

THE JOURNAL OF THE NSW BAR ASSOCIATION | SUMMER 2015

barnews



**REMEMBERING
SIR KENNETH JACOBS KBE QC**

PLUS

Lawyers, causes and passion

Tipping the scales: equity and diversity at the bar

Interview with Attorney General Gabrielle Upton

barnews

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ISSN 0817-0002

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

Cover: Sir Kenneth Jacobs KBE QC. The portrait by Ralph Heimans was commissioned by the Bar Association in 2011 and donated to the Supreme Court of NSW.

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Editor's note

The final edition of *Bar News* for 2015 brings the usual mix of features, recent developments, bar history and reviews.

We are delighted to have an interview with the Hon Gabrielle Upton MP, attorney general of New South Wales, who discusses a number of current issues and initiatives.

Several articles in this issue look at the careers and lives of notable judges, including an address by the chief justice of Australia, the Hon Robert French AC, commemorating the life of Sir Kenneth Jacobs KBE QC, who was formerly a judge of the Supreme Court of NSW then the High Court – as well as the author of *Jacobs on Trusts* – and who died on 24 May 2015.

The Hon John Bryson QC has contributed a piece describing his personal recollections of a number of judges from the 1950s. And Tina Jowett

has interviewed Acting Justice Jane Mathews AO, who was the first female appointment to judicial office in NSW: her Honour was appointed a judge of the District Court in 1980; then to the Supreme Court in 1987; then president of the AAT in 1994.

Elsewhere, this issue includes another address by the chief justice, this time on the occasion of the 30th anniversary of the NSW Environmental Defender's Office. Ian Barker QC has written a piece on the treatment of Indigenous people: 'How to behave while bathing in the Northern Territory'.

David Robertson has a comprehensive and helpful treatment of the new Legal Profession Uniform Laws. Talitha Fishburn has interviewed Phillip Boulten SC on the topic of equitable briefing.

Christine Melis has contributed a piece in honour of Paul Daley, who has recently

retired after 54 years' service as clerk on Eleven Wentworth chambers. When Christine asked Paul how he had kept it up for so long his answer was simple: 'I loved coming in to work every single day. There was always something different happening.'

Bar News thanks the outgoing president of the Bar Association, Jane Needham SC, for her tireless efforts during her term as president. We have included in this issue her speech: 'Tipping the Scales: Equity and Diversity at the Bar'. And *Bar News* welcomes the incoming president, Noel Hutley SC, whose inaugural column appears below.

Finally, *Bar News* notes with great sadness the loss of Andrew Thomas Martin of Chalfont Chambers. An obituary will appear in the Autumn 2016 edition.

Jeremy Stoljar SC
Editor

Direct briefing a growth area for the New South Wales Bar

By Noel Hutley SC



It is a great privilege to assume the role of president of the New South Wales Bar Association. This organisation has a proud history of representing the interests of its members, both in the public sphere and in dealings with government, members of parliament, the courts and the wider legal profession. I am honoured to have the opportunity to represent the interests of New South Wales barristers and continue the Bar Association's traditions of promoting the administration of justice, the rule of law and the importance of a strong, independent bar in this state.

I wish to pay tribute to the outstanding contribution of my predecessor as president, Jane Needham SC. Jane performed her difficult role with

great skill and grace, often in trying circumstances. Jane can rightly look back at her time as president with considerable pride and satisfaction. It has been a pleasure and a privilege to work with her.

In the course of the Bar Council election period it became clear that there are differing views as to the Bar Association's public profile. I take the view that the Bar Association has an important role to play in public life, by explaining the role of the justice system and the courts and supporting fundamental legal rights and freedoms. Over the years the association has provided a respected independent perspective in public debate on legal issues and I see that function as an inherent part of this organisation's activities.

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One of the most pressing issues facing the New South Wales Bar is the increasing competition for work we face from solicitors. This, combined with falling filing rates in civil matters in our courts, means that finding sources of work for the bar must be a major priority. My first duty as president involved taking part in a panel presentation, along with other members of the Practice Development Committee, to in-house lawyers at the ACC/ACLA National Conference on the Gold Coast in early November. That presentation, entitled 'Direct briefing as a modern strategy' focussed upon the utility of in-house counsel briefing the bar direct in suitable matters and the cost savings that can result where the need for external solicitors is eliminated in appropriate cases. In many cases the specialist expertise of barristers, and the junior bar in particular, offers a cheaper alternative to law firms.

It is clear that corporate and government counsel are making increased use of direct briefing arrangements and this is a growth area of work for the bar. The Bar Association will continue to build on its relationship with Australian corporate lawyers, as well as pursue other new opportunities for work for NSW barristers.

Proper resourcing of the justice system needs to be a priority for governments. Insufficient funding of judicial positions is an emerging issue at both state and

federal levels. The current arrangements regarding family law judges provide a telling example. There is a serious shortage of judges in the area of family law which is resulting in increasing delays and in turn causing real problems for families in crisis, as well as imposing concerning burdens on the judges.

For some time the Bar Association has expressed its concerns at the state of legal aid funding, particularly with regard to criminal matters. The situation worsens with each year that goes by. The current Commonwealth/state legal aid funding arrangements are clearly inadequate, and there appears to be no appetite on the part of government at federal or state level to satisfactorily address the problem.

Although the Australian Government restored a proposed funding cut regarding complex criminal trials at the beginning of the year, this is a band aid solution at best. A comprehensive strategy must be developed to safeguard the long-term future of legal aid criminal matters in this state.

The entitlement to a fair trial within a reasonable time is fundamental. But in many cases, the accused cannot afford a lawyer, so they are faced with the alternative of seeking legal aid or attempting to conduct their own defence.

Inadequate funding for criminal trials runs the risk that matters may not be able to proceed in circumstances where

an accused does not have representation. There are recent instances of such delays, and without the prospect of a resolution to the funding crisis such issues will become all too common. This is clearly unacceptable from the perspective of the accused, the prosecution and victims of crime.

Government reliance on pro bono work to address the shortcomings of the legal aid system is unrealistic. Our members spend thousands of hours each year undertaking pro bono work, but government should not regard that as a basis for not dealing with those deficiencies of that system.

A co-ordinated and long term solution is required. The restoration of legal aid funding to sustainable levels, along with the pursuit of new areas of work for the New South Wales Bar, will be priorities for the Bar Council over the coming year.

Our members spend thousands of hours each year undertaking pro bono work, but government should not regard that as a basis for not dealing with those deficiencies of that system.

An update from the Katrina Dawson Foundation



thekatrinadawsonfoundation.org

It is difficult to believe that it is December again. Strange that the worst year of your life can go so quickly.

One thing that has given our family strength and purpose in the last twelve months is how far we have been able to come with The Katrina Dawson Foundation. What has been achieved just could not have occurred without the extraordinary support of the legal profession. In the midst of the raw shock and devastation we all suffered when my extraordinary sister died, an immediate determination developed to honour her in a meaningful way. We were able to establish the foundation in a very short space of time, and have been overwhelmed by the desire to help so widely shared. We have been sustained

wonderful opportunities, she constantly strived to improve the lives of those less fortunate.

We are very pleased that the foundation is already in a position to have established two important programmes. We recently announced a scholarship programme for undergraduates to attend The Women's College within the University of Sydney. In 2016 there will be three scholarships – a four year Katrina Dawson Foundation Macquarie Group Scholarship and two further scholarships funded by the foundation. We are in the process of identifying the recipients of these scholarships, which will give three young women access to an extraordinary experience in an environment of excellence, one which Katrina cherished.

their potential in education and beyond. Three inspiring women have already received fellowships, one of whom recently returned from a study tour to investigate further study at Columbia or Cambridge, with a view to working in human rights and policy with a focus on Indigenous people and minorities.

These are exciting and meaningful programmes.

And the bar has played a significant role in making them possible. Many have given their time to help us deal with regulatory issues and to ensure compliance, many have made extraordinarily generous donations, and there was of course the teams who ran in the *Sydney Morning Herald* Half Marathon and then the City2Surf, raising over \$60,000 for the foundation. We have also received countless offers of assistance, from all corners of the bar. This has been a great and fitting tribute to a woman held in great respect and with great affection, who was already one of our finest barristers.

So may I offer you our sincere gratitude, on behalf of the Dawson and Smith families and the foundation. Together we can make the world a little more like the place Katrina would have wanted it to be. Thank you, from the bottom of our hearts.

Sandy Dawson

The foundation is all about delivering educational opportunities otherwise out of reach to inspiring young women.

by the thought that Katrina has inspired so many people at the bar and in the legal community generally to be part of creating something so positive from something so heartbreakingly tragic.

The foundation is all about delivering educational opportunities otherwise out of reach to inspiring young women. This is a true reflection of Katrina's values: she believed passionately in women's education and, always conscious of her own good fortune in having had

In addition, we have also announced our fellowship programme which funds a woman who has already chosen and achieved in her field, but needs support to further her education in some way. We have recently announced that the foundation's partner for the 2016 fellowships is the Aurora Education Foundation and the Roberta Sykes Indigneous Education Foundation. Aurora is a non-profit organisation that supports Indigenous students to achieve

Bar Practice Course 02/2015



Back row, left to right: Dinesh Ratnam, Christoph Liedermann, Andrew Stevens, Tristan Cleary, Albert Judah, Ali Cheema, Rod Howle, Brodie Buckland, Matthew Daniels, Desmond Sweeney, Brendan Queenan, Michael Valentin, Chris McMeniman, Ed Anderson. **Third row, left to right:** Steven Cominos, Tracy Flintoff, Julie Granger, Uche Okereke-Fisher, Jaye Alderson, Mark Sheldon, James Pearson, Nicholas Simpson, Peter Horobin, Phil Gledson, Fiona Bustos-McNeil, Luke Reeves, Sam Sykes, Tarik Abdulhak. **Second row, left to right:** Claire O'Neill, Vikram Misra, David Harris, Ian Fraser, Phillip Sharp, Jared Bennett, Glenn Fredericks, Matt Kalyk, Chris McGorey, Peter Gaffney, Jon Baxter-Wright, Ismail Kirgiz, Keni Josifoski. **Front row, left to right:** Arjun Chhabra, Louis Do, Linton Teoh, Gabrielle O'Shannessy, Michael Cosgrove, Alicia Irving, Cecilia Curtis, Gina Guirguis, Rebekah Haylock, Marina Kiriakos, Leigh Finch, Madeleine Ellicott, Danielle Woods

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The Holt Prize

Federation Press hosted its inaugural Holt Prize on Wednesday, 25 November 2015. Dr A J Brown, professor of public policy & law at Griffith University, reports.

Why name Australia's richest legal book prize after Chris Holt?

Simple, really... because Chris Holt was Australia's best legal publisher. And it's not too much to add: Australia's best legal publisher, ever. To an extent that it will be difficult for anyone to eclipse for that honour for a very long time.

The books of the joint winners of the first Holt Prize ever awarded – Giovanni Di Lieto from Monash Business School, and Scott Stephenson from Melbourne University School of Law – will be just the first of many more proofs of why.

Unless Chris Holt and his co-founders of The Federation Press, Kathryn Fitzhenry and Diane Young had taken the bold step in 1987 of establishing Australia's own, independent, high quality publishing house for legal, social and academic books, there is no telling how much important scholarship may have never been published – either at all, or with the impact it has had.

Not because these works were any less in quality or significance than those published by other major, typically overseas-owned legal and academic presses. In fact, the reverse. Chris Holt was dedicated to publishing the best research, scholarship and analysis of the technical and political issues surrounding almost every area of law and legal policy important for modern Australia. He was equally dedicated to supporting the often previously-unpublished scholars who were producing this cutting edge work – like all entrants to the new Holt Prize.

While books also had to sell, he and his partners knew a smaller, independent publisher could apply its own tests, free of the need to deliver a particular profit margin to a parent institution or company on the other side of the



Left to right: Professor Andrew Lynch, Neil Williams SC, Giovanni Di Lieto, the Hon Justice Stephen Gageler, Yee-Fui Ng, Scott Stephenson (James Watson unable to attend)

world. As Tony Blackshield told the assembled crowd at the awarding of the first prize last Wednesday, it became the magic of The Federation Press to use the reasonably-selling textbook market to support publication of other, niche but vital, books on smaller print runs than most commercial publishers would ever contemplate.

Chris Holt was dedicated to publishing the best research, scholarship and analysis of the technical and political issues surrounding almost every area of law and legal policy important for modern Australia.

These are all factors that enabled high quality publications on a myriad of vital legal and social subjects that otherwise may never have seen the light of day, or not for years after their topicality had morphed or faded. Migrant Labour Law: Unfolding Justice at Work in Free

Markets, by Di Lieto and From Dialogue to Disagreement in Comparative Rights Constitutionalism, by Stephenson, continue in these fine traditions. Everyone who heard High Court Justice Stephen Gageler explain the judges' choices will be watching the careers of Di Lieto and Stephenson very closely... along with the runners up, Yee-Fui Ng

from RMIT and James Watson from the New South Wales Bar.

Chris Holt was also Australia's best legal publisher for other reasons. His personal values of social justice and intellectual inquiry, and vision of the need for the law to adapt and for the relations between

At \$12,000, the fact that The Federation Press has created the biennial Holt Prize as the richest legal book prize in Australia makes it an even more fitting tribute.

law, politics and society to be exposed and critiqued, flowed through into the hundreds of titles published under his watch.

What he contributed, not only by choosing those works but by helping many rising authors to craft and edit them for maximum impact – applying his own standards of intellectual integrity – was second to none.

My own experience of just how good Chris Holt really was came about when I was selecting who should publish my biography of Michael Kirby, a great Australian and the nation's most famous modern judge (Michael Kirby: Paradoxes & Principles, The Federation Press, 2011; paperback 2013). Some books don't have to struggle to attract publishers' attention, and this was one. Indeed, I was wined and breakfasted by the commissioning editors of several of the big houses, in various cities.

But then I met Chris Holt, and two things happened. First, he did not want

to simply get his hands on something that what would clearly sell well, even if mediocre. Better than anyone else I had talked with about the project, he grasped what it could and should be, from the outset. He wanted it to be a great book and laid out a challenge for how to make it one. Clearly, he had no confidence (yet) that I could do it. I liked that challenge.

Second, he had the nous to recognise that given the market, The Federation Press could afford to do a bigger print run on the first edition than the other publishers were proposing, and hence, could offer me a bigger advance ... which I needed to help fund the research. So Chris Holt not only out-thought the competition – without even trying, since he was just being himself – he also outbid them on their own commercial terms. These are reasons why I know, personally, that he was the best. And that was before we even got started on the book ... a process in which Chris Holt ended up being to me, what Katharine Graham of the

Washington Post was to the Watergate journalists, Bob Woodward and Carl Bernstein. (Young people can google them up.) The rest is history, and at the award ceremonies for the Walkley Book Award, the National Biography Award and the Prime Minister's Literary Awards, of which we made all the short-lists, there was no question in my mind that I'd chosen the best publisher.

At \$12,000, the fact that The Federation Press has created the biennial Holt Prize as the richest legal book prize in Australia makes it an even more fitting tribute.

As The Federation Press continues to grow and expand its range beyond the law, into more areas of social and political history and inquiry, there is no doubt Chris Holt would – and should – be quietly proud of his legacy, in his own quirky and self-effacing way. Chris Holt not only changed the publishing landscape of Australia through the ideas, knowledge and debates that his publishing gave to legal and political discourse, he helped change Australia itself, and will continue to do so for many years to come – all for the better.

2015 Holt Prize

Judges

The Hon Justice Stephen Gageler, Neil Williams SC and Professor Andrew Lynch

Joint winners

Giovanni Di Lieto and Scott Stephenson (received a cash prize of \$6000 each and a publishing contract)

Finalists

James Watson and Yee-Fui Ng (received a publishing contract)

Construing commercial contracts

Talitha Fishburn reports on *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited*; *Wright Prospecting Pty Limited v Mount Bruce Mining Pty Limited* [2015] HCA 37.

This case involved two separate but related proceedings. Both involved construing terms of a commercial contract. The contract in question was a mining royalty agreement entered into by Wright Prospecting Pty Limited, Hancock Prospecting Pty Limited (together, Hanwright), Hamersley Iron Pty Ltd and Mount Bruce Mining Pty Limited (MBM) and others in 1970. Under the agreement, MBM acquired iron ore mining rights in relation to 'temporary reserves' granted under the *Mining Act 1904* (WA) (the MBM Area) in exchange for royalties for iron ore won from the area. The obligation to pay royalties extended to 'all persons or corporations deriving title through or under' MBM to the 'MBM Area'.

At issue were two central questions. First, whether the areas the subject of claims for royalties by Hanwright were within the MBM Area, a question which turned on whether the term 'MBM Area' referred to the area of land occupied by MBM, or the mining rights. Secondly, and if so, whether entities deriving title to the land 'through or under' MBM were mining the iron ore in that area. In S99 of 2015, the court construed the term 'MBM Area' in clause 2.2 of the contract in answering the first question. In S102 of 2015, the court construed the term 'through or under' in clause 3.1 in answering the second.

S99 of 2015

The first issue before the court was whether the term 'MBM Area' refers to an area of land fixed with existing boundaries and documented on a map appended to the agreement (Hanwright's case) or was a reference to present and future rights in relation to temporary reserves (MBM's case). The court rejected MBM's case and upheld the New South Wales Court of Appeal's finding that properly construed, the term 'MBM Area' was a reference to the parcels of land identified in the contract, not the rights held under those reserves.

The plurality (French, Nettle and Gordon JJ) restated the applicable legal principles for construing a commercial contract. The rights and liabilities of parties under a provision of a contract are determined objectively¹ by reference to its text, context and purpose.² In relation to a commercial contract, it is necessary to ask what a 'reasonable businessperson' would have understood those terms to mean.³ That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.⁴

Further, ordinarily the process of construction is possible by reference to the contract alone. If a term of a contract is ambiguous or capable of more than one meaning, evidence of surrounding circumstances (events, circumstances and

things external to the contract, which may include its history, background, context and the market in which the parties were operating) can be adduced to contradict its plain meaning. However, evidence of parties' statements and actions reflecting their actual intentions and expectations is inadmissible.⁵ Recourse to the events, circumstances and things external to the contract may be necessary in identifying the commercial purpose or objects of the contract, and in determining the proper construction where there is constructional choice.

In deciding that the 'MBM Area' refers to the area of land fixed by the boundaries and which is indicated on a map appended to the agreement, the plurality considered the text, context and purpose of the agreement and applied the ordinary and unambiguous meaning of the relevant words of the definition of 'MBM Area'.⁶ Their Honours also considered the commercial circumstances which the agreement addressed and the purpose and object of the transaction it was intended to secure, namely to effect a division of the temporary reserves between Hanwright and MBM.⁷ Moreover, reading the contract as a whole other terms supported the term 'MDM Area' being referable to the physical areas identified in the contract.⁸

Kiefel and Keane JJ (with whom Bell and Gageler JJ agreed) also dismissed MBM's appeal. They held that the agreement gave MBM the opportunity to obtain iron ore from land affected by the existing temporary reserves, but did not confine it to the rights which existed under those reserves at the time. Their Honours referred to the fact that temporary reserves are rights of temporary occupancy. In their Honours' view, it would have been 'obvious' to the parties that the temporary reserves would be replaced by other tenements (such as leases) for the site to be exploited.⁹

S102 of 2015

The ore in relation to one of the areas the subject of the claim was being won by a joint venture pursuant to mining leases obtained conditional on surrender of earlier rights held by MBM. In these proceedings, the court considered whether the term 'through or under' in the phrase 'persons or corporations deriving title through or under' was limited to succession, assignment or conveyance (MBM's case) or whether it was sufficiently broad to cover a close practical or causal connection between the rights exercised by the joint venturers and the rights which MBM obtained from Hanwright under the agreement (*Hanwright's case*). The court unanimously overturned the New South Wales Court of Appeal's construction of 'through or under' and accepted Hanwright's submission. Namely, that 'through or under' did not mean the same thing as 'from', was not limited to formal succession, assignment or conveyance,

Talitha Fishburn, 'Construing commercial contracts'

and did not require proof of an 'unbroken chain of title'.

