

THE JOURNAL OF THE NSW BAR ASSOCIATION | AUTUMN 2015

barnews

Vale Katrina Dawson (1976–2014)

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Editor's note



Photo: James Alcock / Fairfaxphotos

2014 came to a bleak and shocking end. This journal is the Bar Association's journal of record, so some account of what occurred should be included here.

On 15 December 2014 an armed man took over the Lindt Café on Phillip Street.

He took a number of hostages, including three barristers: Katrina Dawson and Julie Taylor of the 8th Floor of Selborne Chambers, and Stefan Balafoutis of Tenth Floor chambers.

A siege ensued. Many chambers were evacuated. The courts were closed.

The siege ended in the early hours of 16 December 2014. Katrina Dawson lost her life, as did the manager of the café, Tori Johnson. All the other hostages survived.

The president's column on the next pages recounts the steps taken by the Bar Association in the immediate aftermath of the siege.

The loss of Katrina Dawson was a terrible blow for all barristers.

Katrina was quite simply one of the

finest young barristers at the bar. Not just in the sense of her legal skills, although these were exceptional – Katrina had an instinct for justice. She always did the right thing.

Katrina's legal connections ran deep – her husband Paul Smith is a partner at King & Wood Mallesons and her brother Sandy is at Banco Chambers. Everyone knew her, everyone liked her. She was fun to be around. Most of all, she was a loving and deeply attentive mother to her three young children.

Jason Potts, also of the 8th Floor, has written an obituary which we publish in these pages. Jason has managed to capture what Katrina was like to have in chambers and how much we have lost.

Katrina's death resonated with people everywhere, whether they knew her or not. The 8th Floor received messages, flowers and gifts from people across Sydney and indeed across the world.

I myself received many emails and letters – from colleagues at the bar, solicitors, judges, former staff on the 8th Floor. Reading over these letters now one can sense the great wave of shock and horror

that swept through the legal community when the news broke.

Katrina's family and friends have established the Katrina Dawson Foundation, to preserve and honour her memory by providing support for the education of exceptional young women.

Bar News does not overlook in any of this that Katrina's was not the only loss of life. We send our deepest condolences to Tori Johnson's partner and family.

The other hostages in the siege were all traumatised and are still suffering – we offer them our support and sympathy also.

Most of all we send our thoughts and support to Katrina's family – to her brothers, Sandy and Angus, her parents Jane and Sandy, and to Paul, Chloe, Oliver and Sasha.

Jeremy Stoljar SC

8th Floor Selborne Chambers

Reflection and remembrance

By Jane Needham SC



In my last president's column for Summer 2014, I noted the number of obituaries in that issue – six in total. Since that edition of *Bar News*, the bar has undergone an horrendous event which culminated in the loss of another of our members. Jason Potts's moving obituary for Katrina Dawson appears in this issue, and the editor has added his own personal reflection of her in his column.

The events of 15 and 16 December 2014 will be etched in the minds of the members of the New South Wales Bar Association for a long time to come.

The events of 15 and 16 December 2014 will be etched in the minds of the members of the New South Wales Bar Association for a long time to come. The Sydney Siege, as it has come to be known, tested the association and its members in many ways.

Early in the course of the siege, the Bar Association notified Penny Johnston, the director of BarCare, who in turn was in contact with her team of mental health professionals in order to ensure that any calls on her time and theirs were able to be answered. The specialists on the BarCare panel responded magnificently. They took calls outside of usual hours, took urgent appointments, and generally only charged their usual rate for their unusual workload.

In particular, the services of BarCare were offered to those most directly affected by the siege. Penny has conducted a number of floor de-briefings as well as arranging individual contact and counselling to our members. She has personally assisted many of our members and their (and the Bar Association's) staff. Penny's work was the subject of a number of letters and calls of personal thanks to the association, and I know that she has made a difference in many lives.

With the various inquiries, including the inquest, and the likely continued emergence in the media of details of the siege and its aftermath, it is likely that there will continue to be a higher level of calls on Penny's time than is usual. I encourage our members to contact BarCare in relation to any ongoing issues arising from the siege, whether it is you or a colleague who is having difficulties.

Penny Johnston

Director

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On 16 December, on being informed of the death of Katrina Dawson, the Bar Association issued a media statement and Vale notice. That statement was covered by international media, from major international newspapers and media outlets down to the *Contra Costa*

Times (my brother's local newspaper in Martinez, California). It received tens of thousands of views on our website and on Twitter.

On the morning of 17 December, the Bar Association announced that it would be hosting an Afternoon of Reflection and Remembrance in the Common Room. The need for this arose out of the isolation felt by many at being locked out of chambers, and gave members a chance to come together and grieve. This afternoon was very well attended (an estimated 150 members and staff attending). Penny Johnston and I made an effort to speak to every person who was there, although some people came and went before that was possible. The Afternoon was particularly well attended by our female members. A number of Bar Association staff – including those for whom it was beyond their job description – also attended to offer support to our members.

I was particularly heartened at the way the community of Phillip Street came together.

The siege and its aftermath put an enormous strain on the resources of the Bar Association and its staff. I have thanked the staff personally, and the Bar Council has also expressed its thanks for their assistance and devotion to duty – keeping the association going over two days when the office was unreachable, and working from home in circumstances of real difficulty.

I was particularly heartened at the way the community of Phillip Street came together. There was a very broad response, from local cafes supporting the Afternoon on 17 December, to offers from other organisations of assistance

by way of counselling and support. I was very moved amongst the horror of that week to have a huge outpouring of support, both from Australia and overseas.

Our thoughts are often, of course, with Katrina's family, her husband Paul Smith, her children, and her brother Sandy Dawson, himself a member of our association.

In more mundane ways, life does go on. The Bar Council has been considering its usual range of issues, and has issued a statement of policies for consideration by the various parties in the election campaign. Those issues cover areas of criminal law including bail and mandatory sentencing, Indigenous incarceration, compensation of accident victims, and more. It is available on our website, although by the time this edition of *Bar News* is published the outcome of the election will be known. I trust that the matters in the election policy are of more than mere historical interest.

Picking up on matters which I wrote about last year, the Martin Place childcare centre, at which the association guarantees ten spots per day for its

Twenty-two chambers have now adopted the Best Practice Guidelines, and a number more have considered their existing policies in the light of the guidelines.

members, is now at 80 per cent capacity and providing regular or emergency care to a number of bar families. A number of courts (the District and Local courts, as well as the Land and Environment Court, in addition to the Supreme Court and the Federal Court whom I wrote about last year) have picked up the 'certainty in sitting hours' suggestion and have implemented consideration of family or carer responsibilities in regulating sitting hours. Twenty-two chambers have now adopted the Best Practice Guidelines, and a number more have considered their existing policies in the light of the guidelines.

Our NARS response working party and equitable briefing working party continue to look for ways to deal with the issues raised by the Law Council survey. The

Equal Opportunity Committee and Women Barristers Forum are each working hard on these issues as well.

On 20 March I presented Ian Temby QC with a life membership of the Bar Association. Ian has served (and continues, as chair of a PCC, to serve) the bar in many ways since his interesting career path brought him to Sydney, and his life membership is well-deserved.

Finally, I would like to thank those members of the Bar Association who have contributed to the February–March landslide of CPD. In addition to the regular Sydney lectures, of which there are many in that period leading up to the deadline for CPD points, our members have attended at Newcastle, Orange, Ballina and Parramatta as well as the all-day event in Sydney. I attended Newcastle and Orange and found each a very enjoyable occasion (particularly an excellent dinner with the local profession in Orange!). The quality of the presentations is remarkable and those who give up their weekends to present papers should be congratulated.

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Overseas conferences: to go or not to go?

By the Hon John Nader QC

Since 1987 the Criminal Lawyers Association of the Northern Territory (CLANT) has held its biennial criminal law conference in Sanur, Bali, with the next one due in June 2015. The CLANT conference has become an institution. It is eagerly looked forward to by lawyers in the Top End, well-attended by their colleagues in other states, and highly regarded by leading members of the judiciary, including High Court judges and retired judges of eminence from throughout Australia. It is significant that the CLANT conferences have, for various reasons, also come to be regarded by many Indonesians as important events. They are usually visited by one or more senior Indonesian lawyers.

Early in February 2015 the president of CLANT sought opinions from members as to whether the 2015 Bali conference should proceed while two Australian citizens were awaiting execution by the Indonesian Government.

I have responded that I would not attend. The fact that two of the persons on death row are Australian is quite irrelevant. What matters is that, since the election of the new Indonesian president, the use of the death sentence has experienced a crescendo which I found too serious to ignore. Fundamental to my decision is the belief that not holding the CLANT conference in Bali would disappoint Indonesian authorities.

It is now commonplace for Australian legal professional organisations to hold conferences overseas. Sometimes, they are held in countries that have capital punishment on their statute books, or where internationally recognised human rights are violated. CLANT's 2015 Bali conference poses a number of difficult questions. Should organisers of conferences for legal practitioners take into consideration the human rights record of the proposed host-country? Should CLANT, or any other bar association or law society for that matter, be held to a higher standard? How would



Sanur Beach Hotel, Bali. Photo: Chris Winslow

Should organisers of conferences for legal practitioners take into consideration the human rights record of the proposed host-country?

this affect the many conferences held in Singapore or even the United States of America?

I believe that there is no more reliable indicator of the depth of the civilization of a nation than its criminal law and administration of the criminal law.

Of all people in a community, criminal lawyers are most obliged by their profession to stand guard over the propriety of the criminal law and to protest when it falls below acceptable standards, and to suggest to governments what should be done to improve it. It is commonly done by lawyers in Australia almost every day of the week. Mining law and other branches of legal practice are of course important, but they are as nothing if a state does not have civilised criminal laws.

Of course standards change and evolve over time, and laws which were appropriate in the past may be considered repugnant in today's civilised society.

If lawyers can influence foreign countries with close connections to ours to adopt more just laws, they should be able to do so without suffering adverse criticism.

However, many foreign laws that we may not approve of are born of custom and cannot be said to be bad laws unless they unequivocally transgress universal human rights. I put the death sentence for crime in that category.

It seems to me that we are precisely in that position with respect to Indonesia. Indonesia is geographically and politically close to us. We are neighbours. In a real sense we are friends: should we turn a blind eye to what we perceive to be serious infringements of human rights by a neighbour?

In our lifetime we have seen what we consider to be immense advances in the standards of Indonesian governance. It had a long way to go and it has come a long way forward. It has not yet quite accepted the standards of civil liberties and criminal administration that we would hope for. I think it is appropriate for us to use all legitimate means, excluding hostile language or action, to encourage Indonesia to move yet further.

Of course we can tell the Indonesians when we are in Bali how badly we regard capital punishment and express our reasons civilly.

The Hon John Nader QC, 'Overseas conferences: to go or not to go?'

...practising criminal lawyers are close to having a duty to put their conduct where their mouths are.

There can be no doubt that they already know how strongly our opinions are held.

I believe that boycotts, even sporadically imposed, by important groups such as criminal lawyers, are one acceptable means of letting our friends know that we are serious when we mouth noble platitudes at criminal law conferences.

I have never thought that by removing a conference from Bali, the Indonesians would be induced to abolish capital punishment instantaneously. But, I think that of all groups of non-government people, practising criminal lawyers are close to having a duty to put their conduct where their mouths are. We should start the ball rolling towards more civilised punishments

and try to persuade the new president to adopt the stance taken by his predecessor, Susilo Bambang Yudhoyono, and reinstate the pause in executions.

The last cricket match played at the SCG between Australia and South Africa which I attended was the last test played by South Africa in Australia for many years. Boycotts and falling tourism amongst many other things eventually wore down South African resistance to the abolition of apartheid.

If we abandon Bali as a conference venue on short notice, and if other serious organizations do the same, there is a chance that some persons in authority in Indonesia will react favourably to us, not only to retain our goodwill but also by seeing that

it does not benefit them to alienate a close neighbour.

I would be foolish to think that barristers, whose professional activity thrives on finding reasons to disagree with other barristers, will all agree that my refusing to attend the June CLANT Bali conference was appropriate. None may agree. I urge those who think my action was misguided or inappropriate to write to the *Bar News* and express their opinions. I can imagine that many might think that my action was too idealistic to lead to any benefit, either because very few will adopt similar action in like situations or because even if such action became general the desired result would be a vain hope, or both. My mind is open to persuasion that I have been wrong.

CLANT responds

For 30 years, CLANT has held its biennial conference in Bali, interrupted only once, in the months following the 2002 Bali bombings, when for reasons of security, the conference was moved to Port Douglas. We have scheduled the fifteenth Bali conference to be held at the Sanur Beach Hotel in Bali from 20 to 26 June 2015.

The recent spate of executions in Indonesia, with the threat of further judicially sanctioned killings has outraged the Australian and indeed the international legal community, and is of deep and acute concern to CLANT. Some of our members and supporters have urged us to relocate the conference away from Indonesia, as a sign of that concern. In response,

the CLANT Committee has sought and received advice from our proposed conference speakers, our members and senior members of the legal community, including the judiciary, past CLANT presidents, and CLANT life members.

Passionately expressed, impeccably argued and widely divergent views have been expressed, but there is a very substantial majority in favour of retaining the arranged venue, and accordingly we now confirm it. We have had regard to, *inter alia*, the following considerations, distilled from the responses we have received, for which we are grateful:

- CLANT members abhor and deplore capital punishment, wherever it is practised.

- The issue of capital punishment in Indonesia is of particular current concern, because of the Executive's recent decision to execute a large number of drug offenders on death row, including Australian offenders who have been represented by some of our own members.
- It is incumbent on CLANT to 'send a message' that these executions are unacceptable to us.
- Changing the venue is unlikely to have any significant effect in influencing the Indonesian Government to change its policy.
- Moving the conference would give rise to a perception that CLANT parochially and unfairly

The Hon John Nader QC, 'Overseas conferences: to go or not to go?'

places a higher value on the lives of Australian drug offenders than offenders from other countries.

- Moving the conference would unfairly single out Indonesia, one of many countries in the region (including, it is to be noted, Australia) with an unsatisfactory human rights record.
- Moving the conference now would be inconsistent with our long-standing commitment to maintaining the conference in Bali, over a period in which various Indonesian regimes have pursued policies with which CLANT members have strongly disagreed.

- Moving the conference from Bali would adversely effect the Balinese tourism industry.

- If we move the conference from Bali, a precedent will be set which may well result in us never returning.
- Holding the conference in Bali affords CLANT the opportunity to continue to engage with our colleagues in the Balinese and Indonesian legal community.
- Changing the venue would cause significant inconvenience and expense to CLANT members who have already made their travel arrangements, and to CLANT

itself, which has already contracted with the conference venue.

Many of the responses we have received urged us to include in the conference program a session dealing with the issue of capital punishment, featuring speakers from the Indonesian legal community. Although the Organising Committee is mindful that this would entail a risk of harmfully ruffling feathers, we are seriously considering amending the program as has been proposed.

Russell Goldflam
President
CLANT

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Opening of Sir Anthony Mason Chambers

By Elpi Chrysostomou



L to R: David Elliott, Philip A Beale, Craig K Stewart, Matthew Vesper, The Hon Sir Anthony Mason AC KBE GBM, Lady Patricia, Elpi Chrysostomou, Philip Bates, John R Young, Ken Pryde, Mark Thompson

The application of the harmonising art of *feng shui* to barristers' chambers and life after the High Court were among other stories recounted recently by Sir Anthony Mason at the opening of the chambers named in his honour.

Sir Anthony Mason AC KBE GMB, former High Court chief justice, accompanied by his wife, Lady Patricia, were in Sydney on 25 July 2014 to formally open Sir Anthony Mason Chambers, Sydney.

Looking something akin to a busy Equity List in Court 11E, it was standing room only as the occasion was attended by members of the judiciary, New South Wales Bar Association, Law Society and artists and friends to hear Sir Anthony's speech.

Presiding as a High Court justice from pre-Whitlam and continuing to sit to this day in Hong Kong, Sir Anthony was a justice of the High Court during the most exciting and arguably most important era in Australian judicial

history. As the ninth chief justice of the High Court and a member of that court for a total of 23 years, Sir Anthony presided during a number of landmark cases including *The Tasmanian Dam Case* (1983) 158 CLR 1, *Teoh's Case* (1995) 183 CLR 273, *Dietrich v The Queen* (1992) 177 CLR 292, *Cole v Whitfield* (1988) 165 CLR 360, *Burnie Port Authority* (1994) 179 CLR 520, *Plenty v Dillon* (1991) 171 CLR 635, and of course *Mabo* (1992) 175 CLR 1.

In that connection, British aphorist, Geoffrey Madan, suggested that the destruction of ideas is much like the setting of a beautiful sunset. With the stoning of the *terra nullius* doctrine in *Mabo* and the pronouncement that native title had survived colonial settlement in 1788, our society was to some extent propelled into a new era. The sun had indeed set upon a doctrine, but it was about to rise on a new age of understanding of the First Australians and their deep historical and emotional relationship with the land and the

creatures physical and spiritual which inhabit it. Native title, it seemed, had survived like buried water in the bore of jurisprudence. It was the Sir Anthony High Court that revealed it.

It has been said that Sir Anthony is known, not only for his keen intellect, but also his wit. His persona in court has been described in the following words:

He said relatively little but was very good at progressing the business of argument. The combination of a commanding intelligence, vast experience, and an ability to convey by facial expression the fact that the shelf-life of an argument had expired made him very effective in that regard. At the same time he was good-humoured and encouraged even the most junior practitioners who had done their work.¹

Philip Beale together with Scot Wheelhouse SC warmly welcomed Sir Anthony to the floor noting that it is Sir Anthony's intellectual rigour, understanding, encouragement and

Elpi Chrysostomou, 'Opening of Sir Anthony Mason Chambers'



The Hon Sir Anthony Mason AC KBE GBM



The Hon Sir Anthony Mason AC KBE GBM and Lady Patricia at the unveiling

tolerance to which the new members of Sir Anthony Mason Chambers would aspire.

The members of Sir Anthony Mason Chambers have decided to support local artists by providing a space in which their work can be displayed for sale at no charge to the artist. The chambers have the benefit of a constantly changing

array of Australian contemporary art, a notion and aesthetic which was much admired by Sir Anthony and Lady Patricia.

While Sir Anthony Mason has chambers named in his honour in Adelaide, being a local, it seemed fitting, inevitable even, that chambers would be named in his honour in Sydney.

It did not take long for Sir Anthony to open into his trademark intellect, wit and insightful observations, particularly about his recent experiences in Hong Kong. He noted the aesthetics in the new chambers in Hong Kong were not such a priority where the Feng Shui consultant need only look at an inappropriately located window for it to be bricked up from the inside.

'This, apparently, to prevent barristers fees from exiting the window and drifting down to the barristers on lower floors', he said.

Happily, noted Sir Anthony, 'There are, for the time being at least, no floors of barristers below these to drain your revenue in this inscrutable way. Thus, you may be able to keep your magnificent floor to ceiling windows providing harbour vistas without such penalties to your finances.'

A relief to all, no doubt. At the conclusion of his address, Sir Anthony was invited to unveil a plaque on the floor to commemorate the occasion.

While Sir Anthony previously attended chambers shortly after its state of the art renovations, and continues to remain in contact with the floor, true to form, Sir Anthony noted that he 'looked forward to visiting chambers on occasions otherwise than in the capacity of a client.'

Those at Sir Anthony Mason Chambers look forward to it too and extend their heartfelt thanks to Sir Anthony for his generous support in allowing the chambers to be named after him.

Endnotes

1. David Jackson, *Personalalia*; Sir Anthony Mason AC, KBE (1995) 69 ALJ 610/ Kristen Walker.

Proving lack of consent

David Robertson reports on *White v Johnston* [2015] NSWCA 18

This case heard recently by the New South Wales Court of Appeal (Barrett, Emmett and Leeming JJA) raised for consideration the question of which party bears the onus of proving lack of consent in the cause of action of assault and battery. The question was raised in the context of consent to medical treatment.

The background is as follows. The respondent/plaintiff, Ms Johnston, was a patient of the appellant/defendant, Ms White, a dentist. The plaintiff attended the defendant's dental surgery on a number of occasions for two different dental treatments, involving filling and building up teeth that were affected by decay. By an amended statement of claim filed in the District Court of New South Wales, the plaintiff alleged that the two treatments had been performed by the defendant negligently, and also that the treatments constituted an assault because they were 'unnecessary and ineffective and known to be so by [the defendant]' and were carried out solely to derive financial benefit for the defendant.

Therefore, there was no dispute between the parties that the plaintiff had voluntarily attended the defendant's surgery and had consented to the treatments at the time the defendant carried them out. Rather, the issue was whether the plaintiff's consent was vitiated because the plaintiff's purpose in carrying out the treatments was to extract money from the plaintiff rather than for any therapeutic purpose.

The primary judge (Finnane DCJ) entered a verdict in favour of the plaintiff on her case of assault, on the basis that the treatments were 'totally unnecessary' and carried out 'on every occasion for the purpose of extracting money from the Department of Veteran's Affairs [which was paying for the treatment], and not for the purpose of treating the plaintiff'. In his reasons, the primary judge held that it was for the defendant to prove that the plaintiff's consent to the treatments was genuine and valid. The primary judge found that the defendant had failed to discharge this onus. The primary judge awarded the plaintiff general damages and exemplary damages. The primary judge did not determine the plaintiff's alternative claim for negligence. The defendant appealed.

The Court of Appeal unanimously allowed the defendant's appeal. Leeming JA gave the leading judgment. The main issue on appeal was whether the primary judge's finding that the plaintiff's consent was vitiated because the treatments administered by the defendant were 'wholly unnecessary' and not for any therapeutic purposes was a finding open to be made on the evidence (at [76]). This raised an anterior question: which party bore the onus of proving that the plaintiff's consent to the treatments had been vitiated?

The primary judge (Finnane DCJ) entered a verdict in favour of the plaintiff on her case of assault, on the basis that the treatments were 'totally unnecessary'

Leeming JA held that, where a plaintiff sought to establish lack of consent by alleging that the treatments bore no therapeutic purpose, the onus is on the plaintiff to prove lack of consent (at [96]). There were three steps in his Honour's reasoning. First, the plaintiff's allegation was tantamount to an allegation of fraud, since where 'a medical practitioner performs treatment with the undisclosed intention of achieving no therapeutic purpose, then there is a knowing deceit practised upon the patient' (at [82]). Second, since it is an essential element of her cause of action to establish fraud, on ordinary principles the legal burden to do so rests with the plaintiff (at [87]–[89]). Third, given the variety of fraud that may be alleged, the onus of establishing fraud is ordinarily on the party advancing the allegation (at [90]). For these reasons, Leeming JA held that the primary judge's approach which placed the onus on the defendant was erroneous and so allowed the appeal.

Leeming JA also undertook an extensive review of the authorities on the question of which party bears the onus of establishing lack of consent in assault and battery *simpliciter*. Although strictly *obiter*, the review of the authorities is useful given the unsettled state of the law on this point. Leeming JA concluded that since absence of consent was the gist of the cause of action of assault and battery, the plaintiff bears the legal burden of proving absence of consent (at [125]). In so concluding, his Honour relied on an 1848 decision of the Court of Queen's Bench, sitting en banc, *Christopherson v Bare* (1848) 11 QB 473, which held that absence of consent was an essential to a plaintiff's case and was not for a defendant to plead by way of confession and avoidance (at [118]).

However, his Honour's conclusion is contrary to McHugh J's view on the same point in *Marion's Case* (1992) 175 CLR 218 at 310–311 (although McHugh J was in dissent in that case), as well as two first instance decisions that had been cited by McHugh J in his discussion. Although it is left for another case to answer the question conclusively, with respect Leeming JA's analysis is persuasive and likely to be so when the question does arise.

Goods trademarked in a foreign language

Catherine Gleeson reports on *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd* [2014] HCA 48

This case concerned whether certain trade marked words in a foreign language were inherently adapted to distinguish goods from those of other persons within the meaning of s 41(3) of the *Trade Marks Act 1995* (Cth).

Cantarella imports and markets coffee beans under a number of marks including Vittoria. It markets some coffee blends by use of the registered marks 'Oro' and 'Cinque Stelle'. Modena imports and distributes coffee beans using the brand name Molinari. Molinari products also used the marks 'Oro' and 'Cinque Stelle'. It was common ground that the two disputed marks were Italian words for 'gold' and 'five star' respectively.

Cantarella brought trademark infringement proceedings against Modena in the Federal Court of Australia. Modena by cross-claim sought for the marks to be cancelled under s 88 of the Act on the basis that s 41 of the Act prevented their registration.

Section 41(2) at the relevant time prevented registration of a mark that is not capable of distinguishing the subject goods from the goods of other persons. Section 41(3) required the Registrar to consider, in applying s 41(2), whether the mark is inherently adapted to distinguish the goods from the goods of other persons.¹

At first instance, Emmett J found for Cantarella, holding that, while Italian speakers would understand the marks as having the English meanings identified above (which were agreed to

be generally accepted signifiers of quality and not of themselves distinctive), that would not be the general understanding of those words amongst English speakers in Australia.² On appeal to the Full Federal Court, Modena was successful, with the court holding that the test for whether a mark was inherently adapted to distinguish goods turned not upon the general understanding of the meaning of the mark but rather upon whether other traders would want to use the mark in connection with the same goods.³

The difference between the positions stated by the primary judge and the full court turned on the import of Kitto J's statement of the test in respect of whether a mark is 'inherently adapted to distinguish' in *Clark Equipment Co v Registrar of Trade Marks* (1964) 111 CLR 511 at 514:

...by reference to the likelihood that other persons, trading in goods of the relevant kind and being actuated only by proper motives — in the exercise, that is to say, of the common right of the public to make honest use of words forming part of the common heritage, for the sake of the signification which they ordinarily possess — will think of the word and want to use it in connexion with similar goods in any manner which would infringe a registered trade mark granted in respect of it.

French CJ, Hayne, Crennan and Kiefel J gave a joint judgment in Cantarella's appeal from the full court. The plurality held that the inherent adaptation of a mark to distinguish goods is

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Catherine Gleeson, 'Goods trademarked in a foreign language'

to be assessed by determining the 'ordinary signification' of the word to the target audience of the mark, being the ordinary purchasers, consumers and traders of the goods. It is not to be assessed by determining the likelihood that other traders may legitimately desire to use the word in connection with their goods: at [30], [71]. That is a separate inquiry and does not accommodate any desire by a trader to use words that convey an allusive or metaphorical meaning in respect of the goods: at [73].

The meaning of a foreign word, when translated, is not critical but may be relevant to whether the mark is inherently adapted to distinguish goods. The word is to be viewed by reference to the point of view of the possible impairment of the rights of honest traders, and of the public. What is critical is the meaning conveyed by the foreign word to those concerned with the goods, namely, whether or not it is understood by consumers to be directly referable to the character or quality of the goods (and thereby *prima facie* not registrable): at [48], [59].

In the present case, the words were not demonstrated to convey a meaning or an idea to any person in Australia concerned with coffee as having a direct reference to the character or the quality of the goods: at [72]–[77]. For that reason, the marks were inherently adapted to distinguish the goods from those of other traders: at [78].

Gageler J dissented. His Honour's reading of the authorities was that the focus of the test is on the extent to which the monopoly granted by registration of a mark would foreclose other traders in the goods from using them without any desire to benefit from the applicant's reputation: at [92].

For Gageler J, the conclusion that a word does not have a direct reference to the character or quality of the goods or services is not itself a finding that the word is inherently adapted to distinguish the one trader's goods from those of others. In relation to a technical or a foreign word, other considerations will arise, including the use by traders of the word in its technical or foreign context: at [98], [110].

His Honour agreed with the Full Federal Court that the words, 'gold' and 'five star', are ordinary English words and denote quality. They are not inherently adapted to distinguish goods and are words that a trader may legitimately seek to use. The Italian equivalents of those words, which the evidence showed were applied to goods often associated with, and imported from, Italy and often sold to Italian speakers, was not inherently adapted to distinguish Cantarella's goods: at [112], [113].

Endnotes

1. The present version of s 41 is differently formulated but to the same effect.
2. *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd* (2013) 299 ALR 752 at [117].
3. *Modena Trading Pty Ltd v Cantarella Bros Pty Ltd* (2013) 215 FCR 16 at [80].

