory and curial rights

of review or appeal against decisions of some private tribunals whose socio-economic impact is great, including the developing single-judge jurisdiction based on public funding of political parties and the collateral impact of discrimination legislation.

Chapter 6 examines the degree to which error-based criteria, particularly irrationality in decision-making, can result in what is close to a merits review. The history and meaning of 'natural justice' is discussed in Chapter 7. The implications of the right to be heard are explored in Chapters 8 to 14: does it apply prior to proceedings being commenced and to the process of commencement; can urgent action be taken without full observance; how fully must the case to be met be articulated; what time to respond must be allowed; representation; form of hearing; standard and means of proof; when are reasons required to be exposed, and in what depth and form; and internal appeals. Chapter 15 discusses the differing standards of disqualifying bias in public and private tribunals.

Chapter 16 summarises the differing procedures and remedies against statutory and private tribunals. Chapter 17 outlines the available judicial controls in respect of Royal commissions and other public inquiries.

The current edition carries forward the crisp statements of principle and discussions of controversy that characterised preceding editions. The author does not shy away from arguing robustly for a particular conclusion or from pungent critique in topics of controversy such as public funding jurisdiction and the impact

of discrimination clauses. There is an overt distaste for expansion of curial intervention in organisational decision-making beyond the orthodox bounds.

Historical development is succinctly expounded so as to elucidate the current position, particularly in relation to the review of domestic tribunals whose decisions affect livelihood, other economic interests, or reputation. Footnotes give full reference to principal and consequential authority for propositions in the text without becoming an essay in themselves and distracting from the argument in the text. The index is helpful.

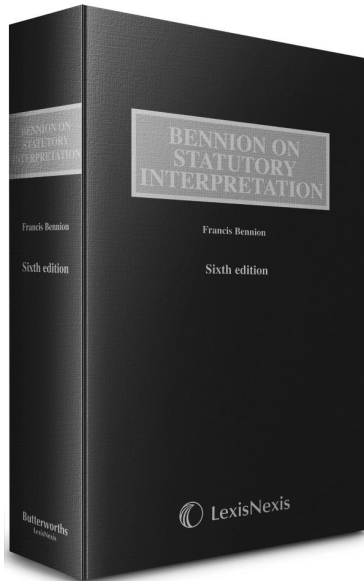
Most chapters are largely unchanged from the previous edition apart from discussion of recent case law and statutory development, and the addition or expanded discussion of earlier authority in quite a few instances. There is, for instance, an expanded discussion in Chapter 15 of the standard for findings of bias applied in different decision-making bodies. There is an expansion, primarily in Chapter 5, of the critique of the rationale for single-judge decisions on the broad reviewability of decisions of political parties by reason of public funding provisions. Curiously in this respect, the author does not appear to discuss the potential to achieve a similar result in respect of political parties by the application of *Buckley v Tutty* principles to decisions (such as candidate selection and endorsement processes) that potentially or actually impact on economic interests.

Reviewed by Gregory Burton SC



## Bennion on Statutory Interpretation (6th ed)

By Oliver Jones | LexisNexis Butterworths | 2013



First published in 1984, the sixth edition of *Bennion on Statutory Interpretation* has recently been released. It is the first edition prepared by someone other than Mr Bennion himself, the editorship having passed to Oliver Jones, a barrister at Seven Wentworth.

For the uninitiated few, *Bennion on Statutory Interpretation* takes the form of a code consisting of 404 sections which together set out the principles governing statutory construction. Each section of the code is accompanied by commentary and numbered examples, with the examples being drawn (predominantly) from British caselaw.

The code, now spanning over 1100 pages, is organised into seven broad divisions.

Division One identifies the interpreters of legislation, the nature of what is being interpreted (Acts of parliament and delegated legislation), the temporal, territorial and personal operation of legislation, and lastly, the 'anatomy' of an

enactment and how doubt concerning the meaning of a legislative provision is resolved.

Division 2 examines the legal meaning of an enactment, described in section 150 (the first section within this division) as 'the meaning that correctly conveys the legislative intention'. It is Part X within this division which sets out what is referred to as the 'interpretative criteria' or 'guides to legislative intention', namely, the rules, principles, presumptions and canons of construction which may be used to discern that intention.

Division 3 identifies and elucidates the rules of construction laid down at common law and by statute.

Division 4 describes the interpretative principles derived from legal policy.