The plurality examined the language of the contract and the surrounding circumstances to support its construction. In the text of the agreement, they identified indications that the phrase 'through or under' is broader than formal succession, assignment or conveyance.¹⁰ For instance, the agreement contemplated changes in the 'MBM Area' over time. The term 'though or under' was used (c.f. 'from'). The plurality also stated that the expression, 'through or under' has been acknowledged to be a relatively flexible one.¹¹

Their Honours also found that the surrounding circumstances support the wider construction, including the fact that the agreement was drafted on the basis that it was unlikely that title, in a legal sense, to the temporary reserves included in the MBM Area would remain static.¹² Further, the wider construction accords with commercial reality, namely, that the extent of an iron ore body is unknown and work on one area is often dependent on work undertaken on an area adjacent to or near another area the subject of current exploration. The plurality held that those circumstances make clear that the wider construction is consistent with the purpose or object of the agreement and commercial reality.¹³

The plurality identified the error of the Court of Appeal as confining its analysis of the term 'through or under' by reference to its decision in *Sahab Holdings Pty Ltd v Registrar-General (No 2)*, construing an equivalent phrase in legislation,¹⁴ when the construction identified in that case would not necessarily arise on the construction of an agreement reached in a different context.

Justices Kiefel and Keane stated the issues as follows: 'The real question is whether [the Mining lease] affects an area of land title to which was a title deriving 'through or under' MBM.'¹⁵ Their Honours concluded that because it was a condition of the grant of a mining lease that MBM surrender certain sections, it was correct to say that title to the mining lease was derived 'through or under' MBM. Their Honours identified some extrinsic factors in support of this construction. This included the indefinite duration of the agreement and the parties' mutual knowledge that the temporary reserves would need to be converted into different tenure to enable further development.¹⁶ Kiefel and Keane JJ made reference to comments made in the course of reasons for the refusal of special leave in *Western Export Services Inc v Jireh International Pty Ltd*,¹⁷ to the effect that it was a requirement that there be an identified ambiguity before recourse may be had to the surrounding circumstances and the object of the transaction. Comments were also made by Bell and Gageler JJ.¹⁸ Kiefel and Keane JJ observed:

There may be differences of views about whether this requirement arises from what was said in *Codelfa*. This is not the occasion to resolve that question. It should, however, be observed that statements made in the course of reasons for refusing an application for special leave create no precedent and are binding on no one. An application for special leave is merely an application to commence proceedings in the court. Until the grant of special leave there are no proceedings inter partes before the court [footnotes omitted].

The question whether an ambiguity in the meaning of terms in a commercial contract may be identified by reference to matters external to the contract does not arise in this case and the issue identified in *Jireh* has not been the subject of submissions before this court. To the extent that there is any possible ambiguity as to the meaning of the words 'deriving title through or under', it arises from the terms of cl 24(iii) itself. Thus, in the face of an agreed ambiguity in the terms of the contract under consideration by the High Court, the scope of the circumstances in which recourse may be had to surrounding circumstances remains under question.

Endnotes

1. *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7.
2. *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24.
3. *Electricity Generation Corporation v Woodside*.
4. *Ibid*.
5. *Codelfa*.
6. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [58]–[61].
7. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [62].
8. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [63]–[67].
9. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [92]–[94].
10. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [75]–[76].
11. *Tanning Research Laboratories Inc v O'Brien* [1990] HCA 8; *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014).
12. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [77]–[78].
13. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [79]–[80].
14. [2012] NSWCA 42; (2012) 16 BPR 30,353 at 30,360 [28]; *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [81].
15. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [103].
16. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [104]–[106].
17. [2011] HCA 45; (2011) 86 ALJR 1 at 2 [2]; *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [111].
18. *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [118]–[122], their Honours otherwise agreeing with the reasons of Kiefel and Keane JJ at [123].

Backwards tracing

Angus O'Brien reports on *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2015] 3 WLR 599.

Introduction

'Tracing is the process of identifying a new asset as the substitute for the old.'¹ More particularly, where one asset is exchanged for another, tracing enables a trust beneficiary to treat the value in a substituted asset as representing the value in the original asset by making the substituted asset the subject of his claim.² Accordingly, tracing cannot avail a beneficiary where there is no value attributable to the original asset, such as where that value has been dissipated, e.g., by payment into an overdrawn bank account.³ *Ex nihilo nihil fit*: nothing comes from nothing.

Two principles might be thought naturally to follow.

First, where misappropriated trust monies are deposited into a mixed bank account, the beneficiary's claim is limited to such an amount as does not exceed the lowest balance in the account during the period between the payment in of the trust money and the time when the disentanglement of the account falls to be made (the 'lowest intermediate balance rule').⁴

Secondly, trust money cannot be traced into an asset acquired before the money was misappropriated from the trust since the asset acquired does not represent the trust money (the 'principle against backward tracing').⁵

Despite their apparent orthodoxy, these principles – and particularly the principle against backward tracing – have been the subject of academic controversy⁶ and conflicting authorities.⁷ The decision of the Privy Council (on appeal from the Court of Appeal of Jersey) in *Durant* was the first time that they were authoritatively considered by a final appellate court in the Anglo-Australian common law world.

Facts and litigation history

In early 1998, Mr Paulo Maluf, then former mayor of the Municipality of Sao Paulo (the 'municipality'), received 15 payments which were bribes in connection with a major public road building contract. From 9 January to 6 February 1998, funds equivalent to 13 of those payments, amounting to \$10.5m, were converted to US dollars and paid into an account under the control of Mr Maluf's son (the 'Chanani Account'). From 14 to 23 January 1998, 6 payments totalling \$13.1m were made from the Chanani Account to an account held by a BVI-registered company ('Durant') controlled by Mr Maluf and/or his son (the 'Durant Account'). From 22 January to 23 February 1998, 4 payments totalling \$13.5m were made from the Durant Account to an account held by another BVI-registered company that was a wholly-owned subsidiary of Durant ('Kildare' and the 'Kildare Account').

Their Lordships also rejected the plaintiffs' submission that money used to pay a debt can in principle be traced into whatever is acquired in return for the debt. That was described as 'a very broad proposition' that 'would take the doctrine of tracing far beyond its limits in the case law to date'

The municipality sought to trace the amount of \$10.5m to the Durant Account and thence to the Kildare Account. The defendants Durant and Kildare argued that their liability as constructive trustees was limited to \$7.7m for two reasons.

First, three of the payments into the Chanani Account were made after the final payment from the Chanani Account to the Durant Account. Accordingly, the principle against backwards tracing prevented those payments from being traced to the defendants.

Secondly, it was said that, by reason of the lowest intermediate balance rule, two payments from the Chanani Account to the Durant Account could not be said to have come from the bribes but must have come from other sources.

The defendants' arguments were unsuccessful in the Royal Court of Jersey and on appeal to the Court of Appeal. The defendants appealed again to the Privy Council.

Decision

Their Lordships recognised that '[c]onceptually the [defendants'] argument is coherent and it is supported by a good deal of authority.'⁸ This authority included a majority of the English Court of Appeal in *Foskett v McKeown* [1998] Ch 265, albeit that the relevant observations were obiter.⁹

Their Lordships also rejected the plaintiffs' submission that money used to pay a debt can in principle be traced into whatever is acquired in return for the debt. That was described as 'a very broad proposition' that 'would take the doctrine of tracing far beyond its limits in the case law to date'.¹⁰

However, their Lordships noted that, 'there may be cases where there is a close causal and transactional link between the incurring of a debt and the use of trust funds to discharge it'.¹¹ In those circumstances, since equity is concerned with

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Durant is a welcome decision for victims of fraud.

substance not form, it is permissible to look at the 'transaction overall'.¹² As a matter of policy, this was necessary given the sophistication of many modern frauds:

The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debts between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a coordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in a bank account of an intermediary before a reciprocal credit entry.¹³

Their Lordships accordingly rejected the defendants' submission that there could never be backwards tracing or tracing into an overdrawn bank account. However, for such tracing to occur, 'the claimant has to establish a coordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction, such as to warrant the court attributing the value of the interest acquired to the misuse of the trust fund.' Their Lordships recognised that, '[t]his is likely to depend on inference from the proved facts, particularly since in many cases the testimony of the trustee, if available, will be of little value.'¹⁴

Since certain admissions in the pleadings meant that the necessary connection existed on the facts of *Durant*, the Privy Council dismissed the defendants' appeal.¹⁵

Conclusion

Durant is a welcome decision for victims of fraud. English law's focus on substance rather than form ensures that it is well-equipped to enable victims of fraud to assert proprietary claims over substituted assets. However, the decision will be unwelcome for unsecured creditors of fraudsters. It has also

been said that the decision is disappointing for purists and that the need to assess whether the requisite connection between a series of transactions exists means each case will turn on its facts, with no general rules for guidance.¹⁶

Australian courts have not to date had cause to rule authoritatively upon the availability of backwards tracing.¹⁷ It remains to be seen whether they will follow *Durant*.

Endnotes

1. *Foskett v McKeown* [2001] 1 AC 102 at 127 per Lord Millett.
2. *Foskett v McKeown* [2001] 1 AC 102 at 128 per Lord Millett; Snell's Equity (33rd ed., 2015) at 786 [30–051].
3. *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2015] 3 WLR 599 at [17]; *Lewin on Trusts* (19th ed., 2014) at 2030 [41–109].
4. *Lewin on Trusts* (19th ed., 2014) at 2008 [41–070].
5. *Lewin on Trusts* (19th ed., 2014) at 2031 [41–112].
6. See especially Smith, 'Tracing into the Payment of a Debt' (1995) 54 CLJ 290 and *The Law of Tracing* (1997) at 146–152 and 215–217 (in defence of backward tracing); Conaglen, 'Difficulties with tracing backwards', (2011) 127 LQR 432 (against backward tracing).
7. See especially *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 (CA) at 216–217 per Dillon LJ, at 221 per Leggatt LJ and at 222 per Henry LJ; *Foskett v McKeown* [1998] Ch 265 (CA) at 283–284 per Scott V-C; *Shalson v Russo* [2005] Ch 281 at [141] per Rimer J.
8. *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2015] 3 WLR 599 at [18].
9. See *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2015] 3 WLR 599 at [24]–[26].
10. *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2015] 3 WLR 599 at [33].
11. *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2015] 3 WLR 599 at [34].
12. *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2015] 3 WLR 599 at [37].
13. *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2015] 3 WLR 599 at [38].
14. *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2015] 3 WLR 599 at [40].
15. *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2015] 3 WLR 599 at [42].
16. See STEP, 'UK Privy Council allows backward tracing of bribes paid to former Brazilian mayor', 6 August 2015, quoting Craig Connal QC of Pinsent Masons.
17. See *Grimaldi v Chameleon Mining NL (No. 2)* (2012) 200 FCR 296 at 447 [707]; *Georges v Seaborn International Pty Ltd* (2012) 206 FCR 408 at 440–442 [179]–[192]; *Conlan (as liquidator of Rowena Nominees Pty Ltd) v Connolly (as trustee for Connolly Family Trust)* [2011] WASC 160 at [52]–[96]; *Re Rowena Nominees Pty Ltd; Ex parte Conlan* [2006] WASC 69 at [64]–[67].

Gene patents and the limits of ‘invention’

Natasha Case reports on *D’Arcy v Myriad Genetics Inc.* [2015] HCA 35.

In *Myriad*, the appellant sought the revocation of three claims made in the respondent’s patent pursuant to s 138 of the *Patents Act 1990* (Cth) (Patents Act). The appellant argued that these claims were for naturally occurring genetic information and were not patentable inventions. The Federal Court,¹ and a unanimous Full Federal Court,² disagreed with this proposition.

The High Court unanimously upheld the appeal. In three judgments, the majority (French CJ, Kiefel, Bell and Keane JJ), Gageler and Nettle JJ in a joint judgment and Gordon J each took different approaches to the question of patentability.

The patent

The patent related to a human gene which produces a protein called BRCA1 (‘the patent’).³ Certain mutations in the BRCA1 protein, when detected in a woman, indicate likely susceptibility to breast and ovarian cancer.

Claims 1 – 3 of the patent (‘the claims’), which were challenged in the proceedings, extended to all mutations of the BRCA1 protein identified in tables attached to the patent. Each of the claims was to the ‘isolated nucleic acids’ which were capable of producing those mutant BRCA1 proteins.

The ‘isolated nucleic acids’, the subject of the claims, were collected from many patients over many years using well-known and long-standing techniques of extraction, isolation and amplification. Those processes were not the subject of the claims. Nor were the ‘isolated nucleic acids’ produced using these processes altered in substance from their natural state. In form, however, they were clearly different from their natural state. For this reason, they were said by the respondent (and by the courts below) to be a ‘product’.⁴

The majority judgment

Patentable subject matter

A patentable invention is defined in s 18(1)(a) of the Patents Act as ‘a manner of manufacture within the meaning of section 6 of the Statute of Monopolies’. The majority recognised the explicit role that this definition accorded to the courts in the development of patent law in Australia, and endorsed the ‘widening’ approach to patentability endorsed in *National Research Development Corporation v Commissioner of Patents* (NRDC).⁵ However, the majority cautioned that the courts should approach their role with ‘modesty and constraint’.⁶

In *NRDC*, the formula adopted for determining whether a claim could be classified as a ‘method of manufacture’ was the identification in the claim of:

- (a) an artificially created state of affairs and
- (b) the economic significance of the product.⁷

However, while satisfaction of those criteria would in many cases demonstrate patentability, it did not ‘mandate a finding of inherent patentability’.⁸ The question arising was:

...whether the claimed invention lay within the established concept of a manner of manufacture and, if not, whether it should nevertheless be included in the class of patentable inventions as defined in s 18(1)(a) of the Act.⁹

Where the subject matter of a patent is not clearly or analogously within the ‘established boundaries’ of patentability, the courts should be mindful of the ‘limits of judicial lawmaking’. At these outer reaches, the ‘purposive and consequentialist’¹⁰ implications of extending patentability to new classes of claim may be relevant to determining whether a class of claim was patentable.

Considerations at the boundaries of patentability

The majority identified four considerations, further and in addition to the *NRDC* criteria of artificiality and economic significance, as potentially relevant to determining whether to extend the concept of ‘manner of manufacture’ to include the claim:

3. Whether patentability would be consistent with the purposes of the Act and, in particular:
 - 3.1 whether the invention as claimed, if patentable under s 18(1)(a), could give rise to a large new field of monopoly protection with potentially negative effects on innovation;
 - 3.2 whether the invention as claimed, if patentable under s 18(1)(a), could, because of the content of the claims, have a chilling effect on activities beyond those formally the subject of the exclusive rights granted to the patentee;
 - 3.3 whether to accord patentability to the invention as claimed would involve the court in assessing important and conflicting public and private interests and purposes;

Natasha Case, 'Gene patents and the limits of 'invention''

4. Whether to accord patentability to the invention as claimed would enhance or detract from the coherence of the law relating to inherent patentability;
5. Relevantly to Australia's place in the international community of nations:
 - 5.1 Australia's obligations under international law;
 - 5.2 The patent laws of other countries;
6. Whether to accord patentability to the class of invention as claimed would involve law-making of a kind which should be done by the legislature.¹¹

The respondent sought to characterise the claims as claims for a chemical compound, falling squarely within the established boundaries of 'method of manufacture'.¹² The court found that the claimed product was 'genetic information'¹³ not differing in substance from naturally occurring genes and therefore not falling within the established boundaries of the concept of 'method of manufacture'.¹⁴

Consequently, consideration of whether that concept should be applied or extended to incorporate 'genetic information' as a new class of claim was required.¹⁵

Application of the considerations

The court considered that factors 3, 4, and 6 were significant in this case.¹⁶

Under consideration 3, the court observed that the claimed product was as a class, large, wide, diverse, without limit and unquantified. Breach of the patent could not be predicted and therefore risked a 'chilling effect' on innovative activity falling outside the purpose of the patent.¹⁷

Under consideration 4, the court found that both the Federal Court and Full Federal Court had incorrectly assumed that the claimed product was 'within existing conceptions of 'manner of manufacture''¹⁸ an 'assumption which elevates form over substance and to the detriment of the developmental function entrusted to the court'.¹⁹

Under consideration 6, the court found that the extension of the concept of 'method of manufacture' to isolated nucleic acids was 'not appropriate for judicial determination'²⁰ and was a matter appropriate for the parliament to determine.

Gageler and Nettle JJ

Justices Gageler and Nettle cast the issue upon which the appeal turned as that of 'inventiveness', notwithstanding that inventiveness was conceded by the appellant.

Their Honours relied upon and extended the decisions in *Commissioner of Patents v Microcell Ltd*²¹ and *NV Phillips Gloeilampenfabriken v Mirabella International Pty Ltd*²² (*Mirabella*) to find that inventiveness was (or to restore it as) a threshold requirement necessary to establish the subject matter of a patent and therefore for assessing patentability.²³ Their Honours reasoned that as a matter of substance, the monopoly granted by a patent is bounded by the inventive step embodied in the claim, stating '[m]onopolies are granted for inventions, not for the inventiveness of the drafting with which applicants choose to describe them'.²⁴

On their Honours' analysis of the claims and the science behind them, no invention could be identified in the claims.²⁵ In truth, their Honours found, the claims were for the products of a process. The process was not Myriad's invention and the product itself was not new but merely a discovery.²⁶ Consequently, the patent must be revoked.²⁷

Their Honours reasoned that as a matter of substance, the monopoly granted by a patent is bounded by the inventive step embodied in the claim, stating '[m]onopolies are granted for inventions, not for the inventiveness of the drafting with which applicants choose to describe them'

Gordon J

Justice Gordon found that the *NRDC* test was inapposite because that case involved a process claim and the present appeal involved a product claim.²⁸ The erroneous application of that test by the courts below had produced an incorrect approach to the construction of the claims 'as claimed'.

Natasha Case, ‘Gene patents and the limits of ‘invention’’

On a strict approach to the construction of the claims, her Honour determined that their subject matter could not be comprehensively defined by reference to a chemical structure or particular product, was not invented by Myriad in any relevant sense and were too broad. For these reasons, the claims were not ‘patentable subject matter’.²⁹

Conclusion

The majority observed that this case was not about ‘gene patenting generally’. However, the reasoning of the majority accepted that the claims were *prima facie* patentable when assessed against the *NRDC* test and found it necessary to take an additional step in order to resolve the question of whether isolated nucleic acids were patentable.

Neither Gageler and Nettle JJ nor Gordon J applied the *NRDC* test to the claims. Both considered the question of patentability to be determined by the application of different considerations.

Gageler and Nettle JJ applied a threshold test of ‘inventiveness’ to the concept of ‘manner of manufacture’, a consideration arising before the application of the *NRDC* test. Gordon J did not consider the test for ‘inventiveness’ in *Mirabella* to be a separate threshold test but a test of general application. She confined the *NRDC* test to particular types of claim (process claims). The decisions of the majority, Gageler and Nettle JJ arguably commend a cumulative, three-stage test for patentability.