Recent decisions from the United Kingdom Supreme Court

Daniel Klineberg reports on two recent decision of the United Kingdom Supreme Court. *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 concerned the scope of the right of conscientious objection to taking part in an abortion pursuant to the Abortion Act 1967 (UK). *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 concerned whether the police owed a duty of care in relation to its response to an emergency call.

Greater Glasgow Health Board v Doogan [2014] UKSC 68

The *Abortion Act 1967* (UK) (the 'Act') provides a comprehensive code of the circumstances in which it is lawful to bring about the termination of a pregnancy in England, Wales and Scotland. It also regulates the procedure. Thus, other than in an emergency, two doctors must be of the opinion that the grounds for bringing about a termination exist and the termination must take place either in a National Health Service hospital or in a clinic approved for the purpose.

The Act contains a clause protecting the right of conscientious objection to taking part in an abortion. The case concerned the scope of that right.

The Act

Section 1(1) of the Act provides that a person will not be guilty of an offence 'when a pregnancy is terminated by a registered medical practitioner' if two registered medical practitioners are of the opinion, formed in good faith that:

- (a) the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family;
- (b) the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman;

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Section 4(1) provides, relevantly, that 'no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection'.

(c) the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The vast majority of abortions performed in the United Kingdom are performed on ground (a) (98 per cent in England and Wales and 98.7 per cent in Scotland in the year to 31 December 2012).¹

The effect of section 1(3) of the Act is that 'any treatment for the termination of pregnancy' must be carried out in a National Health Service hospital or other place approved for the purposes by the secretary of state for health.

Section 4 of the Act is headed 'Conscientious objection to participation in treatment'. Section 4(1) provides, relevantly, that 'no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection'. That right is expressed to be subject to section 4(2) which provides that section 4(1) does not affect any duty to participate in treatment which is necessary to save the life of, or to prevent 'grave permanent injury' to, the physical or mental health of a pregnant woman.

The issue to be determined was what did the words 'to participate in any treatment authorised by this Act' to which the person has a conscientious objection mean.

Facts

The petitioners were two experienced midwives employed at Southern General Hospital in Glasgow. Each worked in the Labour Ward at the hospital and was a 'Labour Ward co-ordinator'. Both of the petitioners were practising Roman Catholics who believed that termination of pregnancy was a grave offence and that any involvement in the process of termination rendered them accomplices to and culpable for that grave offence. Each informed their employer, the Greater Glasgow Health Board, of their conscientious objection to taking part in the termination of pregnancy when they began work in the Labour Ward in 1988 and 1992 respectively. The petitioners had been able to 'work around' their conscientious

objections to playing any part at all in the procedures conducted in the Labour Ward by organising others to undertake tasks which might otherwise have fallen to them.

Medical terminations of pregnancy on ground (a) above at Southern General Hospital occur in the Gynaecology Ward, not the Labour Ward. However, terminations on the remaining grounds and in the emergency situations provided for by section 1(4) of the Act occur in the Labour Ward.

The proceedings came about because the petitioners became concerned that the reorganisation of maternity services at Southern General Hospital would result in an increased number of abortions being carried out on the Labour Ward. They sought assurances from the hospital that their objections would continue to be respected and accommodated. The contentious issue concerned the petitioners' objection to 'delegating, supervising and/or supporting staff to participate in and provide care to patients throughout the termination process'.² The hospital took the view that those tasks did not constitute providing one-to-one care to patients and that the petitioners could be required to do that work.

The petitioners brought judicial review proceedings challenging the decision of the hospital. They were unsuccessful at first instance³ but successful on appeal where the Inner House⁴ granted a declaration that the petitioners' entitlement to conscientious objection to participation in treatment for termination of pregnancy pursuant to section 4(1) of the Act:

includes the entitlement to refuse to delegate, supervise and/or support staff in the provision of care to patients undergoing termination of pregnancy or feticide throughout the termination process save as required of the petitioners in terms of section 4(2) of the said Act.⁵

The Inner Court reasoned that 'the right was given because it was recognised that the process of abortion is felt by many people to be morally repugnant' and that it is 'in keeping with the reason for the exemption that the wide interpretation which we favour should be given to it'.⁶

Arguments before the Supreme Court

No party submitted that the clause 4 was limited to the actual ending of the pregnancy. Lady Hale (with whom Lord Wilson, Lord Reed, Lord Hughes and Lord Hodge agreed) stated that

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in a medical termination (as opposed to a surgical termination), it would make no sense to make lawful the ending of the pregnancy without also making lawful the prescribing and administration of the drugs which bring that termination about.⁷

The three arguments before the Supreme Court were as follows. The Royal College of Midwives, which intervened in the case, said that the expression 'treatment authorised by this Act' in clause 4 was limited to the treatment which actually caused the termination, that is, the administration of the drugs which induce premature labour. It did not extend to the care of the pregnant woman during labour, or to the delivery of the foetus or to anything that happens after the delivery.⁸ In contrast, the petitioners argued that they had the right to object to any involvement with patients in connection with the termination of pregnancy. This would involve receiving and dealing with the telephone calls booking the patient into the Labour Ward, the admission of the patient, the assigning of a midwife to look after the patient and the supervision of the staff looking after the patient.⁹

The Greater Glasgow Health Board argued for an interpretation between the other two arguments. It submitted that the 'treatment authorised by this Act' began with the administration of the drugs and ended with the delivery of the foetus. Accordingly, clause 4 did not cover making bookings or aftercare for patients who have undergone a termination. Further, 'participating' was limited to direct participation in the treatment involved and did not cover administrative and managerial tasks, such as allocating ward resources, assigning staff or supervisory duties.¹⁰

Reasoning of the Supreme Court

Lady Hale stated that the issue was 'a pure question of statutory construction'.¹¹ Section 4 of the Act was required to be read with section 1. Although section 1(1) did not use the term 'treatment' which is used in section 4, the termination of pregnancy was the treatment referred to in section 4. This had been stated by the House of Lords in an earlier case concerning the Act, namely, Royal College of Nursing of the *United Kingdom v Department of Health and Social Security*.¹² Accordingly, what is authorised by the Act was the whole course of medical treatment bringing about the ending of the pregnancy.¹³

Accordingly, Lady Hale agreed with the Greater Glasgow Health Board that the course of treatment to which the petitioners could object was 'the whole course of medical treatment bringing about the termination of the pregnancy' which 'begins with

the administration of the drugs designed to induce labour and normally ends with the ending of the pregnancy by delivery of the foetus, placenta and membrane'.¹⁴ Her Ladyship considered that treatment under section 4 also would include the medical and nursing care which was connected with the process of undergoing labour and giving birth such as the monitoring of the progress of labour, the administration of pain relief and the giving of advice and support to the patient.¹⁵

As to the question of the meaning of 'to participate in' the treatment, Lady Hale said that on any view, it would not cover things done before the course of treatment began, such as making the booking before the first drug was administered. However, a broad meaning might cover things done in connection with that treatment after it had begun such as assigning staff to work with the patient and supervising and supporting such staff. On the other hand a narrow meaning would restrict the participation to 'actually taking part', that is actually performing the tasks involved in the course of treatment.¹⁶

Lady Hale favoured the narrow meaning. Her Ladyship stated that that meaning was 'more likely to have been in the contemplation of parliament when the Act was passed'. Since the focus of section 4 was on the acts made lawful by section 1, Lady Hale said it was unlikely that, in enacting the conscience clause, parliament had in mind the host of 'ancillary, administrative and managerial tasks' that might be associated with those acts. Lady Hale said that those tasks would extend to hospital administrators who decide how best the service can be organised within the hospital, the caterers who provide the patients with food and the cleaners who provide them with a safe and hygienic environment. In Lady Hale's opinion, participate 'means taking part in a 'hands-on' capacity'.¹⁷

Her Ladyship proceeded to set out how the above construction applied to an agreed list of 13 tasks which the petitioners' role as Labour Ward co-ordinators required them to undertake.

Conclusion

As noted above, Lady Hale considered the issue as one of statutory construction. An argument raised in an early stage of the case concerned the relevance of the petitioners' rights under article 9 of the European Convention on Human Rights 'to freedom of thought, conscience and religion' including the freedom 'to manifest his religion or belief, in worship, teaching, practice and observance'. Lady Hale noted that the argument that the hospital should have made reasonable adjustments to the requirements of the job in order to cater for their religious beliefs depended, to some extent at least, 'upon issues of

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practicability which are much better suited to resolution in the employment tribunal proceedings ... than in judicial review proceedings such as these'. Accordingly, the Supreme Court did not consider the effect of the European Convention on Human Rights on the construction issue to be decided.

Endnotes

1. [2014] UKSC 68 at [13].
2. [2014] UKSC 68 at [19].
3. Before the Lord Ordinary, Lady Smith.
4. Lord Mackay of Drumadoon, Lady Dorrian and Lord McEwan.
5. [2014] UKSC 68 at [20].
6. [2014] UKSC 68 at [21].
7. [2014] UKSC 68 at [29].
8. [2014] UKSC 68 at [29].
9. [2014] UKSC 68 at [31].
10. [2014] UKSC 68 at [32].
11. [2014] UKSC 68 at [33].
12. [1981] AC 800.
13. [2014] UKSC 68 at [28], [33].
14. [2014] UKSC 68 at [34].
15. [2014] UKSC 68 at [34].
16. [2014] UKSC 68 at [37].
17. [2014] UKSC 68 at [38].

Police duty of care

Daniel Klineberg reports on *Michael v Chief Constable of South Wales Police* [2015] UKSC 2

On 5 August 2009, Joanna Michael died. In the early hours of 5 August 2009, Ms Michael's ex-boyfriend turned up at her house, assaulted her physically and threatened to kill her. Following the assault, at 2.29am Ms Michael called the emergency 999 number and reported the assault and the threat to her life. Although Ms Michael lived in Cardiff which was in the area of South Wales Police, the emergency call was routed to Gwent Police. The call ended with Ms Michael being told that the information would be passed on to the police in Cardiff. The call was graded by Gwent Police as 'G1' meaning it required an immediate response from police officers. There was a police station no more than six minutes' drive away from Ms Michael's house.

The Gwent call handler immediately called South Wales Police and gave an abbreviated version of what Ms Michael had said. However, no mention was made of the threat to kill. South Wales Police graded the priority of the call as 'G2'. This meant that officers assigned to the case should respond to the call within 60 minutes.

At 2.43am Ms Michael again called 999. The call also was received by Gwent Police. Ms Michael was heard to scream and the line went dead. South Wales Police were immediately informed. Police officers arrived at Ms Michael's address at 2.51am. They found that she had been brutally attacked and was dead. Her attacker was soon found and arrested. He subsequently pleaded guilty to murder and was sentenced to life imprisonment.

Data held by South Wales Police recorded a history of abuse or suspected domestic abuse towards Ms Michael by the same man. On four occasions between September 2007 and April 2009, incidents had been reported to the police and entries had been made on a public protection referral for domestic abuse form, but in two instances the risk indications section of the form was not completed.

An investigation by the Independent Police Complaints Commission led to a lengthy report. It contained serious criticisms of both police forces for individual and organisational failures.

Procedural history

The claimants were the parents of Ms Michael and her two children. They sought damages for negligence at common law (as well as under certain legislation). They also sought damages under the *Human Rights Act 1998* for breach of the defendants' duties as public authorities to protect Ms Michael's right to life under article 2 of the European Convention on Human Rights. Originally, there was also a claim for misfeasance in public office. This note will consider only the issues arising out of the negligence claim.

The police applied for the claim to be struck out or for summary judgment to be entered in their favour. They were unsuccessful at first instance but, on appeal, the Court of Appeal held unanimously that there should be summary judgment in favour of the defendants on the negligence claim. The claimants

Daniel Klineberg, 'Police duty of care'

appealed. The issue before the Supreme Court was whether the police owed any duty of care to Ms Michael on the facts as alleged. This raised three questions for determination as follows.

Question 1: if the police are aware or ought reasonably to be aware of a threat to the life or physical safety of an identifiable person, or member of an identifiable small group, do the police owe to that person a duty under the law of negligence to take reasonable care for their safety?

Question 2: in the alternative to Question 1, if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his or her life or physical safety, does B owe to A duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed?

Question 3: on the basis of what was said in the first 999 call, and the circumstances in which it was made, should the police be held to have assumed responsibility to take reasonable care for Ms Michael's safety and therefore owed her a duty of care in negligence?

Reasoning of the Supreme Court

The majority of the Supreme Court comprised Lord Toulson, with whose reasons Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge agreed. Lord Toulson noted, in relation to the issue of domestic violence, that it was not suggested that the law of negligence should be developed in a way which was gender specific. However, it was submitted that the need to combat domestic violence should influence the development of the common law in relation to potential victims of violence generally.¹

His Lordship said that it had been long-established that the police owe a duty for the 'preservation of the Queen's peace'.² The duty is one which any member of the public affected by a threat of breach of the peace, whether by violence to the person or violence to property, is entitled to call on the police to perform. It is a duty owed to the public at large for the prevention of violence and disorder.³

Lord Toulson then considered whether the police may owe a private law duty to a member of the public at risk of violent crime in addition to their public law duty. His Lordship reviewed relevant case law commencing with the House of Lord's decision in *Hill v Chief Constable of West Yorkshire*⁴ where, in giving the leading speech of the House of Lords, Lord Keith of Kinkel held that the general duty of the police to enforce the

law did not carry with it a private law duty towards individual members of the public.⁵

In *Hill*, Lord Keith also concluded that it would be contrary to the public interest to impose liability on the police for mistakes made in relation to their operations in the investigation and suppression of crime. This was because the manner and conduct of such an investigation necessarily involved a variety of decisions to be made on matters of policy and discretion, such as: which particular line of inquiry is most advantageously to be pursued; and what is the most advantageous way to deploy available resources. Many such decisions would not be appropriate to be called in question, but elaborate investigation of the facts might be necessary to ascertain whether or not this was so. The result would be a significant diversion of police manpower and attention from their most important function. Lord Keith considered that the police were 'immune' from an action of this kind.⁶

Lord Toulson described the use of the word 'immunity' as 'not only unnecessary but unfortunate' in that an immunity is generally understood to be an exemption based on a defendant's status from a liability imposed by the law on others.⁷

Lord Toulson's analysis of the case law following *Hill* included the twin decisions of the House of Lords in *Smith v Chief Constable of Sussex Police* and *Van Colle v Chief Constable of the Hertfordshire Police*⁸. In those decisions, Lord Bingham of Cornhill, in dissent, described (at [44]) the relevant duty in the form of the Question 2 set out above. Lord Bingham did not consider that the policy reasons given by Lord Keith in *Hill* justified the width of what Lord Keith said about police 'immunity'.⁹

Lord Toulson stated that there were cases of a police force being held liable in negligence for failing to take proper care for the protection of a police officer against a criminal attack. However, those cases were based on the duty of care owed to the claimants as employees whose employment exposed them to the risk of such an attack in the performance of their duty.¹⁰ Claims against other emergency services had been treated in a similar way to claims against the police.¹¹ The exception was in the case of the ambulance service in respect of which it had been held in the Court of Appeal's decision in *Kent v Griffiths*¹² that the staff of the ambulance service owed a similar duty of care to that owed by doctors and nurses operating in the health service.¹³

His Lordship then considered other common law jurisdictions including New York, South Africa, Canada, New Zealand, Ireland and Australia. As to Australia, Lord Toulson referred

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to the High Court's decisions in *Modbury Triangle Shopping Centre Pty Limited v Anzil*¹⁴ and *Sullivan v Moody*¹⁵ noting that in the latter decision, the High Court 'cited the decision of the House of Lords in *Hill* in support of the proposition that the conduct of a police investigation involves a variety of decisions on matters of policy and discretion, including decisions as to priorities, and that it is inappropriate to subject those decisions to a common law duty of care'.

Lord Toulson then said that the common law does not as a general rule impose liability on a defendant for injury or damage to the person or property of a claimant caused by the conduct of a third party. This is because the common law does not generally impose liability for pure omissions.¹⁶ His Lordship also referred to various exceptions from that rule.

Following this analysis, Lord Toulson said that although there existed in society what Lord Toulson described as a 'protective system', it did not follow from the setting up of that protective system from public resources, that if that system failed to achieve its purpose through organisational defects or fault on the part of an individual, 'the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible'. That would be 'contrary to the ordinary principles of the common law'.¹⁷

Accordingly, leaving aside the issue as to whether the police should have a special immunity as referred to in *Hill*, there was no basis for creating an exception to the ordinary application of common law principles against there being a duty of care owed by the police which would cover the facts of the present case.¹⁸ Accordingly, his Lordship considered the appeal should be dismissed.

In separate judgements, Lord Kerr and Lady Hale would have allowed the appeal based on arguments which involve the concept of proximity.

Endnotes

1. [2015] UKSC 2 at [20].
2. [2015] UKSC 2 at [29].
3. [2015] UKSC 2 at [33].
4. [1989] AC 53.
5. [2015] UKSC 2 at [37].
6. [2015] UKSC 2 at [43].
7. [2015] UKSC 2 at [44].
8. [2009] 1 AC 225 – the two cases were heard jointly.
9. [2015] UKSC 2 at [60].
10. [2015] UKSC 2 at [70].
11. [2015] UKSC 2 at [71].
12. [2001] QB 36.
13. [2015] UKSC 2 at [80].
14. (2000) 205 CLR 254.
15. (2001) 207 CLR 562.
16. [2015] UKSC 2 at [97].
17. [2015] UKSC 2 at [114].
18. [2015] UKSC 2 at [116], [118], [130].

Duty of care to an owners corporation

Victoria Brigden reports on *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36

The High Court unanimously allowed the appeal of a builder, Brookfield Multiplex Ltd, from a decision of the New South Wales Court of Appeal in which it had been held that Brookfield owed a duty of care to the owners corporation of strata-titled serviced apartments to exercise reasonable care in the construction of the building to avoid causing the owners corporation to suffer pure economic loss resulting from latent defects in the common property which were structural or constituted a danger to persons or property in the vicinity or made the apartments uninhabitable.¹ The High Court found, in four separate judgments, that Brookfield did not owe the owners corporation a common law duty of care.

Consideration of earlier decisions of the court in *Bryan v Maloney*² and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*³ was critical to the court's reasoning. In *Bryan v Maloney*, the High Court held that a builder of a dwelling house owed a duty of care to a subsequent purchaser of the house, a breach of which, by careless construction giving rise to latent defects, would support an action in negligence for pure economic loss. Six members of the court in *Woolcock* held that an engineering company which designed the foundations of a warehouse and office complex did not owe a subsequent purchaser of the building a common law duty of care to avoid economic loss. The reasoning in *Woolcock* was applied, and *Bryan v Maloney* distinguished.

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French CJ

French CJ considered the development of the notion of vulnerability in the context of establishing the existence of a duty of care for pure economic loss, the concept referring to the plaintiff's incapacity or limited capacity to take steps to protect itself from economic loss arising out of the defendant's conduct.⁴

His Honour held that there was a sharp distinction between *Bryan v Maloney* and the present case on the question of vulnerability, and that the distinction was analogous to that made in *Woolcock*.⁵ His Honour observed that the question as to whether the plaintiff was vulnerable in *Woolcock* could not be answered definitively in that case.⁶

In considering whether Brookfield owed a duty of care to the owners corporation, his Honour found that the responsibility assumed by Brookfield with respect to the developer, as the initial owner of the lots, was defined in detail by the design and construct contract, and therefore there could be no responsibility on the part of Brookfield for pure economic loss flowing from latent defects beyond the limits of responsibility imposed by the contract. His Honour also found that there was no duty of care owed to the owners corporation as a proxy for the developer by virtue of the statutory relationship between them.⁷ His Honour then considered whether there was a duty of care owed to the owners corporation by virtue of its relationship to subsequent purchasers from the developer, and observed that because the contract for sale already contained specific provisions relating to the construction of the building and the developer's obligation to undertake repairs, it was not a case in which the subsequent owners could be regarded as vulnerable, nor the owners corporation as their statutory agent.⁸

His Honour found that the relationship between Brookfield and the owners corporation was not analogous to the relationship in *Bryan v Maloney* between the builder and the later purchaser of the house, but considered that it was analogous, but not identical, to the position of the purchaser of the complex in *Woolcock*. His Honour found that there was no duty of care in relation to pure economic loss flowing from latent defects owed by Brookfield to the owners corporation, nor any duty of care owed by Brookfield to the subsequent owners, therefore no duty of care owed to the owners corporation.

Hayne and Kiefel JJ

Hayne and Kiefel JJ held that the question of vulnerability, consistent with *Woolcock Street*, would determine the appeal.

Their Honours observed that it was not necessary or profitable to attempt to define what would constitute vulnerability, but stated that:⁹

It is enough to observe that both the developer and the original purchasers made contracts, including the standard contracts, which gave rights to have remedied defects in the common property vested in the Owners Corporation. The making of contracts which expressly provided for what quality of work was promised demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder in performance of its contractual obligations.

Their Honours therefore concluded that Brookfield did not owe the owners corporation a duty of care.

In so deciding, their Honours stated that that conclusion did not depend upon making any a priori assumption about the proper provinces of the law of contract and the law of tort, nor did the conclusion about the absence of vulnerability depend upon a detailed analysis of the particular content of the contracts the parties made.¹⁰

Crennan, Bell and Keane JJ

Their Honours held that the expansive view of Brookfield's obligations to the owners corporation as upheld by the Court of Appeal was not supported by *Bryan v Maloney* and did not accord with *Woolcock*, stating:¹¹

The court's decision in *Bryan v Maloney* does not sustain the proposition that a builder that breaches its contractual obligations to the first owner of a building is to be held responsible for the consequences of what is really a bad bargain made by subsequent purchasers of the building. To impose upon a defendant builder a greater liability to a disappointed purchaser than to the party for whom the building was made and by whom the defendant was paid for its work would reduce the common law to incoherence.

Their Honours noted that in *Woolcock*, the concept of vulnerability did not afford a basis for holding the defendant liable because the facts did not show that the plaintiff could not have protected itself against the economic loss it alleged it had suffered, and referred to a passage of the judgment of McHugh J in which his Honour noted that purchasers of commercial premises are usually sophisticated and well-advised. In those circumstances, the court must assume, in the absence of contrary evidence, that first and subsequent purchasers are

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able to bargain for contractual warranties from the vendor of such premises.¹² Their Honours stated:¹³

These passages accord with the primacy of the law of contract in the protection afforded by the common law against unintended harm to economic interests where the harm consists of disappointed expectations under a contract. The common law has not developed with a view to altering the allocation of economic risks between parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort.

In considering the obligations of Brookfield to the developer, their Honours found that the relevant provisions of the contract placed the risk of deficient work upon Brookfield, rather than the developer, and to supplement those with an obligation to take reasonable care would alter the allocation of risks effected by the contract.¹⁴

Their Honours found that a duty was not owed by Brookfield to the owners corporation independently of its obligations to the developer, and a contrary finding was not consistent with the court's finding in *Woolcock*.¹⁵ The correct question was not whether the relevant legislative scheme excluded a duty of care in favour of the owners corporation, but whether the owners corporation itself suffered a loss in terms of the value of the common property vested in it when it came into existence, viewed separately from the individual owners. The fact that the owners corporation did not exist at the time that the defective work was carried out was held to point against, rather than in favour of, the duty of care propounded by the owners corporation.¹⁶

Their Honours noted that their conclusion accorded with the position in the United Kingdom and the preponderance of judicial authority in the United States, although it differed from the approach in Canada, which their Honours considered should not be followed in Australia.¹⁷

Gageler J

His Honour considered the position in other jurisdictions on the issue of whether a builder should be recognised to owe a duty of care to a subsequent owner, and observed that there was no reason to consider any one of those approaches to result in a greater net cost to society than any other. Rather, provided the principle of tortious liability is known, his Honour considered that builders can be expected to accommodate it in the contractual terms on which they are prepared to build, and subsequent owners can be expected to accommodate it in the

contractual terms on which they are prepared to purchase. His Honour observed that there is a net cost to society which arises from uncertainty as to the principle to be applied.¹⁸

In considering the principle for which *Bryan v Maloney* remained authority after *Woolcock*, his Honour referred to the judgment of McHugh J in *Woolcock* and in particular to the finding that the ultimate question was whether the residual advantages that an action in tort would give were great enough to overcome the disadvantages, and in the absence of data to permit that judgment to be made, the better view was that the court should not take the step of extending the principle of *Bryan v Maloney* to commercial premises.¹⁹

Gageler J held that absent any application that *Bryan v Maloney* should be overruled, and absent data which might permit the making of a value judgment different from that made in *Woolcock*, the view expressed by McHugh J in the latter decision should be accepted. His Honour considered that the authority of *Bryan v Maloney* should be confined to cases concerning dwelling houses and where the subsequent purchasers could be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care, because, by virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring economic loss of that nature.²⁰

Endnotes

1. *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479.
2. (1995) 182 CLR 609.
3. (2004) 216 CLR 515.
4. At [22].
5. At [23].
6. At [29].
7. At [34].
8. At [34].
9. At [58].
10. At [59] – [60].
11. At [69].
12. At [130] – [131].
13. At [132].
14. At [142] – [144].
15. At [148].
16. At [149] – [150].
17. At [164].
18. At [176] – [177].
19. At [183].
20. At [185].

Working with interpreters: judicial perspectives

The following paper was delivered by the Hon Justice Melissa Perry¹ and Kristen Zornada² at the AIJA Cultural Diversity and the Law conference in Sydney on 13–14 March 2015.

Introduction

In the past year, over 300 interpreter bookings were made for cases before the Federal Court and the Federal Circuit Court. In the administrative arena, 85 per cent of hearings in the Refugee Review Tribunal, for example, involved an interpreter, and 57 per cent in the Migration Review Tribunal which together equate to over 11,000 hearings involving interpreters in 98 languages.³

The vast majority of cases in federal courts in which the services of an interpreter were used were migration matters where the litigants appeared in person without legal representation. From the perspective of these litigants, these were proceedings in a foreign court in a foreign land experienced through the conduit of an interpreter. The impression of justice in our courts that such litigants will take away with them will be affected in large part by the respect with which they are treated, and by how well they understand the proceedings and are understood. The same may be said of their impressions of administrative justice before tribunals. In each of these respects, the interpreter plays a vital role.

The interpreter also plays a vital role in ensuring that justice is in fact done. It is a cornerstone of the Australian judicial system that all who come before our courts are entitled to a fair hearing before a decision-maker who is, and is perceived to be, independent and impartial.⁴ These principles of fairness and equality before the law are fundamental to a democratic society governed by the rule of law, and their observance is essential to the maintenance of public confidence in the judiciary.⁵ For those with no or limited proficiency in the language of our courts and tribunals, interpreters make their participation possible and play an important role in ensuring that justice is done and can be seen to be done. And so, for example, where a person appearing unrepresented in the Federal Court cannot afford an interpreter, the court provides one upon request free of charge.

The questions on which this paper will focus are: how does a court or tribunal assess whether the person needs an interpreter; what is the standard of interpretation required at law; and, in the case of an administrative decision, when will a failure to meet that standard result in an invalid decision?

But first some background.

What is the current system in Australia for interpreters?

While fully acknowledging the invaluable assistance that interpreters provide to non-English speaking litigants and to the

courts, there are deficiencies in the system that are not readily overcome. While there are 112 NAATI-accredited languages and varying accreditation standards within those languages, over 300 languages are spoken in Australia, including Indigenous languages. Furthermore, in general, the federal courts prefer NAATI-accredited interpreters of the 'professional interpreter' standard. However, interpreters are not always available at that level.

Indeed, even to speak of 300 languages is to mask the complexity of the issue given the prevalence of dialects within those broad language descriptions.⁶ For native English speakers, it can be difficult to appreciate the extent of differences between dialects in other languages. When we think of differences between Australian English and American or British English, we usually point to a few different words but at the end of the day we know that a 'jumper' is the same as a 'sweater', and that 'fries' are 'chips'.

For those with no or limited proficiency in the language of our courts and tribunals, interpreters make their participation possible and play an important role in ensuring that justice is done and can be seen to be done.

In many other languages the differences occur not just in particular words or accents, but in grammatical structure and tense usage. For example, in Italian, while the remote past tense is used in written standard Italian to refer to events that occurred historically, speakers of some dialects native to the south of Italy employ it even when referring to events that may have just happened.⁷ Conversely, use of the remote past tense in speech died out in many northern dialects hundreds of years ago.⁸ Such differences occur in other languages and other dialects,⁹ and it is not difficult to imagine the impact a misinterpretation of tense may have, for example, on applicants describing when relevant events took place.