Division 5 sets out the interpretative presumptions which arise from the nature of legislation, for example, the presumption that the text of the enactment is the primary indication of the legislator's intention (section 284) and the presumption that parliament does not intend 'absurd' consequences to flow from the application of its Act (dealt with in Part XXI).

Division 6 concerns the linguistic canons of construction – those principles which are 'based on the rules of logic, grammar, syntax and punctuation', which are said

to apply to all forms of language, rather than being confined to statutes or the field of law generally.

Division 7 (significantly pared back in this edition) addresses the construction of European Union legislation and its interaction with and effect on British legislation, and the impact of the UK *Human Rights Act 1998*.

Even the brief précis given above demonstrates the comprehensive nature of this book. Its stated intention is to articulate a holistic methodology for statutory interpretation, or what Mr Bennion has referred to as 'the Global Method of Statutory Interpretation'. To that end, the book can and should be read as a whole but it is also designed to be used by practitioners as a reference tool when confronted with an issue of statutory construction.

Such is the level of respect and admiration which this work has garnered in the 20 years since its original publication that many will have a copy of a previous edition and will be asking whether Mr Jones has added anything to the sixth edition to warrant its purchase. The answer to this question is a resounding 'yes', both in terms of the additions that have been made and with respect to the material that Mr Jones has seen fit to excise.

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*Bennion on Statutory Interpretation (6th ed)* (LexisNexis Butterworths, 2013)

Principal among the worthwhile additions is the extensive citation of authorities in which particular sections of the code (and sometimes the accompanying commentary) have been judicially approved. This innovation will be particularly attractive for Australian practitioners who might (unwisely and unjustly) query purchasing an English text on statutory interpretation over, or in addition to, an Australian equivalent. This is because Mr Jones has clearly gone to great effort to include references to Australian authorities as part of this exercise and there is evidently no shortage of Australian authorities from which to choose. Mr Jones has also increased the work's relevance to and purchase on Australian practitioners by including more Australian authorities in the examples and commentary to sections. For example, a discussion has been incorporated of the High Court's application of the *Barras* principle (which describes the presumption that where a term is used in an enactment upon whose meaning the courts have previously pronounced, the legislature intended that term to have the same meaning in the enactment under consideration). By way of further illustration, the High Court's decision in *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, is cited as an example to section 320, which distinguishes lawful means of getting around an Act (avoidance) from unlawful means (evasion).

The challenge in preparing new editions of reference works of this nature is to

*Mr Jones has gone some way towards modernising the feel of the work, yet without detracting from the charm of Mr Bennion's prose.*

update the work to ensure its continuing relevance and utility whilst not inflating the work to a size which is either unmanageable or unaffordable. In this respect, Mr Jones is to be commended, as he has succeeded in updating the work whilst slightly reducing its formidable length. As part of this process, Mr Jones has gone some way towards modernising the feel of the work, yet without detracting from the charm of Mr Bennion's prose. By way of example, the commentary on punctuation which accompanies section 258 has been dramatically slimmed down. However, Mr Jones managed to slip in a reference to the Federal Court's remarks regarding the weight to be given to the semi-colon as a constructional aid in *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 98 FCR 168; these remarks, particularly those of Katz J, deserve to see the light of day yet might have gone unobserved by everyone but migration practitioners were it not for their inclusion in this text.

The only criticism of this edition worth mentioning is that the introduction from Mr Bennion included in former editions provided a guide to the structure of the work, as well as an explanation of its underlying philosophy. Given the length and ambition of the work, such a guide is

both useful and edifying. Mr Jones might consider incorporating a similar guide in the next edition.

In the early pages of the work, in the commentary accompanying section 6 (which refers to the jurist or text writer as a type of interpreter of legislation) it is stated that 'some textbooks, going into edition after edition, have acquired the status of legal monuments.' This observation appeared in Mr Bennion's first edition and it is hard to resist regarding the sentence as aspirational. Surely an attempt to codify the principles governing statutory interpretation bespeaks an objective on the part of the author to create a textbook which, over time, would also acquire this status. After only 20 years in print, it may be too soon for this reviewer to declare that *Bennion on Statutory Interpretation* has become a legal monument in its own right. However, it at least may be safely predicted that in passing the editorial baton to Mr Jones, Mr Bennion has ensured that this work is very much still in the race.

Reviewed by Juliet Curtin