The majority observed that this case was not about ‘gene patenting generally’

Endnotes

1. *Cancer Voices Australia v Myriad Genetics Inc* (2013) 99 IPR 567.
2. *D’Arcy v Myriad Genetics Inc* (2014) 224 FCR 479.
3. Each judgment describes the biology the subject of the claims in detail. Any error in the representation of the claims is the author’s own.
4. *Myriad* at [73].
5. (1959) 102 CLR 252 at 269.
6. *Myriad* at [24] – [26].
7. *Ibid* at [19] citing *NRDC* at 277.
8. *Ibid*. See also Gageler & Nettle JJ at [167] and Gordon J at [219].
9. *Ibid* at [24].
10. *Ibid*.
11. *Ibid* at [30].
12. *Ibid* at [27] and [86].
13. *Ibid* at [89].
14. *Ibid* at [93].
15. *Ibid* at [28].
16. *Ibid* at [31] – [36].
17. *Ibid* at [93]. See also Gordon J at [259] – [264].
18. *Ibid* at [22] and [74], [88].
19. *Ibid* at [88].
20. *Ibid* at [94].
21. (1959) 102 CLR 232.
22. (1995) 183 CLR 655.
23. *Myriad* at [133].
24. *Ibid* at [145].
25. *Ibid* at [162].
26. *Ibid* at [155] and [164].
27. *Ibid* at [123] and [152].
28. *Ibid* at [278].
29. *Ibid* at [229] and [261].

Verbatim

Gladio Pty Ltd v Buckworth [2015] NSWSC 922 (McDougall J – 14 July 2015)

[49] .. Not surprisingly, Mr Lane’s reply led to considerable discussion between the directors of Ashdown. Those directors included (I think this is a recognised collective noun) a quarrel of lawyers: highly experienced and well-regarded legal practitioners. One matter which arose out of those discussions was ‘an additional rule to cover shareholders who are not real persons’ ..

Enforceability of lease executed in breach of statute

Uche Okereke-Fisher reports on *Gnych v Polish Club Limited* [2015] HCA 23.

Introduction

The High Court of Australia recently considered the issue of statutory illegality in the matter of *Gnych v Polish Club Limited* [2015] HCA 23. In this case, the court unanimously allowed an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales and, in doing so, held that a lease granted in contravention of s 92(1)(d) of the *Liquor Act 2007* (NSW) (Liquor Act) was not void and unenforceable.

Facts

The lessor, Polish Club Limited, (Club) was a registered club and the holder of a license under the Liquor Act. The club agreed in principle that Mr and Mrs Gnych (lessee) would be granted a lease of part of the club's licensed premises, namely, the restaurant area together with the kitchen attached to the restaurant, an office next to the kitchen and a store room and toilet. In addition, it was agreed in principle that the lessee would have non-exclusive access to the 'mirror room', for overflow customers of the restaurant and to cater for larger functions.

The lessee drafted a lease agreement proposing the terms of the lease. The club resolved to accept the terms of the lease but the club's resolution was not communicated to the lessee. Subsequently, the lessee's solicitors sent the club a draft lease and negotiations ensued about the terms of the lease. However, no written agreement was ever finalised.

The lessee's restaurant operated successfully. However, relations between the lessee and the club deteriorated. On 7 July 2013, the club's solicitors sent the lessee's solicitors a letter advising the club's decision to terminate the relationship and requesting that the lessee vacate the premises. On 5 August 2013, the lessee was excluded from the premises.

The club contended that the lease, which came into existence upon the lessee's election to take advantage of s 16 of the *Retail Leases Act 1994* (NSW) (Retail Leases Act)¹, contravened s 92(1)(d) of the Liquor Act and was therefore void and unenforceable. The lessee argued that the contravention of s 92(1)(d)² was a result of the club's failure to have the lease approved by the NSW Independent Liquor and Gaming Authority (Authority) before granting the lessee possession of part of the licensed premises (Breach) and to hold the lease to be void and unenforceable would prejudice the lessee without furthering the objects of the Liquor Act.

The court stated that the question whether a statute which contained a unilateral prohibition on entry into a contract is void was a matter of construction and depended upon the mischief the statute was designed to prevent, its language, scope and purpose and the consequences for the innocent party.

The main issue between the parties before the primary judge and on appeal concerned the club's contention that the lease was illegal under s 92(1) of the Liquor Act and that consequently the lease was void and unenforceable.

Supreme Court

At trial³, the primary judge (Ball J) held that, although there had been a breach of s 92(1)(d), the lease was not unenforceable. His Honour's view was that the Breach did not affect the lessee's leasehold interest because their claim did not depend on any illegality. The lease arose from the conduct of the parties and pursuant to s 16(1) of the Retail Leases Act. His Honour went further to state that the lessee was entitled to an injunction restraining the club from interfering with their rights of exclusive possession.

As to the mirror room, the primary judge held that the lessee was entitled to an order for specific performance of an agreement to license that area to them for a period of five years.

Court of Appeal

On appeal⁴, the Court of Appeal (Tobias AJA, with whom Meagher and Leeming JJA agreed) held that s 92(1)(d) of the Liquor Act rendered any lease between the lessee and the club unenforceable. The Court of Appeal stated that the legislative purpose of the Liquor Act, as well as the policy behind the prohibitions expressly stated in s 92, required the conclusion that any lease caught by that provision was not to be enforced by the courts.

High Court

The High Court⁵ allowed the appeal, holding that on a proper construction of the Liquor Act, the breach of s 92(1)(d) did not automatically render the lease void and unenforceable.

Uche Okreke-Fisher, 'Enforceability of lease executed in breach of statute'

The court noted a general disinclination on the part of the courts to allow a party to a contract to take advantage of its own wrongdoing⁹ except in cases where the legislation which creates the illegality is sufficiently clear as to overcome that disinclination.

The court stated that the question whether a statute which contained a unilateral prohibition on entry into a contract is void was a matter of construction and depended upon the mischief the statute was designed to prevent, its language, scope and purpose and the consequences for the innocent party.

The court held that the scope of the prohibition in s 92(1)(d) of the Liquor Act can be understood only by reference to the dual characteristics of a lease being, an executory contract and an executed demise.⁶ Accordingly, s 92(1)(d) is not directed at the lease between the club and lessee; rather, it is directed at the conduct of the club in executing the lease. Section 92(1)(d) proscribes the grant by the club rather than that which is granted and does not, proscribe the performance by the parties of their obligations under the granted lease.⁷

The court considered that it would be an 'unattractive result' if the club was able to terminate a freely-entered contractual arrangement, by relying on its breach of the statute, to the detriment of the lessee, as argued by the club.⁸ The court noted a general disinclination on the part of the courts to allow a party to a contract to take advantage of its own wrongdoing⁹ except in cases where the legislation which creates the illegality is sufficiently clear as to overcome that disinclination. The club's breach of s 92(1)(d) was complete when the club granted the

lessee exclusive possession. The subsequent observance by both parties of the terms of the lease was not prohibited.¹⁰

The High Court was of the view that the provision of a statutory penalty for breach of s 92(1) meant that there was no need to prevent the lease and the Court of Appeal erred in holding that the purpose of the Liquor Act was not compatible with enforcing the lease.¹¹

Endnotes

1. This provides 'the term for which a retail shop lease is entered into ... must not be less than 5 years'.
2. Section 92(1)(d) provides: 'A licensee or a related corporation of the licensee must not ... lease or sublease any other part of the licensed premises except with the approval of the Authority'.
3. *Gnych v Polish Club Limited* [2015] HCA 23 at [21]–[24].
4. *Gnych v Polish Club Limited* [2015] HCA 23 at [26]–[28].
5. French CJ, Kiefel, Keane and Nettle JJ in a joint judgment with Gaegler J agreeing with the orders made in separate reasons.
6. *Gnych v Polish Club Limited* [2015] HCA 23 at [41] referring to Deane J in *Progressive Mailing House Pty limited v Tabali Pty Limited* (1985) 157 CLR 17 at 51.
7. *Gnych v Polish Club Limited* [2015] HCA 23 at [43].
8. *Gnych v Polish Club Limited* [2015] HCA 23 at [44].
9. *Gnych v Polish Club Limited* [2015] HCA 23 at [45].
10. *Gnych v Polish Club Limited* [2015] HCA 23 at [46].
11. *Gnych v Polish Club Limited* [2015] HCA 23 at [50].

Verbatim

Macoun v Commissioner of Taxation [2015] HCATrans 257 (9 October 2015)

Ellicott QC: ... That is, I would suggest, one of the most telling statements of principle in relation to the interpretation of statutes. Your Honours, I suggest that the most important question which arises in this case is to identify the privileges and immunities which were appropriate and needed by the specialised agencies and to ask the question why. In searching for the answer to that question, one is most likely to find the meaning of the text in this case. One could address the

court, take your Honours to the provisions, go through them and say, well, they are ordinary words, they should be given the benefit of construction, and sit down, and we would be on the 11 o'clock plane. But, your Honours, one has to recognise that -

French CJ: It is a very attractive proposition.

Mr Ellicott: I do not think that is going to happen

High Court upholds constitutional validity of political donations legislation

Madeleine Ellicott reports on *McCloy v New South Wales* [2015] HCA 34.

In *McCloy*, the High Court considered whether certain provisions of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) (EFED Act) that impose a cap on political donations, prohibit property developers from making such donations and restrict indirect campaign contributions impermissibly infringed the implied freedom of political communication.

The majority (French CJ, Kiefel, Bell and Keane JJ in a joint judgment, Gageler J and Gordon J) found that none of the impugned provisions were invalid. Nettle J upheld the challenge to Division 4A of the EFED Act but found that none of the other impugned provisions were invalid. The court diverged on the issue of the appropriate methodology for analysing burdens on the freedom of political communication under the test in *Lange v Australian Broadcasting Corporation*¹.

Background

Mr McCloy, the first plaintiff, was a director of the second and third plaintiffs, McCloy Admin and North Lakes. From about October 2010, Mr McCloy made political donations exceeding the cap imposed in Division 2A of Part 6 of the EFED Act. Further, McCloy Admin made an indirect campaign contribution in full or part payment of the remuneration of a member of the staff of the election campaign of a candidate in the March 2011 New South Wales state elections.²

The plaintiffs brought a special case in the High Court challenging the following provisions of the EFED Act:

- The scheme for imposing caps on donations (Division 2A of Part 6);
- The banning of donations from all categories of prohibited donors (Division 4A of Part 6); and
- The banning of indirect donations (s 96E).

The 'Lange' test

It was not in dispute³ that the test to be applied to determine whether a law infringes the implied freedom is that in *Lange v Australian Broadcasting Corporation*,⁴ as restated in *Coleman v Power*.⁵ This test involves a two-limb analysis: first, whether the law effectively burdens the freedom and second, if the law effectively burdens that freedom, whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.⁶

In *McCloy*, the approach adopted by the plurality and the other

three judges as to the formulation of the *Lange* test diverged. At the outset of their judgment, the plurality broke down the *Lange* test into three questions, as follows:⁷

1. Does the law effectively burden the freedom in its terms, operation or effect?
2. If 'yes' to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object?

Their Honours also stated that the 'proportionality' test involved in answering the third question had three stages, being whether the law is justified as suitable, necessary and adequate in its balance.⁸ According to the plurality, suitability requires 'a rational connection to the purpose of the provision'. The requirement that it be 'necessary' requires that 'there is no obvious and compelling alternative, reasonably practicable means of achieving the purpose which has a less restrictive effect on the freedom'. Finally, adequacy of balance requires a value judgment describing the balance between the importance of the purpose served by the restrictive measure, and the extent of the restriction it imposes on the freedom.⁹ In formulating this test, their Honours had regard to analogous criteria developed in other jurisdictions (particularly in Europe and the United Kingdom).¹⁰

In contrast, the other three justices eschewed the need for a reformulation of the *Lange* test. In particular, Gageler J was critical of the plurality's approach, stating that:

This case does not require a choice to be made between the alternative expressions of the 'reasonably appropriate and adapted' formulation. Much less does this case warrant consideration of the benefits and detriments of the wholesale importation into our constitutional jurisprudence, under the rubric of proportionality, of a particular and prescriptive form of proportionality analysis which has come to be applied in relation to the Canadian Charter of Rights and Freedoms and the European Convention on Human Rights'.¹¹

Gordon J stated that the questions raised in the special case could be answered 'by reference to the known questions and tools' and noted that no party had contended for a revised test.¹² Similarly, Nettle J endorsed the two-limbed test in *Lange*, noting that 'the standard of appropriateness and adaptedness does vary according to the nature and extent of the burden'.¹³

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Was the freedom burdened?

It was not disputed that the provisions of the EFED Act effectively burdened on the freedom, as reflected in the previous judgment of the court in *Unions NSW v New South Wales*,¹⁴ as they restricted the funds available to political parties to meet the costs of political communication.¹⁵ The plaintiffs’ submission that the provisions had a further effect on the freedom, namely, on the ability of donors to make substantial political donations in order to gain access and make representations to politicians and political parties, was rejected, the plurality noting that the implied freedom was not an ‘individual right’.¹⁶

Legitimate purpose/reasonably and appropriately adapted

The plurality, applying the three-step test set out above, held that while each of the provisions did burden the implied freedom, they had been enacted for legitimate purposes, advanced those purposes by rational means that ‘not only do not impede the system of representative government ... but enhance it’, were adequate in their balance, and that there are no obvious and compelling alternative and reasonably practicable means for achieving that purpose.¹⁷ In particular, their Honours held that the impugned provisions were clearly directed to the stated object of the EFED Act, being the prevention of ‘corruption and undue influence in the government of the state’.¹⁸ They also served an ancillary purpose of ‘overcoming perceptions of corruption and undue influence’. Their Honours rejected the plaintiffs’ argument, founded in United States jurisprudence such as the decision of Kennedy J in *Citizens United v Federal Election Commission* that ‘ingratiation and access ... are not corruption’,¹⁹ and in so doing, underlined the risk of perceived ‘clientelism’ to the political process.²⁰

Gageler J concluded that the restrictions on political communication imposed by the provisions were no greater than were reasonably necessary to be imposed in pursuit of a compelling statutory object.²¹ Gordon J, applying a two-step *Lange* analysis, found that while each provision burdened the implied freedom, they served a legitimate object and were reasonably and appropriately adapted to serving that end.²²

Nettle J upheld the validity of the political donation caps and restrictions on indirect contributions, however held that the prohibited donor provisions were invalid as they failed the second limb of the *Lange* test; in particular, his Honour noted

The plurality’s approach to proportionality testing in this case may have significance, not only for cases considering the implied freedom, but also more broadly.

that ‘burdens which discriminate between, or have an unequal effect upon, segments of the community, political parties and candidates or certain political viewpoints require strong justifications’.²³

Conclusion

The plurality’s approach to proportionality testing in this case may have significance, not only for cases considering the implied freedom, but also more broadly. In particular, the issue of whether the proposed method of analysis should also be applied in cases involving purposive and incidental powers, as foreshadowed in the joint judgment at [3], is a question for another day.

Endnotes

1. (1997) 189 CLR 520.
2. *McCloy v New South Wales* [2015] HCA 34 at [277] – [279].
3. *Ibid* at [308].
4. (1997) 189 CLR 520.
5. (2004) 220 CLR 1.
6. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–8; *Coleman v Power* (2004) 220 CLR 1, 50–51 (McHugh J), 77–8 (Gummow and Hayne JJ), 82 (Kirby J).
7. *McCloy v New South Wales* [2015] HCA 34 at [2], [66] – [93].
8. *Ibid*.
9. *Ibid*.
10. *Ibid* at [3].
11. *Ibid* at [140].
12. *Ibid* at [308] and [311].
13. *Ibid* at [220] and [222].
14. [2013] HCA 58.
15. *McCloy v New South Wales* [2015] HCA 34 at [30].
16. *Ibid* at [25] – [30].
17. *Ibid* at [5].
18. *Ibid* at [33].
19. 558 US 310 at 360 (2010).
20. *McCloy v New South Wales* [2015] HCA 34 at [36].
21. *Ibid* at [98].
22. *Ibid* at [311].
23. *Ibid* at [251].

Accusation and adjudication don't mix

Brodie Buckland reports on apprehended bias and incompatibility of roles in *Isbester v Knox City Council* [2015] HCA 20; (2015) 89 ALJR 609.

Introduction

In *Isbester*, the High Court considered whether the test for apprehension of bias was fulfilled where one member of a three-person panel reviewing whether a dog should be destroyed had earlier brought charges in her official capacity concerning that dog. In so doing, the High Court applied the *Ebner* test¹ to circumstances where the apprehension of bias was said to arise as a result of that panel member occupying two incompatible roles.

The facts

Ms Isbester, the appellant, was the owner of a Staffordshire terrier named Izzy, and was charged in the Ringwood Magistrates' Court with an offence relating to Izzy having attacked a person and caused serious injury. The appellant pleaded guilty. While it was open to the Magistrates' Court to order the destruction of the appellant's dog, no such order was sought or made.

The charges in the Magistrates' Court were brought by Ms Kristen Hughes, an employee of the respondent, Knox City Council. Ms Hughes was the informant on record in the Magistrates' Court proceedings, and instructed solicitors to prosecute the charges and negotiate pleas with the appellant. The day after the appellant was convicted, Ms Hughes drafted a letter to the appellant informing her that the council was convening a Panel to consider an order for destruction of Izzy. That Panel, it was said, would consist of three Council officers: a chairperson, who would make the relevant decision, Ms Hughes, and a third officer who had not had any prior involvement in the matter.

The material before the Panel included material that was the result of Ms Hughes' investigations, and Ms Hughes accepted in cross-examination at trial that she played a major role in the Panel's decision-making process. The order for Izzy's destruction was, however, made by the chairperson and not Ms Hughes.

The appellant sought judicial review of the order for Izzy's destruction.

First instance

The appellant sought orders in the nature of certiorari and prohibition from the Supreme Court of Victoria on a number of grounds, including apprehended bias. Emerton J identified the 'double-might' test for apprehended bias from *Ebner v Official Trustee in Bankruptcy*, namely, that, 'a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.'²

Her Honour observed that the required standard of freedom from apprehended bias is not the same for a decision-maker that is not a judicial officer:³ what amounts to apprehended bias depends upon the circumstances.

In assessing the standard required in the instant case, Emerton J had regard to *McGovern v Ku-ring-gai Council*,⁴ which concerned an apprehension of bias in the approval of a development application by a local council. As Basten JA observed in *McGovern*, a local council was quite different from a court, and, given the difference in context, 'the fair-minded observer will expect little more than an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the application, the matters required by law to be taken into account and any recommendation of council officers.'⁵

Emerton J held that none of the indicia of bias were present in circumstances where a decision-maker had been involved in an earlier prosecution, as a fair-minded observer would not apprehend that there might be bias based on that fact alone. The appellant's action was dismissed.

Appeal to the Court of Appeal

The appellant's appeal to the Victorian Court of Appeal was limited to the ground of apprehended bias. The Court of Appeal distinguished, on three bases, earlier cases⁶ in which apprehended bias was made out in relation to members of decision-making panels who had acted as accusers of the person before those panels: first, that the Panel in the instant case had not conducted a quasi-judicial hearing; second, that Ms Hughes, despite her role as informant in the Magistrates' Court, did not occupy the role of the accuser in the Panel proceedings; and, third, that Ms Hughes had no personal interest in the matters before the Panel.

The appellant's appeal to the Court of Appeal was dismissed, and the appellant appealed to the High Court.