How does a court assess whether the person needs an interpreter?

Normally courts and tribunals will accede to a request for an interpreter by a witness or litigant who has difficulty speaking English.¹⁰ In migration proceedings, whether before a tribunal or a court, applicants are required to indicate whether they require an interpreter, and the language, and (if applicable) the

dialect, in which the interpreter should be competent.

But this requires a self-assessment, and it cannot be assumed a person necessarily appreciates his or her level of competency, especially in a specialised setting like a court or tribunal. The seriousness of the difficulties that interpreting in a legal context may pose can be illustrated by those cases in which the oft-used phrase 'execute a warrant' has been interpreted as 'execution' in the sense of carrying out a death sentence. Indeed, the specialised language of legal proceedings points to a need for education, and perhaps even a separate accreditation, for interpreters commonly interpreting in this context.

Applicants and witnesses may also be unwilling to accept that they require an interpreter. This is, for example, a particular issue in some Indigenous communities where there is a cultural tendency to agree with answers to questions by persons in authority, or so as not to upset the questioner. This issue has been sufficiently prevalent that the Kimberley Interpreting Service, the only Indigenous language interpreting service in Western Australia, has produced guidelines to determine if someone requires an interpreter. In addition to asking the person whether they understand, it involves, for example, laying word traps to reveal potential areas of miscommunication.

Applicants from other cultural backgrounds may also be reluctant to admit that they need an interpreter for a variety of different reasons. Further, in at least one somewhat unusual case, an interpreter was requested in a language that the applicant did not even speak. In that case, despite requesting a Portuguese interpreter before the Refugee Review Tribunal, it quickly became evident that the applicant did not speak Portuguese. Rather, it appeared that he had requested a Portuguese interpreter to effectively 'corroborate' his claims in support of a protection visa as a citizen of Angola where Portuguese is spoken.¹¹

Cases such as this, however, appear rare and the risk that a person may seek to rely improperly upon an interpreter must be weighed against the serious injustice, and breach of fundamental human rights, if a reasonable request for an interpreter is denied. In this regard, it is important to bear in mind that competence in English in ordinary daily interactions will not necessarily adequately equip the individual to understand what is being said in the peculiar setting of a court proceeding.¹² It is not the point that a person can speak *some* English, but rather whether their English language skills are sufficient to enable them to understand the case against them, and to put their case or evidence before the court or tribunal. If that is not the case and no interpreter has been booked, the hearing must

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be adjourned until an appropriate interpreter can be found.¹³ This occurred recently in a case in the Federal Court where an Indian couple challenging a visa decision found that they were having greater difficulties in following the proceedings than they had anticipated.

If an interpreter is required, what standard of interpretation is required at law?

NAATI sees the Professional Interpreter standard as the minimum level of competence for professional interpreting and minimum level recommended for work in most settings, including the law.¹⁴ This is also the standard preferred by the Federal and Federal Circuit courts. However, while accreditation to the appropriate 'level' tends to suggest that the interpreter will provide an adequate interpretation,¹⁵ from the perspective of tribunals and courts, the level to which the interpreter is qualified is not necessarily determinative. A hearing may still be fair even though an interpreter below the preferred level was used.¹⁶ Indeed, any other approach would be impractical and not in the interests of justice, given the difficulties in engaging qualified interpreters to which reference has been made.¹⁷

So, focussing upon administrative decision-making, what then is the standard required?

Guidance can be found in the decision of the full court of the Federal Court in *SZRMQ v Minister for Immigration*¹⁸ delivered last year. The full court explained that where the standard of interpretation fell, to be addressed from the perspective of procedural fairness the question was an evaluative one, namely:

whether the applicant has had a real and fair opportunity to put what she or he wanted to put, to understand what was being said to him or her, and to participate in the hearing in a way from which it can be concluded that the hearing was fair, and thus that administrative justice was done.

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Viewed individually, it may be that intermittent mistranslation and non-translations are not significant, but viewed together they may demonstrate a pattern that indicates a denial of procedural fairness.

The assessment of whether jurisdictional error exists, therefore, when viewed through the prism of procedural fairness, is a '*fact sensitive*' inquiry – it turns on an assessment of the facts in the individual case.

Significantly, the full court also held that it suffices to establish a denial of procedural fairness if it is shown that the errors *could* have affected the outcome. It is not, therefore, necessary to establish a causal link between a failure to interpret the proceedings adequately, on the one hand, and an adverse finding made by a tribunal relevant to the outcome, on the other hand, to establish a denial of procedural fairness.¹⁹ Indeed, in many cases that will not be possible, such as where a tribunal's decision is based in whole or in part on the witness' credibility in light of perceived inconsistencies and gaps in the witness' evidence.²⁰

Cases where a direct causal link can be established between the mistranslation or non-translation of discrete words and an unfair outcome are unusual. After all, interpretation is not merely a 'mechanical exercise',²¹ and there will be some words that may not translate directly. For example, it is difficult to translate the concept 'house arrest' into Farsi, but a full court of the Federal Court held that 'under control ... at ... home' effectively conveyed the substance of the concept.²² The inquiry is ultimately one of fact and degree.

Where, however, the misinterpretation or non-interpretation is frequent or continuous, as opposed to intermittent, a court will more readily find a denial of procedural fairness because it can be seen that the process overall has miscarried. By contrast, where there are intermittent errors, it is necessary to assess not only the individual errors but their impact on the overall fairness of the hearing.²³ Viewed individually, it may be that intermittent mistranslation and non-translations are not significant,²⁴ but viewed together they may demonstrate a pattern that indicates a denial of procedural fairness.

An example of a case where such a pattern emerged from intermittent errors is found in the case of *SZOBN v Minister for Immigration*.²⁵ The applicant was a citizen of India, and claimed to fear persecution in her predominantly Hindu region because she was Christian. When questioned by the Refugee Review Tribunal through a Malayam interpreter as to what she

knew about Christianity, her answers were that 'Jesus died for poor people', 'I was able to see my father at church' and that she goes to church to get '*Quarbana*', a Malayam word that was not interpreted. Given her apparent lack of knowledge of basic Christian beliefs, the Tribunal found that she was not credible and disbelieved her claims. However, evidence was led on judicial review of an interpretation by another Malayam interpreter of the recording of the Tribunal hearing. It was his evidence that she had in fact said that 'Jesus died for our sins', 'I was able to see the Pope' and 'I go to church to get the Eucharist'. These answers demonstrated knowledge of the meaning of Jesus' life, the Pope and the Eucharist, and not surprisingly the court found that the Tribunal may well have formed a different view or pursued more details by further questioning if her answers had been accurately interpreted.²⁶

Relevance of inadequate interpreting to jurisdictional errors other than procedural fairness

Finally, the potential impact of inadequacies in interpreting upon the validity of an administrative decision is not limited to questions of procedural fairness. This is an important point as the *Migration Act 1958* (Cth) (Migration Act) essentially abrogates the natural justice hearing rule at common law and sets out an exhaustive code of what is required by a fair hearing.²⁷ While the standard required of an interpreter may differ according to the particular kind of jurisdictional error alleged, errors in interpreting may also give rise to other grounds of judicial review. An example is legal unreasonableness, such as, perhaps, where a decision-maker dismisses out of hand an applicant's contention that the translation of his or her evidence is affected by material errors.

Similarly, where the question is whether an administrative decision is vitiated by error of law (as was the case under an earlier iteration of the Migration Act), the focus has been on the minimum requirements of the content of the right to an interpreter and to a hearing. Justice Robertson described this as a '*blunter question*' in *SZRMQ*. This does not mean that there is a need to demonstrate that the applicant was prevented from giving *any* evidence *at all*, but rather that the applicant was unable to put her or his case in relation to matters of significance for the applicant's claims or the Tribunal's decision.

For example, in the decision of *Perera v Minister for Immigration and Multicultural Affairs*²⁸ in 1999, Kenny J found that the applicant had effectively been prevented from giving evidence on issues critical to his application for a protection visa, being: the basis for his belief that the government had adverse interest in him; the significance of the government's animosity; the legal status of a political group of which he claimed to be a supporter; and his status as a human rights lawyer.²⁹ Taken as a whole, her Honour found, the transcript indicated that the interpretation was of poor quality, and for the purposes of the appeal, incompetent.³⁰

Conclusion

The services afforded by interpreters are integral to the capacity of courts and tribunals every day to dispense justice. One of the important aspects of this conference is to draw attention to the significance of that role, and to discuss ways in which interpreters and the courts can work better together.

The courts are continuing this important conversation through initiatives such as the Judicial Council on Cultural Diversity (JCCD).³¹ It is only through continuing collaboration between the courts, interpreters and bodies such as the JCCD and the Australian Institute of Judicial Administration in the search for solutions to issues such as those raised here, that we can provide a judicial and administrative system that truly affords individuals from culturally and linguistically diverse backgrounds the procedural fairness to which they are entitled.

Endnotes

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2. Former associate to Perry J; LLB (Hons), BBus (Bond).
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Considering alternatives to drug prohibition

Stephen Odgers SC provides an overview of the policy context in which the Bar Association's discussion paper, *Drug Law Reform*, was drafted and the Criminal Law Committee's position.

The control of illicit drugs is a complex issue, and there is a real divergence of opinion on the most effective way of limiting their use and preventing production and distribution. Currently, illicit drug use is prohibited, and that prohibition is backed by criminal sanctions, which is consistent with Australia's obligations under international law.¹

However, the landscape is changing. New threats are emerging. The old weapons in the 'war on drugs' are no longer fit for purpose where users are increasingly turning to the abuse of pharmaceuticals, the use of synthetic drugs and the trade of drugs on the 'dark net'. Indeed, the UN Office on Drugs and Crime now considers the reduction or elimination of drug use to be an 'aspirational goal akin to the elimination of war and poverty'.²

The problem will not be fixed with harsher prison sentences for users or more money for conventional law enforcement methods. It is time to take a step back, look at the issue afresh and acknowledge that law enforcement alone is not responsible for fixing the problem. This is a social problem, a health problem, a personal problem, a community problem and ultimately, a policy problem. It is time to have a robust debate on the available alternatives, and give those alternatives serious consideration. On 24 November 2014 the Association released a Discussion Paper prepared by the Criminal Law Committee on the topic of drug law reform.³

Clearing up some misconceptions

Dependence

Even though all drugs can be addictive, only a minority of individuals who use illicit drugs become dependent on them.⁴ The percentage of users of cannabis, cocaine, opiates and amphetamines who become dependent is, on average, 13 per cent.⁵ Dependent users suffer the greatest primary and secondary harms. The tangible and intangible costs associated with tobacco, however, are greater than those of alcohol and illicit drugs combined.⁶

Rational drug use?

A recent survey of drug users found that the most common reasons cited for using drugs are:⁷

- Relaxation
- Enjoyment
- Socialising with others
- To feel better or to cope with life issues
- Dependency

Many people who use drugs are rational consumers insofar as they make a deliberate choice to take a drug or drugs to achieve a desired effect.⁸ Most drug users limit their levels of use to ensure minimal impact on education, employment and proper social functioning.⁹

Effectiveness of current law enforcement measures

A number of studies have shown that the reasons most often cited for the decision not to use a particular drug are: lack of interest (73.3 per cent) and health or addiction concerns (47.0 per cent). Legal reasons were cited by only 28.6 per cent of respondents.¹⁰

A study by the Bureau of Crime Statistics and Research released early this year found that increased law enforcement efforts to reduce the supply of illicit drugs 'are more likely to signal an increase rather than a reduction in drug consumption'.¹¹ Similarly with respect to levels of drug-related harm, increases in seizure quantity or frequency have 'little if any impact on the harms associated with heroin, cocaine and ATS' [amphetamine-type stimulants].¹²

Evidence on the efficacy of current drug law enforcement is difficult to find. As the market in illicit drugs is 'black', there is no way of knowing what percentage of the overall market a seizure represents. In 2009–10, 64.1 per cent of a total \$1.6 billion federal drug budget was allocated to drug law enforcement.¹³ In 2012–13, 61 per cent of drug arrests were for possession and use of cannabis, followed by amphetamine-type stimulants at 21.8 per cent and 'other and unknown' at 13.5 per cent.¹⁴

It is argued that law enforcement efforts increase the risks associated with drug dealing, which increase price and decrease levels of use.¹⁵ The question of whether use of a drug is 'price-elastic' is a complex one, and some would argue that increasing

the price of drugs merely increases the incentive to trade in illicit drugs, and increases the likelihood that those drugs will be 'cut' with dangerous additives.

A 2008 study demonstrates the profits involved in the illicit drug trade.¹⁶

Product	Market level	Effective price per/kg
Coca leaves	Farmgate/Colombia	\$300
Coca base	Farmgate/Colombia	\$900
Cocaine hydrochloride	Export/Colombia	\$1,500
Cocaine hydrochloride	Import/US	\$15,000
Cocaine (67% pure)	Dealer/US	\$40,000
Cocaine (67% pure)	Retail/US	\$150,000

In 2003 the UN Office on Drugs and Crime estimated that the value of the wholesale market in illicit drugs exceeded global exports of ores and other minerals, and the value of the retail market was higher than the GDP of 88 per cent of the countries of the world.¹⁷

The levels of risk in the drug trade are also changing. Drugs can easily be purchased on the 'dark net' and posted to your door. Following the death of a teenager on Sydney's Northern Beaches in 2014 that resulted from an overdose of cocaine purchased on the 'dark net', the NSW Drugs Squad Commander commented, '[w]e can't be in people's living rooms or next to a 16 year old with a smartphone... it's virtually unpoliceable'.¹⁸

Criminalisation and the black market

The criminalisation of conduct occurring frequently in our society is something that deserves careful consideration.

Most people are drug users; caffeine, nicotine, alcohol. Not everyone is an illicit drug user, but many have been at some point in their lives. The Drug Household Survey from 2013 found that 35 per cent of people over the age of 14 reported using cannabis in their lifetime.¹⁹

Criminal sanctions are justified on the grounds that they will:

- Secure incapacitation of the offender
- Exact retribution upon the offender for the harm that they have inflicted upon another and/or society
- Deter the offender (specific deterrence) and others (general deterrence) from engaging in criminal behaviour
- Allow the offender to be rehabilitated.

Incapacitation

A recent study found that 46 per cent of participants reported injecting during their time in prison.²⁰ Covert drug injection in a prison setting increases the rate of infection for blood borne viruses²¹, with one study finding that 81.9 per cent of

inmates who injected an illicit drug in prison shared a needle or syringe in doing so.²² It has been reported that syringes sell at a premium on the prison black market, and some prisoners have resorted to the use of sharpened basketball pump spikes, ballpoint pens and chicken bones.²³

Retribution and deterrence

Drug dependence is as a medical condition, so in the absence of a concomitant crime, it is difficult to justify criminal sanction on the grounds of retribution.

A recent study found that the probability of a cannabis user being arrested for use in the last month is 1 in 19.6; for use in the past year, it was 1 in 34.8. The likelihood of arrest for the use of methamphetamine, a drug of serious concern, was 1 in 34.5 for use in the last month, and 1 in 86.4 for use in the last year.²⁴ This may explain why only 28.6 per cent of respondents to a survey detailed above gave 'legal reasons' for their decision not to use a particular drug.²⁵

Rehabilitation

Rehabilitation programs in prison are difficult to successfully implement, often being under-resourced and poorly co-ordinated. Follow-on care is often inadequate, with suicide and overdose the primary cause of death for inmates in the period immediately following release from prison.²⁴

What next?

The Criminal Law Committee will be holding a forum to discuss alternatives to the current legal position on illicit drug use. The

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harms caused by illicit drug production, trafficking and use to the individual and society are too great. The criminalisation of widespread conduct diminishes respect for the law. Something needs to change. The questions are: what should change? And how should that change take place?

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Justice Hugo Black and the Ku Klux Klan

By Geoffrey Watson SC

While Justice Black sat on the US Supreme Court from 1937 until 1971 he established himself as one of the most liberal judges ever to serve on that court. His judgments were politically motivated and ideologically driven with scant regard for precedent – by American standards Black was positively left wing. Yet Black had also been a member of the Ku Klux Klan. How was this so?

Hugo LaFayette Black was born on 27 February 1886 in a clapboard farmhouse in Clay County, Alabama – hillbilly country. He was one of eight children; poor, but Southern proud. Despite his background, Black had a reasonable education, and shortly after school he commenced study at the law school of the University of Alabama in Tuscaloosa. It was a two year course and the 22 students were taught all their subjects by the two faculty members.

Black determined to become a trial advocate. In 1907 he headed to the state capital, Birmingham. He only had \$10 and walked part of the way to save on the train fare. He shared a room in a boarding house with three other men – four men sharing two double beds. The few cases that Black got were small and poorly paid. He took an appointment as a ‘Municipal Court judge’ for \$125 per month where he dealt with the lowest level of crimes amongst the poorest members of the community – nearly all of the persons who came into his ‘dingy, dank, dark and dirty’ courtroom were African-Americans. He acquired a reputation for efficiency (he would decide about 80 to 100 cases per day) and there was no hint of racism in his judgments.

A committed Democrat, Black took his first step into politics in 1914, successfully nominating for election as the Jefferson County solicitor – effectively its DPP. He quickly showed that he was a genuine reformer. One of his first actions was to drop the charges against 500 petty offenders incarcerated because they were unable to muster bail. Nearly all were African-Americans. His term was marked by zealous prosecution of powerful business interests and corrupt politicians and police. He produced a report damning the police for extracting ‘confessions’ from black prisoners through force, and he indicted four police officers following a particularly brutal interrogation. He successfully prosecuted a well-connected town marshall for the murder of a black prisoner. Naturally, this was never going to last. The Alabama political establishment undermined his authority, and Black resigned in protest in 1917.

Black then joined the Army, was commissioned as a captain – but Armistice came just before he shipped out. Returning to private legal practice in Birmingham he soon became the city’s leading plaintiff’s lawyer. Birmingham was an industrial town with plenty of juicy industrial accidents and Black was



Hugo La Fayette Black. Library of Congress LC-USZ62-33516 / Photo by Harris & Ewing photography.

He addressed juries with tears running down his cheeks – but only in bigger cases: he told one opponent ‘Hugo Black doesn’t cry for less than \$25,000’.

soon making a fortune out of contingency fees he took out of generous jury awards. In 1926 he declared a taxable income of \$65,000 – ‘as large an income as any lawyer in Alabama’ he claimed. Accounts of his courtroom antics (‘usually feisty and aggressive’) suggest that he was a prototype for the flamboyant advocates that we see today on American TV. Known as ‘Ego Black’ by his opponents, he skirted ethical edges claiming ‘If you’re not threatened [with contempt of court] at least once during a case, you’re not doing your job’. He addressed juries with tears running down his cheeks – but only in bigger cases: he told one opponent ‘Hugo Black doesn’t cry for less than \$25,000’.

Now you cannot be an important person in Birmingham, Alabama in the 1920s and stay too far away from the Ku Klux Klan. ‘The Invisible Empire’ was at its peak, with between four and six million members across America. The Klan controlled the voting machinery in Alabama. In Birmingham there were 32,000 registered voters, 15,000 of whom were Klansmen. For Black the connection became important when, in 1921, he was selected by the Klan to conduct a case which had excited national attention.

In 1921 a Methodist minister, Rev ‘Roscoe’ Stephenson, murdered a Catholic priest, Father James Coyle. Rev Stephenson was a member of the Birmingham Klavern and his daughter had run away to marry a Puerto Rican Catholic named Pedro Gussman. Father Stephenson officiated. The KKK was (amongst its many other prejudices) virulently anti-Catholic. Stephenson was naturally very cranky, so he sought out Father

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Coyle at his presbytery and told him 'you have acted like a low down, dirty dog ... you have ruined my home ... that man is a nigger'. Stephenson then shot the priest dead. Although these facts were not in dispute Stephenson pleaded not guilty. The KKK retained Hugo Black to appear for Stephenson. It was not a fair trial. The presiding judge was Judge Fort – a Klansman and an old friend of Black. The jury foreman was a senior Klansman. The majority of the jury were Klansmen. Black's defence was disgraceful. It involved parading the swarthy Gussman before the jury (Black arranged it so that the courtroom blinds were lowered so that Gussman would appear even darker). Meanwhile Rev Stephenson came to court each day dressed in his clerical robes. Black's cross-examination often concluded with a swingeing 'You're a Catholic aren't you?' and his address to the jury was a naked appeal to prejudice – he submitted that the Catholic witnesses were 'brothers of falsehood as well as faith'. He even recited part of the Klan's official prayer to the jury. Stephenson was acquitted – the jury made a specific finding that he had acted in self-defence – a remarkable result given that this was not the defence case and the priest was unarmed.

Now different people could react in different ways to those events. Hugo Black reacted by paying his 'klectoken' and joining the Robert E Lee Chapter of the Ku Klux Klan on 13 September 1923. It was hardly spur of the moment: He had been thinking of joining since 1920. He was admitted in a ceremony involving the traditional flaming crosses, and he wore the pointy hood and white gown while taking a Klan oath. That oath required him, inter alia, to 'shield and preserve ... white supremacy'.

In 1926 an opportunity arose for Black to run for the US Senate. To garner Klan support he spoke at klaverns and konklaves across Alabama. His typical speech was anti-Catholic. The Grand Dragon of the Realm of Alabama, James Esdale praised Black saying 'Hugo could make the best anti-Catholic speech you ever heard'. Black received endorsement from the KKK (in fact, his total vote closely approximated the Klan membership). Shortly after his election Black triumphantly addressed 3,000 hooded Klansmen at a celebratory 'klorero'. The 'exalted cyclops' introduced Black as 'chosen by the Klansmen of Alabama' and awarded Black a KKK 'passport' – the Klan equivalent of the keys to the city. In return Black pledged his allegiance to the Klan referring to it as 'the pride of Anglo-Saxon spirit' and 'the heart of Anglo-Saxon patriots'.

Upon his election to the Senate Black followed a Klan protocol – he signed a formal resignation from membership of the KKK. The protocol was designed to allow any Klansman in public

office to deny actual membership – the grand dragon later recounted how he told Black 'You give me a letter of resignation ... against the day you'll need to say you're not a Klan member'. But the resignation was not a genuine resignation – it was really just a device – once a Klansman always a Klansman. The resignation was signed off by Black with these letters 'ITSUB' – which, in Klanspeak, stands for 'In the Sacred, Unfailing Bond' – and that sacred, unfailing bond trumped any resignation.

...the grand dragon later recounted how he told Black 'You give me a letter of resignation ... against the day you'll need to say you're not a Klan member'

In the Senate Black demonstrated lingering signs of a pre-disposition toward Klan prejudices. Black sought leave from the Senate so he could return to Alabama to defend a Klan friend, the aromatically named Chum Smelley, who had deliberately murdered an African-American. Again self-defence succeeded although Smelley had shot the unarmed dead man in the back. Twice during 1929 Black moved in the Senate that all immigration be suspended for five years 'in defence of racial purity and national traditions'. He supported laws prohibiting marriage between blacks and whites. In 1935 Black delivered a filibuster designed to prevent the passage of an anti-lynching law.

Black strongly supported Roosevelt's infamous plan to enlarge the Supreme Court and to overwhelm conservative judicial opposition to his New Deal by packing the Supreme Court with sympathetic progressive judges. As is well known, Roosevelt's plan became unnecessary partly because one of the conservative judges, Willis Van Devanter, retired in 1937. This gave Roosevelt a legitimate opportunity to recreate the Supreme Court to his liking, and he nominated Black for the available position. Black's nomination was quickly confirmed by his colleagues in the Senate.

According to an article written by Black after Roosevelt was dead, he had informed Roosevelt of his former Klan membership – but the sequence of events seem to suggest that this claim was untrue. In any event, a few weeks after his confirmation, newspapers revealed Black's connection with the Klan. In an interview with a leading newspaper Grand Dragon Esdale produced documents proving Black's membership. The public response was angry. There were calls for Black's resignation or for his impeachment. Black responded by making an eleven

minute public statement on the radio. There was a nationwide audience. That speech by Black was a masterful piece of rhetoric. Only one minute of the speech was devoted to the real issue – he mentioned his former Klan membership, emphasising his resignation. The next ten minutes of the speech were devoted to an attack on religious and racial bigotry in the United States. It even included the good old, time-worn 'among my friends [are] many members of the coloured race' and 'some of my best and most intimate friends are Catholics and Jews'. Then the controversy quickly subsided. It is probably fair to say that in 1937 there was still a substantial proportion of Americans who would not have been terribly antagonistic toward the principles of the Ku Klux Klan.

Excuses have been offered to explain how or why Black came to join the KKK. Black himself generally avoided answering questions on the subject. Over his lifetime he did say some things, but some were quite inconsistent with others. For example, Black explained to his law clerks that membership of the KKK was only a little different from joining any other civic association. That is rubbish: during the 1920s the Alabama Klan was routinely organising whippings, murders, and lynchings – and even the odd tarring and feathering. Not really like Rotary. One apologist has made the suggestion that Black joined the Klan because he was drawn to its 'idealistic side', including the Klan's 'strict moral code' and its protection 'of the common labourer, too often victimised by manipulative corporate powers'. Yeah, sure. Another writer is closer to the mark: 'Black joined the Klan because it would get him into the Senate, because his views at the time were close enough to those of the Klan's membership that he was not deeply troubled by joining, and because he thought he could get away with it'. In early 1958 a daring young law clerk asked the question: 'Mr Justice, why did you join the Klan?' Apparently Black went silent, laughed – then offered 'Why son, if you wanted to be elected to the Senate in Alabama in the 1920s, you'd join the Klan too'.

All of this leaves two questions: the first – did Black's judicial work manifest prejudices consistent with those of the Klan? The answer must be no, it was almost exactly the opposite. Black ruled consistently in favour of minorities, and took an avidly pro-civil liberties stance. In fact the quite striking and political position adopted by Black might cynically be interpreted as an attempt to erase any question mark over his earlier Klan membership. Black continually went out of his way to establish his liberal credentials. Sometimes his actions in this respect were a little obvious: when the public furore over his Klan membership blew up, Black appointed a Jewish law clerk,

a Catholic secretary, and a Black Catholic messenger to his staff.

And that leads quickly to the second question: what sort of a judge was Black? This question is more difficult to answer. By the end of his term there is no doubt that Black was entitled to be described, in American terms, as liberal, progressive, activist and creative. Yet overall I would suggest that his legal work would be dismissed in Australia as politically-motivated and results driven. There was only a loose connection between precedent and his results; his judgments were short and his reasoning very thin. Viewed through the prism of strict legalism he was a failure. But the Americans do not view things that way, and there is no doubt that Black's career was, in American terms, highly successful: he regularly figures on the lists of the most influential of the Supreme Court justices. When he was joined later by Bill Douglas, Earl Warren and Bill Brennan, they formed the core of a judicially active Supreme Court which drove (rather than merely applied) the civil rights agenda in the 1950s and 1960s.

In his personal life Black was modest, unfailingly polite and oozed Southern charm. He was an adoring husband, but his first wife Josephine was very badly afflicted with depression and died in mysterious circumstances in 1951. Many thought it suicide, and Black could not forgive himself. He had three children and one of his sons, Hugo Jnr, became an eminent lawyer. He was religious, describing religion as 'a vital part of the warp and woof of our national existence'. He was energetic and skilful at tennis, competing right into his 80s. He was genuinely likeable. He was popular even amongst his ideological opponents in the Senate and on the court – he was especially close to that classical conservative John M Harlan.

Black remained on the US Supreme Court until his health began to fail. He then initiated what he called 'Operation Frustrate the Historians' by ordering the destruction of all of his personal papers. He resigned on 17 September 1971 and was dead within a week. In accordance with his will, he was buried in the cheapest available plain pine box, with a copy of the US Constitution in his pocket.

Further reading

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James F Simon, *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America*, 1980

Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*, 2010

A High Court welcome for the new silks

Silks from across Australia took their bows before the High Court in Canberra on 2 February 2015, after which the Australian Bar Association held its annual dinner in the Great Hall. There, Jonathan Horton QC delivered the following speech on behalf of the new silks.

American rapper, Kanye West (born 1977) recently collaborated with Sir Paul McCartney to produce the song *Only One*. A fan of the rapper tweeted:

Who tf is Paul McCartney? This is why I love Kanye for shining light on unknown artists.

Another tweeted this:

I don't know who Paul McCartney is, but Kanye is going to give this man a career with this new song!

We might wonder at how Sir Paul McCartney - the man who sold 100 million records - could so quickly be forgotten. More baffling is how, in the information age, this could have occurred. Maybe rappers are too cool even for Google.

Modern barristers and judges are of course better placed to avoid such heresies. The system of precedent and the judicial method provide some protection. The development of the law case by case is incremental and careful, slowly building on knowledge and altering or refining principles to adapt to changing circumstances. These themes of tradition and change underpin the common law. By these means knowledge which time and experience have shown to be right is preserved and utilised.

Bask as we might in that security, it does not mean that judges and lawyers, or the common law for that matter, always get it right.

In 1944 – only 70 years ago – Helen Duncan was convicted of conspiring to contravene the *Witchcraft Act 1735*. She had conducted a séance in which the spirit of a sailor revealed to her that his ship had sunk. That his ship had sunk was in fact true, but it had not been made public by the authorities. The D-Day landings were at that time being planned. There was concern that Ms Duncan might see and reveal those plans. Her perspicacity or her unluckily accurate prognostication - earned her a nine month prison sentence.

Legal predictions too – even by very eminent members of our profession - sometimes miss the mark. Justice McHugh tells a story of being approached by a very bright and promising young junior. The junior had been offered an appointment to the Conciliation and Arbitration Commission. The junior sought advice whether he ought accept the appointment. Mr McHugh replied 'if you take that appointment, no-one will ever hear of you again'. That junior barrister was Michael Kirby and we have not stopped hearing about him ever since.

That mis-prediction is nowhere near as egregious as some made by others *outside* the law.

Daryl Zanuck (a co-founder of 20th Century Fox) predicted that:

Television won't be able to hold onto any market it captures after the first six months. People will soon get tired of staring at a plywood box every night.

In the late nineteenth century, the chief engineer of the British Post Office Sir William Preece thought that Britain would never need the telephone. The Americans though, he said, would. Britain, on the other hand, he said, had plenty of messenger boys.

One prediction which has time yet to come to fruition is that of British economist John Maynard Keynes. His 1930 essay 'Economic Possibilities for our Grandchildren' predicted that increased wealth would mean that workers in industrialized countries would only need to work a fifteen-hour work week by the year 2030. The Sydney Bar, always ahead of the game, has of course already attained the short week. Those of us at the other bars, ever-aspiring to Sydney standards, remain burdened by long hours in chambers.

No prediction was so spectacularly bad as that made by the Order of the Star in the East (a Theosophical body) which said that Christ (or a Great Teacher – no one is sure now which) would return in 1924. The venue for his coming was to be Sydney Heads. Tickets were sold to watch the spectacle from Balmoral Beach and viewing points were constructed. No Messiah came.

The main cause of the error into which the Kanye West fans fell is assuming that we have never been as clever as we are now. To that, our profession also offers an antidote. The 'chronological prestige' of judges helps maintain a long, long corporate memory – far longer than the short careers of rappers. This court boasts one of the longest-serving members of a final appellate court. Justice McTiernan served for 46 years.

A less euphemistic description of judicial longevity is one I heard uttered by Justice Gummow who, on rare occasion, referred to commentary on decisions of this court by retired justices as 'comments from the mothball court'. It conjures up the image of Statler and Waldorf from Jim Henson's Muppets. Those two disagreeable old men hurled insults at the performers but would always return the following week to do so all over again, occupying the best seats in the house.



We, as new silks, may be as far removed from mothballs - or Statler and Waldorf - as one could possibly be. We are freshly minted. But Malthusian traps still lie in wait for us. We have, however, in the wisdom of the court – and perhaps from time to time in the commentary of the mothball court - the antidote to some of our potential pitfalls. Voices from the past – Paul McCartney’s or otherwise – are not always ones that we, as would some Kanye West fans, should treat as obsolete.

Thank you, Justice Crennan, for your remarks. On behalf of the new silks, I wish you well in your retirement. With just a few closing hours remaining as a judge of this court, the new silks appreciate you taking the time to address us. We are all fortified by your observations. We do hope the next years free you more to pursue your loves of history and literature.



Top: the silks take their bows before the High Court in Canberra.

Above: The Australian Bar Association Dinner, in the Great Hall of the High Court.

Above left: Jonathan Horton QC speaks on behalf of the new silks.

Left: Fiona McLeod SC, president of the Australian Bar Association.

Reformulating reform: courts and the public good

The annual Opening of Law Term address was delivered by the Hon T F Bathurst AC, chief justice of New South Wales on Wednesday, 4 February 2015.¹

In the years shortly following the Great Fire of London in 1666, resourceful individuals began to establish private entities which offered fire insurance.² Without any public or organised firefighting units, the insurers – perhaps quite predictably – formed and maintained private fire brigades to guard the properties they insured, as well as to advertise their new services. A mark carrying the insurer's emblem was affixed to each customer's property to help identify which fire brigade was responsible for extinguishing a blaze.

In America, a slightly different practice came about. While firefighting units in the United States were generally formed on a voluntary basis, marks were attached to insured properties to indicate to the volunteer brigades that the insurer would pay a significant sum if they managed to put out a fire.³ Apparently, on occasion, a homeowner would steal a fire mark and attach it to their own front door. This practice abruptly came to an end in one town where volunteer firefighters, who discovered they had extinguished a blaze for no reward, returned the next day and burned the house to the ground.⁴

A further little known fact is that in the early nineteenth century, New York ensured local fire regulations were rigorously enforced by allowing private individuals to prosecute violations of the local ban on gunpowder.⁵ An enthusiastic group of amateur prosecutors was all but guaranteed by the incentive that any gunpowder found to be illegal would be forfeited to the person who had brought the action. This, of course, was not unusual. Historically, the victim of a crime was generally responsible for prosecuting the alleged offender.⁶

Most of you who are present tonight will be pleased to learn that I do not intend to talk about insurance; be it fire insurance or otherwise. For some (although probably only a few outliers in the room), this might come as a disappointment. Nor do I plan to trace the history of private prosecutions, including in relation to fire regulations; as interesting as that subject may be.

The link between these two very different matters is that publicly funded fire brigades and prosecutorial services are aspects of society which are now, I think, considered to provide an inherent public good. As such, it may come as a surprise that the private versions of both continue to exist today. Private prosecutions are provided for in this state,⁷ and they seem to have experienced a resurgence in England and Wales.⁸ Far more startling is the fact that private fire departments continue to operate in the United States. Apparently they can issue sizable bills for their services, and have been known not to respond to those who have failed to pay the subscription fee.⁹

Despite this, I think it is fairly uncontroversial to suggest that

we can rightly expect that someone will come to our aid if our home catches alight, and that a group of skilled practitioners is publicly funded to prosecute alleged criminal offences. They are both entrenched aspects of our society today.

This leads me to my topic for this evening: the public good of our judicial system, the contribution of the courts to the economic prosperity and social harmony of modern Australia, and the extent to which the idea of 'user-pays' justice conflicts with that public good. Unsurprisingly, it is an issue on which many have spoken previously. What is more, some will suggest that raising the subject this evening is the ultimate act of preaching to the choir. Others have warned against too readily broaching the topic of independence in the belief it can lead to a degree of public cynicism.¹⁰ The latter is a legitimate caution against courts falling into the trap of crying wolf. However, these are not sufficient reasons to avoid the issue entirely. In fact, I would suggest there has sometimes been a tendency for the judiciary to acquiesce too easily in the shifting discourse about the role of courts in our society.

My remarks tonight have been prompted by the Productivity Commission's recent report into *Access to Justice Arrangements*.¹¹ As you may know, the report was commissioned to consider Australia's civil dispute resolution system, with a focus on promoting access to justice. There are, however, two important caveats that apply generally to my comments. First, in my view, the justice system in this state is fundamentally sound; fortunately there is a productive working relationship between the judiciary and the Executive. Second, the Supreme Court has pursued a number of important reforms in recent years with the goal of achieving efficiencies to improve access to justice. I will say something later about some of those changes. However, we cannot afford to ignore intrusions into the functions performed by courts, along with the dangers that arise from ideas of user-pays justice.

Courts and the public good: the threat of user-pays justice

The concept of user-pays justice and the shifting discourse about the role of courts are by no means recent developments. For instance, a well-known cartoon by the late J. B. Handelsman appeared in the *New Yorker* in 1973. In it, a bowtie-wearing attorney sits behind his desk and offers the following words to his anxious client: 'You have a pretty good case, Mr Pitkin. How much justice can you afford?'. The same idea has appeared elsewhere.¹²

However, early references to user-pays justice are not only to be found in satirical comics. Recent events have given me reason

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to reflect on a review into the New South Wales court system that was completed 25 years ago.¹³ In it, the authors, while 'recognising the principle of accessibility of justice', indicate that they 'find it hard to see justification for taxpayers' funds to be used to finance some types of civil cases'; and further, that the 'long term aim should be to establish cost recovery principles' so the total costs of certain matters are recovered in full.¹⁴ A quarter of a century later, the Productivity Commission has adopted a strikingly similar approach to user-pays justice.

At the outset, it must be acknowledged that there are a number of extremely valuable recommendations in the commission's report. Like the various inquiries into access to justice that have been conducted over the past few decades,¹⁵ lessons will be learned and changes implemented as a result of the commission's work. For instance, significant attention has already been given to the recommendations that an additional \$200 million should be invested into the system for civil legal assistance services, and that funding for legal assistance should be stable enough to permit long term planning.¹⁶ The current state of funding for legal aid certainly warrants close attention.

Mention should also be made of the broader framework that the Productivity Commission adopts in relation to the role of courts in our society. It is, in a number of respects, appropriately considered. The commission recognises that courts form the 'central pillar of the justice system'.¹⁷ The report also accepts that well-functioning courts promote justice outside the courtroom;¹⁸ that individuals and businesses require 'fair and equitable access to legal redress, regardless of their circumstances';¹⁹ that public as well as private benefits result from the courts' work;²⁰ and significantly, that an effective legal system is necessary 'first and foremost to uphold the rule of law'.²¹

Unfortunately, I would suggest that these reasonably basic concepts, which have been set out with a degree of care at the outset of the 1,000-odd page report, have to some extent been overlooked or disregarded in a number of the substantive chapters. The following matters are of particular concern.

First, while initially identifying the courts as the central pillar of the justice system, the report consistently conceives of the work done by courts as a 'service'.²² Comparisons are drawn with toll roads, and the point is made that courts will need to reduce their reliance on general taxation for funding as a result of 'competing demands for other government-funded services'.²³ The commission charitably acknowledges that while 'the courts comprise the third arm of government, it is unclear why the judicial arm should not be seen as a service provider for those parties who choose to use the courts'.²⁴ Admittedly, it

is only the first clause of that sentence that is at all charitable.

Second, as I have mentioned, the report emphasises the importance of fair and equitable access to justice. The focus of the inquiry was undeniably premised around improving access; indeed, it is there in the report's title. However, several aspects of the report seem to have very little to do with increasing access to justice. In particular, the commission focuses on the need for courts to move toward a much higher level of cost recovery. While the recommendations in this respect are perhaps less strident than those in the draft report,²⁵ the commission does propose that cost recovery should be increased, and that courts should recover *all* costs in substantial cases.²⁶

...several aspects of the report seem to have very little to do with increasing access to justice.

However, as the report makes clear, the purpose of greater cost recovery is not simply to raise revenue. According to the commission, it is a matter of introducing appropriate 'price signals' for those who wish to access the courts.²⁷ This, it is said, is because some parties do not face 'adequate incentives' to attempt private forms of dispute resolution before they seek to enforce their rights in the courts 'at the taxpayers' expense'.²⁸ What is essentially taking place is a move to introduce a cost-benefit analysis for potential litigants, so the court's so-called services are 'only accessed where the benefits outweigh the costs'.²⁹ However, it is not clear precisely whose benefits and whose costs are being referred to. Is it the plaintiff, so that the benefits and costs to the defendant are irrelevant? Or is it some balancing factor? This simply highlights one of the difficulties with the analysis.

At this juncture it is worth referring to Dame Hazel Genn's 2008 Hamlyn Lectures, entitled *Judging Civil Justice*. In her first lecture, Dame Hazel makes the following relevant observation:

The report is called 'Access to Justice', but the narrative precisely reflects the two competing stories about civil justice in the late twentieth century – too little access, too much litigation. On the one hand the report seeks to break down barriers to justice, while on the other it sends a clear message that diversion and settlement is the goal...³⁰

While Dame Hazel's comments were in fairly robust terms and obviously directed at a different inquiry, it might equally be suggested that the aim of certain parts of the commission's report is to increase barriers to the courts.

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Finally, as I have said, the report correctly recognises the role of the courts in upholding the rule of law. Nevertheless, the commission draws a sharp distinction between private and public benefits derived from litigation.³¹ The consequence is, to use the commission's words, that a service should only be 'subsidised' where the private benefits or interests at stake are likely to be insufficient.³² What is most startling, and let it be clear that I am quoting the report: 'In the commission's view the courts themselves are not, in an economic sense, a public good'.³³ Instead, courts provide so-called positive spillovers to society, which include, among other things, the rule of law.

I think it is fair to suggest that to measure the importance of a judicial system available to all citizens by reference to some economically measured spillover or externality reveals a misapprehension of our constitutional structure.

To briefly expand on this, the commission's thesis essentially seems to be that there are a limited number of what it considers to be 'public goods'. The essence of a public good is this: first, it is available to all people at no additional cost – in the sense that consumption by one person does not diminish consumption by others – and, second, it is non-excludable – that is, it is difficult to exclude anyone from benefiting from it.³⁴ The commission offers two examples of what is a public good: national defence and lighthouses (although, I note that no mention is made of the protracted debate among some economists about whether lighthouses are in fact a public good³⁵). The commission then suggests that non-public goods – that is, goods which do not have these characteristics – can be subsidised to account for the beneficial externalities or spillovers which result from providing the service.

I think it is fair to suggest that to measure the importance of a judicial system available to all citizens by reference to some economically measured spillover or externality reveals a misapprehension of our constitutional structure. The framers of our Constitution, in incorporating Chapter III, recognised the fundamental importance of the judicial system. The difficulty with the apprehension of the commission is immediately exposed by describing the absence of the rule of law as a *negative* spillover. Most people who have encountered an inadequate legal system would, I suggest, express their concerns in far

stronger terms. One has only to look at concerns expressed when citizens, rightly or wrongly, believe that the judicial system has failed them. The importance of avoiding this 'negative spillover' can be demonstrated by the fact that any major investment in a state or country involves consideration of sovereign risk, a crucial part of which is whether there exists an independent, transparent and accessible judicial system. However, even if the distinction is accepted, the commission fails to fully appreciate the extent of the benefits that we each derive from a stable and accessible legal system.

Nonetheless, in my view, the analysis is flawed. Lighthouses and national defence both cost money; and defence, particularly significant amounts. Ultimately, the benefit that society derives from a highly skilled and well-resourced defence force is security. In a similar way, the public benefit to society from a stable and effective judicial system is that we can each be confident that a mechanism exists to enforce the law and resolve disputes, thus enabling the orderly administration of society. It is misleading to consider whether the benefits of such a central aspect of our social order can be determined by a hypothetical consideration of externalities. This, however, is not merely the view of a lawyer. The great economist Paul Samuelson wrote in the seventh edition to his seminal text *Economics*:

...government provides certain indispensable public services without which community life would be unthinkable and which by their nature cannot appropriately be left to private enterprises... Obvious examples are the maintenance of national defence, of internal law and order, and the administration of justice and its contracts.³⁶

This, I believe, highlights a number of the fundamental flaws in the approach taken by the Productivity Commission; not least in characterising the third arm of government as a service provider that is not – irrespective of it only being in an economic sense – a public good. However, I want to avoid responding to particular aspects of the commission's report any further. Instead, I would prefer to offer some general observations about the role of courts in society, and the need for our judicial system to remain accessible.

An appropriate place to begin this discussion is to return to Dame Hazel's Hamlyn Lectures. I would suggest that the general thesis of her papers is twofold: first, there has been a devaluing of the civil justice system as a result of a number of interrelated factors, and second, there is a broader need to re-assert the public value of civil justice.³⁷ To an extent, there is merit in the notion that civil justice has been devalued. It is true that most public attention in relation to the court's work concerns the criminal law.

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Consistent with what was said by Dame Hazel, it is essential that public discourse about the justice system and proposed reforms to it – especially those that search for efficiencies with the aim of improving access to justice – should be informed by, and shaped around, the central role performed by courts in our society. It goes without saying that courts determine rights and responsibilities, protect against excesses of government power, and administer the criminal law. In the words of former Chief Justice Brennan:

What the Judicature does or does not do largely determines the character of the society in which we live... [As a consequence] the state of the Judicature is the concern not only, nor even chiefly, of the officers of the Judicature; rather it is the concern of the people of Australia who are protected by, and are subject to, its jurisdiction.³⁸

In this sense – and particularly in the civil sphere – it is incorrect to suggest that courts simply adjudicate disputes between individual litigants. Such a view more accurately reflects commercial arbitration. Judgments will often have a broader effect on our social and economic wellbeing, which can be overlooked by focussing solely on the impact of a decision for the parties involved. This broader influence has been termed the shadow of the law.³⁹

Judgments will often have a broader effect on our social and economic wellbeing, which can be overlooked by focussing solely on the impact of a decision for the parties involved.

If a shadow is the most appropriate analogy (and I must admit that I have not managed to craft one that is any better), then it is a long shadow indeed. A great deal occurs in this particular shade: contracts are negotiated and completed, government departments make decisions within the bounds of legislation, disputes arise and are settled on the basis of previous decisions, and we are deterred from engaging in conduct which has been criminalised.

As a result, the health of the justice system has a considerable effect on economic prosperity. Certainly, a reputable legal system is a prerequisite if business is to prosper. For example, even international arbitration relies upon stable domestic legal systems for the enforcement of arbitral awards. Some commentators have attempted to calculate the extent to which judicial independence facilitates economic growth.⁴⁰ However, while I am by no means an economist, I would suggest the value

of an established legal system – both socially and for business efficacy – is almost immeasurable. If any value can be placed on social order and an environment conducive to commercial activity, it surely must be greater than a mere positive spillover.

As such, we should be careful to avoid devaluing or downplaying the value of an effective justice system – both civil and criminal – in modern Australia. It is by no means a service that is equivalent to others which are provided by government; and in that comment I do not intend in any way to criticise essential public services. However, as Lord Neuberger noted in an address several years ago, the central functions of government are these: to defend the nation from abroad, and to maintain the rule of law at home.⁴¹ Of course Lord Neuberger was simply emphasising the importance of the government's role in maintaining the rule of law. Governments obviously perform a range of beneficial functions. However, the maintenance of a stable and efficient justice system is vital for the overall wellbeing of society.

Taking all of this into account, the operation of courts cannot be reduced to a simple equation of what litigants are prepared to pay. Equally, it is false that the extent of access to justice should be assessed in each case – with fees levied on the basis of a futile attempt to measure the public benefit of an individual matter or class of case. The court system is not at all like a toll road, where you can either pay for access or otherwise elect to take the less desirable route. In fact, rather than asking what the public benefit of a certain piece of litigation is, or what an individual litigant is prepared to pay to enforce their rights in court, it may be far more valuable to consider the counterfactual. What would our society look like if we did not have an effective justice system? What would the cost be to our general social wellbeing? Just how much justice are we actually prepared to go without?⁴²

We should, in my opinion, be extremely cautious about the language of user-pays justice. It suggests there is a market for the functions performed by the courts.⁴³ Just as there is no market for representative government, so too there is no market for an independent and accessible justice system – be that in relation to enforcing the criminal law or resolving civil disputes. In this respect, while there has certainly been a much stronger emphasis on user-pays theories in relation to civil disputes, it is the case that questions of cost recovery can arise in both the civil and criminal spheres.⁴⁴ However, it is not simply a matter of considering the nature of the dispute itself. Rather, it is an issue which goes to the underlying structures of our democratic system of government, guided by a real and robust separation of powers.

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We should, in my opinion, be extremely cautious about the language of user-pays justice. It suggests there is a market for the functions performed by the courts.

Despite my concern about theories of user-pays justice, I am not suggesting that we seek to maintain the status quo. There is always value in considering how litigation is conducted, and ways in which the system might be adjusted to minimise costs for litigants to improve access to justice. This year marks the tenth anniversary of the Civil Procedure Act. It has in no way been a static piece of legislation, and I am confident that future adjustments – both to the Act itself and to court procedure generally – will continue to improve and refine the litigation process. However, any reforms must be predicated on the essential role of courts in society, and the need for them to be accessible. To again quote the words of former Chief Justice Brennan:

It should never be forgotten that the availability and operation of the domestic courts is the unspoken assumption on which the provisions of our Constitution and laws are effected, on which the entire structure of government depends, on which peace and order are maintained, on which commercial and social intercourse relies and on which our international credibility is based.⁴⁵

These values should underpin broader discussions about the courts and the challenges of improving access to justice. As part of that conversation it is reasonable for governments to expect that court funding will be efficiently used. As I have said previously, in this regard there is potential for a degree of institutional blindness.⁴⁶ This alone is reason enough for regular external reviews, such as that led by the Productivity Commission. However, the task of realising efficiencies is one to be arrived at between the courts and government. As I noted at the outset, in this state there is a positive relationship between the Judicial and the Executive arms of government. However, so-called efficiency dividends should not be imposed on courts without fully appreciating their effect. Likewise, moves to modernise court systems must be determined *with* the courts, and designed for the task.

Part of this discussion is that litigants should make some contribution to the costs that are associated with running the court. This is achieved in two ways: directly, through filing fees, and indirectly, by the courts ensuring that practitioners and litigants do not conduct themselves inefficiently. The latter

requires the court to both encourage and enforce efficiency.⁴⁷ I am of the view that this obligation will need to be exercised with increasing force in the coming years, particularly having regard to the goal of minimising the costs imposed on parties, as well as reducing the fiscal burden that is placed on government. This, however, does not mean that the cost of accessing the courts should be based on cost-recovery values; let alone full cost-recovery.

Ultimately, I am confident that the courts will continue to provide effective recourse for those who require it. In this regard, the accessibility and efficiency of the Supreme Court has been improved by a number of reforms.

Maximising the public good: recent reforms

As the Productivity Commission acknowledges, courts in Australia have themselves driven changes which are directed at reducing cost and delay.⁴⁸ This has certainly been the case in terms of reforms in the Supreme Court.

At occasions such as this, it need hardly be said that the guiding principle in civil proceedings is to facilitate the just, quick and cheap resolution of the issues in dispute.⁴⁹ This is also the case in criminal proceedings, where the principles of case management are directed at reducing delay, to ensure that proceedings are dealt with efficiently.⁵⁰ It will come as little surprise that those same guideposts are used when considering possible reforms.

The object of any reform is to implement better systems and procedures which enable proceedings to be dealt with as capably and efficiently as is possible. Greater efficiency assists those who are involved in a dispute by lessening the pressure and financial costs that litigation inevitably inflicts. As Chief Justice Allsop once put it when president of the Court of Appeal:

...parties are entitled to expect that the costly and stressful, though necessary evil that is litigation be resolved with reasonable despatch so as to minimise, where reasonably possible, the time during which people are subjected to its rigours and strains.⁵¹

However, greater efficiency not only benefits the litigants in question. It also aids those who are waiting to gain access to the system, and ultimately the broader community by minimising the costs associated with the courts.⁵²

I have emphasised on previous occasions that court rules and procedure – and reforms to them – are not ends in themselves.⁵³ They should not, in my view, be overly prescriptive or inflexible. Put simply, this is because the judges of the court are highly skilled and experienced. Case management should be determined by judges, drawing upon their considerable

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In recent years, the Supreme Court has pursued a number of reforms with the goal of achieving greater efficiencies while also maintaining flexibility.

professional expertise, in conjunction with the parties involved and their legal representatives. Case management must be tailored to the matter in question, rather than simply being determined by static written procedures.

In recent years, the Supreme Court has pursued a number of reforms with the goal of achieving greater efficiencies while also maintaining flexibility. For instance, the Productivity Commission made several recommendations in relation to the scope of, and costs associated with, discovery.⁵⁴ It is a matter in relation to which the court has already taken several major steps.

As you know, in early 2012, changes were introduced in the Equity Division which provide that, unless there are exceptional circumstances, an order for disclosure will not be made until the parties have served their evidence.⁵⁵ In addition, no order for disclosure will be made unless it is necessary for the resolution of the real issues in dispute. The purpose of these reforms is to reduce the burden of discovery, and also to require parties to identify the case they seek to prove at an early stage.⁵⁶ Initially, it is fair to say that these changes were marked by a chorus of grumbling from the profession, along with murmurings that proceedings would be commenced elsewhere.

Almost three years later, I think we can declare that the changes have been a resounding success. It is true that there was an initial period of adjustment. Numerous motions were filed on the basis of exceptional circumstances, and some short-lived attempts were made to circumvent the reforms by way of subpoenas and notices to produce.⁵⁷ However, after a brief period of initial complexity, the practice in relation to discovery has now settled down.

There have, I believe, been a number of significant benefits. First, cases are coming on and getting to the issues in dispute with greater speed. This is a direct result of parties being required to put on their evidence at an early stage. There has also been a reduction in applications for disclosure. In principle, the effect of these developments should be a drop in costs for the parties involved. Anecdotally, I also believe it is leading to a greater degree of cooperation among practitioners regarding the disclosure of documents, and, I hope, less time being spent by junior lawyers reviewing materials in poorly lit rooms. Finally, there has not been the mass exodus from the Equity Division which some predicted. In fact, it remains busier than ever.

The second reform can be dealt with in greater brevity. Last

year there was considerable change in relation to the procedures for defamation matters. Under the new regime, a listing date is fixed as soon as a statement of claim is filed.⁵⁸ Prior to that date, the parties are obliged to discuss any objections to the pleadings, and are expected to be in a position to argue any that are maintained at the first hearing. At a second listing, the court may consider whether to make orders for discovery or interrogatories; it must be satisfied that either is necessary to resolve the real issues in dispute. Finally, where the Practice Note or a direction of the court has not been complied with, the court has the capacity to call a show cause hearing as to why the matter should not be dismissed, or the defence struck out and judgment given.

Again, these reforms are directed at improving efficiency while also retaining flexibility. While they have only been operating for a few months, I believe that the changes have been well-received by those practising in the area. Notably, interlocutory disputes are occupying far less time, which results in a saving both of the court's time, as well as the costs borne by the parties.

Equally, significant reforms have been in place in relation to family provision matters for a number of years.⁵⁹ It is an area that has, I believe, benefited from more detailed obligations on parties in terms of case management, and it demonstrates the fact that a one-size-fits-all approach cannot be applied to litigation generally. The changes emphasise diversion to alternative dispute resolution – in fact there is a presumption that applications will be referred to mediation. There is also a series of requirements which aim to keep both the parties and the court informed about the costs of the litigation (and, in turn, how those costs compare to the overall value of the estate).

The fourth important set of reforms concerns representative proceedings, or class actions.⁶⁰ The court has implemented procedures aimed at ensuring continuity in the management of class actions,⁶¹ while also maintaining maximum flexibility in bringing proceedings to trial. The court currently has a number of significant ongoing class actions, including several which relate to the 2013 bushfires in the lower Blue Mountains, as well as proceedings regarding the floods in Brisbane in early 2011.

Both in relation to class actions – and also more broadly – the court will continue to ensure that judges with particular expertise are deployed to hear relevant matters.⁶² For instance, there is a fixed panel of judges who hear class actions – three

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each from the Common Law Division and the Equity Division. In addition, as you know, the court has a specialist commercial list to deal with increasing levels of demand in this area. This year, four judges will sit in that list, each of whom is highly experienced in commercial law, along with two judges sitting full time in the corporations list.

Reforms in the criminal area have also taken place. Arraignments are now conducted electronically, thus avoiding the expense of prisoners on remand coming to court. Already, in the short space of time this development has been available, 94 people have had their arraignments conducted electronically rather than being brought to the Sydney Supreme Court. Proceedings are case managed by the arraignment judge, and ultimately by the trial judge who deals with pre-hearing issues before the jury is empanelled. This minimises the time spent by jurors in criminal trials, and lessens the risk of the possibility of trials being abandoned as a result of unexpected events which can occur in the course of a hearing.