Appeal to the High Court

The question before the High Court was whether Ms Hughes' participation in the prosecution of the charges in the Magistrates' Court and subsequent Panel process led to an apprehension of bias. In answering that question, the majority (Kiefel, Bell, Keane and Nettle JJ) described the *Ebner* test as requiring two steps: first, 'the identification of what it is said might lead a decision-maker to decide a case on other than its legal or factual merits', with the nature of any interest in the outcome of litigation clearly spelled out; second, 'the logical

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connection between that interest and the feared deviation from the course of deciding the case on its merits.’⁷

As an aspect of wider principles of natural justice, how the *Ebner* test is applied depends upon the circumstances in which the power is exercised, including:

- the nature of the decision and its statutory context;
- what is involved in making the decision; and
- the identity of the decision-maker.⁸

The majority considered that *Minister for Immigration v Jia Legeng*⁹ and *McGovern*,¹⁰ central to the decisions of Emerton J and the Court of Appeal, had limited application in the instant case, as those cases did not concern a situation where a person’s involvement in a decision-making process might be inappropriate because of that person’s involvements in prior events.¹¹ Rather, the majority relied upon cases that the Court of Appeal had distinguished,¹² and upon statements made in obiter in *Ebner*,¹³ for the proposition that a person who has performed the role of accuser or prosecutor cannot then act as a member of a tribunal hearing that charge.

Occupying both roles in relation to the same matter was incompatible with the rules of natural justice. Ms Hughes’ role as prosecutor or moving party before the Magistrates’ Court, although at an end before the Panel process began, could not be separated from her presence on the Panel.¹⁴ Ms Hughes had a personal investment, based upon her earlier role in the prosecution, in ensuring the Panel made an order for the destruction of Izzy¹⁵ – if a person has acted as both accuser and adjudicator, then the logical connection between that person’s interest and a deviation from a decision made on the merits is obvious.¹⁶ The majority held that Ms Hughes’s involvement in the Panel process gave rise to an apprehension of bias justifying

relief, even though Ms Hughes did not herself make the order for destruction. The appeal was allowed, and the council’s order was quashed.

Gageler J, concurring in the result, opined that the test for the appearance of a disqualifying bias should focus on the overall integrity of the decision-making process, especially in circumstances where the process involved multiple stages or decision-makers.¹⁷

Overall, this case makes two points clear. First, an apprehension of bias can arise as a result of the position a decision-maker has occupied prior to undertaking a particular decision. Second, what constitutes a disqualifying bias is to be judged in the circumstances enumerated above without undue reliance on precedent.

Endnotes

1. *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
2. *Ibid*, at 344.
3. Relying upon the majority in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 563, which afforded a wider scope for possible bias to the Minister due to his political position and democratic oversight of his position.
4. (2008) 72 NSWLR 504.
5. *Ibid*, at [80] per Basten JA.
6. *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509; and *Dickason v Edwards* (1910) 10 CLR 243.
7. *Isbester*, at [21].
8. *Ibid*, at [23].
9. (2001) 205 CLR 507.
10. (2008) 72 NSWLR 504.
11. *Ibid*, at [28].
12. *Ibid*, at [34–37], citing *Stollery and Dickason*, above n vi.
13. *Isbester*, at [38].
14. *Ibid*, at [42].
15. *Ibid*, at [46].
16. *Ibid*, at [49].
17. *Ibid*, at [58].

Saving ICAC

Glenn Fredericks reports on *Duncan v Independent Commission Against Corruption* [2015] HCA 32.

On 6 May 2015, the NSW Parliament enacted the *Independent Commission Against Corruption (Validation) Act 2015* (NSW) (the Validation Act) to preserve the validity of decisions and actions of the Independent Commission Against Corruption (ICAC), which would otherwise be beyond power by reason of the High Court's decision in *Independent Commission Against Corruption v Cunneen*¹ (Cunneen's case)².

The proceedings in *Duncan v Independent Commission Against Corruption* [2015] HCA 32 (Duncan) challenged the effectiveness of the Validation Act in saving from invalidity those actions and decisions. The High Court rejected the challenge to the Validation Act.

Background

The High Court held in *Cunneen's case* that ICAC has the power to investigate conduct which is alleged to be corrupt on the grounds that it compromises the probity of public administration but that ICAC does not have the power to investigate conduct which allegedly compromises the efficacy of public administration³.

The Validation Act inserted a new part 13 at the end of schedule 4 of the ICAC Act, consisting of two clauses. Clause 34 includes a definition of 'relevant conduct' which purports to include within the definition of corrupt conduct in s 8(2) of the ICAC Act conduct which 'affects, or could adversely affect, the efficacy (but not the probity) of the exercise of official functions'. Clause 35 provides that any actions taken by ICAC before 15 April 2015 (the date that the High Court handed down its reasons in *Cunneen's case*), which would have been validly done if 'corrupt conduct' included 'relevant conduct', is taken to have been, and always to have been, validly done. That is, the definition of corrupt conduct in s 8(2) of the ICAC Act would apply to acts prior to 15 April 2015 which affected not only the probity, but also the efficacy of the exercise of public functions.

Mr Duncan (and others) had been found by ICAC to have engaged in a number of instances of corrupt conduct, in each instance with the intention of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeid family in the Mount Penny tenement.⁴ It was common ground in the proceedings in the High Court that, as a result of the decision in *Cunneen's case*, these findings were affected by jurisdictional error.⁵ Accordingly, if the Validation Act was held to be invalid, then such findings and the investigation itself were beyond the power of ICAC.

The challenge in *Duncan*

The key issue in the challenge to the Validation Act was whether part 13 changed the substantive law as to what was corrupt conduct under the ICAC Act prior to 15 April 2015 or whether it was, in effect, a direction to the courts to regard relevant conduct as being corrupt conduct. Mr Duncan argued that:⁶

- part 13 did not validate invalid acts of ICAC, rather it directed courts to treat as valid acts that were, and which remained, invalid. On this basis, this case was distinguishable from previous decision of the High Court which had upheld the validity of laws which acted retrospectively to make invalid acts valid;
- by directing the courts to treat as valid that which part 13 had left invalid, it contravened the principle in *Kable v Director of Public Prosecutions (NSW)*⁷ (*Kable*) as it undermined the institutional integrity of the Supreme Court of New South Wales; and
- part 13 offended the principle in *Kirk v Industrial Court (NSW)*⁸ (*Kirk*) by taking from the Supreme Court the power to grant relief on account of jurisdictional error.

Judgment of the plurality

Effect of part 13

The plurality⁹ stated that to give part 13 the construction contended for by Mr Duncan was implausible and that it was not sustainable on a fair reading of the relevant provisions¹⁰. Rather, their Honours found that by a plain reading of the words of part 13, the part has the effect that ICAC's acts in investigating into, and reporting on, corrupt conduct (where that conduct occurred on or before 15 April 2015) were valid as if the definition of corrupt included 'relevant conduct' (i.e. conduct which affected the efficacy but not the probity of public administration). The plurality stated that part 13 has the effect of amending the application of s 8(2) to acts prior to 15 April 2015 and changed the meaning of 'corrupt conduct' as a matter of substantive law from the meaning given in *Cunneen's case* in respect of those acts¹¹.

Kable

Their Honours held that the starting point for considering whether the legislation offended the *Kable* principle is to ask whether the law in question would have offended chapter III of the Constitution if that law had been a law of the Commonwealth¹². The plurality reviewed a number of

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authorities on this issue and found that part 13 would not be inconsistent with chapter III of the Constitution¹³. Their Honours stated that it was well-settled that a statute which altered substantive rights does not involve an interference with judicial power contrary to chapter III, even where those rights were in issue in pending litigation.¹⁴ Further, a statute which retrospectively validated an administrative act would not be invalid for that reason.¹⁵ The plurality found that there was no attempt by part 13 to direct the courts as to the manner and outcome of the exercise of their jurisdiction, which would be invalid or to confer a power or function on a Supreme Court which might have been consistent with chapter III.¹⁶

Kirk

The plurality found that part 13 did not offend the principle in *Kirk* as it did not attempt to withdraw any supervisory jurisdiction of the Supreme Court. Rather it changed the substantive law as to what constitutes corrupt conduct and the Supreme Court retained its supervisory jurisdiction over ICAC¹⁷.

Alternative argument

An alternative argument was put by Mr Duncan that as federal jurisdiction had been engaged, due to the proceedings in the Court of Appeal involving a question arising under the *Corporations Act 2001* (Cth), part 13 could only apply to proceedings through s 79 of the Judiciary Act which would directly engage chapter III. The plurality found that it was not necessary to consider the interaction between part 13 and chapter III on this basis as part 13 was not inconsistent with chapter III.¹⁸

Judgments of Gageler J and Nettle and Gordon JJ

Gageler J delivered a separate judgment agreeing with the orders proposed by the plurality.

His Honour found that Duncan's 'constitutional argument teeter[ed] on a narrow proposition of statutory construction'¹⁹

and, on applying statutory and common law principles of statutory interpretation, found that part 13 has the effect of making past invalid acts valid.²⁰

Nettle and Gordon JJ also agreed with the orders proposed by the plurality, but decided that part 13 did not have the effect of amending s 8(2) of the ICAC Act in its application to acts done before 15 April 2015. Their Honours held instead that, the part created a different legal regime with the effect that there is an expanded concept of corrupt conduct in operation prior to 15 April 2015 and that part 13 validates acts taken prior to 15 April 2015 in accordance with that different legal regime.²¹

Endnotes

- [2015] HCA 14; 89 ALJR 475; 318 ALR 391.
- New South Wales, Parliamentary Debates House of Representatives, 6 May 2015, 175 (Bruce Baird).
- Cunneen's case at [2] & [3] per French CJ, Hayne, Kiefel and Nettle JJ.
- Duncan v Independent Commission Against Corruption* [2014] NSWSC 1018; (2014) 311 ALR 750 at [7].
- Duncan*, at [7].
- Ibid* at [9].
- [1996] HCA 24; 189 CLR 51; 70 ALJR 814; 138 ALR 577.
- [2010] HCA 1; 239 CLR 531; 84 ALJR 154; 262 ALR 569; 113 ALD 1; 190 IR 437.
- French CJ, Kiefel, Bell and Keane JJ.
- Duncan*, at [10].
- Ibid* at [12].
- Ibid* at [17] citing *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [561562 \[14\]](#); [\[1998\] HCA 54](#)
- Ibid* at [18].
- Ibid* at [26].
- Ibid* at [19] quoting *Nelungaloo Pty Ltd v The Commonwealth* [1947] HCA 58; (1948) 75 CLR 495 at 579 per Dixon J.
- Ibid* at [27] and [28].
- Ibid* at [29].
- Ibid* at [30] & [31].
- Ibid* at [37].
- Ibid* at [39] and [42].
- Ibid* at [46].

Revisiting the penalty rule

John Eldridge reports on *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67.

Introduction

In *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67, the Supreme Court of the United Kingdom engaged in an extensive review of the rule against penalties ('the penalty rule'). In declining to extend the penalty rule beyond provisions which, as a matter of substance, provide for the consequences of a breach of contract, the Supreme Court opted not to follow the approach taken in *Andrews v Australia and New Zealand Banking Group Limited* (2012) 247 CLR 205 (*Andrews*).

The court also revisited the classic statement of law of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, where his Lordship framed the inquiry as turning upon the distinction between a penalty and a genuine pre-estimate of loss. The Supreme Court cautioned against permitting this distinction to obscure the true test, which was said to be whether the impugned clause imposes on the party in breach consequences which are out of all proportion to any legitimate interest of the other party in the contract's enforcement.

The appeals

As they turned on common questions of law, the appeals in *Cavendish Square Holding BV v Talal El Makdessi* (*Cavendish*) and *ParkingEye Limited v Beavis* (*ParkingEye*) were heard together.

The appeal in *Cavendish* arose out of a complex share purchase agreement (SPA) under which Mr Makdessi sold a controlling interest in the advertising agency of which he was the founder. The SPA provided that the consideration payable to Mr Makdessi in respect of the shares consisted of two fixed sums payable upon and after completion as well as two further instalments calculated by reference to the performance of the business. The SPA also contained a number of restrictive covenants which effectively obliged Mr Makdessi not to compete with the agency.

Clause 5.1 of the SPA provided that should Mr Makdessi breach the restrictive covenants, he would forgo the two further instalments of the purchase price to which he otherwise would have been entitled. Clause 5.6, which was also triggered by a breach of the restrictive covenants, required Mr Makdessi to sell his remaining 20 per cent shareholding in the agency

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to Cavendish Square Holding at a price which disregarded goodwill. In the Supreme Court, Mr Makdessi contended that Clause 5.1 and Clause 5.6 were penalties.

The appeal in *ParkingEye* arose out of a contract for the use of a space in a shopping centre car park. A number of notices displayed at the premises stated that parking was free for up to two hours, but that any stay in excess of this would attract a charge of £85. Mr Beavis exceeded the maximum permitted stay by an hour, and was charged £85. He contended in the Supreme Court that the provision imposing the £85 charge was a penalty. Mr Beavis also sought to rely upon the Unfair Terms in Consumer Contracts Regulations 1999.

In reasoning to their conclusions, their Lordships dealt with a number of questions of considerable interest to the Australian reader.

The ambit of the rule

One question before the court was whether the application of the penalty rule should be taken to extend beyond provisions which, as a matter of substance, provide for the consequences of breach of contract.

It is precisely this step which was taken by the High Court of Australia in *Andrews*. In that case, the High Court rejected the contention that the equitable jurisdiction to relieve against penalties had 'withered on the vine', declaring instead that the equitable jurisdiction continued to exist and could offer relief in an appropriate case.¹ Significantly, the application of this continuing equitable jurisdiction is not limited to provisions which provide for the consequences of a breach of contract.

The Supreme Court declined to follow the High Court's approach. The most detailed engagement with *Andrews* is found in the leading judgment of Lord Neuberger and Lord Sumption (with whom Lord Carnwath agreed), where the approach in *Andrews* is criticised on a number of bases. Their Lordships begin by stating at [42]:

In the first place, although the reasoning in *Andrews* was entirely historical, it is not in fact consistent with the equitable rule as it developed historically. The equitable jurisdiction to relieve from penalties arose wholly in the context of bonds defeasible in the event of performance of a contractual obligation. It necessarily posited a breach of that obligation. Secondly, if there is a distinct and still subsisting equitable jurisdiction to relieve against penalties which is wider than the common law jurisdiction, with

The Supreme Court's conclusion in respect of the ambit of the penalty rule confirms a clear divergence between UK and Australian law on this point.

three possible exceptions it appears to have left no trace in the authorities since the fusion of law and equity in 1873 ... Thirdly, the High Court's redefinition of a penalty is, with respect, difficult to apply to the case to which it is supposedly directed, namely where there is no breach of contract. It treats as a potential penalty any clause which is 'in the nature of a security for and in terrorem of the satisfaction of the primary stipulation.' By a 'security' it means a provision to secure 'compensation ... for the prejudice suffered by the failure of the primary stipulation'. This analysis assumes that the 'primary stipulation' is some kind of promise, in which case its failure is necessarily a breach of that promise.

Their Lordships then go on to articulate a critique of *Andrews* which has already found expression in other quarters:²

[T]he High Court's decision does not address the major legal and commercial implications of transforming a rule for controlling remedies for breach of contract into a jurisdiction to review the content of the substantive obligations which the parties have agreed. Modern contracts contain a very great variety of contingent obligations. Many of them are contingent on the way that the parties choose to perform the contract ... The potential assimilation of all these to clauses imposing penal remedies for breach of contract would represent the expansion of the courts' supervisory jurisdiction into a new territory of uncertain boundaries, which has hitherto been treated as wholly governed by mutual agreement.³

Though the judgments of Lord Mance and Lord Hodge dealt with *Andrews* only in passing,⁴ no enthusiasm for the High Court's approach is evinced by any member of the court.

When Will a Provision Be A Penalty?

After noting that 'the law relating to penalties has become the prisoner of artificial categorisation'⁵ as a result of 'an over-literal reading of Lord Dunedin's four tests and a tendency to treat them as almost immutable rules of general application which then exhaust the field',⁶ the leading judgment of Lord Neuberger and Lord Sumption states that:

The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation ... In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations.⁷

Very similar formulations were offered by Lord Mance and Lord Hodge.⁸

On the application of this test, all members of the Supreme Court concluded that the impugned provisions in *Cavendish* were not penalties, and all members of the court apart from Lord Toulson were of the view that the impugned provision in *ParkingEye* was neither a penalty nor contrary to the provisions of the Unfair Terms in Consumer Contracts Regulations 1999. As Lord Toulson concluded that the provision in *ParkingEye* did offend the Regulations, his Lordship did not find it necessary to offer a view as to the application of the penalty rule in that appeal.

Conclusion

The Supreme Court's conclusion in respect of the ambit of the penalty rule confirms a clear divergence between UK and Australian law on this point. But with the appeal from the judgment of the Full Federal Court in *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50 to be heard in the coming months, the High Court will soon have an opportunity to consider the status in Australia of the Supreme Court's formulation of the test for determining whether an impugned provision is a penalty.

Endnotes

1. See the contrary view in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 191 per Mason and Wilson JJ, cited in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292, 320 at [99] per Allsop P, Giles and Ipp JJA agreeing.
2. See, e.g., John Carter, Wayne Courtney, Elisabeth Peden, Andrew Stewart and Gregory Tolhurst, 'Contractual Penalties: Resurrecting the Equitable Jurisdiction' (2013) 30 *Journal of Contract Law* 99, 112.
3. *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67, [42].
4. *Ibid* [130] (Lord Mance), [240] – [241] (Lord Hodge).
5. *Ibid* [31].
6. *Ibid*.
7. *Ibid* [32].
8. *Ibid* [152] (Lord Mance), [255] (Lord Hodge). Lord Clarke agreed generally with the reasons of Lords Neuberger, Sumption, Mance and Hodge. Lord Toulson at [293] specifically endorsed Lord Hodge's formulation.

How to behave while bathing in the Northern Territory

Ian Barker QC

There has been much talk of late, at least in Northern Territory legal circles, about ‘paperless arrests’ and the death in custody of Kumanjayi Langdon, a Pintubi man who, on 21 May 2015, fell foul of the law makers by doing practically nothing.

Paperless it no doubt is. Tyrannical it also is, enabling arbitrary arrest and incarceration for four hours (more in some circumstances) without any record of the person having been arrested or justification for the arrest.

On its face, the new law, *Police Administration Amendment Act 2014*, does not discriminate between black and white. But in practice it does just that. Its covert unspoken purpose is to cleanse the streets of Darwin of the black peril. Langdon’s offence was to be seen drinking from a plastic bottle in a public park. He was not intoxicated and, as the coroner found, was at all times polite and co-operative.

Having been arrested, handcuffed, driven while in an iron cage and detained in a cell at 6.44pm, he died in the same cell at 9.07pm, from heart failure. In the process following the arrest Mr Langdon was issued with a ‘spot fine’ of \$40, the triviality of which did nothing to diminish the indignity of his treatment. As the coroner found, the implicit message from government and senior police command was that Aboriginal people seen drinking in designated public areas should be taken off the streets for up to four hours (or longer if a police officer reasonably believed the suspect was intoxicated).

The coroner also observed that Kumanjayi had the right to die as a free man and in the circumstances he should have done so. ‘In my view’, the coroner said, ‘unless the paperless arrest laws are struck from the statute books more and more disadvantaged Aboriginal people are at risk of dying in custody and unnecessarily so.’

The anti-Aboriginal discrimination is obvious although unexpressed.