...there has been a significant take up of the court's online registry service.

Technology is the final area of change that I want to raise this evening, and it is one which will remain a central focus for the court in the years ahead. In terms of physical developments, this year the court will open a new legal suite, as well as a remote witness room, both within the main Law Courts building. These improved facilities will allow practitioners to speak privately with their clients via AVL, and will assist victims and other vulnerable witnesses to give evidence from a separate location in the court precinct.

In the electronic space, there has been a significant take up of the court's online registry service. About half the originating processes for corporations matters are now being filed online, and for certain documents in relation to possession matters, around three quarters are being submitted using the online facility. This year also marks the launch of a redesigned Caselaw website, and versions of the website are now available for tablet and mobile devices. The court will continue to focus on developments in the electronic space, as we steadily move away from a reliance on paper-based materials.

Ultimately, as the Productivity Commission recognised, the court has itself continued to drive reforms to increase the efficiency of the litigation process, with the broad aim of reducing litigant costs and improving access to justice. What

I have said is not meant to simply heap praise on the Supreme Court; although I should take the opportunity to recognise the work of the judges of the court, their staff and those who work tirelessly in the registry. On the contrary, my view is that courts across Australia are constantly working to achieve similar improvements, although no doubt in slightly different forms.

However, reforms of this nature require the input and cooperation of the broader profession. The court already has a range of committees which include practitioners. In addition, last year I met with a group of solicitors and barristers in Parramatta regarding additional services that the court could offer in Western Sydney. My broader message this evening in terms of reforms to the court is this: we are listening. I want to hear the views of the profession about things we could improve, and how we could go about achieving them. All opinions are welcome. They are important and they will be treated seriously. Cooperation between the judiciary and the profession will remain a significant contributing factor in improving access to justice.

Conclusion

To conclude, I believe the Supreme Court has taken a number of important steps in the past few years to drive efficiencies, to enhance the experience of those who appear in the court and, ultimately, to reduce costs in order to improve access to justice. Each of the changes I have referred to has had a significant effect on the way in which litigation is conducted in the court. We will, of course, continue to pursue reforms – particularly in relation to technology – with, I hope, the valuable input of the profession. However, court costs are only one component of the issues which arise in relation to legal need and barriers to justice.⁶³ These are challenges which the courts, the government, the profession and the community must face together.

We should be extremely wary of calls for greater cost recovery and notions of so-called user-pays justice. As I have said, these proposals are by no means new. Despite the enthusiasm with which they have been promoted over the past few decades, I think we can agree that imposing 'price signals' represents an attempt to dissuade people from entering the system, rather than increasing access to justice.⁶⁴ To borrow words from Jeremy Bentham's essay, *A Protest Against Law-Taxes*, such barriers fall upon a person at the very time when the likelihood of them wanting that ability is at its utmost.⁶⁵

We do not, I believe, want to revert to a position where we have to rely on private fire brigades, or where private criminal prosecutions are the norm.⁶⁶ So too, we must not allow our

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courts to become another public service that is viewed only as a mechanism for resolving private disputes, and which is founded on the principle of what potential litigants are prepared to pay.

Our courts are a fundamental aspect of society. They have a considerable effect on our social cohesion and economic prosperity. The benefits that we derive from an effective justice system cannot be reduced to a mere positive spillover. If anything, the extent of criticism and public debate in relation to the work of the courts illustrates the central role which they perform in society. We must not allow the justice system – both in relation to enforcing criminal laws or deciding civil disputes – to be devalued as simply a service.

It is the case that I have dedicated some time this evening to dissecting the work of the Productivity Commission and offering some general 'feedback'. However, I would like to conclude by reading a short passage from early in the commission's report, which says the following:

An effective system is required first and foremost to uphold the rule of law. To do so, the system must be acceptable to the Australian public, whose behaviour it seeks to regulate. Laws, and the system that upholds them, must both be accepted if society is to flourish.⁶⁷

These words reflect the importance of the justice system to the nature and character of our society. It is a passage about which I think we can agree.

Endnotes

1. I express my thanks to my research director, Haydn Flack, for his assistance in the preparation of this address.
2. See H Johnson, 'The History of British and American Fire Marks' (1972) 39:3 *The Journal of Risk and Insurance* 405 for a history of fire insurance and fire marks.
3. Ibid at 416.
4. Ibid.
5. W Novak, 'Public-Private Governance: A Historical Introduction' in J Freeman and M Minow (eds), *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009) at 31.
6. See e.g. Sir J F Stephen, *A history of the criminal law of England* (Macmillan, 1883) at 244–245, 493, discussed in M O'Neill, 'Private Vengeance and the Public Good' (2010) 12:3 *Journal of Constitutional Law* 659 at 665–672.
7. *Criminal Procedure Act 1986* (NSW), ss 14, 49, 174.
8. See e.g. *Zinga, Pillai v R* [2012] EWCA Crim 2357; [2013] Lloyd's Rep FC 102; *R v Zinga* [2014] EWCA Crim 52; [2014] 1 WLR 2228 in relation to a private prosecution brought by Virgin Media Limited for offences of conspiracy to defraud. In *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52; [2013] 1 AC 484 at [123], Lady Hale (albeit in dissent) described the right of access to a court to prosecute an alleged offender as being 'as much a constitutional right as a right of access to a court to bring a civil claim.'
9. See e.g. D Lohr, 'Arizona Firefighters Charge Family Nearly \$20,000 After Home Burns Down', *Huffington Post* (11 August 2013), http://www.huffingtonpost.com/2013/11/08/justin-purcell-fire_n_4242734.html; M Laris, 'Tenn. family's loss after not paying fire fee resonates in Montgomery', *The Washington Post* (13 October 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/13/AR2010101307592.html>.
10. The Hon M Gleeson AC, 'The Role of the Judge and Becoming a Judge', National Judicial Orientation Programme (Sydney, 16 August 1998).
11. Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014).
12. The cartoon by JB Handelsman is extracted, and other similar examples are discussed, in M Galanter, *Lowering the Bar: Lawyer Jokes and Legal Culture* (University of Wisconsin Press, 2005) at 244–246.
13. Coopers & Lybrand WD Scott, *Review of the New South Wales Court System* (May 1989).
14. Ibid at [1215]–[1220]. At [1219] the authors note that 'In general principle, we consider that the long term aim should be to establish cost recovery principles such that the total costs of appropriate civil court activities are recovered in full, through a combination of initial and time-based fees and charges.'
15. See e.g. Australian Law Reform Commission, *Managing Justice: a Review of the Federal Civil Justice System* (ALRC Report 89, 2000); Victorian Law Reform Commission, *Civil Justice Review*, (Report No. 14, 2008); Senate Legal and Constitutional Affairs References Committee, *Access to Justice* (December 2009).
16. Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014), recommendations 21.4–21.5.
17. Ibid at 2, 14, 76, 383.
18. Ibid at 76, 138.
19. Ibid at 139.
20. Ibid at 142.
21. Ibid at 144.
22. See e.g. Ibid at 534–535.
23. Ibid at 534, 556.
24. Ibid at 535.
25. Compare recommendations 16.1 and 16.2 (Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 549, 560) alongside draft recommendations 16.1 and 16.2 (Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 482, 488).
26. Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 558.
27. Ibid at 534, 541, 555–556, 569.
28. Ibid at 555.
29. Ibid at 556.
30. H Genn, *Judging Civil Justice* (Cambridge University Press, 2010) at 53.
31. See e.g. Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 536–538.
32. Ibid at 540.
33. Ibid at 539.
34. Ibid at 539. See also Productivity Commission, *Cost Recovery by Government Agencies* (Inquiry report No. 15, 16 August 2001) at 13.
35. See e.g. the discussion of the British lighthouse system by the late Nobel laureate in economics, Ronald Coase, in R Coase, 'The Lighthouse in Economics' (1974) 17:2 *Journal of Law and Economics* 357.
36. P A Samuelson, *Economics: An Introductory Analysis* (McGraw-Hill Book Company, 7th ed, 1967) at 47. This passage is noted in R Coase, 'The Lighthouse in Economics' (1974) 17:2 *Journal of Law and Economics* 357 at 358.
37. H Genn, *Judging Civil Justice* (Cambridge University Press, 2010).
38. The Hon Sir G Brennan AC KBE, 'The State of the Judicature', Opening of the 30th Australian Legal Convention (Melbourne, 19 September 1997), reported in (1998) 72 *Australian Law Journal* 33.
39. H Genn, *Judging Civil Justice* (Cambridge University Press, 2010) at 20–21, 35, referred to in Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report,

- December 2009), Ch 4 at [1.10] and Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 142, 537.
40. See e.g. D Klerman, 'Legal Infrastructure, Judicial Independence, and Economic Development' (2006) 19 *Global Business & Development Law Journal* 427; L Feld and S Voigt, 'Economic growth and judicial independence: cross-country evidence using a new set of indicators (2003) 19:3 *European Journal of Political Economy* 497. Studies have also sought to measure the effect of reduced funding for courts.
41. Lord Neuberger, 'Justice in an Age of Austerity', Tom Sargent Memorial Lecture 2013 (15 October 2013) at 2–3. See also Sir J Fortescue, Kt, *The Governance of England* (Oxford University Press, 1885) at 127.
42. Questions of a similar nature are posed in the Hon M Gleeson AC, 'The Purpose of Litigation', Martin Kriewaldt Memorial Address (Darwin, 12 August 2008), as published in (2009) 83 *Australian Law Journal* 601 at 607; and H Genn, *Judging Civil Justice* (Cambridge University Press, 2010) at 76.
43. The point has repeatedly been made that there is no market for the services which are provided by courts. See the Hon M Gleeson AC, 'The Purpose of Litigation', Martin Kriewaldt Memorial Address (Darwin, 12 August 2008), as published in (2009) 83 *Australian Law Journal* 601 at 607.
44. For instance, several states and territories impose levies on persons who are convicted of an offence. The levy does not form part of the sentence: e.g. *Victims Rights and Support Act 2013* (NSW), s 106; *Victims of Crime Act 2001* (SA), s 32. Such levies are generally used to fund schemes to assist victims of crime. However, others are used more broadly to contribute to the costs associated with law enforcement and administration: see *Penalties and Sentences Act 1992* (Qld), s 179A.
45. The Hon Sir G Brennan AC KBE, 'The State of the Judicature', Opening of the 30th Australian Legal Convention (Melbourne, 19 September 1997), reported in (1998) 72 *Australian Law Journal* 33, 35.
46. The Hon T F Bathurst, 'Separation of Powers: Reality or Desirable Fiction?', Judicial Conference of Australia Colloquium (Sydney, 11 October 2013) at 20.
47. See *Civil Procedure Act 2005* (NSW), ss 56(2), 59. See also *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303 at [51]–[57].
48. Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 385–387.
49. *Civil Procedure Act 2005* (NSW), ss 56.
50. *Criminal Procedure Act 1986* (NSW), ss 134, 149E.
51. *Richards v Cornford* (No 3) [2010] NSWCA 134 at [44], referring in part to *White v Overland* [2001] FCA 1333 at [4].
52. As the plurality made clear in *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 at [93], extracting a passage from *Sali v SPC Ltd* (1993) 67 ALJR 841 at 849.
53. See the Hon T F Bathurst AC, 'Accessing justice and dispensing it justly: some assorted thoughts', Salvos Legal Lecture Series (Sydney, 8 November 2014) at [44]ff.
54. See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014), recommendations 11.4–11.5 (at 396–407).
55. Disclosure in the Equity Division (Practice Note No. SC Eq 11, 26 March 2012).
56. See e.g. *Graphite Energy Pty Ltd v Lloyd Energy Systems Pty Ltd* [2014] NSWSC 1326 at [13]; *Bauen Constructions Pty Ltd v New South Wales Land and Housing Corporation* [2014] NSWSC 684 at [26]; *SkyMesh Pty Ltd v Ipstar Australia Pty Ltd* [2012] NSWSC 696 at [7]–[9].
57. See *The Owners Strata Plan SP 69567 v Baseline Constructions Pty Ltd* [2012] NSWSC 502 at [23]–[24].
58. Defamation List (Practice Note No. SC CL 4, 5 September 2014).
59. Family Provision (Practice Note No. SC Eq 7, 1 March 2013).
60. Representative Proceedings (Practice Note No. SC Gen 17, 12 August 2014).
61. Judicial continuity or ownership was an issue dealt with by the Productivity Commission. See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 394–396.
62. Specialisation is also an issue addressed by the Productivity Commission. See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 584–589.
63. The Productivity Commission estimates 'that, on average, court fees comprise roughly one tenth of a party's legal costs': see *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 553. The extent of legal need has been addressed at length. The commission provides a summary of the research in relation to unmet legal need: see *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 84–111. See also R Denniss, J Fear and E Millane, The Australia Institute, 'Justice for all', Institute Paper No. 8 (March 2012) and C Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in New South Wales* (Law and Justice Foundation of NSW, 2012).
64. See concerns recently raised by the lord chief justice of England and Wales regarding the increase in court fees announced in England and Wales in January 2015 (Letter from the Hon Lord Thomas of Cwmgiedd to Ministry of Justice, 19 December 2014, <http://www.judiciary.gov.uk/wp-content/uploads/2015/01/20141219-lcj-response-tomaj-civil-fees.pdf>).
65. J Bentham, 'A protest against law-taxes, showing the peculiar mischievousness of all such impositions as add to the expense of appeal to justice' in *The Works of Jeremy Bentham*, published under the superintendence of his executor John Bowring (1843) at 573, 576.
66. In *R v Zinga* [2014] EWCA Crim 52; [2014] 1 WLR 2228 at [55], the court observed that 'the bringing of private prosecutions as an alternative to civil proceedings has become more common; some lawyers and some security management companies now advertise their capabilities at mounting private prosecutions and the advantages of private prosecution over civil proceedings.'
67. Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) at 144.

Equitable briefing: a conversation with Steven Finch SC

In response to the Law Council's National Attrition and Re-engagement Study Report (NARS), the Equal Opportunity Committee will name senior practitioners as advocates for change. The first of these is Steven Finch SC. Catherine Gleeson spoke to him about his views on increasing the representation of female barristers in commercial matters.

For Steven Finch SC, the solution to achieving equality in briefing at the bar is simple: we need to see more women on their feet.

Finch has established a reputation for supporting talented women in commercial practice. Many of his readers, co-counsel and juniors have built successful practices, taken silk or been appointed to the bench.

The biggest challenge in commercial matters, according to Finch, is getting female practitioners into cases. There is no obvious reluctance to brief women *per se*, rather what needs to be overcome is a reluctance by some firms to brief people they don't know.

Even when women are getting a seat at the bar table, the challenge is to get them a speaking role.

female practitioners and more importantly, simply to give them greater exposure to other solicitors in court.

Finch's solution is twofold. First, he maintains a list of juniors that he uses to refer to his instructors, which he ensures include a sufficient number of female barristers. Maintaining the list is a matter of asking around his colleagues as to who are the best female juniors coming through the ranks.

Finch finds that there are plenty of opportunities to use his list – most talented juniors are very busy and there is often a need to find an alternative.

Second, Finch ensures, where appropriate, that his juniors have an opportunity to take on a part of the case and to run the argument of that part. This is not always easy to achieve – many clients and solicitors, having retained a senior silk, expect him or her to be running all aspects of the case. But Finch considers that this is important to develop the advocacy skills of junior barristers and to give them the kind of exposure that is particularly important when promoting equitable briefing.

Finch says that it is important to give juniors an opportunity to have a role beyond that of a glorified senior associate. It is important

that the junior is given an advocacy role and Finch considers it important for senior counsel to give clients a push towards accepting an advocacy role for juniors in some parts of the case. There are often times where there are tactical advantages in sending a junior into the fight rather than a silk. For Finch, it is important to take those opportunities to ensure that good juniors are getting as much experience as they can on their feet.

This tactic can also be helpful in ensuring greater exposure for female silks – which Finch has observed are sadly under-represented in commercial cases. He sees there being an expectation that the lead silk in a matter will be male, most likely because there are so few female silks practising in the area.

Photo: Fairfax Photos / Jessica Shapiro

For Finch, the solution lies less in ensuring that firms adopt formal equitable briefing policies than in working on practical ways to break firms' traditional briefing habits.

Part of the problem relates to visibility rather than any entrenched bias. Finch says that in his observations of large commercial matters, it is rare to see one in five barristers at the bar table that are female. In contrast, the gender composition of instructing solicitor teams is far more balanced.

Even when women are getting a seat at the bar table, the challenge is to get them a speaking role. It is important to increase the number of female practitioners on their feet in commercial matters. This is likely to increase confidence in

Catherine Gleeson, 'Equitable briefing: a conversation with Steven Finch SC'

At present, one of the biggest pressures on supply is the tendency for female silks to take judicial appointments early.

Finch has found that an incremental approach can be successful in these instances. For example, where a commercial matter is particularly big and there is a need to get in a second silk, it is easy to divide the case vertically to ensure that a junior silk has the running of a particular aspect. Finch SC's practice is to ask for a female silk if there is a need for a second silk in a matter and this gives the opportunity for her to get on her feet for a part of the case. This worked successfully in a recent matter and

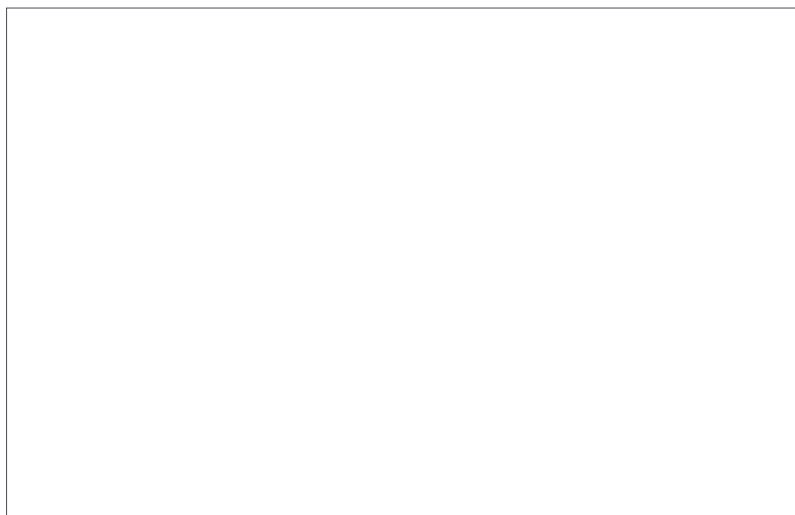


Photo: Fairfax Photos / Rob Homer

he received no push back from his solicitors when he proposed that course.

Finch's view on the dearth of female silks in commercial matters is that it is a problem of supply that will diminish in time. At present, one of the biggest pressures on supply is the tendency for female silks to take judicial appointments early. He does not see that much can be done about this: it is a career choice for each individual practitioner, and in circumstances where there is also a shortage of female judges, there is going to be a shortfall somewhere. On the bright side, Finch sees a big cohort of female senior juniors at the commercial bar, and as they progressively take silk the problem will diminish over time.

Finch has a sanguine attitude towards concepts of unconscious bias. He accepts that members of the bar do not have control over who is briefed in certain matters, and that there may be a tendency for solicitors and barristers to become comfortable working only with men. Finch believes that this is largely a failure of imagination rather than any perception that women are less competent than men, and people simply need to jolt themselves out of this comfort zone. Increasing the numbers and visibility of women at the bar is the obvious solution to this problem.

On the subject of family pressures, Finch has not seen any negative attitudes to briefing women based on their lifestyle. For Finch, taking time out of practice to raise children is not very different to being stuck in a large case – at least so far as time 'out of the loop' is concerned. There is no perfect solution to this, but in Finch's view it can be overcome by building a good following before going off on leave and maintaining as much contact with the profession and colleagues as possible while on leave. Maintaining relationships with one's floor is particularly important – both because they will help to rebuild practice after a period of leave and because the floor can help facilitate licensing accommodation so that the financial

impacts of leave are minimised. No one would pretend that this juggling act is easy, but there are plenty of women at the bar demonstrating that it is possible.

Finally, Finch does not believe in any notions that women have different, or lesser, styles of advocacy from men. It is not the case that there is only one way to be persuasive. Barristers are good because they are prepared, reasoned and cogent, and not because they have a loud voice. Men have no particular monopoly on being persuasive. For Finch, the solution lies in taking practical steps to ensure that women have more opportunities to speak – so that they have an equal chance of developing quality advocacy and so that consumers of legal services have a greater chance of hearing them.

The Advanced Trial Advocacy course

By Jonathan Clark

It was a Sunday afternoon in the middle of January. I had just showered off the beach sand, was gathering shirts and ties, and marking up a brief - a flurry of last minute preparation for the Advanced Trial Advocacy course in Melbourne.

The course took place over the week of 19 to 23 January. Yes, in January - that sacred and (generally) litigation free month when many of us are allowed to switch off our brains and place them in a cupboard, preferably under the beach towels. Although I'd seen the course advertised in previous years, I'd dismissed it as unnecessarily masochistic. The last thing I had wanted to do in January was more legal work. But this year was different and, as I made my way to the airport, I found myself looking forward to the week ahead.

The course is one of three intensive advocacy training courses run each year by the Australian Bar Association Advocacy Training Council. Its aim is to help barristers be excellent advocates. It is designed for experienced advocates but, in my view, you only need some trial experience to cope with, and benefit from, the course.

Like the litigation it seeks to mimic, the course starts with the receipt of a brief - criminal or civil depending on your selection. Both briefs are based on real cases that have been tweaked to make the competing merits of each party more finely balanced. The material is realistic and far from simplistic. The civil brief comprises the pleadings, six affidavits and two expert accounting reports. The observations at the front of the brief give you some feel for how the trial should be run. There are a few red herrings thrown in for good measure. You are expected to run the trial when the course commences and to meet this expectation you need at least three days to prepare.



L to R: Simon Davis (WA), Susan Downes (Qld), Michael Flynn (Vic), David Purcell (Vic - via webpage), Jonathan Clark (NSW), Carl Moller (Vic) and Rodney Garrett QC (Vic).

We were introduced to the advocacy and performance coaches at the opening session. This year there were 19 advocacy coaches, including senior barristers from England, New Zealand, South Africa, Malaysia and most Australian jurisdictions. Four judges from the Federal and state Supreme courts gave an aura of reality to the proceedings. With 42 course participants, the coach-to-participant ratio was almost 1:2. This meant you were never idle. It was humbling to see so many busy professionals giving up their time to help us become better advocates. If I had any lingering resentment about the encroachment of my holiday time it quickly evaporated at this point.

So what did the course involve? Running the trial meant doing an opening, examination-in-chief of two lay witnesses and an expert, cross-examination of two lay witnesses and an expert, and a closing. In fact I did most of these things more than once. Before we performed, however, the advocacy coaches provided a demonstration of each of these essential advocacy tasks. This was done to inspire and to encourage refinement of our own performances overnight. For many of us who had nothing yet to refine, the

It was humbling to see so many busy professionals giving up their time to help us become better advocates.

demonstrations galvanised us to finally prepare!

Over the course of the week every portion and aspect of my advocacy was reviewed and critiqued. Every time I was on my feet my performance was recorded by video and then assessed by coaches in the court room. This critique mainly focussed on the content of my advocacy - e.g. the form of my questions, the purpose of my line of enquiry and how that purpose might be more effectively achieved.

Subsequently, my performances were reviewed by coaches watching the video footage. This process can be quite confronting and there is nowhere to hide. It is surprising what you learn when you're able to observe your performance and have it scrutinised by someone else. For example, I observed that in cross-examination I raised my eyebrows at the tail end of almost every question - it

Jonathan Clark, 'The Advanced Trial Advocacy Course'

It is surprising what you learn when you're able to observe your performance and have it scrutinised by someone else.

came across like a plea to the witness to give me the answer I wanted. Others learned to unshackle themselves from the lectern so as to more effectively project their presence in court. In the past, when I have prepared for trials, I have had an almost exclusive focus on the content of my advocacy. So I found the focus on my actual performance both interesting and valuable.

A special feature of the course is its use of specialist performance and voice coaches. This provided me with an opportunity to forget about the case for a while and give full attention to the physicality of

my court room performance: posture, breath, voice projection and energy. During one of my performance sessions I experimented with relaxing my stance. As soon as I did my voice projected far more powerfully. This may be the sort of stuff that seems obvious in hindsight but when it unexpectedly happens it is a revelation.

The week is a very social one. Everyone, participants and coaches alike, stays in the same hotel. Most nights there's a dinner and the wine flows freely. The theory presumably being that if you can prepare a decent cross-examination late at night while under the influence, you can prepare one anytime. Everyone I met approached the course with humility and open-mindedness so that the atmosphere for learning was supportive rather than competitive.

It was, however, a tiring week. I found myself working late into the nights

Everyone I met approached the course with humility and open-mindedness so that the atmosphere for learning was supportive rather than competitive.

and then again early in the mornings to be properly prepared for each day's performances. While the feedback I received was very valuable, it was quite challenging to take it all in and then try to apply it. But because of the quality of the course and the coaches I felt well rewarded for doing so. Overall the course led me to realise that I had sub-consciously held back performing advocacy in the way I in fact aspired to do it. I'm optimistic that I'll approach it with more confidence and enjoyment from now on.

A special feature of the course is its use of specialist performance and voice coaches.



Bullfry cooks up a storm

By Lee Aitken

‘Your Honour, we see this as a ‘link in the chain’ not a ‘strand of the rope’ case – so a *Shepherd* direction is called for’.

‘I have never quite got to grips with that distinction, Mr Bullfry, and the Benchbook is of little assistance’.

Was it wise on the part of the disposing powers to let his Honour Judge Snowdrop SC descend from the lofty heights of complex commercial litigation to Hades, and the criminal calendar? Running a two week drug trial was not the same as relieving a lessee against forfeiture! The judge was more than satisfactory with a slip and fall on a dropped chip, or a rear-ender in Erskineville – but a drug lab in Leura? Long ago, *pace* Lord Ackner, Bullfry had, on occasion, lived on the proceeds of armed robberies. He wondered inwardly whether ‘crystal meth’ represented an improvement.

‘We say that Mr Xinoda was not the ‘cook’, nor even a ‘bottle washer’. His presence was adventitious, and the case against him is entirely circumstantial’.

‘But Mr Bullfry, just consider. He is found 250 metres from the scene of the explosion, in a dazed condition, wearing an apron (among other things!), his hair is on fire, and 80 packets of Codral® (bought at a discount) are in a knapsack at his feet – what strand of the ‘rope’ is missing?’

‘Well, happily for him, Mr Xinoda, as well-advised, has made no admissions whatsoever. He gave a perfectly good explanation for his presence at the scene. He may under advisement tell the jury that imbued with a sudden nostalgia he was visiting the lookout where he had first contemplated proposing to his late wife. The sun was setting and as he approached what appeared to be a deserted cottage, he was rendered unconscious by an explosion. He will

First of all, your Honour, the intercepts all appear to be in the Lower Dalmatian dialect. There is no clear admission contained in any of them. On one view the interlocutors are discussing how to make a well-known, and delicious, Adriatic version of minestrone.

add further that he cannot abide Hello Kitty, the Japanese cartoon character, and he would never own a knapsack with that image on its cover. As to the apron, and other garments he was wearing, that has an innocent explanation which will excite both the jury’s curiosity, and pity’.

‘But what about the telephone intercepts, Mr Bullfry?’

‘First of all, your Honour, the intercepts all appear to be in the Lower Dalmatian dialect. There is no clear admission contained in any of them. On one view the interlocutors are discussing how to make a well-known, and delicious, Adriatic version of minestrone. It is a mere unfortunate coincidence that he spent two happy years in that region as an exchange student in his youth, and that the lessee of the cottage was the son of his former host’.

‘What about the Crown’s expert, Dr Pengloss? I would have thought that her evidence (based on her doctoral studies, and the focus of her forthcoming TV documentary and book) that ‘drug cooks’ have a particular psychological attraction to Japanese fantasy exemplified by Hello Kitty, and the *anime* cartoon world generally, would carry a lot of weight with the jury’.

‘Your Honour admitted her evidence over objection and despite my references to *Murphy*, *Smith*, *Tang* and *Honeysett*. It seemed to involve large problems of hearsay, lack of expertise, and the ‘ultimate question’.

‘What do you say requires a ‘link’ direction?’

‘Your Honour, we would submit that Mr Xinoda’s obvious lack of skill as cook of any description leads irresistibly to the inference that he cannot have played any active role in the concoction of the illicit substance. It follows, in our submission, that your Honour should direct the members of the jury that, unless they can be satisfied beyond reasonable doubt that the accused knows more about cooking than how to boil an egg in a saucepan of water, he must be acquitted’.

‘But the Crown has already led credible evidence that Mr Xinoda is well-known in the street where he lives for his superb sponge cakes’.

‘That is just the point, your Honour, as I objected at the time. *Rowton* tells us that you can only lead evidence of general character. In Lord Cockburn’s famous words (which have on occasion been applied to me personally) – “that his character is that of a man capable of the grossest indecency and the most flagrant immorality”. You could attempt to show that he is by general repute a good short-order cook, but you cannot then delve into the minutiae of his recipes’.

‘I am afraid you are showing your age, Mr Bullfry – it may be time for another CLE – *Rowton* was overtaken by section 413, and section 110 of the new Act, in its turn, has now overtaken them both’.

‘I can only quote the immortal words of Justice Bryson in another context, your

I can only quote the immortal words of Justice Bryson in another context, your Honour – that the new Act appears to be a late work of the committee that designed the camel.

Honour – that the new Act appears to be a late work of the committee that designed the camel’.

‘Be that as it may – I am disinclined to give any *Shepherd* direction – *Hillier*, I think, tells us that not every piece of the menu, so to speak, needs to be accorded equal weight if it is clear from the congeries of events that the accused is involved somewhere in the ‘kitchen’ – whether as cook, bottle washer, or waiter’.

‘Well, your Honour, that may be a matter, with respect, that I will need to test in another place, depending on how matters play out’.

‘The exception is noted, Mr Bullfry. Is the defence going into evidence? Are you intending to call the accused?’

Bullfry hesitated. This was always a crucial matter. He thought back to *R v Bywaters and Thomson* – would Edith have survived if the letters of her homicidal lover had not been read back to her, selectively, and to the jury? On the other hand, in the *Green Bicycle Case*, Ronald Light had saved his neck by giving evidence that he had not shot Bella Wright, even though he owned the relevant green bicycle. In *Brighton Trunk Murder (No 2)* Mancini had survived the charge of murdering Violet Kaye by candidly admitting to a series of offences, none of which involved violence. Lawrence QC in *R v Bodkin Adams* had wisely called no evidence from the accused doctor in a nasty capital case (‘easing the passing’) and achieved an acquittal.

How would Xinoda shape up under cross-examination? What would the jury make of his undoubted fluency in Dalmatian, and his relationship to the lessee of the cottage? Or, his unlikely responses when taxed with his choice of clothing, and his Facebook membership of the Friends of Anime?

‘Given the time, your Honour, might I consider that overnight?’

‘All rise!’

POETRY

I am for the Crown ...

I am for the Crown in my wig and my gown, as I stand here pressing for justice

As does my foe, at the end of the row, so persuasive she could be Augustus

She says, ‘I’m for the good, believe me, you should, that man there did not do this deed’

We both seek to persuade, only one makes the grade, as we each do our best to succeed

Evidence led, memories of things that were said, accusations, violations, it’s true

‘I don’t remember it all, but what I recall, is what I said I saw him do

Believe me or not, my word’s all I’ve got, what I’ve told you is what I did see

It’s in my mind’s eye, to you I won’t lie, there’s no reason you can’t believe me’

When the Crown case is over, is it weed, grass or clover, the accused has sewn in your lap

Chasing reasonable doubt, it’s what he needs to get out, is he honest or just full of crap

It’s a game of a kind, as he plays with your mind; it’s a challenge, something like chess

Is it fact or just fiction, to avoid a conviction, this story he seeks to progress

The evidence ended, the Crown case still splendid, my address it is balanced, exact

I romance the jury, my opponent feigns fury, her retort a mish-mash of fact

The judge gives directions, most learned injections, the jury retreat, then return

Their verdict announced, his displeasure pronounced, and we rise, and then we adjourn

By PWK

The Hon Justice Geoffrey Nettle

Geoffrey Nettle QC was sworn-in as a judge of the High Court of Australia on 3 February 2015.

His Honour was born in Cottesloe (WA) but grew up in Victoria where he studied at Bennettswood State School in Burwood, Victoria, before attending Wesley College in Melbourne. His Honour completed an Economics degree at the Australian National University, then worked for a year at Treasury before undertaking a law degree at Melbourne University from where his Honour graduated in 1975 with First Class Honours. His Honour then read for the BCL at Oxford where he was taught evidence by Rupert Cross, conflict of laws by JHC Morris and restitution by Peter Birk and graduated with a First in 1976.

Returning from Oxford, his Honour's professional career began as an articled clerk of the firm then known as Mallesons. Within five years he became a partner of the firm. He was called to the bar in 1982. His Honour read with Hartley Hansen, QC, later Justice Hansen of the Supreme Court and the Court of Appeal of Victoria, and with Justice Hayne.

As a junior barrister, his Honour had a reputation for being a prodigious and efficient worker, quickly developing a reputation as a hard-working and able advocate. His Honour was involved in what has frequently been described as the 'arduous' 1991 *Bank of Melbourne* trial in the Victorian Supreme Court, for the bank, as a junior to Hayne QC, in which his Honour's reputation as a formidable trial lawyer and cross examiner were cemented. His Honour took silk in 1992.

The Commonwealth attorney-general, Senator the Hon George Brandis QC, noted his Honour's talent for recalling leading cases from almost any field of law from memory. The attorney continued:

As an appellate advocate, the depth of your Honour's knowledge of the law and your firm grasp of legal principle was evident. When you appeared at first instance, you were both a feared and an admired cross-examiner. Your Honour is known for wearing your erudition modestly, and not seeking personal acclaim for your work.

At the bar, you were enormously supportive of colleagues, in particular junior colleagues, with a leadership style that inspired junior barristers to excellence. That commitment to the professional wellbeing of your colleagues was evident in the enthusiastic reaction of so many of them to your appointment to this Court.

Your Honour is an exemplar of the highest levels of integrity and the ethical standards of the bar. Between 1989 and 2002, your Honour demonstrated a commitment to public service as a part-time member of the Victorian Civil and Administrative Tribunal and its predecessor, balancing that work with the demanding practice you then conducted.



In July 2002, his Honour was appointed as a judge of the Supreme Court of Victoria and in 2004 he was appointed to the Court of Appeal of the Supreme Court of Victoria.

Outside the law his Honour enjoys sailing and still sails the Jubilee class sailing boat he bought many years ago: and he still owns the 1946 Mark IV Jaguar that he bought whilst at university and lovingly restored. His Honour has three children.

The attorney concluded that his Honour is regarded by bench and bar alike as one of Australia's finest jurists.

His Honour observed that the magnitude of the court's development of Australian law over the last 40 years and the court's fluidity of approach and depth of understanding in that time represents standards that are 'phenomenal' and 'inspiring'. His Honour stated, in light of that history, that 'to say that I am excited about beginning on the task to which I have been sworn this morning would be a very considerable understatement.

His Honour concluded:

At the same time I remain acutely conscious that this Court is both the custodian of the Constitution and the final arbiter of the Australian common law. There is no court above it to detect and correct one's errors. The role which I take up today thus entails extraordinary responsibilities and it is impossible not to be aware of the heavy burden of trust which that means is now placed in me.

His Honour Judge Alexander Street SC

Alexander Street SC was welcomed on 19 February 2015 having been sworn-in as a judge of the Federal Magistrates Court on 1 January 2015.

His Honour attended Cranbrook School in Bellevue Hill before studying law at UTS from where he graduated with a Bachelor of Laws in 1982. His Honour largely attended evening classes and by day was employed at Ebsworth & Ebsworth in the firm's leading maritime practice. Upon admission to the Supreme Court of New South Wales in 1982 his Honour took the bold step of immediately commencing practice as a barrister.

His Honour soon earned a reputation as a fiercely intelligent and highly articulate advocate. In 1987 his Honour appeared in the last appeal from an Australian court to the Privy Council, following which he exercised his lifelong passion for rowing in the Diamond Sculls at Henley. His Honour's High Court appearances notably included *Street v The Queensland Bar Association* (1989) 168 CLR 461 and *Lane v Morrison* (2009) 239 CLR 230.

In *Street* the validity of a rule, which made it difficult for interstate barristers to practise in Queensland, was challenged. The judgment developed constitutional law on the scope and meaning of s 117 of the Commonwealth Constitution providing for non-discrimination as between residents of different states and gave the practical legacy before mutual recognition was achieved of facilitating lawyers from one state to practising in another.

In *Lane v Morrison*, the law with respect to Chapter III of the Constitution and the exercise of commonwealth judicial power was developed and the Australian Military Court invalidated.

His Honour also developed a reputation and affinity for areas as

diverse as equity, commercial, maritime and admiralty law. His Honour was appointed senior counsel in 1997.

Beyond the bar his Honour has given distinguished service in the Royal Australian Navy's legal reserve since 1987. In 2004 he was commissioned a commander, and in 2013 was appointed a commander of a Sydney naval legal panel.

His Honour also served on the Bar Council of New South Wales Bar Association for 15 years, including two tours of duty on the Executive of the association as treasurer, has had editorial responsibilities with the *Australian Bar Review* and has been a part time hearing commissioner with the Human Rights and Equal Opportunity Commission.

The Honourable Bronwyn Bishop, speaker of the House of Representatives representing the Australian Government (on behalf of Attorney-General Brandis) noted that:

all present are aware that the Street family is one of extraordinary legal pedigree. Your Honour's elevation to judicial office sees you following in the footsteps of your father, the Honourable Sir Laurence Street, your grandfather, the Honourable Sir Kenneth Street, and your great grandfather, the Honourable Sir Philip Street. All of whom served as chief justices of the Supreme Court of New South Wales. Far from being a birthright, judicial appointment reflects mastery of the law. Your Honour's appointment to the Federal Circuit Court is a fitting recognition of the legal aptitude that you have demonstrated over the course of your distinguished career.

His Honour Judge Ian Newbrun

Judge Ian Newbrun was sworn-in as a judge of the Federal Circuit Court on Wednesday, 11 March 2015. Noel Hutley SC spoke on behalf of the bar.

His Honour graduated from the University of Sydney with a Bachelor of Laws in 1979, and went on to attain a Master of Laws from the London School of Economics in 1981. He was admitted as a solicitor of the Supreme Court of New South Wales in July 1982, then called to the New South Wales Bar three years later. He built up a successful practice, initially with a common law emphasis, but increasingly in Family Provision Act, insurance, administrative law matters.

Since 2010 his Honour was a mediator and an arbitrator in the Supreme, District and Local courts. Between 2005 and 2013 he was on the panel for the Refugee Review Tribunal Legal Advice Scheme. In 2012 his Honour was appointed deputy chair of the

NSW Health Tribunal, which was consolidated into the New South Wales Civil and Administrative Tribunal in 2014, and your Honour became a principal member in the Occupational Division, Health Practitioner List. In the federal sphere, he was the NSW chair of the Federal Medicare Participation Review Committee from 2005 to the date of his appointment.

His Honour is also an experienced referee, at one stage reaching the level of Sydney Grade Rugby.

His Honour Judge Justin Smith

Justin Smith was welcomed as a judge of the Federal Magistrates Court on 19 February 2015, having been appointed on 1 January 2015.

His Honour was born in Port Moresby in Papua New Guinea and raised there until the age of six. Thereafter his Honour lived in various parts of Australia with his father's work as in-house counsel and lecturer in law, in due course settling in Sydney.

At high school his Honour showed a flair for debating and competed in representative teams for St Aloysius, at Milsons Point. His Honour graduated from the University of Sydney with a Bachelor of Arts and a Bachelor of Laws in 1991. Giving away a budding career as a lead singer in a rock band, his Honour worked at Pryor Tzannes & Wallis and Dunhill Madden Butler, and generously volunteered at the Redfern Legal Centre.

His Honour commenced practice at the bar in March 1997, reading with Mark Dempsey and Jonathan Simpkins and found his niche in chambers on 7 Wentworth.

His Honour established his reputation as a leading junior in administrative law, especially in relation to migration matters. However, his practice was much broader, including a mixture of significant equity cases. As a junior, his Honour appeared in a number of significant cases in the High Court in migration.

His Honour worked with leading silks in his field whilst a junior. In the years prior to taking silk his Honour appeared regularly at the appellate level. That practice was combined with his Honour's extensive trial practice.

His Honour contributed generously to pro bono work. In 2002 his Honour appeared for the applicant in the High Court matter of *NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1; (2005) 79 ALJR 1142. The case remains an important contribution to the jurisprudence on what constitutes a well-founded fear of persecution on the grounds of religion.

It was noted by Mr Hutley SC, who spoke on behalf of the NSW Bar, that among his Honour's many attributes is his 'ease on the tabla which, as we all know, is a set of two hand drums used in North Indian music of ancient origin or belting out Acca Dacca classics on what I imagine is a well-worn and treasured Stratocaster'. The Hon Bronwyn Bishop MP, speaker of the House of Representatives on behalf of the Australian Government, had earlier pointed to his Honour's love of travel and cooking and brown belt in karate, complementing his jurisprudential knowledge and advocacy skills.

His Honour Judge Andrew Scotting

Judge Andrew Scotting was sworn-in as a judge of the District Court and the Dust Diseases Tribunal on 17 February 2015. President Jane Needham SC spoke on behalf of the bar.

His Honour was born in Bankstown and was educated at St Gregory's College, Campbelltown and John Therry Catholic High School, Rosemeadow. He attended the University of Sydney and graduated with a Bachelor of Arts, majoring in Economics and Law. He worked full time as a legal clerk at Marsdens Solicitors in Ingleburn, before commencing his Bachelor of Laws at the University of New South Wales. He was admitted as a solicitor of the Supreme Court in February 1992.

After a brief time doing personal injury and commercial litigation for Marsdens in their Campbelltown office, his Honour moved to the firm of Baker Ryrie Rickards Titmarsh in Parramatta in January 1993 and then to the bar in September 1996. He read with Anthony Black and Colin Heazlewood and took a room on 8th Floor Garfield Barwick Chambers.

By 2003 his Honour moved to 13th Floor St James Hall Chambers, where he remained until his appointment was

announced. His Honour had a diverse practice, encompassing succession, common law, commercial, equity, professional negligence, administrative and criminal law. He appeared frequently in the Supreme Court, the Court of Appeal and the Dust Diseases Tribunal.

Among his many notable cases were *Kelly v Jowett* (a Court of Appeal decision on personal costs orders) and *Northern Residential Pty Ltd v Newcastle City Council* (another success in the Court of Appeal, relating to provisions of the Environmental Planning and Assessment Act).

President Jane Needham SC thanked his Honour for his contributions to the bar.

Your Honour has contributed to the life of the bar by your service on the Bar Association's Health and Wellbeing Committee, and on Professional Conduct Committee No.1. Your Honour also shared your time with a number

of readers, some of whom are here today. One of them, Simon Chapple, speaks highly of your generosity of time. These are important and time consuming duties, and I thank you for your time and dedication.

However, your chief contribution as a member of the Association is your Honour's pivotal achievements on the Bar Hockey Team, whether that be on the field, as an

organiser, or as an occasional correspondent for the sports pages of *Bar News*. I'm sure your Honour was also on the front foot when it came to hockey social functions. Your Honour has also served as a member of the Sydney Hockey Association Judiciary Panel and the NSW Hockey Association Member Protection Tribunal.

Local Court of New South Wales

Michael Crompton and Gary Wilson were sworn-in as magistrates of the NSW Local Court on 23 February 2015. Jeffrey Phillips SC spoke on behalf of the bar.

Magistrate Gary Wilson

His Honour completed a Diploma of Law from the Solicitors Admissions Board in 1982 and was admitted as a solicitor of the Supreme Court of New South Wales in July the following year. His Honour began work as a solicitor at Glover & Glover Lawyers before moving to Minter Ellison in 1997.

His Honour began practising at the New South Wales Bar on 2 April 2001. He read with Michael Inglis in State Chambers, before taking a room in Denman Chambers in 2006, where he stayed until the time of his appointment. He built up a thriving, diverse practice in professional negligence, insurance, motor accidents, employment and criminal law. He appeared before a broad range of courts and tribunals – from the Local Court to the Court of Appeal.

For five years his Honour was on the roster of the Duty Barrister Scheme (in the Downing Centre) and the Bar Association's Legal Assistance Referral Scheme.

His Honour is also an accomplished yachtsman, having competed in three Sydney to Hobart races. He is also an avid skier and was a member of the Thredbo Ski Patrol for 18 years.

Magistrate Michael Crompton

His Honour studied Arts at the University of Queensland. He went on to study law at Queensland University of Technology, from which he graduated in 2000. As a student, he was an associate to his Honour Judge Neil McLauchlan QC of the Queensland District Court.

In August 2000 he began work as a solicitor with Legal Aid Queensland, working as a youth advocate who represented juveniles charged with serious criminal offences. During this time he appeared as duty lawyer in the District Court, the Children's Court and regional Magistrates courts. Following a year spent as a legal officer at the Queensland DPP, he travelled to London, where he was admitted as a solicitor in the High Court of England and Wales. From 2002 to 2004 he worked for the firm of Reynolds Porter Chamberlain managing Hague Convention child abduction cases, domestic and international adoption proceedings and guardianship matters.

Upon his return to Australia in 2005 he came to Sydney and worked as a legal officer and advocate at the Commonwealth DPP and the NSW Crown Solicitor's Office. He acquired extensive experience in a wide range of complex federal criminal matters involving, among other things, people smuggling, sex tourism, terrorism and other offences against the Customs Act, the Migration Act and the Criminal Code.

In October 2010 his Honour was appointed as a registrar of the Supreme Court of NSW, where he remained until his appointment to the Local Court. By his Honour's own tally, he was responsible for managing more than 470 Court of Criminal Appeal hearings and in excess of 4,000 Supreme Court bail applications per year.

Katrina Dawson (1976–2014)

Katrina Watson Dawson was born in Perth in 1976 to parents Sandy and Jane Dawson, and was the youngest of their children, with two elder brothers, Sandy (of Banco Chambers) and Angus. Katrina spent her childhood years in Randwick and was educated at Ascham School in Edgecliff, where she was debating captain; a member of the school committee; and played hockey and basketball. Katrina completed the Higher School Certificate in 1994, ranking equal first in the state, as one of only 14 pupils who achieved a perfect Tertiary Entrance Rank of 100.0 in that year. She told the *Sydney Morning Herald* at the time that despite having obtained a place in arts and law at the University of Sydney, she did not want to be a lawyer.

Katrina subsequently attended the University of Sydney and the Women's College, ultimately graduating in 1997 in arts with a major in French, and in 1999 with a first class honours degree in law. During that time, in 1999 Katrina completed a semester at the Sorbonne in Paris. Happily for the legal profession, somewhere along the way she changed her mind about becoming a lawyer, and having earlier completed a summer clerkship at Mallesons Stephen Jaques at the end of 1998, she joined the firm as a graduate. As a solicitor she practised in the dispute resolution group specialising in banking and insolvency advice and litigation, as well as commercial disputes. At Mallesons she found not only professional success, but also her future husband, Paul Smith, whom she married in 2002. Katrina rose to the ranks of senior associate, while concurrently studying for a Master of Laws at the University of New South Wales, which she completed in 2004.

Katrina won the Blashki & Sons prize for the highest aggregate in the bar exams, and then came to the bar in February 2005 at 28 years of age, reading with Stoljar SC and McCallum J. She joined 8th Floor Selborne Chambers, where she remained for the duration of her career. Friday night drinks on the 8th Floor were (and some might say - obviously wrongly - still are) something of a bear-pit, and no place for the timid or fainthearted. If Katrina felt any hint of intimidation, she never showed it, and from the outset she displayed what we would come to learn were enduring character traits: calm self-assurance; an ability to hold her own; to match wits with the

best; and an impeccably wicked sense of humour. She rapidly became an integral and widely loved part of the floor, and the bar, and forged many enduring friendships.

Katrina prospered at the bar and developed a successful, even at times, eclectic, practice. As well as the more routine commercial and insolvency cases in which she was regularly briefed, Katrina attracted a wide range of briefs. Cases involving bull joining (look it up), train derailments, parquetry and tiling, and other oddities were a great amusement for the rest of us, but Katrina took them all in her stride, and whomever the client, Katrina fought hard for each and every one of them.



Katrina's time at the bar was briefly interrupted by the arrival of each of her three children. Just prior to the arrival of her second child, an obviously heavily pregnant Katrina was negotiating with an opponent at the District Court as to the timing of an adjournment. When her opponent suggested dates further into the future, Katrina indicated that she could not agree to those dates, as she was having a baby. Her opponent's response: 'don't you have to be pregnant to have a baby?' left her bemused and offended in equal measure. It did not stop her retelling the story many times.

In her nine years at the bar Katrina managed three trips to the High Court, appearing in *SST Consulting Services Pty Limited v Rieson* (2006) 225 CLR 516; *Campbells Cash & Carry Pty Limited v Fostif* (2006) 229 CLR 386; and *Black v Garnock* (2007) 230 CLR 438. She appeared in the Court of Appeal and before the full court of the Federal Court of Australia, often unled. She was regularly in the Supreme and Federal, and District courts. Katrina ran many cases unled, often against senior counsel many years her senior, and often with considerable success. It was fitting that Leeming JA, who led Katrina in many cases at the bar, paid this tribute to her in his reasons for judgment in *White v Johnston* [2015] NSWCA 18 at [156]:

This appeal was originally listed for hearing on 16 December 2014, the day when senseless nihilism came to Sydney. It could not be heard that day. It was heard as soon as possible thereafter, on the last day of term, in circumstances which must have tested both counsel. Their professionalism was exemplary. I wish to add that Ms

Katrina Dawson (1976–2014)

Phillips' advocacy on the part of her client was in the finest traditions of the bar, and displayed a clarity, precision, fairness and restraint recalling that of Katrina Dawson, who appeared regularly and without a leader in this court and whose time as a barrister was far too brief.

In the same judgment Emmett JA at [20] paid a similar tribute:

[T]he loss to the profession of Ms Katrina Dawson was a momentous one.

Anyone who thought that Katrina's considerable success came effortlessly would be mistaken. One mark of greatness is the ability to make the difficult appear effortless, and Katrina certainly had that quality, but her many and varied successes were born of hard work, dedication, determination, and more often than not, sleep deprivation. In an email she sent me one morning in 2012 she said: 'Sent out my awful opinion (66 pages) and now they want to have a conference about it. I'm so tired that I fell asleep waiting for the water coming out of the hot tap to heat up!' I have no doubt that it was true. I still marvel at how Katrina seemed to find the time to fit in all the things she seemed to cram into her ever busy life. She always found time to attend the various activities that enriched her children's lives, whether it was school reading, sporting events, birthday parties or the myriad of other events. She also always found time to help others, whether it was meeting various would-be barristers who were thinking of coming to the bar to offer guidance; judging in school mooting competitions; or helping friends and colleagues affected by illness or other difficulties; Katrina always seemed to find the time and the words to assist.

The president's statement at the time of Katrina's death, that she was on her way to becoming one of the leading barristers at the bar, was no exaggeration. Katrina had a great capacity to absorb detail, even of the most tedious kind, and her mastery of it was her greatest strength as a barrister. In one case, with no notice, after lunch mid-trial her opponent called and was permitted to call a previously unforeshadowed witness whom Katrina was forced to cross-examine on the spot. Such was her knowledge of the detail of the case that the cross-examination ended the case – her opponent capitulating in the face of inevitable defeat. I marvelled at her capacity to work through detail of the most tedious kind, and her capacity for hard work. In another case she returned to chambers appalled that her opponent had not read the authorities on her list, and could not engage with the court about them. It was something she would never have done. No client who ever briefed Katrina ever got anything less than 100 per cent commitment from her.

Any occasional criticism (which was only ever constructive) was met with good humour. In one case which Katrina won at first instance (but to her dismay, lost on appeal), she met the trial judge subsequently at a social event. Having seen her cross-examine a number of witnesses in the case, in the kindest possible way the judge offered her the advice that she needed to develop a bit more of a 'poker-face' when cross-examining. As she later relayed the advice she had received, she explained that her undisguised incredulity, which had made an impression on the judge, was a product of her utter amazement and disbelief at the evidence that was being proffered.

'I just couldn't believe the answers that were coming out of their mouths!', she said.

There is no doubt that Katrina had great professional and academic qualities, for which she should be justly remembered, but it was her personal qualities that made her a truly exceptional human being. There is a natural tendency in eulogising those we have lost to exaggerate their good qualities and deeds. In Katrina's case, she was in every sense as good and wonderful as so many people have said. She had a generosity of spirit and a joy for life that is rare, coupled with a quiet determination and a humility that belied the true strength of her intellect and abilities. Always up for fun, and easily distractible, she was the perfect companion in chambers. Her lunching abilities were legendary among those of us who were privileged enough to have dined with her, and every day in her company was filled with good humour. In response to one joke, directed at her good friend Julie Taylor, who protested with some sarcasm that we were 'all hilarious', Katrina responded by email: 'I can confirm that I am, in general, really very funny'. And she was.

The circumstances of Katrina's passing will long haunt all of us, but for those who knew her, those events will never overshadow the joyous manner in which Katrina lived her life, and all the many great things that she achieved in it. We on 8th Floor Selborne will forever claim her as our own.

Katrina is survived by her husband, Paul Smith, and the three children she adored, Chloe, Ollie and Sasha, as well as her parents Sandy and Jane, and her brothers, Sandy and Angus.

By Jason Potts

Edward Gough Whitlam AC QC (1916–2014)



Gough Whitlam photographed at his Sydney office, 28 October 2005.
Photo: Fairfaxphotos / Stephen Baccon

In the preface to the first volume of her biography of Edward Gough Whitlam, Jenny Hocking said:

The ubiquitous representation of Gough Whitlam as though he simply emerged – fully formed – into public prominence *circa* 1972 is all the more remarkable given the absolutely fundamental influences these earlier years reveal¹.

The fundamental influences included his family, growing up in the new capital of Canberra, his war service and his experiences as a barrister.

In his speech at the 1973 Bar and Bench Dinner, Gough claimed to be the only prime minister descended from and married to the legal profession.

Gough was born in Melbourne in July 1916, his father Harry Frederick (Fred) Whitlam was deputy crown solicitor to Sir Robert Garran and then crown solicitor of the Commonwealth. His father had a deep interest in foreign affairs and in particular an interest in international human rights law; Nugget Coombs described Fred Whitlam as having a gentle softly spoken style but as deep a commitment to social reform as his son.

Many of the characteristics usually associated with Gough appear to be inherited from his mother, Martha Maddocks, who was one of eleven unusually tall siblings. She was clever, witty with a sharp tongue and had strong opinions. Family folklore maintained that Martha coughed at the appropriate point during her wedding ceremony rather than say 'obey'.

After Fred Whitlam won first place in the Victorian Public Service clerical exams, he joined the Victorian public sector but upon federation transferred to the Commonwealth Public Service. His promotion through the Crown Solicitor's Office

required Fred Whitlam to move to the newly established national capital Canberra. Gough grew up in this bush capital and credited this experience as strengthening his convictions about the central role of the national government in the nation's affairs.

In his final year of high school Gough won a scholarship to read classics at the University of Sydney. Gough commenced studies in arts in 1935 and law in 1938.

His university extracurricula activities included journalism. He was the editor of *Hermes*, the magazine for undergraduates of the university and a co-editor of the University Law Society journal, *Blackacre*. Gough was a member of the Sydney University Dramatic Society, through which he met 'Dovey' - Margaret Dovey - a social work student and champion swimmer.

Gough's war service politicised him. During his service he was located in the South Pacific and Northern Australia and while located in Cooktown and Gove, he witnessed discrimination against Aborigines.

In 1942 Gough made his 'best appointment' and married Margaret, hence he had also married into the legal profession as Margaret's father was Bill Dovey KC, later Justice Dovey of the Supreme Court. Gough's father-in-law was a colourful, Dickensian character. He smoked a pipe, wore a monocle, loved a scotch and a bet at the races. He also had an imposing physical presence, a sonorous voice and a Shakespearean vocabulary.