But it was ever thus. In earlier times society was not bothered by tiresome anti-discrimination legislation aimed directly at the black target. A splendid example of the earlier official disdain for Aboriginals in the Northern Territory (there are many others) is

the Lamerook Baths Regulations, which found their odious way into the penal law on 1 April 1937, replacing Darwin Town Council Regulations of 13 April 1922.

In 1937 Lamerook baths could be found on a little beach between the Esplanade and the sea. There was a tidal pool where people could swim, bothered only by sand flies, sea wasps, the occasional inquisitive crocodile and sometimes an inspector.

In 1937 they were probably the only enclosed swimming pool in Darwin, being on Lamerook Beach, which was dedicated for the use and benefit of the inhabitants of the town of Darwin by proclamation dated 20 May 1921. The beach included Crown lands reserved for the use and benefit of the inhabitants of Darwin as published in the Commonwealth Gazette on 13 April 1922.

Dedicated and reserved as they were by Regulation 3, the regulations had to be read down rather violently to accommodate Regulation 5 which read as follows:

5. The Administrator may from time to time by notice in the Gazette fix or alter the day and hours on and during which the Baths shall be open for public use and may allot certain days and hours for each sex or nationality *except full-blooded aboriginals who shall not be allowed to use the Baths at any time.* (My emphasis.)

The regulations were silent about how ‘full blooded’ was to be determined. It is perhaps of peripheral relevance to this paper, but on 29 December 1956 a Darwin magistrate ruled that a ‘native boy’ could not be classified as an Aboriginal because he ate with a knife and fork, like a white man (*NT News* 29 December 1956). If that were the state of the law in 1937, anyone who could use a knife and fork like a white man would not have been caught by Regulation 5. The issue would have required close attention. As I recall the ability of white men in Darwin to use cutlery, they were not uniformly graceful diners. So how could it be said that any person could use cutlery like a white man? What white man, and who bore the onus of proof? The man claiming not to be Aboriginal, or an inspector? I don’t know that the matter was ever fully litigated.

In 1937 Lamerook baths could be found on a little beach between the Esplanade and the sea. There was a tidal pool where people could swim, bothered only by sand flies, sea wasps, the occasional inquisitive crocodile and sometimes an inspector.

...on 29 December 1956 a Darwin magistrate ruled that a 'native boy' could not be classified as an Aboriginal because he ate with a knife and fork, like a white man (NT News 29 December 1956).

As I recall Darwin in 1970 (when I went there to live) the baths were unusable. The beach was the product of warfare between the City Council and various hippies who claimed the right to live on the beach. The council twice prosecuted the campers for acting illegally in possessing a small part of Lameroo Beach. The hippies were represented by Darwin lawyer Tom Pauling and the council twice lost. Upon the arrival of the monsoon, the hippies floated away and the problem was solved.

The administrator and the drafter of the regulations clearly saw that merely banning full blooded Aboriginals from using the pool was quite insufficient for the proper governance and protection of the baths. Clearly the regulations were the produce of an almost lunatic anxiety to control the conduct of others. We see 78 years later the same disposition in the drafting of so-called anti-terrorist legislation, far beyond the purpose it purports to achieve.

The Commonwealth of Australia was protective of its baths and grimly determined to ensure that loose living white entrants, or those attempting to enter and use the baths, were fit and proper to do so, both morally and physically.

The following is a brief look at some of the regulations. There were 44 in all, 34 more than those received on Mt Sinai. Enforcement of the regulations was the duty of every member of the police force of the Northern Territory, all of whom were designated *ex officio* inspectors.

To secure the observance of decency, all persons over 4 years had to be clad in a bathing costume (Regulation 6). In case of a chink in the armour of social propriety, an inspector was required to direct that an imperfectly dressed miscreant, upon being discovered, should resume his 'ordinary' dress. What constituted 'ordinary' dress is hard to say, but the law sagely entrusted the issue to the determination of a police officer who was given the power to remove the offender, with any necessary force, to the dressing shed. The offender of course was a person (a) who was white and (b) who was over 4 years old.

Although the touchstone of Regulation 6 and the criminality it created was whether dress was ordinary, Regulation 6(2) enlarged the offence to encompass the opinion of an inspector that a person's bathing costume was indecent or inadequate or the material thereof was too thin or in a proper state of repair or was for any reason unsuitable.

Regulation 6(2) is worth recounting in full:

- 6.(1.) All persons over four years of age bathing in the Baths or on any portion of Lameroo Beach shall be clad in a bathing costume so as to secure the observance of decency and any Inspector shall require any person contravening this provision to at once resume his ordinary dress.
- (2.) In any case where any Inspector is of opinion that any person's bathing costume is indecent or inadequate or that the material thereof is too thin or is not in proper state of repair or is for any reason unsuitable he shall direct such person to resume his ordinary dress.
- (3.) If any person fails to resume his ordinary dress when directed so to do by any Inspector he shall be guilty of an offence against these Regulations and may with any necessary force be removed to the dressing shed by any Inspector.

Regulation 7 created the further offence of disarranging any part of the offender's costume in any place open to public view.

Clearly mistrustful of the ability of the Darwin citizenry to observe the sort of standards attributable to a paragon of circumspection, the administrator went on to ensure that no male person above the age of 6 years could enter upon any part of the baths set aside for the exclusive use of females (white ones, of course) (Regulation 8).

By Regulation 9, children under 16 were, it seems, deemed to be adults unless under 6, and with parents or guardians in which case they could enter the adults' dressing accommodation. Peace was assured by Regulation 10, which forbade the playing of games in the vicinity of any entrance or exit from a dressing shed, which could be used only for dressing and undressing. But then we come upon Regulation 13, which empowered the administrator to mark off an area adjacent to any dressing shed for the use of females, which if over 8 years old had exclusive use of the marked off area.

Decency and religious observance were preserved by Regulation 14, which banned blasphemous, profane, obscene or insulting language and indecent behaviour.

By Regulation 18 an inspector could refuse entry to anyone

Ian Barker QC, 'How to behave while bathing in the Northern Territory'

who in the inspector's opinion was dirty. Regulation 19 seems a touch curious, forbidding entry to any dressing shed or compartment when the area was already occupied by the full number of persons authorised by an inspector to use the same at one and the same time.

Regulation 20 no doubt had some utility, forbidding as it did entry to the baths or dressing sheds while under the influence of drink. I suppose in fairness one should look at all this in the context of a community who enjoyed a drink or two. As Banjo Paterson put it (writing for the Bulletin in 1900): 'People in Darwin stop drinking just before breakfast and start just after....' As it happened, Darwin was hit by a cyclone on 11 March 1937, so the place was undoubtedly more disorganised than usual. This was the land of Xavier Herbert and *Capricornia*.

I do not know why the cyclone appears to have promoted regulations for the running of a swimming pool, but drinking liquor in the territory has never been a pastime confined to Aboriginals.

A random look at other Lamerloo Baths' regulations (all applicable only to white people because black people were totally excluded) reveals an astonishing array of things the administrator thought should be forbidden. For example, there was to be no writing upon any part of the baths, fittings or premises, no riotous, unseemly, improper or disorderly disturbances, no intruding into any compartment in use, no interfering with the clothing, towels or bathing costumes of others and definitely no act whatever whereby inconvenience or annoyance may have been occasioned to any person. Loitering was a no no, provided there was no reasonable excuse and it occurred after use of the baths or after quitting any dressing shed or compartment.

It will be seen that the opinion of the inspector was usually unconfined by any objective test, such as whether it was reasonable. An inspector (having it would seem the sort of dictatorial powers enjoyed by others in the world of 1937) was in charge and could enter when called upon, perhaps to remove the dog forbidden by Regulation 25, or to cleanse the place of soap which rendered the water turbid, or to ensure removal of the dead fish or broken earthenware proscribed by Regulations 32 and 33.

Spitting and smoking were proscribed, and one could not bathe at or near the vicinity of any place indicated by a 'danger signal' or notice at a place where it was dangerous to bathe. As I remember what was left of the baths in 1970 they were fraught

with an assortment of dangers, but in 1937 an inspector could warn you off from bathing at or 'near the vicinity' of any place (Regulation 30).

Safety was assured, it seems, by the prohibition against driving, leading, causing to be led or allowing to stray or wander any horse, cattle, or goat along any ramp or path descending to the beach or near the baths. So drovers were not allowed to herd cattle at the baths (Regulation 35). I do not know whether anyone ever tried. Horses in particular were singled out because it was an offence to bathe or swim or allow to bathe or swim any horse (Regulation 36).

And so it went on. A sort of mini proclamation of conduct required by his Honour the administrator whereby the peasantry were told how their lives were regulated.

I should mention the nod to procedural fairness conferred by Regulation 40 which gave a right of appeal to the administrator by any person refused admission (he would have to be white to get anywhere) or who felt aggrieved by any action of any inspector. The administrator after due inquiry was required to give such directions in the matters as he thought fit. His discretion was unfettered. So wide was his discretion one would have approached such an appeal with considerable caution. We must assume he was always within earshot to listen to aggrieved petitioners, at the same time I suppose keeping careful watch on the observance of Regulation 42, which mandated the requirement that bathers should provide their own towels.

So there you have it. Keep out the blacks and closely monitor the behaviour of others, whose transgressions at the Lamerloo Baths were met with a fine of 10 pounds.

The baths and the regulations have passed into history. I cannot find a record of a formal repeal or revocation. Probably, the regulation documents were destroyed by Japanese bombs on 19 February 1942. I think a court would say the regulations should be presumed dead. I hope this will be the early fate of 'paperless arrests' law.

I should add that the validity of the Police Administration Amendment Act is the subject of a High Court challenge by North Australian Aboriginal Justice Agency. The court has reserved judgment.

Tipping the Scales: Equity and Diversity at the Bar¹

By Jane Needham SC

On 14 March 1924 Eugene Gabriel Sayegh was called to the bar. His admission was moved before the full bench of the High Court by the attorney general of New South Wales, Sir Thomas Bavin. Sydney's infamous tabloid at that time, *The Truth*, described him as 'the only Syrian barrister in Australia' and followed up with the superfluous observation that 'foreign legal lights are few and far between in this country, so Mr Sayegh's position is rather unique'.²

In fact, Eugene Sayegh was born in Auckland where he attended Sacred Heart College, before moving to Australia and graduating from Sydney Law School. According to *The Truth*, Sayegh had appeared in 'several big lawsuits in which his countrymen have figured', although it's entirely unclear as to whether this meant Syrians or New Zealanders. As if anticipating disbelief on the part of its readers, *The Truth's* correspondent felt the need to assure them of Mr Sayegh's competence.

Fourteen years later, in May 1938, William Jangsing Lee became the first Australian of Chinese heritage to be admitted to practise as a barrister in NSW.³ The *Sydney Morning Herald*, and at least ten other newspapers across the country, reported his admission. At the time, there were only 10,222 Chinese in New South Wales out of a population of 1.35 million. Briefs for juniors were hard to come by in those days, but Lee's ethnicity would have compounded the problem. In a fascinating article published in the Winter 2015 edition of *Bar News*, Malcolm Oakes SC described how Lee eventually gained a foothold at the bar through connections to the small, but tight-knit Chinese community:

His practice improved with the formation of the Australian branch of the Chinese Seamen's Union in 1942. Some 2,000 Chinese seamen became refugees as a result of the fall of Hong Kong and Singapore...The connection spawned an immigration law practice: briefs in the Industrial Commission seeking equal pay for Chinese crew; defending Chinese seamen on criminal charges for desertion; defending Chinese who failed the dictation test; and later refugee deportation briefs.

Recently, I was honoured to represent the Bar Association at the launch of the New South Wales chapter of the Asian Australian Lawyers Association, the AALA. Appropriately, the special guest speaker was the Hon Michael Kirby, who has spoken often of the need for greater diversity in the Australian legal profession. He said, in speaking of the need for hard facts in order to ground the way forward: 'You can only build the future on what is known in the present'. Data compiled by the AALA shows that currently, only 1.6 per cent of barristers and 0.8 per cent of judges are of Asian background.⁴ Further evidence, if



any were needed, can be found from the Bar Association's own records. When asked to identify proficiency in languages other than English, responses revealed only one Mandarin speaker, one spoke Arabic, one Hindi and there was a solitary Punjabi speaker.⁵ The language most commonly spoken by barristers is, oddly, French.

Of course, the monochromatic nature of the New South Wales Bar is most keenly felt in the appallingly low representation of Indigenous Australians. It was not until 1972 that Lloyd McDermott (Mullenjaiwakka) became the first Indigenous Australian to practise as a barrister.⁶ Nearly fifteen years after the establishment of the Indigenous Barristers Trust and the implementation of the Indigenous Barristers Strategy by a dedicated working party, only four members of the bar identify as having Aboriginal or Torres Strait Islander status.⁷ It was only this year, of course, that Anthony McEvoy SC became the nation's first Indigenous silk.

It was only this year, of course, that Anthony McEvoy SC became the nation's first Indigenous silk.

For its part, the media has duly reported the arrival and undoubted achievements of various 'pioneers' at the New South Wales Bar.⁸ But these vignettes don't portray the mere

Jane Needham SC, 'Tipping the scales: equity and diversity at the bar'

absence of equity and diversity during the first century and a half of an independent referral bar. Rather, they depict a male, Anglo-Saxon or Anglo-Celt hegemony, which not only constituted and defined the profession of barrister, but also determined who was permitted to enter the profession. To be sure, representatives of each minority, whether successful or not at their practice, were tolerated. However, they were always the exceptions to the proposition that a barrister was a tall, white, 'not too young, preferably baritone man'.⁹

Indeed, in 1969 the Right Honourable Sir Victor Windeyer KBE CB DSO ED began the Introduction to John Bennett's *History of the New South Wales Bar* by saying:

The history of the Bar of New South Wales is the story of men practising as barristers.¹⁰

This opening statement by Sir Victor wasn't inaccurate, even in relatively recent times. Until 1976 no more than two women commenced at the NSW Bar in any year.¹¹ When I started at the bar in 1990, there were still so few women readers that we were able to be taken individually to lunch in the Common Room by Janet Coombs. Now, the Janet Coombs lunch for new women readers fills the Law Society venue in which it is held.

It's well known that the first woman to seek admission as a barrister in NSW was Ada Evans. She graduated from Sydney Law School in 1902 but was barred from practising until the passage of the *Women's Legal Status Act 1918*. The bill for that Act had a fraught passage through the male-dominated NSW Parliament.¹² Evans was eventually admitted in 1921 but never practised. The honour of being the first practising female barrister went to Sybil Morrison, who was admitted on 2 June 1924.

Until recently, the question of why so few women practised at the bar excited surprisingly little academic research.¹³ Yet the 'question of women's experiences at the bar intersect with more fundamental questions about survival at the bar, which are faced by all its members'¹⁴ – including those who come from disadvantaged socio-economic backgrounds.

In 2004 *Bar News* examined the relationship between equity and diversity. Gleeson SC and Sofroniou began with the ontological question of 'what is a barrister' and focussed on the nature of advocacy itself. They argued that:

Powerful male role models reinforce notions that a cross-examination is there to 'destroy' a witness's credibility or to

leave 'blood on the floor'. Young barristers model themselves upon those they see as being successful leaders of the profession. When most of these leaders are by historical necessity male, stereotypes are perpetuated and are in turn fed through to solicitor and client perceptions.¹⁵

Through the excellent work done by the Bar Association's Equitable Briefing Working Party, and the authors of a recent survey of members, we've moved from the anecdotal to the empirical. The data shows that many female juniors experience difficulty being briefed, getting time on their feet in court, and getting paid the same as male colleagues. Around 20 per cent of the bar are women. However, a survey of reported cases for the period 1 July 2014 to 30 October 2015 shows that seven per cent of senior counsel appearing in the High Court, and only 4.48 per cent of cases in the NSW Court of Appeal, were women. Things are a little better in the Court of Criminal Appeal at 37.5 per cent, but that is explicable to an extent

by the Crown prosecutors and public defenders having a significant number of women advocates who undertake appeal work in crime. I am indebted to Kate Eastman SC and Kate Morgan for their research on this issue.

Sadly, the survey of our members in 2014 demonstrates that the gender pay gap at the bar is well over 30 per cent – way above the differential in other fields.

There have to be factored into those figures issues of seniority and the fact that 90 per cent of silks are men, but a significant difference in fees is observable at all stages, and across all cross-correlations of experience, which tells us that there is a significant problem.

Diversity and advocacy

What, then, is the cost to society of a bar lacking in both equity and diversity?

In her contribution to the bar's centenary essays (2002) Rosalind Atherton (now Croucher) asked the deceptively simple question: 'Why did Evans and Morrison become barristers?'¹⁶

Croucher's first explanation is pedigree: both came from legal families. At the time of Morrison's admission it was said that 'her parents were steadfast in their desire that she should 'follow in the footsteps of her uncle, who was a famous KC in Dublin, and go one better than her brother, who is a well known solicitor in Queensland'.¹⁷

Croucher also noted that in addition to family ties to the law, Ada Evans 'had a personal mission'. She was motivated to practise as a barrister by her visits to help destitute women in the inner suburbs of Sydney. This 'apparently revealed the deficiencies of the legal system with respect to women ... and led her to see the need for women to seek to assist and represent women'.¹⁸

Similar arguments are made in respect of the need for more Indigenous barristers. Yet it must be asked: doesn't a competent barrister, adhering to the cab rank rule, provide the best possible representation for their client regardless of the client's identity? Isn't Australian law replete with cases where effective advocacy was a function of calm, disinterested professionalism, rather than affinity with a particular culture, religion, language or gender? Certainly, while that may be true, there is an inherent value in barristers reflecting the society in which they live, enabling those with a preference for a barrister with a greater understanding of the issues faced by particular groups in society to feel more represented and understood.

... there is a risk that an insular, unrepresentative bar might act more in its own interests than in that of the public.

There's no doubt that the New South Wales Bar has fulfilled its vital role in upholding the rule of law. And while not doubting that members of the bar have used their skills to provide the best possible representation to their clients, there remains an opportunity cost of an institution that doesn't reflect the composition of the society it serves. The ambitions of many who wished to practise at the bar went unfulfilled. Some of those who did brave it were victims of attrition; leaving the bar to pursue other endeavours in less hostile environments. More importantly, there is a risk that an insular, unrepresentative bar might act more in its own interests than in that of the public. Where nobody challenges privilege, the assumption that 'if it's not a problem for me, it's not a problem' flourishes. A more representative bar will be a better place, both for its members and for the public who rely on our advocacy.

The work of the Bar Association

I'm proud to have served as president of the Bar Association, which has made great progress in seeking to break down barriers to access to the bar. We have in place a Diversity and Equity Policy, which commits us to equal opportunity in

legal practice, fostering tolerance and reflecting the social and cultural diversity of the communities we serve. In furtherance of those aims, and as a response to the Law Council's landmark National Attrition and Re-engagement Survey, the Bar Association has promulgated the Best Practice Guidelines, the Equitable Briefing Policy and a Reconciliation Action Plan. It has provided a guarantee of childcare spaces for its members (including for chambers staff, upon whom we rely) and mentoring programs for women and Indigenous law students. With the assistance of the courts, family and carer responsibilities are taken into account when the courts are considering variations of sitting hours. I'm very grateful to the chief justice for his swift acceptance of our proposal and the leadership which was shown by his adoption of it which was instrumental in most of the courts which operate in New South Wales following suit.