Gough's legal studies continued and he was articled to senior partner, Walter Forsyth of the law firm Sly and Russell. In July 1941 he began work as associate to Justice Victor Maxwell of the Supreme Court of New South Wales, a judge of 'unrivalled sharpness of mind'² and was exposed to trials before civil and criminal juries. It made the law interesting for Gough and he considered it very good training for the bar.

His legal studies were interrupted when he enlisted and joined the Royal Australian Air Force's 13 Squadron, which had been re-equipped with Navy Ventura aircraft, and in which over the next four years he served as a navigator.

Gough's war service politicised him. During his service he was located in the South Pacific and northern Australia and while located in Cooktown and Gove, he witnessed discrimination

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against Aborigines. In August 1944 his squadron was moved to Yirrkala, where he met the Yunupingu family whose members in the future would agitate for Indigenous rights and land rights (and play in the rock band Yothu Yindi). Throughout his life, when discussing Indigenous rights, Gough would recall the experience of a young and keen Aboriginal member of the ground staff who, being suitably qualified with a leaving certificate, applied many times to join aircrew. His applications were constantly rejected and his race was his sole disqualification.

The fourteen power referendum sought to give to the federal government additional powers in peace time, on a variety of issues including Indigenous Australians, national health, corporations and monopolies. The referendum failed to pass, though Gough's Squadron 13 recorded one of the highest 'Yes' votes in the country.

Gough's interest in constitutional matters arose during the war. His experience of the Curtin Labor government's use of the expanded war time Commonwealth powers, which enabled it to carry out its policies, led him in 1944 to campaign actively for the 'Yes' vote in the post-war reconstruction referendum. The fourteen power referendum sought to give to the federal government additional powers in peacetime, on a variety of issues including Indigenous Australians, national health, corporations and monopolies. The referendum failed to pass, though Gough's 13 Squadron recorded one of the highest 'Yes' votes in the country. Gough's hopes were dashed by the outcome but it inspired him to do all he could to modernise the Australian Constitution.

After resigning his commission in 1946, Gough returned to the University of Sydney to complete his law degree and he worked as associate to Justice William Owen of the Supreme Court.

On 14 February 1947 Gough was called to the New South Wales Bar. He joined Denman Chambers in Phillip Street, where Dr HV Evatt and his brother Clive and Eric Miller QC were members. He shared a room with Ken Pawley (later Justice Pawley of the Family Court).

As a junior barrister, many of his briefs were from the Commonwealth Legal Service Bureau, an innovation created in

1942 by Dr Evatt to provide free legal aid to serving and former members of the armed forces and their families. As this work concentrated in the areas of tenancy and contract law, Gough developed an expertise in these areas and appeared in the High Court in tenancy matters of: *Owen v Woolworths Properties Ltd* (junior to Garfield Barwick QC for the applicant); and *Thompson v Easterbrook* (for the respondent).

Gough appeared as junior to BP MacFarlan QC and Garfield Barwick QC for the respondents in *Grannall v Marrickville Margarine Pty Ltd*, an authority dealing with s 92 of the Constitution, as well as *Saffron v R* as junior to L C Badham QC, and a judgment concerning advisory opinions by the High Court.

The brief which generated most publicity was as junior counsel assisting the Royal Commission into Illegal Activities in the New South Wales Liquor Industry. The royal commission was established in July 1951. Justice Maxwell was appointed as commissioner and Bill Dovey KC was counsel assisting.

In 1957 Gough joined the newly established Wentworth Chambers on the Tenth Floor. The chambers were headed by John Kerr AC and Marcel Pile QC

Gough described how the royal commission often recaptured the English low-life depicted by Hogarth and Rawlinson.³ It was typical Sydney theatre and drew crowds similar to contemporary royal commissions and ICAC inquiries. The royal commission commenced in 1951 and over 2 ½ years heard from over 400 witnesses, including Garfield Barwick's brother, Douglas Barwick, the licensee of the Captain Cook Hotel adjacent to the SCG, who gave evidence on a number of occasions. According to Gough, from time to time Douglas Barwick's appearances received more attention in the press than Garfield's in other jurisdictions. Garfield Barwick's contemporary view of the commission was that the only resemblance between the commission and a court of law was the furniture.

Gough was a member of the Bar Council from 1949 to 1953. In 1957 Gough joined the newly-established Wentworth Chambers on the tenth floor. The chambers were headed by John Kerr QC and Marcel Pile QC and his colleagues included Maurice Byers, Trevor Morling and Hal Wooten. His clerk was Ken Hall.

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Mr White, Mr Arthur Beckhouse (a solicitor and accountant in the Auditor-General's Department), an unidentified man and Gough Whitlam (assisting the Commissioner) attend the Liquor Royal Commission at the Supreme Court in Sydney on 2 September 1952. Photo: Fairfaxphotos / Sun News / Picture by CARTY

Gough became silk in 1962 at the same time as Tom Hughes QC.

Although Gough continued at the bar his main interest and vocation became politics. In the 1950s and 1960s it was not an unusual career path for senior members of the bar also to have a parliamentary career. Many of his contemporaries at the bar, such as Garfield Barwick, Nigel Bowen, John Kerr, Tom Hughes, and Robert Ellicott, were also contemporaries in federal parliament.

After the war Gough pursued his interest in politics, joining the Australian Labor Party in 1945 while still wearing his RAAF uniform. His first appointment within the party was as the minutes secretary of the Darlinghurst Branch. In 1947 Margaret and Gough moved to Cronulla and in 1952 he was elected to parliament as the member for the seat of Werriwa. He remained the member for Werriwa until 1977.

Werriwa which was a 'microcosm of post-war urban Australia' and which 'represented Australian inequality comprehensively':

... the electorate has the highest proportion of migrants, increasingly non-British, the highest birth rate, the highest disparity between total population and enrolled voters, the fewest schools, the worst health services the least public amenity. It grew unplanned and unsewered.⁴

Gough and his family's experiences led to the development of the Whitlam reform strategy. Also while in parliament, Gough acquired an interest in law reform, prompted by constituents' problems. He proposed legislative change concerning the defence of common employment and third-party liability.

His interest in the Constitution was encouraged through his membership in the Joint Parliamentary Committee on Constitutional Review, which made recommendations to the parliament about constitutional reform. His view on the limitations of the Constitution changed over time.

In 1957, in his Chifley Memorial Lecture, Gough addressed the topic of Labor versus the Constitution and he concentrated on the difficulties confronting a reform government. Later, in his 1961 Curtin Memorial Address, he emphasised the opportunities a Labor government would have in carrying out its policies. He identified that through its financial hegemony it could create better conditions in transport, housing, education and health; and through international arrangements it could create the more orderly and equitable production, distribution and exchange of goods and skills. Gough identified the potential of the use of external affairs power to ground Commonwealth legislation.

In the 1960s Gough continued to develop his reform strategy and he progressed within the opposition, becoming deputy

Edward Gough Whitlam AC QC (1916–2014)

leader to Arthur Calwell in 1959 upon Doc Evatt's resignation. He became leader of the opposition in 1967.

In 1972, campaigning on the slogan 'It's Time', Gough told the men and women of Australia that their decision on 2 December 1972 was a choice between the past and the future, between the habits and fears of the past and the demands and opportunities of the future. It was a time for a new drive for equality of opportunities. Gough identified that many of the fundamental challenges to be met by the Labor government lay in the field of law reform.

This was consistent with his concept of the rule of law which in 1963 he described as embracing not only Dicey's concepts of civil and political rights but economic, social and cultural rights.⁵

The Labor Party won the general election held on 2 December 1972, however it did not control the Senate.

As if he predicted the frustrations of the next three years and to show that the electoral change was meaningful, Gough immediately embarked on an ambitious package of reforms. As the results in nine seats remained doubtful and dependent upon preferences and absentee votes, the first Whitlam ministry from 5 to 18 December 1972 was a duumvirate consisting of Gough and his deputy Lance Barnard in which they shared all ministries. It was the smallest ministry with jurisdiction over Australia since the first Duke of Wellington formed a ministry with two other ministers 128 years previously. Gough was the attorney general and immediately there was a flurry of activity including the release of seven young men serving gaol sentences under the National Service Act, recognition of the People's Republic of China and an application to the Arbitration Commission to have the hearing on equal pay to be re-opened.

Over the next three years the Whitlam governments revolutionised Australian society by introducing Medibank and free university tuition. The Whitlam program was devised during, and assumed the continuation of, the post-war boom. However, this period was also characterised by a radically changing international economy which saw spiralling oil costs and the emergence of a new economic phenomena: stagflation.

In his speech during the first session of the twenty-eighth parliament on 27 February 1973, the governor-general described the government's program as 'the most comprehensive program of legislation in the history of the Australian Parliament.' Many of the proposed legal reforms were achieved during the three years of government or were implemented subsequently by other governments including the Fraser government.

The legal reforms and innovations included:

- the *Family Law Act 1975* and the establishment of the Family Court of Australia;
- appointment of the first female federal judge, Elizabeth Evatt, as a deputy president of the Arbitration Commission and as the first chief justice of the Family Court of Australia;
- the introduction of a bill to establish what became the Federal Court of Australia;
- briefing of Mary Gaudron to appear for the Commonwealth before the Arbitration Commission in the *Equal Pay Case*;
- established the Australian Legal Aid Office and introduced the Legal Aid Bill into parliament;
- establishment of the Australian Law Reform Commission;
- holding the Woodward Royal Commission into Aboriginal Land Rights and introduced *Aboriginal Land Rights (Northern Territory) Bill 1975* into parliament (subsequently passed by Fraser government);
- in 1975 returning the traditional lands in the Northern Territory to the Gurindji people and inspiring a classic Paul Kelly and Kev Carmody song⁶;
- abolishment of capital punishment under Commonwealth laws as well as other laws over which federal parliament had power, by passing the Death Penalty Abolition Act;

So many of our contemporary legal institutions had their genesis in Whitlam policies.

- obtaining an injunction against France in the International Court of Justice at the Hague, which enjoined France from continuing its nuclear testing in the Pacific;
- as part of its legislation dealing with economic pressure, passing of the Trade Practices Act and proposing a uniform Company Act;
- passing the Racial Discrimination Act, based on the International Convention on the Elimination of All Forms of Racial Discrimination, which the government ratified in October 1975;

Edward Gough Whitlam AC QC (1916–2014)

- continuation of the process of abolishing appeals to the Privy Council;
- development of Commonwealth administrative law by passing the Administrative Appeals Tribunal Act and introducing the *Ombudsman Bill* 1975; and
- ratification of 15 significant human rights treaties such as the 1966 International Convention on the Elimination of All Forms of Racial Discrimination.

For a barrister in 2015, it may be surprising to hear these achievements described as radical or as reforms – they are now part of the status quo and are accepted as part of our legal system. So many of our contemporary legal institutions had their genesis in Whitlam's policies.

In 1974 seven government bills, including one to establish a Federal Supreme Court, were rejected on two occasions by the Senate. Governor-General Hasluck accepted Gough's advice as prime minister and dissolved both houses to allow elections to be held on 18 May 1974. The Whitlam government was returned, but it still did not control the Senate.

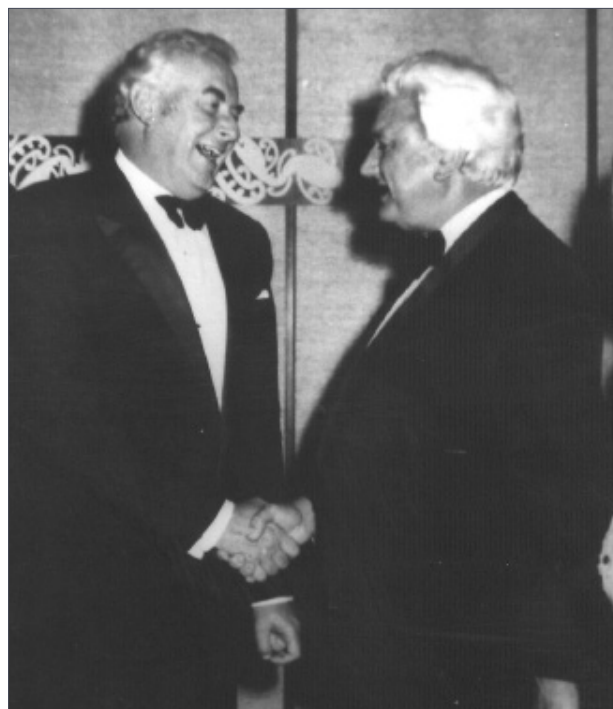
On 11 July 1974 John Kerr was appointed as governor-general.

Throughout 1974 and 1975 the government was criticised for its handling of the economy and ultimately the 'Loans Affair' whereby senior ministers in the government considered circumventing the Loans Council to raise funds from oil-rich Middle East nations. Much government legislation was blocked or rejected by the Senate and this action culminated on 16 October 1975 when the Senate deferred the Appropriation bills, or supply. Supply ran out on 30 November.

In October Gough had a number of discussions with Governor-General John Kerr about the Senate's actions and on 19 October John Kerr asked for Gough's consent to seek advice from Barwick CJ. Gough did not agree. He set out the reasons for his opposition and an advice was obtained from Attorney-General Kep Enderby and Solicitor-General Maurice Byers.

Nevertheless on 10 November John Kerr sought Barwick CJ's advice and on 11 November he dismissed the Whitlam government and appointed Malcolm Fraser as prime minister. In the election held on 13 December the Whitlam government was defeated.

On the 20th anniversary of his government's dismissal, Gough said that, like most great dramas, the central plot of the Dismissal was simple enough but in his view the constitutional crisis was essentially a political crisis fully capable of being resolved by political means. Although on the steps of Parliament House



In 1987 a dinner was held to celebrate the clerk on 10 Wentworth, Ken Hall's 40th anniversary as a clerk. Gough attended as did John Kerr; it may be apocryphal but it is said that this was the only function that the two attended knowing the other was to be present post dismissal.



Edward Gough Whitlam AC QC (1916–2014)

on 11 November he urged the crowd to maintain their rage, Gough was not preoccupied with the Dismissal. He maintained that the relevance of those events lay on the development of Australia as a republic. He became friends with Malcolm Fraser and in 1999 he and Malcolm Fraser issued a joint statement urging support for an Australian republic with an Australian head of state. They appeared in a television advertisement for the republic in which Gough said ‘Malcolm, it’s time’ and Malcolm replied ‘It is.’

Although Gough remained as leader of the opposition after the 1977 election in which the Labor Party was defeated, he retired from parliament in 1977.

After his retirement, political journalist Mungo MacCallum asked Gough at the National Press Club whether he was having as much fun as he had in Canberra. Gough replied ‘the fun is where I am’. Gough did not slow down after 1977. The fun arose from his busy post-parliament life. He was appointed as the Australian ambassador to UNESCO, to many university positions, such as visiting professor at Harvard, Adelaide and the Australian National universities and as chairman of the Australian National Gallery. He wrote a number of books and many publications in politics and law.

He continued his association with the New South Wales Bar. In 1987 a dinner was held to celebrate the clerk on 10 Wentworth, Ken Hall’s 40th anniversary as a clerk. Gough attended as did John Kerr. It may be apocryphal, but it is said that this was the only function that the two attended knowing the other was to be present post-Dismissal.

In May 1999 Gough spoke on behalf of the New South Wales Bar at the ceremonial sitting to mark the 175th anniversary of the Supreme Court of New South Wales. He said that the Supreme Court has made, and continues to make, history and noted that of its 43 judges four are women, it has a chief justice born overseas and it has a Court of Criminal Appeal constituted by women judges. These developments are not radical in 2015, but reflect the changes brought about by the Whitlam government.

Margaret Whitlam passed away in 2012. Gough is survived by his daughter Catherine and three sons Anthony (Tony), Nicholas and Stephen.

His son Tony followed Gough’s vocation and interests. Tony was called to the bar in 1967 and was appointed QC in 1986. He was member for Grayndler from 1975 to 1977 and in 1993 he was appointed to the Federal Court of Australia.



John Howard, Bob Carr and Gough Whitlam at the ceremonial sitting to mark the 175th anniversary of the Supreme Court of NSW.

Gough’s achievements in the law and the reform of our legal system are reflected by Noel Pearson’s obituary at the state memorial service:

The achievements of this old man are present in the institutions we today take for granted and played no small part in the progress of modern Australia. The breadth and depth of the reforms secured in that short and tumultuous period were unprecedented and will likely never be repeated.

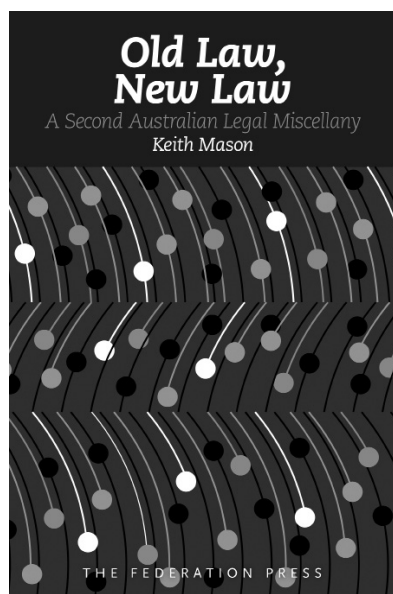
By Trish McDonald SC

Endnotes

1. Jenny Hocking, *Gough Whitlam A Moment in History*, page xvii.
2. TEF Hughes AO QC, ‘Address to Supreme Court Judges’ Dinner’, 2 February 2006.
3. Gough Whitlam, *Abiding Interests*, page 14.
4. Graham Freudenberg ‘Gough Whitlam: A very public life’, *Sydney Morning Herald* 21 October 2014
5. ‘The Rule of Law in the East’ (1963) 36 ALJ 356; E.G Whitlam QC MP response to paper by Vivian Bose, president of International Commission of Jurists.
6. ‘From Little Things Big Things Grow’.

Old Law, New Law: A Second Australian Legal Miscellany

By the Hon Keith Mason AC QC | Federation Press | 2014



This kind of vast romp through more than two centuries of Australian legal and social history, its English precedents and comparative jurisprudence is done with Mason's characteristic brevity and good-humour.

Old Law, New Law: A Second Australian Legal Miscellany is a complement to Mason's earlier volume *Lawyers then and Now: An Australian Legal Miscellany* (Federation Press, 2012). It is a delightful read. With his deft combination of legal history, social commentary and ever-present appreciation of the humour in the historical record, Mason's style is part of the book's charm. So too is its integration of Australia's colonial past into key themes of Australia's (continuing) legal development. On this last point, *Old Law, New Law* fits within a welcome trend in recent legal scholarship to narrate, and recognise the importance of, the colonial and pre-Federation history of this country.¹

Old Law, New Law is divided into five parts: 'Men and Women', 'Essentials of Life', 'Law's Ways and Means', 'Guarding Patches', and 'Public and Private Wrongs'. Unsurprisingly given the nature and content of this book, some common themes traverse these divisions.

For this reviewer, the exploration across at least three of these parts of the evolving relationship in Australia

between the Executive and the courts was a particular highlight. Chapter 9 ('Appeal Courts') includes the story of the Tasmanian Executive Council in the 1870s assuming 'the non-existent powers of a court of appeal' and pardoning a person (Louisa Hunt) who had been convicted and sentenced to seven years' imprisonment for setting fire to a dwelling with intent to defraud her insurer. The attorney-general (an active member of that Executive Council) had been Louisa Hunt's defence counsel at trial. A scathing communication from the court to the governor followed, appealing (though not in terms) to principles resonating what has later become the constitutionalised separation of powers doctrine. In Chapter 13 ('The Rule of Law: Courts and the Executive') this theme receives more direct treatment, with particular focus on the Rum Rebellion of 26 January 1808, the open defiance by the Victorian Legislative Assembly in 1865 of the dictates of the Victorian Constitution Act and decisions of the Supreme Court that the imposition of a lawful tax requires the assent of both houses of parliament, and the stunning defiance by Sir Henry Parkes in 1888 of multiple decisions of the Supreme Court of New South Wales concerning the unlawful imprisonment of Chinese migrants. In Chapter 14 ('Exclusionary Conduct: Colourful Aspects of Constitutional Law') the tension between the Executive and the courts over the application of immigration laws in more modern times becomes the focus. That chapter, for example, narrates the story of the

unsuccessful attempts by the Executive in 1934 (and specifically the newly appointed first law officer, Sir Robert Menzies KC) to exclude the Czech, Jewish and Communist Egon Kisch from Australian shores, and also the more recent skirmishes between the Executive and Chapter III courts over the repulsion, detention and offshore processing of boat people.

This kind of vast romp through more than two centuries of Australian legal and social history, its English precedents and comparative jurisprudence is done with Mason's characteristic brevity and good-humour. The same qualities of writing make equally enjoyable Mason's treatment of two other themes that run throughout this book, namely the pervasiveness of law and legal history to all aspects of Australian life, and the fallibility of law, practitioners, and even judges. The ribbing is (largely) gentle; the stories about practitioners – as someone else has put it – often too good not to be true. Whether picked up to be read from start to finish, or for dabbling here and there, it is a book worth acquiring.

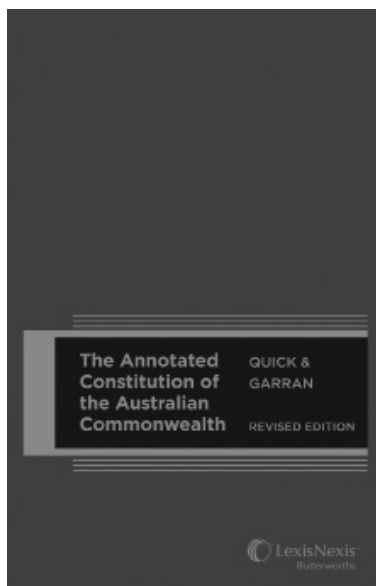
Review by Fiona Roughley

Endnotes

1. See, for example: Mason, *Lawyers then and Now – An Australian Legal Miscellany* (Federation Press, 2012); various chapters in Gleeson, Watson and Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013), Appleby, Keyzer and Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate Publishing, 2014) – see in particular the chapters by Mason and Hanlon.

The Annotated Constitution of the Australian Commonwealth (Revised Edition)

John Quick and Robert Garran | LexisNexis Butterworths | 2014



The original edition of this text was published over a century ago yet remains widely consulted and cited in constitutional law cases. It has now been

published in a revised edition for the first time in some years. The text of the original work remains unaltered, but changes to the book's layout have been made and some useful additional features included.

Readers familiar with the work will be aware that it is divided into several parts. The first provides an invaluable historical introduction to the Constitution, covering ancient colonies, modern colonisation, colonial government in Australia, and the federal movement in Australia. Then follows a list of members of federal conventions and conferences, followed by the text of the Constitution as originally enacted. The bulk of the work consists of the original commentaries on each section of the Constitution, including references to the corresponding sections of other federal constitutions.

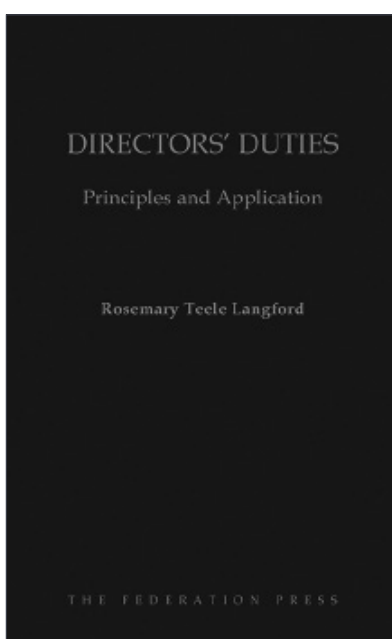
Features of the revised edition include the inclusion of a table of over 160 High Court decisions in which the 1901 edition has been cited, the text of the 2003 compilation of the Constitution showing all amendments in bold and ruled-through text, a new detailed index in addition to the original 1901 index, and the inclusion of the original 1901 edition page numbers in the margin of the commentaries for ease of cross-referencing to the original work.

This work remains a valuable addition to the library of any practitioner of constitutional law or enthusiast of Australian federation history.

Reviewed by Victoria Brigden

Directors' Duties: Principles and Applications

By Rosemary Teele Langford | Federation Press | 2014



The limited liability company has long been lauded as one of the law's most important inventions. It allows commercial people to take commercial risks – and bring rewards – that would be otherwise passed up. Over the years, there has been a growing focus on corporations being good citizens. This focus has brought with it an increasing array of obligations which are foisted upon those who control companies: directors.

Directors are now subject to common law, equitable and statutory duties. These are augmented by guidelines such as the ASX's Corporate Government Principles and Recommendations and those promulgated by the OECD. Directors' personal liability has been clarified and expanded in several areas (including,

effectively, guaranteeing certain of the company's taxation liabilities). Some argue that the volume of corporate regulation and the creeping personal liability of directors discourages qualified people from becoming directors and inhibits risk-taking.

The premise

In this book, Rosemary Teele Langford particularly explores the development of directors' fiduciary duties and the intersection of those duties with the statutory duties imposed by Part 2D.1 of the *Corporations Act 2001*.

Ms Langford's book is argumentative in that it seeks to rationalise the law concerning directors' fiduciary duties. The High Court case of *Breen v Williams*

Directors' Duties: Principles and Applications (Federation Press, 2014)

(1996) 186 CLR 71 marked a shift in Australian fiduciary theory. The court's insistence in the proscriptive (as opposed to prescriptive) nature of fiduciary duties has narrowed the scope of such duties considerably. Indeed, as Ms Langford demonstrates, academics and judges since *Breen* have often treated fiduciary duties as being limited to the 'no conflicts' and 'no profits' rules.

Ms Langford argues strongly against the limitation of fiduciary duties to being solely proscriptive. She states, with considerable force, that the director's duty to act bona fide in the interests of the company is the fundamental fiduciary duty from which other duties spring. This prescriptive (i.e. positive) duty seems to be excluded by *Breen* (which the High Court has followed since). Yet, the argument is so inherently attractive that it has found favour in intermediate appellate courts since (and in apparent disregard of) *Breen*.

The structure

Directors' Duties is structured in such a way as to bring the reader along as the argument builds momentum. After an introduction, the book sets out the history and jurisprudence of directors' fiduciary duties. It then outlines the jurisprudential shift since *Breen*. The following chapters examine particular fiduciary duties by which, Ms Langford argues, directors are bound. It must be acknowledged that certain of these duties are prescriptive in nature and therefore might be somewhat controversial. The book then devotes a chapter to the nature and characterisation of directors' duty of care, skill and diligence. The penultimate chapter is devoted to remedies. In particular, the author engages in a useful discussion of the differences between the remedies which flow from a breach of directors' statutory duties and the much broader array of remedies which a court of equity has at its discretion. The final chapter evaluates the Australian trend of jurisprudence against other jurisdictions, particularly the United Kingdom.

Conclusion

Directors' Duties is a monograph, rather than a textbook. It is clearly the result of a deep study of cases and academic writings on the subject. It is of great assistance in gaining an understanding of the modern evolution of fiduciary duties in general and those that relate to directors in particular.

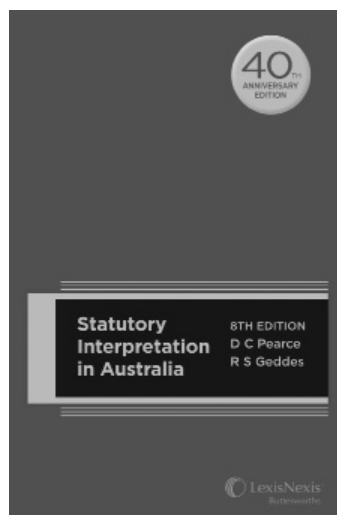
As persuasive as the book is, the reader must bear its argumentative nature in mind. The author is arguing for a more uniform, cohesive and rational treatment of directors' duties – particularly their fiduciary duties. This means that 'dipping in' to the book and reading only a section may paint a misleading picture of the law in the reader's mind.

Practitioners will find the author's discussion of fiduciary duties particularly useful as the remedial differences between a statutory and fiduciary breach may have significant consequences for their clients.

Reviewed by Nicolas Kirby

Statutory Interpretation in Australia (8th Edition)

By Dennis Pearce AO and Robert Geddes | LexisNexis Butterworths | 2014



It has been 40 years since the publication of the first edition of this book. Sir Garfield Barwick wrote the foreword to the first edition. Chief Justice Robert French wrote the foreword to this edition, the eighth. The present chief justice writes of the book's enduring utility to judges, practitioners, teachers and students alike. Its status as the definitive word on the approach to its subject is reflected in the sheer number of cases that reference it: according to Westlaw, more than a 1600 references in the period 3 October 1975 to 16 March 2015.

The first edition was published at a time of great legislative output in Australia. The Whitlam government was notorious for the volume of legislation that it passed. Such seminal instruments as the *Trade Practices Act 1974* (Cth), the *Family Law Act 1975* (Cth), the *Racial Discrimination Act 1975* (Cth) came into force at about this time. The need for a resource to tie together the various principles of statutory interpretation, both legislative and common law, was clear: as the authors note in the preface to this edition, Australian lawyers were forced to have recourse to the leading

Statutory Interpretation in Australia (8th Edition) (LexisNexis Butterworths, 2014)

English texts before the first edition was published. Since then, Pearce and Geddes has built a reputation as an indispensable resource for the approach of Australian courts to the interpretation of legislation.

The structure of the eighth edition does not differ markedly from that of the seventh edition. That is unsurprising as the previous edition contained a number of more substantial textual changes. The book continues to be arranged in such a way as to enable the reader to readily identify, by numbered paragraph, a particular principle of construction, in a particular context, while still allowing for a more comprehensive review of the principles governing various aspects of statutory interpretation. This makes the book easy to reference and to read.

Chapter 1 identifies introductory principles with a particular focus on how courts embark upon the task of statutory interpretation. Some explanation of the basis, structure and style of legislative drafting is also discussed here, as an introduction to the overview of drafting conventions and expressions in Chapter 12.

Chapter 2 lays down the basic common law and statutory principles of legislative interpretation, including the application of the purposive approach set down in s 15AA of the *Acts Interpretation Act 1901* (Cth).

Changes have been made in Chapter 2 to reflect recent developments in the common law principles applicable to reading words into legislation, in particular the High Court's recent decision in *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9 and the intermediate appellate decisions preceding it. The authors beautifully distil the principles elucidated in these and previous cases to identify a general approach to the issue of construction

Taken together, the book constitutes an essential overview of the manner in which legislation is to be construed and with it, and important account of the scope and limitations on state power.

of words used in legislation that do not conform with the apparent legislative intent.

Chapter 3 deals with extrinsic aids to interpretation, again by reference to the common law principles and by the application of s 15AB of the *Acts Interpretation Act* and its state analogues.

Chapter 4 deals with the various interpretative maxims applicable to statutory interpretation, and provides a guide to the structure and framework of Acts.

Chapter 5 deals with the assumptions that constitute the principle of legality. The authors also introduce into this edition an extremely useful tool to aid the application of the principle of legality in various situations: a table has been included at the end of Chapter 5 identifying the various principles, rights and privileges that trigger the presumption that parliament will not be taken to have intended to abrogate fundamental rights and privileges without clear words expressing such an intention, together with references to those parts of the book that discuss each right or privilege in greater detail.

Chapter 6 provides an overview of the various interpretative principles contained in the Commonwealth and state Interpretation Acts, and a detailed account of how the provisions of the Interpretation Acts have been applied by the courts.

Chapter 7 deals with the approach to amendment and repeal of Acts by other Acts, and Chapter 8 deals with

interpretation of consolidating, reprinted or codifying Acts.

Chapter 9 deals with special rules concerning the interpretation of remedial, penal and fiscal legislative provisions.

Chapter 10 deals with the retrospective operation of legislation and includes an overview of general principles of retrospectivity as well as the retrospective operation of particular classes of Act.

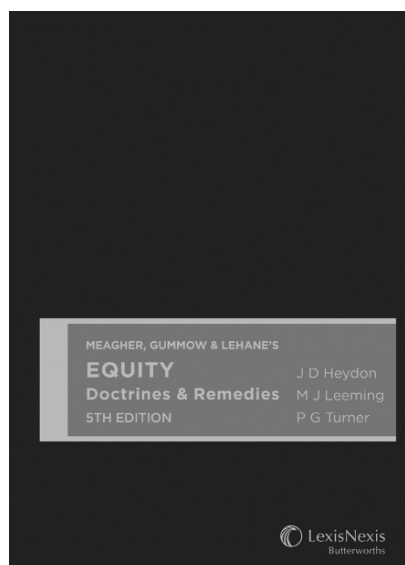
Finally, Chapter 11 deals with the principles concerning legislation conferring obligations and discretions on people and office holders. The chapter provides a guide to the interpretation of statutory duties and powers as well as the consequences of non-compliance with obligatory provisions.

Taken together, the book constitutes an essential overview of the manner in which legislation is to be construed and with it, an important account of the scope and limitations on state power. In his foreword, Chief Justice French speaks of the involvement of statutory interpretation in every aspect of the law, public and private. Construction is essential to determining the validity of legislation, the scope of executive power, and the application of legislation to all areas of public life. This book assumes, in comparatively few pages, the enormous task of guiding the user through the tools necessary to engage in the task of construction, and the authorities that are necessary to approach that task.

Reviewed by Catherine Gleeson

Meagher, Gummow & Lehane's Equity: Doctrines and Remedies (5th Edition)

By J D Heydon, M J Leeming and P G Turner | LexisNexis Butterworths | 2014



The late Professor Emeritus Harold AJ Ford AM, writing for the *Sydney Law Review* in 1976, concluded his review of the first edition of *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* by stating that it was 'a very welcome accretion to Australian legal literature and is more likely to be a possession for all time than many other works'.¹

Much like Thucydides, whose self-confessed intention in writing his *History of the Peloponnesian War* Professor Ford was referring to, Meagher, Gummow and Lehane were never writing to 'win the applause of the moment.' To the contrary, and as was made abundantly clear by the vigorous criticism levelled at certain judges guilty of committing the 'fusion fallacy' or at forms of relief which the authors considered to be lacking in proper jurisdictional basis, the authors had far loftier goals in mind. Clearly, the work was intended to be not only an exposition of the general doctrines and remedies of equity but also an attempt to steer and shape equity jurisprudence, not least through its forceful critique of judicial reasoning deemed by the authors to exhibit a 'disregard for historical

continuity' or a misunderstanding of the Judicature legislation.

However, and as acknowledged by the authors of the recently released fifth edition, the position forty years on from when the first edition was written is quite different. The authors (J D Heydon, M J Leeming, and P G Turner) refrain from commenting on the extent to which the previous editions of *Meagher, Gummow and Lehane* have been responsible for what they regard as a recent and discernible change in judicial reasoning and academic writing. However there is an implicit recognition by the authors of this edition, evident in the change of tone, noticeable particularly in Chapter 2 ('The Judicature System'), as well as in the abbreviation of that chapter, that the battle is over, at least insofar as it relates to the changes effected by the Judicature legislation, and that the authors of *Meagher, Gummow and Lehane*, past and present, have emerged triumphant.

Gone then from this edition, is some of the (self-confessed) 'colourful' and 'pungent' criticism found in earlier editions. Also left behind is the extensive critique of Mareva injunctions in what can only be read as a begrudging concession that the authors' doctrinal objections to this form of relief found in earlier editions have fallen on deaf ears. New to this edition is Chapter 23 on equitable compensation, which plugs what was a conspicuous gap in previous editions.

Certain chapters have been restructured and rewritten. Chapter 10 ('Contribution') is a representative example. The table of contents at the beginning of the chapter (tables of contents for each chapter being one of this edition's welcome innovations) provides a map to the chapter's structure and a shortcut to the reader who already

knows the particular aspect of the doctrine of contribution with which he or she is interested. The presentation of the text is clearer, the language is more concise, the sentences pithier. A more extensive use of sub-headings (yet another innovation of this edition which is carried across the entire work) makes the chapter more easily navigable. The positive effect of removing citations from the body of the text and into the footnotes (as they have been throughout this edition) cannot be overstated. The overall result is a chapter that must surely be of greater utility to a busy practitioner seeking quickly to determine whether to assert an equitable right of contribution on behalf of his or her client. Yet, as with the other rewritten and restructured chapters, the coverage of the doctrine remains comprehensive and its presentation is true to the overall style and tone of the work.

Other chapters have been wholly rewritten and reorganised, such as Chapter 17 ('Estoppel in Equity'). In this edition, the authors have taken the opportunity to analyse the status of the 'single overarching doctrine' suggested by Mason CJ and the 'general doctrine' of estoppel by conduct advanced by Dean J in *Commonwealth v Verwayen* (1990) 170 CLR 394. The conclusion advanced by the authors, based on this new analysis, is that no single overarching doctrine of estoppel by conduct exists in Australia and that the attempts to simplify the law in this area have failed.

The authors have undertaken a similar stock-take in Chapter 42 ('Confidential Information'). It is noted in this chapter that much of the doctrinal uncertainty apparent in the case law on confidential information has been clarified and resolved, such that the fundamental questions in relation to confidential information identified in previous

Meagher, Gummow & Lehane's Equity: Doctrines and Remedies (5th Edition) (LexisNexis Butterworths, 2015)

This fifth edition has not disappointed. The change in tone is refreshing and welcome, as are the authors' conspicuous (and successful) efforts to modernise the work's style and presentation.

editions of the work are now able to be answered. The chapter explores what has been established and what remains to be developed.

Twelve years have passed since the publication of the last edition. As the authors have observed in their preface, during that time there has been

delivered a considerable number of judicial decisions, as well as extensive commentary published, dealing with many areas addressed in this work. In particular, the authors note development in the areas of fiduciary relationships, assignments, estoppel, penalties, equitable compensation, rectification and confidential information. Accordingly, a new edition of *Meagher, Gummow and Lehane* was much needed. This fifth edition has not disappointed. The change in tone is refreshing and welcome, as are the authors' conspicuous (and successful) efforts to modernise the work's style and presentation. The updating of the text with recent judicial decisions and commentary is characteristically thorough and it is

apparent that considerable thought has been given to how these developments affect the authors' commentary and conclusions found in previous editions; where necessary material has been reworked or excised to reflect these developments.

As prophesied by Professor Ford, *Meagher, Gummow and Lehane* is a possession for all time. And thanks to the commitment and erudition of its current authors, it has been allowed to evolve gracefully and judiciously.

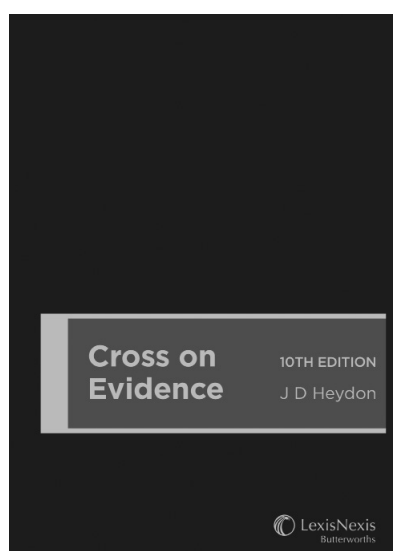
Reviewed by Juliet Curtin

Endnotes

1. Ford, H A J, 'Meagher, Gummow, Lehane, Equity: Doctrines and Remedies', (1976) 7(3) *Sydney Law Review*, 474.

Cross on Evidence (10th Edition)

J D Heydon | LexisNexis Butterworths | 2014



Given the law of evidence is an integral part of the process of litigation it is no surprise that it is the subject of continued attention by the courts and accordingly undergoes rapid and

constant development relative to other areas of law, save perhaps for the law of civil practice and procedure. Consider, to name just some of the recent developments in the case law, the High Court's decisions on opinion evidence (*Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 374; and *Lithgow City Council v Jackson* (2011) 281 ALR 223); spousal incrimination privilege (*Australian Crime Commission v Stoddard* (2011) 282 CLR 620) the rule in *Jones v Dunkel* (*ASIC v Hellicar* (2012) 286 ALR 501); legal and evidential burdens of proof (*Strong v Woolworth Ltd* (2012) 285 ALR 420); the use of extrinsic evidence in contractual construction (*Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1). These and other developments were captured in the ninth Australian edition (2012) of *Cross on Evidence*.

Since then there have been yet more developments in the case law to clarify the law in respect of the uniform evidence legislation and the common law, judicial notice, discretionary exclusion of evidence where the prejudicial effect of which evidence outweighs its probative value; tendency and coincidence evidence, privilege, illegally obtained evidence, expert evidence and the use of extrinsic evidence in contractual construction. These new developments have been captured in the latest edition of *Cross on Evidence*.

As with earlier editions, the target audience of the book includes practitioners, both bench and bar, law students (and academics who teach them and research in the area). This diversity of audience results in there

Cross on Evidence (10th Edition) (LexisNexis Butterworths, 2014)

Cross on Evidence is an indispensable tool for practitioners. Its place on the shelf of every practitioner who routinely engages with the laws of evidence is assured.

being not only a clear statement of principle and extensive citation of authority to assist the practitioner, but also an explanation of the principles underling the various rules of evidence to assist the student. This dual emphasis for the two differing audiences is, at least from the practitioner's perspective, complementary; an understanding of the principles underpinning the rules of evidence being invaluable for their application.

This new edition, in addition to including analysis of the latest developments in case law, also contains two changes in *form* to assist its audience.

First, the table of contents is now significantly more detailed than in previous editions allowing a reader, especially the practitioner, to locate more easily and readily the relevant parts of the book in answer to their particular evidentiary question. This detailed table of contents is a not insignificant change to aiding the readability and usefulness of the book as a resource for practitioners. The book is of course an essential resource for all practitioners with respect to its substantive content. This change serves to further assist the reader in navigating and locating the relevant material in the comprehensive, and therefore necessarily voluminous material, contained in the book. In this respect the changes to the detail of the table of contents now echoes the detailed

and helpful index to the book, which has been, to date, another feature of the book's form assisting readers navigate through the material contained within it.

Secondly, there has been a significant reduction in the number of footnotes, which has in turn significantly reduced the size of the book, certainly from the earlier ninth, and now tenth edition. The footnotes that remain are, as always, detailed and comprehensive and remain essential reading together with the body of the text.

The speed with which developments to the case law occur – or at least the speed with which controversies in the case law arise which may or may not be resolved – and the practicalities of preparing a manuscript for production means that there will be an inevitable lag in capturing either new controversies or new case law that may arise. For example, the tenth Australian edition deals with the developments in the law in respect of the use of extrinsic evidence in contractual construction (*Western Export Services Inc v Jireh International Pty Ltd* ('Jireh') (2011) 86 ALJR 1), however, there is no reference to *Electricity Generation Corporation v Woodside Energy Ltd* ('Woodside') [2014] HCA 7; 306 ALR 25; 88 ALJR 447, the High Court's most recent decision on that topic. Nor is there any reference to the decision in *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184 in which the Court of Appeal (Leeming JA, with whom Ward JA and Emmett JA agreed) expressed the view (at [71]) that *Woodside* (at [35]) was inconsistent with *Jireh*, which decision has now been subsequently followed in *Stratton Finance Pty Limited v Webb* [2014] FCAFC 110 at [40] (per Allsop CJ, Siopis & Flick JJ). The treatment of that controversy awaits the eleventh edition.

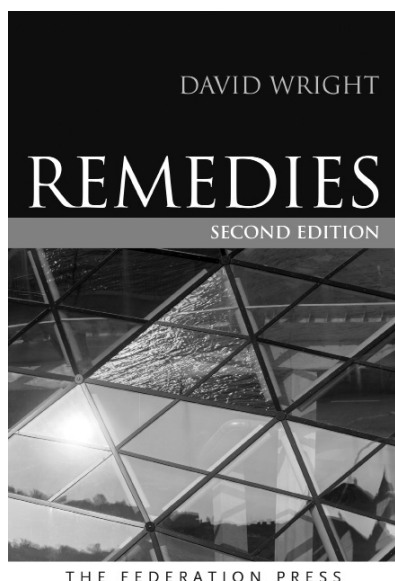
It is therefore inevitable that *Cross on Evidence* will continue to be updated at regular intervals. For those who like to tab and mark up their copies of key texts, this will prove to be frustrating. It is a small price to pay for an updated edition of the most comprehensive textbook of the law of evidence at common law and in statute. In this respect, although uniform evidence legislation largely displaces the common law in those jurisdictions where uniform evidence legislation has been enacted, the common law remains relevant. It remains relevant to non-curial processes (e.g. discovery) sought in a court proceeding in respect of which the privileges contained in in Pt 3.10 of the uniform legislation (both in the NSW and Commonwealth Acts) does not extend to pre-trial processes such as subpoenas, discovery, interrogatories and the like – see s 131A(1)) [e.g. the privilege against self incrimination under s 128 is excluded from the provision extending the privileges in Pt 3.10 of the uniform law (both in the NSW and Commonwealth legislation)]. The common law principles also remain relevant in fora other than courts that do not formally apply the rules of evidence.

Cross on Evidence is an indispensable tool for practitioners. Its place on the shelf of every practitioner who routinely engages with the laws of evidence is assured. Moreover, it quite rightly deserves its place as the leading textbook on the law of evidence, having the benefit and authority of the learning and experience of its author.

Reviewed by Radhika Withana

Remedies (2nd Edition)

By David Wright | Federation Press | 2014



Remedies are, as the author of *Remedies* tells us, what clients want. Yet for the practitioner, they may sometimes be an afterthought. And by the time consideration of the remedy comes around, the time for evidence in support of the preferred remedy may have passed. *Remedies*, now in its second edition, is a welcome addition to the library of any private law practitioner, covering a broad array of remedies, both at common law, in equity and based in statute (to keep the book within manageable limits it does not deal with the remedial consequences that might attend if one of the disputing parties is the Crown). The book's style is simple and accessible. Its anticipated audience covers a wide spectrum of experience from law student to practitioner. There is much in this book for the experienced practitioner.

Whilst *Remedies* lacks the comprehensive detail and doctrinal analysis of a *McGregor on Damages*, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (MGL) or *Spry's Equitable Remedies*, it does provide an accessible

The book serves as a useful springboard providing a comprehensive overview identifying the key principles and case law and important doctrinal disputes and lines of authority.

overview of the three main forms of remedies available in private law. *Remedies* is not a substitute for the detail and learning contained in these leading texts. Rather, it is complementary to them. The book serves as a useful springboard providing a comprehensive overview identifying the key principles and case law and important doctrinal disputes and lines of authority. Key principles are succinctly explained. Although intended to be accessible, Wright has achieved that accessibility without the cost of over simplification. Each chapter is well referenced, with footnotes indicating useful texts and academic articles and other relevant cases. Where relevant he also highlights further development in thinking contained in recent case law (for example, the gradual recognition of the High Court of the remedial constructive trust) and text writers (for example, the concept of the fusion fallacy in remedies developed in MGL).

There are 18 substantive chapters. Chapters 2 to 4 deal with compensation at common law including contractual damages, tortious damages and restitution. Chapters 5 to 15 deal with equitable remedies and includes a chapter each on: Lord Cairns' Act damages, account of profits, rectification, the (remedial) constructive trust, specific restitution, specific performance, rescission and injunctions (final and interlocutory). Finally, chapters 16 to 19 might best be described as 'other' remedies not readily characterised under

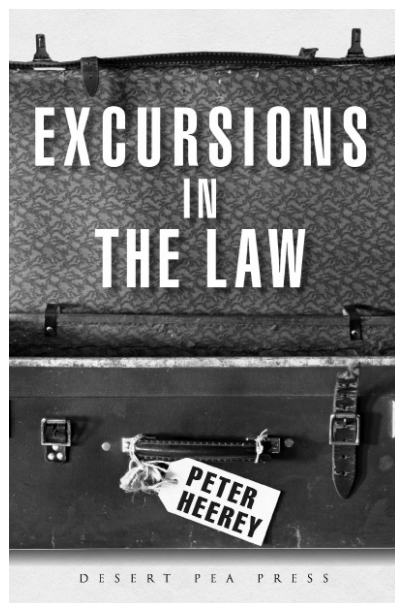
the common law or equity badges including *Mareva* orders, *Anton Pillar* orders, remedies under the *Competition and Consumer Act 2010* (Cth) and declarations. The second edition was published in 2014. It therefore contains a comprehensive account of the most recent authorities of the High Court in these areas (the most glaring omission, simply by virtue of the timing of publication, is that the section on the defence of change of position to a claim in restitution does not refer to the latest decision of the High Court in *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 88 ALJR 552).

With an eye to the student market, and the increasing appetite of law schools to teach remedies, whether as a stand-alone subject or incorporated within key subject areas such as torts and equity, each chapter concludes with a problem question (with answer). For the practitioner this part of each chapter will be of limited utility (although not without a certain degree of passing curiosity and interest), however, it forms only a small part of each chapter and does not detract from the overall usefulness of the book for the private law practitioner.

Reviewed by Radhika Withana

Excursions in the Law

By Peter Heerey | Desert Pea Press | 2014



The foreword to this book was written by Sir James Gobbo. Sir James was the author's pupil-master when the author moved from his hometown of Hobart to Victoria and joined the Victorian Bar. Sir James remarks that he soon came to enjoy the author's breadth of interests, literary flair and wry sense of humour. Those traits are displayed clearly in this book which contains over 30 of the author's papers and other writings including poems.

True to the word 'excursions' in the title, the subject-matter of the papers, which is divided into five parts, is diverse and extends from Hobart and Victoria to overseas jurisdictions including Vanuatu, Canada, the United States and Ireland.

The first part of the book is entitled 'Tasmanian Stories'. It commences with a paper on the Tasmanian-born Andrew Inglis Clark for whom the author has a great admiration. The author describes him as the having 'laid down the basic structure of our Constitution'. The paper traverses Clark's life and concludes with commentary on the movement (supported by the author), in recent years, to seek to rename the federal

electoral division of Denison, which is named after Sir William Denison, lieutenant-governor of Van Diemen's Land from 1847 to 1855, to Clark. It is a very interesting paper especially for those who either have forgotten or did not ever know of Clark's role in preparing the initial draft of the Constitution.

Clark also appears in the paper which follows which celebrates the 'First Century' of the Supreme Court of Tasmania from 1824 to 1924 and in the first poem in the book which alludes to the apparent broken promise by Alfred Deakin to appoint Clark to the High Court. The paper entitled 'The Orr Case Revisited' is, perhaps, of more interest to the community as a whole. It concerns the *cause célèbre* of Professor Sydney Sparkes Orr who was dismissed from the University of Tasmania in 1955 as a result of the allegation that he had had a sexual relationship with an undergraduate. This part of the book concludes with 'Hobart – A Guide for Innocent Mainlanders'. That takes the reader from Salamanca Place and through Hobart and its surrounds. It ends rather delightfully with the suggestion that 'If your visit to Hobart is in any way employment-related, don't forget to put in for your hardship allowance'.

The second part of the book is 'The Justice Business'. It comprises a broad array of papers. One is a short history of the Victorian Bar which is based on a talk given by the author to the Victorian Bar Readers Course on 26 September 2012. Many matters mentioned are similar to those discussed in the NSW Bar Practice Course. However, two matters the author raises concerning silks are of particular note to those in NSW.

The first concerns the rosette which Victorian silks wear on the back of their gown. It would appear that although there are those in NSW advocating for

... although in Sydney 'there has long been a practice' that a silk, when robed, 'should never be seen carrying books or papers', no such practice has applied in Melbourne.

a return to queen's counsel, no-one is suggesting a change to the silk gown so as to include a rosette. The author states that the purpose of the rosette was to prevent powder from the eighteenth century wig staining the back of the gown. Perhaps nostalgia for the concept of powdered wigs was stronger in Melbourne than Sydney following the separation of Victoria from NSW in the nineteenth century. In a subsequent short paper entitled 'Counsel's Baggage' the author sets out the history of the barrister's wig, gown and bag. The second matter concerning silks raised by the author is that although in Sydney 'there has long been a practice' that a silk, when robed, 'should never be seen carrying books or papers', no such practice has applied in Melbourne. The author comments that this is a paradox given that Melbourne is supposed, stereotypically, to be 'stuffy and conservative' while Sydney 'laid back and larrikin'.

The papers in the second part of the book include the author's response to the article by Dyson Heydon in the *Law Quarterly Review* entitled 'Threats to Judicial Independence: the Enemy Within' in which Heydon criticises off-bench discussions by appellate judges of the case before them. The author, who spent 19 years on the Federal Court, comments that since judges on superior courts exercising appellate jurisdiction 'have typically been successful in a career of two decades or so in a highly competitive, and sometimes combative,

Excursions in the Law (Desert Pea Press, 2014)

profession', they are 'unlikely to be shrinking violets, susceptible to seduction by suave glittering phrases or guileful blandishments, or being pushed into decision'. In a subsequent paper in the book entitled 'Judges at Work', the author comments on aspects of judgment writing. In addition, one of the author's poems included in the book is entitled 'Judgment Writing'.

Other papers in the second part of the book include the author's contrary argument to the debate in 2009 on the possible introduction of an Australian Charter of Rights and a paper on Sir Owen Dixon which is itself a review of the biography of Dixon by Philip Ayres.

In the third part of the book ('In Other Lands'), the author travels overseas. The first paper concerns the author's participation in one of the last Australian appeals to the Privy Council. The Author remarks, quite causally, that standing in the sunshine on an autumn morning in London outside the Dorchester Hotel while waiting for a cab 'a pleasing distraction is provided by the departure of the Sultan of Brunei in a powder blue Rolls coupe' with an entourage of bodyguards. The author comments that seeing this and trying to be 'as objective as one can', the thought 'crosses one's mind that ... there is much to be said for the retention of appeals to the Privy Council. Later in the paper, he describes the history of the Privy Council as 'that of the British Empire itself' using the advice in *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508 as an example. The author describes the facts of *Srimati* as evoking 'a world of adventure and romance reminiscent of Kipling at his best'.

This part of the book also discusses the author's time as an acting judge in Vanuatu in 1992 and some impressions of Canada and, in particular, the position of Quebec in the federation, written in 1996–1997 when the author spent five months at McGill University in Montreal. Five papers have the United States as their theme. The subject of the papers are: aspects of the southern United States, including segregation, which paper followed a period of four weeks in 1993 which the author spent in Birmingham, Alabama teaching a course on comparative constitutional law in the Cumberland School of Law; a review of the fourth of a five volume series on Lyndon Johnson by Robert A Caro; a paper on Antonin Scalia based on a 2009 biography of Scalia by Joan Biskupic; a short piece on Abraham Lincoln following the 2005 book by Doris Kearns Goodwin entitled *Team of Rivals: The Political Genius of Abraham Lincoln*; and a paper entitled 'How Judges Think' on Richard Posner.

There then follows a paper on the author's experience of a dinner, in October 2001, at the home of the Irish Bar in Dublin, the King's Inn. He notes that on a coffee table was the latest issue of the *Australian Law Journal* which had reproduced the author's poem 'Judgment Writing' referred to above. The author states that he was able to give the first performance of that poem in Ireland 'or indeed in the Northern Hemisphere'. Part three concludes with a paper on the Dreyfus affair by reference to Robert Harris' novel *An Officer and a Spy*.

Part four of the book contains five papers under the heading 'Law and Literature'. They include a pithily-written analysis of *The Merchant of Venice* by reference to various issues of trade practices and a more lengthy paper on *Louth v Diprose*

(1992) 175 CLR 621. That paper refers to the lower-court proceedings and to various issues arising from the *Louth v Diprose* litigation including what the author terms 'litigation storytelling' and issues of 'gender, class and structural power'. Storytelling also is the subject of another paper in this part entitled 'Storytelling, Postmodernism and the Law'.

The paper 'Aesthetics, Culture, and the Whole Damn Thing' is adapted from an address by the author to the International Conference of the Law & Literature Association of Australia in 2002. It contains various anecdotes including humorous moments in court. One such example concerns the maxim *in pari delicto potior est conditione defendentis*. The author states the example is sourced from the west of Ireland, where the plaintiff is pursuing a particularly dubious claim, and is as follows:

Judge: Mr Houlihan, is your client aware of the maxim *in pari delicto potior est conditione defendentis*?

Counsel: My Lord, in the bogs of Connemara they speak of little else.

The final part of the book concludes with four short pieces written by a person whom the author describes in the introduction to the book as 'my mysterious friend Publius who writes an occasional column for the Commercial Bar Association newsletter'. Whether Publius is a friend of Bullfry is anyone's guess.

Peter Heerey is to be commended for a book which contains a collection of papers and other writings on such a variety of topics.

Reviewed by Daniel Klineberg