In moving beyond the issue of gender equity, the chair of the Equal Opportunity Committee, Anthony McGrath SC, and I recently met the race discrimination commissioner to discuss initiatives for increasing cultural and racial diversity at the bar. Tim Soutphommasane has requested that the Bar Association consider becoming a supporter of the 'Racism: It Stops with Me' campaign. That proposal is in preparation for the new Bar Council. We also spoke about the Australian Human Rights Commission's Cultural Diversity Workplace Tool, which is currently proposed to be released during the first half of 2016. Again, the EOC will consider its application to the bar and make the appropriate representations.

Another step towards encouraging diversity at the bar is investigation of membership of Pride in Diversity – an LGBTI support programme of which almost all major law firms and financial and investment institutions are members. The Equal Opportunity Committee is looking at the tailor-made consultancy, advice, training and access to research and resources which Pride in Diversity provides. There will be a proposal to the new Bar Council for a strategy for inclusion and respect at the bar, among our members, and towards solicitors and clients. It is important that the bar address LGBTI inclusion because that community has some of the poorest mental health outcomes within Australia (such as was revealed in the 2013 Beyond Blue report that this group have a 14 times greater rate of suicide than heterosexual peers and significantly higher rates of depressive episodes).

As with any diversity issue, there is a business case for greater LGBTI inclusion. Law firms are one of most represented groups actively pursuing LGBTI initiatives as members of Pride in Diversity. As the Hon Michael Kirby put it in his AALA speech

Jane Needham SC, ‘Tipping the scales: equity and diversity at the bar’

The bar can only attract and retain the most talented people from all groups within society by being inclusive, engaged and sensitive to the position of the diverse groups from which that talent can be drawn.

earlier this month – ‘there have always been LGBTI people in the law – I hate to break it to you!’.

Conclusion

The bar can only attract and retain the most talented people from all groups within society by being inclusive, engaged and sensitive to the position of the diverse groups from which that talent can be drawn. The work done by the council in particular and the Bar Association more broadly in this aim is supported enthusiastically by the Bar Association staff, without whom many of the projects – particularly the childcare scheme – could not have come about. I thank them sincerely.

In particular, the work done has benefitted from collaboration with those in the legal profession outside the bar. The Equitable Briefing Working Party co-chairs, Moses SC and Eastman SC, were grateful to have the assistance of representatives of mid-tier and large law firms, in-house counsel and government lawyers in undertaking their work.

For my own part, I look forward to a bar that will continue to draw upon its immense pool of talent and its demonstrated goodwill to fashion new and creative responses to the challenge of shaking up this important institution. I would like to see a bar which values both the benefits of greater inclusion and the work that needs to be done to achieve it. I would like to see a membership of 50 per cent women – not in 50 years, but in my working lifetime. And I would like to see in our members a proper reflection of our multicultural society, bringing with it the tolerance and acceptance that flows from better understanding.

The chief justice’s involvement in providing us with this wonderful venue today signifies his court’s support of these aims. Your attendance, and that of Lt General David Morrison, demonstrates the substantive support that the work of the bar over the last few years has gained. The recent experience of other professions, such as surgeons, suggests that we are a

little further down the path than we otherwise could have been. There is, however, a long way to go, and I will be watching the new president, Hutley SC, and his executive and council, from my comfortable retirement armchair, with no small degree of interest, as to how that path is navigated.

Endnotes

1. I would like to acknowledge the assistance of Chris Winslow, Anthony McGrath, Megan Black and Kate Eastman in preparing this speech.
2. ‘Syrian from NZ who wears a barrister’s wig’, *The Truth*, Sunday, 9 August 1925, p.8. I am indebted to Juliette Brodsky for her research on Mr Sayegh.
3. Malcolm Oakes SC, ‘William Lee: first barrister of Chinese descent admitted to the New South Wales Bar’, [2015] (Winter) *Bar News* 75.
4. Stefanie Garber, ‘Kirby throws support behind AALA expansion’, *Lawyers Weekly*, 5 November 2015.
5. Arabic 1; Cantonese 2; Croatian 1; French 3; German 2; Hindi 1; Korean 1; Macedonian 1; Mandarin 1; Punjabi 1; Serbian 1; Turkish 1; Vietnamese 1; Urdu 1; Bosnian 1.
6. He was also the first Aboriginal Wallaby. ‘The Lloyd McDermott Rugby Development Team’, *Stop Press*, November 1999, p.10.
7. *NSW Bar Association 2014 Member Profile Report* (Urbis Pty Ltd) p.3.
8. Similarly, in 1925 *The Truth* ran a feature story on Mr N G McWilliam, whom it described as ‘one of the most remarkable figures at the New South Wales Bar’. ‘He is a thorough lawyer, although he has never seen an affidavit’. Born blind, he mastered Braille. ‘Mr McWilliams reads as fast with the tips of his fingers as the average barrister can read with his natural organs [I don’t know why they couldn’t just call them eyes]. All his affidavits and notes are typewritten in Braille and he runs his hand over the raised letter and imbibes their meaning without faltering.’
9. Justin Gleeson SC and Rena Sofroniou, ‘Why are there so few women at the bar?’ [2004] (Winter) *Bar News* 27 at 29.
10. Sir Victor Windeyer, ‘Introduction: Prologue 1788–1824’ in JM Bennett, *A History of the New South Wales Bar* (Sydney, The Law Book Company, 1969), p.1.
11. Justin Gleeson SC and Rena Sofroniou, ‘Why are there so few women at the bar?’ [2004] (Winter) *Bar News* 27.
12. Tony Cunneen, ‘One of the ‘laws women need’’, [2010] (Summer) *Bar News* 102.
13. Gleeson and Sofroniou said: ‘We are unaware of any expenditure by the bar, the universities or other bodies on research into this issue’. ‘Why are there so few women at the bar?’ [2004] (Winter) *Bar News* 27.
14. *Ibid.*
15. *Ibid.*, p.30.
16. Rosalind Atherton, ‘Early women barristers in NSW: Solo journeys – the ‘glory of the pioneer’’, in Geoff Lindsay and Carol Webster (eds), *No Mere Mouthpiece: Servants of All Yet of None* (Sydney, LexisNexis Butterworths, 2002), pp.113–126.
17. *Ibid.*, p.126.
18. *Ibid.*

Tipping the Scales: Equity and Diversity at the Bar was held in the Banco Court on Tuesday, 17 November 2015



Clockwise: Lt Gen David Morrison AO (Retd); L to R: Sally Dowling SC, Carol Webster SC, Michelle Painter SC, Liz Cheeseman SC. L to R: Andrew Laughlin, Michael Wilcox, Michele Kearns, Paul Walker; the Hon Tom Bathurst AC, chief justice of NSW; L to R: Noel Hutley SC, Chief Justice Tom Bathurst AC, Chrissa Loukas SC, Julia Roy.

Challenges in the world of a junior barrister: accommodation

By Nicholas Smith, Blackstone Chambers

Junior barristers face many challenges, with one of the most significant being accommodation. From the beginning of readership and, for many barristers, years afterwards, practice is accompanied by a ticking clock, counting down until the day when they are kicked out of their accommodation, licence or annex and/or be presented with the ultimatum of 'buy in or leave'. While the bar can be a meritocratic profession, life can be made significantly easier if accommodation that is pleasant, close to supportive colleagues, and reasonably priced can be found.

With these issues in mind the New Barristers Committee presented a seminar focussed on navigating accommodation issues for junior barristers, targeted at new readers and junior barristers, with clerks Michelle Kearns (Martin Place Chambers) and Nicholas Tiffen (7 Wentworth Selborne) and junior barristers Jeff Rose (Level 22 Chambers), Graham Connolly (Blackstone Chambers), and Theresa Dinh (6 Selborne Wentworth) providing attendees with the benefit of their experiences. While the seminar was replete with practical information about the challenges of moving chambers, buying in and licensing, the key conclusion reached by most of the participants was that finding accommodation is not simply a question of bricks and mortar. Rather success can be found by taking active steps to meet people and market oneself in order to create a space to practise as a barrister successfully. Unless a junior barrister is particularly fortunate, clients, mentors, colleagues and accommodation don't come by sitting at a desk, they come by actively seeking those opportunities out.

All moves between chambers involve three steps. They are:

- finding accommodation;
- moving to new accommodation; and
- making that accommodation work for you.

Finding accommodation

One of the key points that came out of the seminar was that when looking for accommodation, it pays to do more than simply look on the Bar Association website or ask friends. It is always worthwhile to speak with clerks in particular chambers to see if there is a vacancy and/or ask to be notified if a room becomes available. When talking to a clerk, ask about how



Photo: Murray Harris Photography

the chambers operates in terms of overheads, buying in and support to junior barristers. Clerks may also know about possible licensing options, both in their chambers and other chambers, and whether there is likely to be competition for any upcoming vacancy. It is also worthwhile talking to barristers in a desired chambers for the same reasons.

It is equally important to ensure that the chambers fits the barrister. A wrong decision about which chambers to move into can cost a barrister time and momentum as they attempt to build their career from a secure base. Does the chambers have fellow barristers that are agreeable? Does it contain

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Nicholas Smith, 'Challenges in the world of a junior barrister: accommodation'

barristers who you would want to work with or are doing similar work? Is it a specialist chamber and if so does that speciality appeal? Equally it is important to work out what commercial arrangement is being entered into. What are the terms of the licence? How does the annex operate? Is there an expectation that the incoming licensee will be required to buy into the chambers at a particular time and what price?

These issues are magnified if a barrister is considering buying into the chambers, which in some cases can involve an investment of several hundred thousand dollars. When a barrister buys into a chambers the first question is 'what are they buying?' Is s/he buying into an entity that owns the floor the chambers is located in or one that is renting office space? What is the level of clerk's fees and if low, does that mean that the chambers has underinvested and/or has potential financial liabilities? Is the chambers likely to need costly renovations, necessitating a levy on members?

Equally before buying, a barrister must consider their personal circumstances. Are they able to finance a purchase of a share of the chambers? As noted in the seminar, it may be easier to obtain finance secured against the shares of a chambers when the chambers, such as the ones located in the Selbourne/Wentworth building, owns the bricks and mortar, compared to a chambers that is renting office space from a landlord. A clerk may be able to advise a prospective member about the best way of finding finance. It also should be noted that when buying into a chambers a barrister is accepting an obligation to make the required floor fee payment. If the barrister is contemplating taking a break from the bar (parental leave or otherwise), what are the prospects of finding a licensee who is willing to cover their obligations?

Making the move

When making the move it is important to not lose touch with clients and colleagues. Obviously it is important to keep clients notified of the change in address, but simple things like ensuring that e-mail to the previous chambers' address is forwarded to the new address and that the previous chambers has the new chambers' contact details should be in place before the move to ensure a smooth transition. Equally it is advantageous to not lose contact with colleagues from your existing chambers, be

If the barrister is contemplating taking a break from the bar (parental leave or otherwise), what are the prospects of finding a licensee who is willing to cover their obligations?

it inviting them to your drinks in your new venue, staying in touch with them over lunch or a few coffees or trying including them in your matters. If a barrister knows that further moves are likely (i.e. the new accommodation is temporary), then it may be worthwhile developing a personal brand that is separate from the chambers, such as personalised e-mail account, or personal website, to ease future transitions.

Making the move work

Moving chambers is both a risk and an opportunity. What a barrister may lose in not staying in chambers with colleagues who are aware of his or her skills, they may gain by the opportunity to work with new colleagues and a new clerk in developing their practice. While moving chambers can lead to uncertainty and be a distraction from building one's practice, it can also be an opportunity. A barrister who has moved chambers has the opportunity to demonstrate their skills and market themselves to different barristers and potentially different clients. He or she can also seek how different chambers operate and make a clear-eyed decision as to whether the chambers is a good fit over the long term.

Ultimately while accommodation issues can be an enormous distraction and are of great concern to many junior barristers, properly managed, the challenges of moving chambers and picking chambers can also be of benefit to a barrister's practice.

An overview of the Legal Profession Uniform Law

By David Robertson

On 1 July 2015, a new regulatory regime for legal practitioners in New South Wales came into operation, with the commencement of the substantive provisions of the *Legal Profession Uniform Law* (NSW), the *Legal Profession Uniform Law Application Act 2014* (NSW), and the associated regulations and rules. Although the structure of the new regulatory regime is new, the substance has not greatly changed: the new regulatory regime is evolutionary rather than revolutionary, building upon earlier moves towards a single, uniform regulatory regime for all legal practitioners in Australia.

The background to the introduction of the new regulatory regime

Since the late 1980s and early 1990s, changes to the regulation of legal services in Australia have largely been driven by economic considerations. By the late 1980s, a belief had taken hold among policymakers that the markets for professional services in Australia, including legal services, were uncompetitive, and that a significant contributing factor to that uncompetitiveness was burdensome professional regulation. It was widely considered by policymakers that professional regulation – which was then primarily or solely the province of the relevant professional body itself – was directed towards reducing competition rather than upholding minimum standards of competence and discipline.¹

As a result of that view, recent changes to the regulation of the legal profession in Australia have been influenced by two main themes: (i) ‘harmonisation’, and (ii) ‘co-regulation’. Regulatory reforms have sought to harmonise the regulatory regime for the legal profession across jurisdictions in Australia, with the aim of increasing competition for the provision of legal services by creating a national market. Reforms have also sought to introduce a co-regulatory model by which the regulation of the legal profession is not solely the province of the professional bodies but also includes independent (non-legal) regulatory authorities. For example, a series of legislative changes made it possible for a legal practitioner admitted in one Australian jurisdiction to practise in any other Australian jurisdiction.² Similarly, a series of legislative changes in the 1990s and 2000s established independent oversight of the regulation of the legal profession, such as the establishment in New South Wales of the Office of the Legal Services Commissioner.³

Since the early 2000s, policymakers have been seeking ways to implement a single national regulatory regime for the legal profession. In 2001, the Standing Committee of Attorneys-General (SCAG) resolved to develop model laws for the regulation of certain aspects of the legal profession, with the view to the model laws being implemented by each Australian

jurisdiction. Under the model laws project, uniformity was sought in the following areas: standards for law degrees and practical legal training; a national practising certificate scheme; requirements for the disclosure of information on costs to clients; definitions of misconduct; rules for trust accounts and fidelity funds; and the regulation of incorporated legal practices and multi-disciplinary practices.⁴ In 2004, a draft of the Model Laws was released by SCAG, and between 2004 and 2008 new legislation based on the Model Laws was introduced in all Australian jurisdictions except South Australia.⁵ However, despite the adoption of new legislation based on the Model Laws, the regulatory regime was still not uniform, since the wording, numbering and structure of each Act differed significantly between jurisdictions.

Building upon the progress towards a uniform national law made by the Model Laws, in 2009 the Council of Australian Governments (COAG), under the auspices of its microeconomic and regulatory reform agenda, set up a taskforce on reform of the regulation of the legal profession which was tasked with, inter alia, drafting a national law for regulation of the legal profession, with the aim that this law would be implemented by all Australian jurisdictions. In December 2010, the taskforce presented final draft versions of the Legal Profession National Law and the National Rules to COAG and to SCAG. The draft National Law and National Rules were largely based upon the provisions of the earlier Model Laws, supplemented by a new national governance structure for the legal profession, including the proposed creation of a National Legal Services Board.

However, following the presentation of the final draft of the National Law, enthusiasm for its adoption diminished among the states and territories. By December 2013, only New South Wales and Victoria remained committed to the implementation of a uniform law. For that reason, in December 2013 New South Wales and Victoria abandoned the COAG process and instead entered into a bilateral Intergovernmental Agreement to develop a uniform law applicable to New South Wales and Victoria.⁶ Thereafter, further drafting work was done by New South Wales and Victoria to the National Law and National Rules. The final result of that work is the *Legal Profession Uniform Law* and associated statutes and regulations, which is based on the draft National Law and National Rules but has been further altered by New South Wales and Victoria and which now more resembles a joint project between the two jurisdictions rather than a national scheme. That legislative scheme commenced in New South Wales and Victoria on 1 July this year.

Even though the new uniform law applies (at least initially) only in New South Wales and Victoria, about 75 per cent of

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Australian legal practitioners practise in those two jurisdictions,⁷ and so the new regulatory regime constitutes a significant step towards a single, national regulatory regime for the Australian legal profession. Furthermore, the regime has been designed so that the other Australian jurisdictions may join in the future.⁸

The new regulatory regime: continuity and change

For barristers in New South Wales, the regulatory regime is now comprised of the following instruments:

- Legal Profession Uniform Law;
- Legal Profession Uniform Law Application Act 2014 (NSW);
- Legal Profession Uniform Law Application Regulation 2015 (NSW);
- Legal Profession Uniform General Rules 2015;
- Legal Profession Uniform Conduct (Barristers) Rules 2015; and
- Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015.

These instruments replace the *Legal Profession Act 2004* (NSW), the *Legal Profession Regulation 2005* (NSW) and the New South Wales Barristers' Rules 2014.

Despite the legislative regime being entirely new, the substantive changes to the rules and regulations applicable to barristers in New South Wales are not significant. This is because many of the rules and regulations which have been implemented by the uniform laws replicate or are based on rules and regulations that have been previously in place in New South Wales under the old regulatory regime.

Bar News met with Philip Selth, the executive director of the New South Wales Bar Association, and Jennifer Pearce, the association's in-house counsel, to discuss the new regulatory regime. Both Mr Selth and Ms Pearce were involved in the drafting and implementation of the new legislation.

Mr Selth said that the Bar Association's members probably noticed little change in their day-to-day practice when the new regulatory regime commenced on 1 July this year. 'As a jurisdiction, New South Wales has been at the forefront of moves towards the adoption of uniform legislation for some time. The New South Wales Bar Association – both its members and staff – has been deeply involved in drafting the new legislative regime. This has had the result that the new uniform rules and regulations for barristers largely reflect the rules and regulations that already applied to barristers in New South Wales. For example, the provisions of the uniform

legislation are mostly carried over from the 2004 Act and 2005 Regulation, generally with only minor substantive changes. The new Barristers' Conduct Rules are based on the Australian Bar Association's Model Rules, which were adopted by the New South Wales Bar Association in 2011. The new Barristers' Continuing Professional Development Rules are based on the Continuing Professional Development Rules that applied in New South Wales immediately prior to 1 July 2015.'

Jennifer Pearce, the New South Wales Bar Association's in-house counsel, agreed that regulatory changes for barristers in New South Wales are relatively minor, at least compared with the changes that have been experienced by our Victorian brethren. 'For barristers in Victoria, the changes have been more significant, because the Victorian Barristers' Rules which previously applied were not based on the ABA Model Rules. Similarly, the Victorian CPD system was different to the new CPD Rules.'

However, Ms Pearce did emphasise that the new provisions relating to costs, which appear in Part 4.3 of the *Legal Profession Uniform Law*, effect some substantive changes to the previous provisions relating to costs in Part 3.2 of the *Legal Profession Act 2004* (NSW). To that end, earlier in the year, the Costs & Fees Committee of the Bar Association conducted seminars to outline these changes, and published new model Costs Disclosure and Costs Agreement documents in accordance with the terms of *Legal Profession Uniform Law*. That information is available at the Bar Association's website: <http://www.nswbar.asn.au/for-members/costs-and-billing/>.⁹

What, then, are the main benefits of the new regulatory regime? Ms Pearce identified the main benefit as being the introduction of a uniform law in both New South Wales and Victoria, the two largest jurisdictions. 'Previously, the legislation was similar but had important differences. Now, the *Legal Profession Uniform Law* is a single legislative instrument that applies in both New South Wales and Victoria. Uniform legislation has been finally introduced', she said. Mr Selth identified the new regime as being the foundation of a national profession for barristers: 'If you are a New South Wales barrister appearing in a court or tribunal in Victoria, the norms of conduct are now identical, whether the norms of conduct appear in the legislation or professional rules.'

Both Mr Selth and Ms Pearce expressed confidence that other Australian jurisdictions will join the new uniform law regime in the future. 'The scheme has been designed so that other jurisdictions can join in the future, and there are positive indications that other jurisdictions are considering doing so', Mr Selth said.

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An overview of the Legal Profession Uniform Law and associated legislation, regulations and rules

The new regulatory regime is essentially comprised of: (i) a uniform law and uniform professional rules which are applicable to all practitioners in New South Wales and Victoria; (ii) some state-specific rules and regulations contained in a state Act and Regulations which apply only in the particular state; (iii) new 'national' regulatory bodies which are responsible for overseeing the development and implementation of the uniform law, rules and regulations; and (iv) state-based regulatory bodies (called 'local regulatory authorities') which are responsible for enforcing the rules and regulations in their jurisdiction.

Legal Profession Uniform Law.

The new regulatory regime has been implemented partly as an 'applied law scheme', that is, a cooperative legislative scheme whereby one jurisdiction enacts a model law which is then picked up or applied by another jurisdiction or group of jurisdictions as a law of the jurisdiction.¹⁰ Victoria is the host jurisdiction for the *Legal Profession Uniform Law* (the Uniform Law). In 2014, Victoria passed the *Legal Profession Uniform Law Application Act 2014* (Vic) (the Victorian Application Act). The Uniform Law is set out in Schedule 1 to the Victorian Application Act. The Uniform Law applies as a law of Victoria (see s 4 of the Victorian Act). Also in 2014 the New South Wales Parliament enacted the *Legal Profession Uniform Law Application Act 2014* (NSW) (the NSW Application Act). Section 4 of the NSW Application Act provides that the Uniform Law applies as a law of New South Wales, as if it were an Act of the New South Wales Parliament.¹¹

The Uniform Law contains provisions relating to: threshold requirements for legal practice (Ch 2); legal practice (Ch 3), including the issuing, suspension and cancellation of practising certificates; business practice and professional conduct (Ch 4), including legal costs (Pt 4.3); dispute resolution and professional discipline (Ch 5); external intervention (Ch 6); investigatory powers (Ch 7); and regulatory authorities (Ch 8).

Legal Profession Uniform Law Application Act 2014 (NSW)

The NSW Application Act, as well as the *Legal Profession Uniform Law Application Regulation 2015* (NSW), contain state-specific legislative provisions that apply only to legal practitioners in New South Wales. Similarly, the Victorian Application Act provides rules that apply only to Victorian legal practitioners. The NSW Application Act contains provisions relating to, inter alia: local regulatory authorities

(Pt 3); practising certificates and registration certificates (Pt 4); trust accounts and the Public Purpose Fund (Pt 5); particular kinds of legal costs (Pt 6), including a rule-making power for fixed costs in particular types of matters (s 59), maximum costs in personal injury matters (s 61), and costs in civil claims where there are no reasonable prospects of success (s 62); costs assessment (Pt 7); and professional indemnity insurance (Pt 8). The *Legal Profession Uniform Application Regulation 2015* (NSW) contains regulations relating to, inter alia: prescribed costs in particular kinds of matters (Pt 5) and costs assessment (Pt 6).

Legal Profession Uniform General Rules 2015

The *Legal Profession Uniform General Rules 2015* (the General Rules) are made by the Legal Services Council (a new regulatory body, whose function is discussed below in further detail) under the rule-making power contained in Part 9.2 of the Uniform Law. Therefore, the General Rules apply to all legal practitioners in New South Wales and Victoria. The content of the General Rules is similar to the types of regulations that were previously included in the *Legal Profession Regulation 2005* (NSW). Relevantly, the General Rules contain provisions relating to legal costs (Pt 4.3), and conditions of practising certificates (Pt 3.3), including notification requirements for certain offences (reg 15).

Legal Profession Uniform Conduct (Barristers) Rules 2015

The *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Barristers' Conduct Rules) replace the New South Wales Barristers' Rules 2014. The Barristers' Conduct Rules are made by the Legal Services Council pursuant to Part 9.2 of the Uniform Law, and apply to barristers in both New South Wales and Victoria.

As noted above, the Barristers' Conduct Rules are based on the Australian Bar Association's Model Rules, and so the applicable rules are similar to those contained in the New South Wales Barristers' Rules 2014 which were also based on the Model Rules. However, there is a substantive change to the rules in relation to a barrister appearing as counsel assisting an investigative or inquisitorial tribunal. Barristers appearing as counsel assisting are no longer bound by any prosecutor's duties;¹² however rules 97–100 of the Barristers' Conduct Rules set out new rules applying to barristers appearing as counsel assisting. Another substantive change is to the anti-discrimination and harassment rules, with new definitions of 'discrimination', 'sexual harassment' and 'workplace bullying'.

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Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015

This set of rules, which may be referred to as 'the Barristers' CPD Rules', is also made by the Legal Services Council pursuant to Part 9.2 of the Uniform Law, and so apply to barristers in both New South Wales and Victoria. As noted above, the Barristers' CPD Rules are based on the CPD Rules that applied to barristers in New South Wales prior to 1 July 2015. Therefore, barristers' CPD obligations are generally unchanged. However, there is now a requirement to keep a record of engagement in CPD activities by filling out a form provided by the Bar Association, which must be retained for three years (rule 12). The prescribed form is available at the Bar Association website. The categories of CPD activities have also been renamed, with 'Ethics and Professional Responsibility', 'Practice Management and Business Skills', 'Substantive Law, Practice and Procedure and Evidence' and 'Barristers' Skills' replacing the previous categories.

The regulatory framework established by the Uniform Law

Chapter 8 of the Uniform Law establishes several new regulatory bodies to oversee the new regulatory regime: the Standing Committee of Attorneys-General, the Legal Services Council, the Commissioner for Uniform Legal Services Regulation, and the Admissions Committee.

These new regulatory bodies are effectively a 'national' or 'inter-jurisdictional' regulatory superstructure for the legal profession in New South Wales and Victoria, because they are intended to operate alongside the regulatory bodies that previously exercised functions under the *Legal Profession Act 2004*, which will continue to exercise functions under the Uniform Law. The Uniform Law continues to rely on 'local regulatory authorities' to exercise regulatory powers in a particular 'local' jurisdiction. These reforms further continue and entrench the co-regulatory model of regulation of the legal profession, since most of the positions on the new regulatory bodies may be filled by persons without legal expertise.

In the carve up of responsibilities between New South Wales and Victoria, Victoria was designated as the 'host jurisdiction' for the Uniform Law and New South Wales was designated as the 'host jurisdiction' for the Legal Services Council and the Commissioner for Uniform Legal Services Regulation.¹³ Therefore, both the council and the commissioner are based in Sydney.

The Standing Committee

In order of precedence, the first new regulatory body (if it may be described as such) is the Standing Committee of Attorneys-General (the Standing Committee), which is comprised by the attorneys-general of the participating jurisdictions (therefore, presently only the attorneys-general for New South Wales and Victoria). The Standing Committee has a general supervisory role in relation to the Legal Services Council, the commissioner for Uniform Legal Services Regulation, and local regulatory authorities (s 391). The Uniform Law also confers other functions on the Standing Committee, such as the power to appoint members of the Legal Services Council.

The Legal Services Council

The Legal Services Council (the council) is established by s 394(1) of the Uniform Law. Section 394(2) of the Uniform Law sets out the objectives which the council is to pursue, which include: monitoring the implementation of the Uniform Law and ensuring its consistent application across participating jurisdictions (s 394(2)(a)); ensuring that the Legal Profession Uniform Framework¹⁴ remains 'efficient, targeted and effective' and promotes the maintenance of professional standards (s 394(2)(b)); and also ensuring that the Framework accounts for the interests and protection of clients (s 394(2)(c)). Schedule 1 to the Uniform Law sets out further provisions relating to the constitution, functions and powers of the council.

As to its membership, the council is constituted by five members drawn from the participating jurisdictions, with the council appointed for a term of three years.¹⁵ The appointment of members to the council is by the 'host attorney general', which apparently is the Victorian attorney-general,¹⁶ with appointments made on the recommendation of the Law Council of Australia (as to one member), on the recommendation of the Australia Bar Association (as to one member), and on the recommendation of the Standing Committee (as to three members, including the chair). The members of the inaugural council were appointed in October 2014, and are: the Hon Michael Black AC QC (chair), Ms Fiona Bennett, Ms Kim Boettcher, Mr Steven Stevens and Mr Bret Walker SC.

An important function of the council is its power to make Legal Profession Uniform Rules. The rule-making function of the council is set out in Part 9.2 of the Uniform Law and is quite complex (and it is unnecessary to examine in any detail). As noted above, pursuant to that power the council has made the General Rules, the Barristers' Conduct Rules and the Barristers' CPD Rules. The council has made equivalent rules

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for solicitors.¹⁷ The council has also made the *Legal Profession Uniform Admission Rules 2015*, which apply in both New South Wales and Victoria in relation to the qualifications and training required for admission, as well as admission procedure.

The Commissioner for Uniform Legal Services Regulation

The office of Commissioner for Uniform Legal Services Regulation (the commissioner) is established by s 398(1) of the Uniform Law. The objectives of the office of commissioner are set out in s 398(2) and include: promoting compliance with the requirements of the Uniform Law and the Uniform Rules; and ensuring the consistent and effective implementation of the provisions of the Uniform Law and the Uniform Rules concerning complaints and discipline. Schedule 2 to the Uniform Law sets out further provisions relating to the office of the commissioner. The commissioner is appointed by the host attorney-general on the recommendation of the Standing Committee and with the concurrence of the council.¹⁸ In September 2014 Mr Dale Boucher was appointed as the commissioner.

The Admissions Committee

The council is responsible for establishing an Admissions Committee (s 402(1)). The Admissions Committee has the functions of developing uniform admission rules pursuant to s 426 of the Uniform Law (s 402(2)(a)), giving advice to the council about guidelines and directions of the council relating to admission and any other matters relating to admission (s 402(2)(b)), and giving advice to the council about any matters referred by the council to the Admissions Committee. Schedule 1 to the Uniform Law sets out further provisions relating to the constitution and powers of the Admissions Committee. The Admissions Committee consists of seven persons drawn from the participating jurisdictions, who are appointed by the council in accordance with cl 21 of Schedule 1 to the Uniform Law.

Local regulatory authorities

The new regulatory regime maintains a local regulatory regime for legal practitioners in New South Wales that is similar to the previous regulatory provisions under the *Legal Profession Act 2004*. Section 6 of the Uniform Law defines a 'local regulatory authority' as 'a person or body specified or described in a law of this jurisdiction for the purposes of a provision, or part of a provision, of [the Uniform Law] in which the term is used'. Section 11 of the NSW Application Act then designates

particular bodies as a 'designated local regulatory authority' to exercise particular functions under a provision of the Uniform Law in New South Wales. The Victorian Application Act does the same for local regulatory authorities in Victoria by designating certain Victorian bodies to exercise particular functions under the Uniform Law in Victoria.

In New South Wales, the local regulatory authorities are: the Council of the New South Wales Bar Association (the 'Bar Council'), the Council of the Law Society of New South Wales (the 'Law Society Council'), the NSW legal services commissioner (the 'NSW Commissioner'), the Legal Profession Admission Board (the 'NSW Admission Board') and the Civil and Administrative Tribunal of New South Wales ('NCAT').¹⁹ These authorities all exercised regulatory functions previously under the *Legal Profession Act 2004*, and each authority continues to exercise the same or similar functions under the Uniform Law as it did under the previous legislation.

The Bar Council is the designated local authority for the following regulatory functions under the Uniform Law:

- Investigating instances of and instigating proceedings in respect of unqualified legal practice (s 14);
- Recommending the removal of the name of a person from the Supreme Court roll (s 23(1)(b));
- The grant, renewal, variation, suspension and cancellation of practising certificates; the imposition of conditions on practising certificates; show cause events; and applications for disqualification orders (Chapter 3);
- Compliance audits and management system directions (ss 256, 257);
- Appointment of a manager for a barrister's law practice (Part 6.4);
- Investigatory powers, except those provisions relating to complaint investigations (Chapter 7);
- Exchanging information (ss 436, 437);
- Issuing evidentiary certificates (s 446); and
- Applying for an injunction to restrain contraventions of the Uniform Law and the Uniform Rules (ss 447–449).

The Law Society Council is the designated local authority for many of the same functions in respect of the regulation of solicitors in New South Wales.

The NSW Commissioner is the designated local authority in New South Wales in respect of complaints (Chapter 5) and complaint investigations (Chapter 7). However, the

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Uniform Law provides a power for the NSW Commissioner to delegate any complaints functions under Chapter 5 to a professional association, so long as the professional association is a 'prescribed entity' (see ss 405, 406). The NSW Application Act has prescribed both the Bar Council and the Law Society Council as delegates of the NSW Commissioner (see ss 29(c) and 31(1)(c)).

Sections 414 and 415 of the Uniform Law make clear that the relevant designated local authority has exclusive jurisdiction with respect to complaints and investigations concerning any particular practitioner. Section 415 states that nothing in Chapter 8 of the Uniform Law authorises the Standing Committee, the council or the commissioner to investigate a matter relating to 'any particular conduct', or to reconsider a prior investigation of 'any particular matter', or to reconsider any decision of a local regulatory authority or its delegate. Such investigations are solely for the relevant designated local authority to conduct.

Conclusion

The *Legal Profession Uniform Law* and the associated legislation, regulations and rules represents an important development in the approach to the regulation of the legal profession in Australia. Finally, after many years of discussion and false starts, two jurisdictions in Australia (in which approximately 75 per cent of the nation's legal practitioners are based) have adopted a uniform legislative scheme to provide uniform regulations for the legal professionals based in those two jurisdictions. That on its own is a significant achievement. Furthermore, the way in which the legislation is drafted provides the possibility for other jurisdictions to join in the future, and so it may well be that the *Legal Profession Uniform Law* has finally laid the foundations for a single uniform law regulating all Australian legal practitioners.

Endnotes

- See New South Wales Law Reform Commission, *First Report on the Legal Profession: General Regulation and Structure*, LRC Report No 31, 1982; Trade Practices Commission, *Regulation of the Professional Markets in Australia: Issues for Review*, December 1990; Trade Practices Commission, *Study of the Professions: Issues Paper – Legal Profession*, July 1992; Trade Practices Commission, *Study of the Professions: Legal, Final Report*, March 1994; Hilmer, Rayner and Taperall, *National Competition Policy*, August 1993. For a discussion of the history of reform to the legal profession in the 1980s and 1990s, see Spigelman, 'Are lawyers lemons?: Competition principles and professional regulation' (2003) 77 *Australian Law Journal* 44 at 49–52.
- See *Mutual Recognition Act 1992* (Cth), s 17(1); *Legal Profession Act 1987* (NSW), s 48Q; *Legal Profession Act 2004* (NSW), s 100.
- See *Legal Profession Act 1987* (NSW), s 59D; *Legal Profession Act 2004* (NSW), s 686.
- Dal Pont, *Lawyers' Professional Responsibility* (5th ed, 2013) at [1.105].
- See *Legal Profession Act 2004* (NSW); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2006* (ACT); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2008* (WA); *Legal Practitioners Act 1981* (SA).
- The *Bilateral Agreement on the Legal Profession Uniform Framework* between New South Wales and Victoria entered 6 December 2013.
- The Hon Robert Clark, Second reading speech, *Legal Profession Uniform Law Application Bill 2013* (Vic), Thursday 12 December 2013.
- Ibid.*
- Other materials relating to the introduction of the new regulatory regime published by the Bar Association can also be accessed via the Bar Association's website: <http://www.nswbar.asn.au/for-members/uniform-law/>.
- Edwards, 'Applied Law Schemes and Responsible Government: Some Issues', in Patmore and Rubenstein (eds), *Law and Democracy: Contemporary Questions* (2014) at 85, 87–90.
- Note that because Victoria is the host jurisdiction of the Uniform Law, and to ensure uniformity in its interpretation, the Victorian *Interpretation Act 1987* (Vic) applies to interpretation of the Uniform Law and regulations and rules made under the Uniform Law, in both jurisdictions: see s 7 of the Uniform Law and s 5 of the NSW Application Act. However, the NSW *Interpretation Act 1987* (NSW) applies to the NSW Application Act and any regulations and rules made under that Act.
- See Barristers' Conduct Rules, r 96, which provides that the prosecutor's duties set out in rules 83–95 do not apply to a barrister who appears as counsel assisting an investigative tribunal. Rule 96 also provides that rule 77 (which concerns publication of material concerning a current proceeding in which the barrister is appearing) does not apply to a barrister who appears as counsel assisting.
- See s 5 of the Uniform Law.
- That is, the *Bilateral Agreement* between New South Wales and Victoria.
- See Schedule 1 to the Uniform Law, cl 2.
- This is despite the New South Wales attorney general being designated as the 'host attorney general' for the council: see s 5(4) of the Uniform Law.
- Legal Profession Uniform Legal Practice (Solicitors) Rules 2015*, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, and *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*.
- See Schedule 2 to the Uniform Law, cl 2.
- NSW Application Act, Pt 3.

Equitable briefing: a conversation with Phillip Boulten SC

As a response to the Law Council's National Attrition and Re-engagement Study Report (NARS), the Equal Opportunity Committee will identify senior practitioners as Advocates for Change. Phillip Boulten SC has been selected as an Advocate for Change in the area of criminal law for defence barristers. Talitha Fishburn spoke to him about his views on female defence barristers and the extent to which equitable briefing impacts them.

Phillip Boulten SC has tutored and mentored many junior barristers over his long career as a barrister in criminal law. 'More than half of my readers were female', he reflected, 'and they were outstanding advocates. They worked hard and they delivered well.' Of his female readers, Boulten observed that one is now a senior counsel, one is a magistrate, and others have a very substantial criminal law practice. He added, 'They were good. Very good. But I can see the same qualities in many female barristers around me, even the absolute newcomers to the bar. They have a lot of talent.'

Boulten noted that barristers at the criminal law bar tend to be very experienced advocates in criminal law prior to coming to the bar. They mostly hark from Legal Aid, the Aboriginal Legal Service or private criminal law defence firms. Their weapon is their very real experience of standing up and running a case. Accordingly, the 'bar' is a high one at the criminal law bar. In particular, the standard of oral advocacy and familiarity with evidence law at the criminal law bar tends to be high even among very new barristers. He stated of criminal law barristers, 'Most of them hit the ground running from day one.' When it comes to females, there is no exception to this. 'Most of the female barristers, even the very junior ones, have a wealth of excellent experience in criminal law and in oral advocacy.'

Seldom is there a criminal law brief that does not require a speaking role.

Boulten is committed to advancing equitable briefing at the bar. However, he admits that from a pure numbers point of view, female barristers at the criminal law bar have a 'fairly good rating' compared with other areas of law, such as commercial litigation. He is aware of the statistics recording extremely low numbers of females with speaking roles in commercial litigation. However, in criminal law, the statistics are far less



skewed and there tends to be more gender parity in briefs and in speaking roles in court.

As for speaking roles in criminal law, that is its 'bread and butter'. Seldom is there a criminal law brief that does not require a speaking role. The reasons for this are twofold. First, criminal advocacy (especially at the trial level) is overwhelmingly oral, compared to the written submissions that dominate other areas of the law. Similarly, in a criminal trial, the mode of adducing evidence tends to be oral compared to civil trials that rely on affidavits for evidence in chief. Secondly, 'junior' briefs, in the sense of being 'led' are few and far between in criminal law compared to other areas where a team of barristers may be briefed for the one client, and junior barristers in such cases might not even go to court, let alone have a speaking role. Particularly in Legal Aid funded cases, due to funding caps, there is virtually never the opportunity for two or more persons to be briefed as might routinely happen in commercial cases.

Despite this gossamer of a 'fairly good rating', for female barristers in criminal law compared to their male colleagues, Boulten is adamant that 'serious work is still to be done' to level the playing field for female barristers in criminal law. 'We all really need to turn our mind to this,' he implores.

Talitha Fishburn, 'Equitable briefing: a conversation with Phil Boulten SC'

Boulten disagrees that criminal law briefs where gender is in issue (for example, sexual assault trials) do not, despite the stereotype, lend themselves more to a female or a male barrister.

While the bald numbers of briefs to females are somewhat better, a more than superficial analysis of these numbers shows some alarmingly wide gaps in terms of the quality and types of practice which are divided along gender lines.

First, the 'really good cases' tend to be briefed to males. That is, the more complex, longer, significant or substantial criminal law trials, possibly with a high profile dimension, tend to be briefed to males rather than females. In contrast, female barristers receive fewer of these sorts of cases and are disproportionately briefed in local court matters and summary matters more so than their male colleagues. In Boulten's view, if a barrister is not getting experience in significant and more complex matters, and tends to be working on the more routine lower court trials, it is harder for them to eventually step up. Accordingly, the quality and type of brief is a matter for attention in bridging the gender gap at the criminal law bar.

Second, in criminal law, briefs are either privately funded or Legal Aid funded. The former tend to be substantially more remunerative than the latter, although there are fewer of them. Female barristers tend to be briefed in fewer privately funded briefs than male barristers. This in turn may contribute in a very material way to the statistic of pay disparity between males and females at the criminal law bar. The pay disparity between males and females at the bar is another gap that needs to be addressed.

Boulten speculated that a reason why female barristers tend to receive briefs for criminal law trials of *shorter* duration, is the perception in the market that women with family commitments are unable to commit to a longer trial. Sometimes, he noted, the inability to commit to a long trial for family reasons is a complete misconception, in other circumstances, it may have some basis. Despite this, Boulten said that a woman's choice to have a family should be no anathema to a successful practice at the bar. He believes that such misconceptions and stereotypes need to be addressed front on.

Boulten recounted examples of some women who needed flexible working arrangements to accommodate family commitments who took off longer blocks of time in between

longer trials, rather than work on a reduced workload from week to week. This meant that the barrister was able to take on longer cases and get experience in more complex cases rather than only accept shorter cases.

This is obviously a big sacrifice that a woman makes. In an ideal world, the market would not require this, but we have courts that sit for five days a week. But if this is a tangible solution that allows a woman with family commitments to accept longer cases, it needs to be facilitated from all sides.

Boulten disagrees that criminal law briefs where gender is in issue (for example, sexual assault trials) do not, despite the stereotype, lend themselves more to a female or a male barrister. Rather, he emphasised, 'A serious female barrister can win the confidence of the hardest jury and the most exacting trial judge just as quickly and just as effectively as a man. I have seen it countless times.' It is a myth that particular briefs are gender critical.

A criminal law practice is built on one's professional connections as well as referrals from other barristers. When Boulten identifies a talented junior barrister, he plainly states to his solicitors, '*You really need to try [X]*'. He admits that he tends to make such recommendations based on talent, regardless of gender. But he added that he is particularly committed to telling his private clients about talented female barristers.

In the opinion of Boulten, there is work to be done to improve gender disparities at the criminal law bar. In summary, he concluded as follows. First, immediate short term solutions are available. These include banishing misconceptions and baseless stereotypes. It also involves conscious recommendations and referrals of talented female barristers. Second, longer term solutions need to start. This includes engagement by the Bar Association, courts, chambers, Legal Aid and private firms thinking of ways to brief female barristers on longer trials despite family commitments.

Lawyers, causes and passion

Chief Justice Robert French AC delivered an address at a dinner on 25 June 2015 to mark the 30th anniversary of the NSW EDO.



Fullerton Cove Blockade against CSG. Photo: Lock the Gate

Justice Mathews, my colleague Justice Bell, judges of the Land and Environment Court, members of the New South Wales Parliament, distinguished guests, ladies and gentlemen. Just over five years ago I addressed the 25th anniversary dinner of the Environmental Defender's Office of New South Wales. I was pleasantly surprised to be asked back to address the 30th anniversary dinner. In 2010, I speculated metaphorically about the classification of environmental lawyers as a species in the legal ecology which might be classed as entirely pestiferous, unattractively beneficial like the dung beetle, or perhaps as a truly wonderful new example of creative evolution. The jury, I suppose, is still out on the taxonomy, and like most taxonomical questions in the law and elsewhere, the response depends very much on whom you talk to. I predicted that the species would be durable. Five years later I can say of that prediction, to the extent that it rests upon the continuing existence of the NSW EDO – so far so good. One source of nutrient, namely Commonwealth funding, has been withdrawn but if that leads to adaptation to more diverse sources of sustenance through a greater level of community support and less dependence on government, that may not be such a bad thing. That, I suppose, is what this fundraising dinner is about as well as the justified celebration of a proud 30 year history.

It is an interesting feature of that history that initial funding for the NSW EDO came from an international property developer and a multi-national oil company. It is difficult in

light of that fact and the objectives served by the NSW EDO to place its people in some simple frame as white knights of the environment doing battle with black knights of government and industry. Neither the objectives of the NSW EDO nor those of the Australian network of environmental defender's offices, of which it is part, are consistent with that kind of crude adversarialism. Those objectives include:

- protecting the environment through law;
- ensuring that the community receives prompt advice and professional legal representation in public interest environmental matters;
- identifying deficiencies in the law and working for reform of those areas; and
- empowering the wider community, including Indigenous peoples, to understand the law and to participate in environmental decision-making.

I am not so sure about passion. There seems to be a lot of it about.

The annual report of the NSW EDO for 2013–14 spoke of three concepts defining its last twelve months and signalling its future – resilience, professionalism and passion. I am all for

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the first two in an organisation dedicated to providing legal services, enhanced community access to justice and working for law reform. I am not so sure about passion. There seems to be a lot of it about. Perhaps we should remember the message in *The New Yorker* cartoon which appeared in the edition of 26 May 1980. It showed two suited men in a bar, one saying to the other: 'I consider myself a passionate man, but, of course, a lawyer first.'¹

Well maybe it wasn't really a message so much as a jibe directed at the profession, but it raised an important point about the nature of legal practice and particularly lawyers working for a cause or 'cause lawyering' as it is being called in some contemporary literature. It is in part what the NSW EDO is about. A brief glance at the annual report reveals an impressive array of activities going well beyond the provision of advisory and advocacy services to individual clients or client groups. The organisation is actively engaged in promoting policy and law reform in New South Wales, nationally and internationally. In 2013/2014 it made over 40 submissions to state and federal governments. It has provided advice to the Productivity Commission, the COAG Taskforce for Regulatory Reform, and to state and national government environment planning and natural resource management departments.

The NSW EDO has an outreach program designed to educate community groups to enhance their practical participation in environmental decisions. It conducts community workshops and seminars on key issues and publishes plain English educational books and other materials explaining environmental law and policy. The outreach program is focussed on rural and regional New South Wales. Feedback from it ensures that the NSW EDO is informed about environmental issues as they arise. In 2013 and 2014, it provided 21 environmental law workshops and seminars across seven regions.

The NSW EDO undertakes an Indigenous engagement program headed up by Indigenous solicitor, Mark Holden. It involves the delivery of Aboriginal heritage workshops and consultations, along with representational and advisory work.

The NSW EDO also has an international program and has provided legal assistance to organisations in the South Pacific. It participates in international networks including the Environmental Law Alliance Worldwide and the International Union for the Conservation of Nature. It has a Scientific Advisory Service which enables it to access in-house scientific advice, to call upon a Technical Advisory Panel made up of academic experts and an Expert Register which lists 140 scientists in a range of fields assisting the NSW EDO on a pro bono basis. The activities I have outlined are indicative of an organisation with

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deep roots in the community and, accordingly, a strong base for developing continuing community support independent of changes in governmental funding arrangements.

I said in 2010, that the proactive, creative and constructive role of the environmental lawyer in the development of public awareness, public policy and law reform is as important, if not more important, than signal victories in courts of law. Signal victories have their place although their long term effects may be overcome by legislative change. Signal defeats also have their place and sometimes lead to beneficial law reform. An important example, from a different field, of a failure in court which led to major legal change, both legislatively and at common law, was the dismissal of the proceedings brought by the Yolngu People of the Northern Territory seeking recognition of their customary title in opposition to the grant of alumina mining leases in the early 1970s. Following the judgment of Justice Blackburn in the Supreme Court of the Northern Territory,² the Australian Government established the Woodward Royal Commission, which in turn led to the enactment of the Northern Territory land rights legislation. That in turn generated a tsunami of litigation in the High Court of Australia which undoubtedly set the scene for a more comprehending judicial approach towards Indigenous land ownership and thereby a foundation for the historic common law recognition of native title in the *Mabo* decision in 1992.

Victories and defeats both in courts and in law reform endeavours, remind all of us, as lawyers, that whatever the cause in which we are engaged whether it be advisory, representative or in public advocacy, we pursue it within the framework of the rule of law in a representative democracy. Acceptance of that reality is part of the resilience upon which the NSW EDO prides itself. The concept of the rule of law, which is alive and well in the 800th year of Magna Carta and has a connection to that almost mystical document, involves the central proposition that nobody is above the law. That is to say all power, public or private, affecting the rights and

In litigation, the advocate seeks justice not according to his or her own concepts or the client's, but justice according to law.

liberties of others and, relevantly, the use and protection of the natural environment, is constrained by law. By law, I mean the Constitutions of the Commonwealth and of the states, the statutes made under them, the various by-laws and legislative instruments made under statutory authority and the common law of Australia. For lawyers, and particularly those involved in litigation, the rule of law provides a framework to which they are professionally and ethically committed. One manifestation of that professional and ethical commitment is the obligation of the legal practitioner, as an officer of the court, to support the integrity of the judicial process. That obligation may transcend the interests of the particular client. Some clients sometimes have difficulty in understanding that. Of course, if you follow the exploits of the legal practitioners depicted in some popular television series you might gain the impression that there are no ethical boundaries and that the client's interests will always trump the rule of law. I will name no names, but those who favour mindless soap opera dressed up as a depiction of legal practice at the high end of town will know of what I speak.

In a representative democracy our obligation as lawyers to honour the rule of law and work within it means that we may have to accept, at least pro tem, its limitations and imperfections. In litigation, the advocate seeks justice not according to his or her own concepts or the client's, but justice according to law. That is not perfect justice although perhaps Ambrose Bierce went too far when he defined it as:

A commodity which is a more or less adulterated condition the state sells to the citizen as a reward for his allegiance, taxes and personal service.³

One lawyer with a clear view of justice from a practitioner's point of view was the legendary Ross Mallam who, in 1911, represented one half of the total legal profession of the Northern Territory. He had a client who wanted justice. He told the client: 'We will probably do better. I think we can win your case.'

Passion in this context is not always helpful. The client needs critical judgment and legal skills more than the client needs passion. A salutary illustration of that truth appeared in a poem

written by W S Gilbert about a lawyer called Baines Carew who had a tendency to disabling grief when taking instructions from his clients:

Whene'er he heard a tale of woe
From client A or client B,
His grief would overcome him so
He'd scarce have strength to take his fee.

One client, Captain Baggs, consulted him on a family law matter complaining that his wife pretended to friends that he was a bird and required him to perform bird tricks in public. On hearing this sad story, Baines Carew broke into sobs:

Oh, dear, said weeping Baines Carew,
This is the direst case I know

The client was unimpressed by this display of emotion:

I'm grieved, said Baggs, at paining you --
To Cobb and Poltherthwaite I'll go --
To Cobb's cold, calculating ear,
My gruesome sorrows I'll impart --
No; stop, said Baines, I'll dry my tear,
And steel my sympathetic heart.

He failed to compose himself. The poem concluded:

But Baines lay flat upon the floor,
Convulsed with sympathetic sob; --
The Captain toddled off next door,
And gave the case to Mr Cobb.

Every client, for whom a lawyer acts, whether as adviser or advocate or both, and whether for a fee or pro bono, is entitled to expect first and foremost the best application of the lawyer's skills. It is not enough to believe in the client's cause. Indeed, that can be a distraction. Sometimes it can lead to a perhaps subconscious sense that the moral purity of the cause will win out in the end. That is not always so. At Gray's Inn in London a few years ago, I heard a sermon on the life of St Paul. It was erudite, worldly and witty and ended with this piece of advice to all the barristers and judges assembled for the service:

What the life of St Paul teaches us is that God helps the meek and the humble but also the articulate and the pushy and particularly the competent.

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The clients, of course, are not instruments of social change to be deployed by their lawyers.

Professionalism is valued by the lawyer's client or client group. In that respect I was struck by the comment of the leader of one community group for whom the NSW EDO acted in relation to a proposal for the expansion of a marina at Soldiers Point. As quoted in the annual report, he said:

No matter how passionate community groups like ours feel, we need help with strong, focussed and professional advice and EDO NSW in the end, was our only hope.⁴

The interesting interaction, in the EDO NSW, of advice and traditional advocacy in judicial and non-judicial dispute resolution processes with extensive small 'p' political activity raises a question about how to harmonise or at least avoid conflicts between those different roles. It is trite legal ethics that a lawyer acting for a client or a client group in the provision of advice or in litigation or indeed any form of dispute resolution, must act in the interests of the client, subject to his or her duty as an officer of the court. The clients, of course, are not instruments of social change to be deployed by their lawyers. If they want to be instruments of social change that is a matter for them and they should have a full understanding of the risks associated with public interest litigation.

In an edited collection of essays on the topic of cause lawyering published in 2001, Professors Austin Sarat and Stuart Scheingold made the obvious point that:

cause lawyering stands in sharp and self-conscious contrast to traditional concepts of lawyering, according to which attorneys are expected to provide case-by-case, transaction-by-transaction service to particular clients without reference to either their own or their clients' values, policy preferences, and political and social commitments. In practice, however, cause and conventional lawyering overlap in a multiplicity of ways ... Individual lawyers frequently cross and recross the lines between cause and conventional legal practice.⁵

The tension, of which I spoke earlier, was recognised in a more recent paper in 2013 in the *Social and Legal Studies Journal* in which the author, a postdoctorate research fellow at Lancaster University Law School, observes that:

Cause lawyers make their values regarding what is socially good and just the goal of their advocacy, rather than allowing the goals of the latter to be set out by another party (the client) that they serve independently of their personal value system. Serving their ethicopolitical

commitments through their work constitutes cause lawyers as essentially political actors – albeit ones whose work involves doing law. The double nature of their activity is susceptible to tensions with their professional establishment and, possibly, political authorities.⁶

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This is a topic about which there does not seem to be much literature in Australia. Nor have I heard it much discussed. It is an interesting and intellectually engaging issue, potentially affecting more than one legal service organisation, and an issue upon which perhaps the EDO NSW can offer some intellectual and ethical leadership. I am sorry to have inflicted it on you at the tail end of an address between entree and main course. You will be pleased to know, however, that I do not propose to speak further about the matter. I simply signal that as part of its long-term planning, the EDO NSW may consider what contribution it can make by setting out a framework within which it conducts its roles and thereby providing a model for other like organisations. I use the words 'long-term planning' advisedly, because I have no doubt that the EDO, characterised as it is by resilience, professionalism and, preferably, deep commitment on the part of its people, will be around for a long time to come.

I congratulate the EDO NSW on its 30th anniversary and wish it well in the decades ahead.

Endnotes

1. Charles Barsotti, The New Yorker Cartoon, 26 May 1980, Item #8441633.
2. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.
3. Ambrose Bierce, *The Devil's Dictionary*, ch 10.
4. EDO NSW, Annual Report 2013/14, 27.
5. Austin Sarat and Stuart Scheingold, *Cause Lawyering and the State in a Global Era*, (Oxford University Press, 2001) 13.
6. Christos Boukalas, 'Politics as Legal Actors – Lawyers as Political Actors: Towards a Reconceptualisation of Cause Lawyering' (2013) 22(3) *Social and Legal Studies* 395, 396–97.

An interview with Attorney General Gabrielle Upton

Richard Beasley SC and Victoria Brigden spoke recently with the Hon Gabrielle Upton MP, who was appointed attorney general of New South Wales following the re-election of the NSW Liberals and Nationals government in March 2015.

Bar News: ABC radio recently aired a program about the difficulties of having victims of domestic violence going to local courts because of the way those courts are set up. The parties sit very closely together and there are reports of abuse while waiting to go in the courtroom. You've brought in some reforms to allow evidence to be given by complainants other than at court – can you explain that to us?

Attorney General: There's no doubt that the community is concerned about violence where there's a domestic relationship between the alleged offender and the victim. The home is the foundation of the community and when you have events that are violent, when there's harassment, where there's physical aggression, it goes to the heart of the community and how it can be pulled apart – so this is on the national and state agenda. There are many things at many levels that need to be done to support victims before matters get into the justice system, and we need to recognise that we can make improvements inside the justice system.

To take you back a step, what we announced in the budget is a commitment of opening three additional places for a program called 'It Stops Here – Safer Pathways'. One of them I visited in Tweed Heads recently. The first step of the program is that now when someone makes contact with police, a meeting is arranged that involves representatives of Justice, the police, and local community groups who can provide housing services and assistance to kids. All of this is to take place before an incident gets to court.

The other thing we introduced is that apprehended domestic violence orders can now be issued by senior police – police who have experience with domestic disputes and violence. There is also a process of case-conferencing between community groups, police, and the people involved to work out how you actually help a victim once the risk is identified. Perhaps you don't even get into the court system then because you're providing that victim – who is almost always a woman – with good information about where she can go for support. If it's a matter that's before the courts updates are given to complainants on the court process, the opportunity to access other services – like the women's legal services and community legal centres. If it becomes a matter for the courts, we don't want people who are giving evidence to feel more intimidated than they have to. We need to recognise that court is sometimes a stressful place to be. If it's an ADVO application, it can help the victim if they have the opportunity to give their evidence 'off-site' so to speak, so that they're not having to walk into the court, be confronted with the alleged perpetrator in an environment that can be



quite confronting. We've also got a scheme we're working up called the 'early warner' through police, based on Clareville in the UK – we've been talking about having a disclosure scheme that operates and we're still working out the detail. Probably at the point that a complaint or concern comes to the attention of police, they will do a risk assessment and then decide whether information about the background of the alleged perpetrator is given to that person – the victim or potential victim. So that person can then decide, if they're in a domestic relationship with somebody where they're feeling threatened, if they want to be given information about the other person's past record, so they can make up their mind about what they want to do. We've been consulting with all the agencies and community legal centres about this scheme and it will be piloted next year. It's a combination of making sure people get assistance before a court is involved, and if things do get to the courts, trying to make it as friendly an environment as possible.

Bar News: You've recently announced the appointment of two new specialist judges to hear child sexual assault matters, Judge Traill and Judge Girdham, and we understand you've previously flagged the intention to appoint expert 'children's champions' to help support child witnesses in court. Can you tell us a bit

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about what sort of expertise these children's champions would have and what they would do?

Attorney General: The two women we've just appointed to the District Court have great professional experience in child sexual assault matters. They bring technical expertise and understanding of the court and its processes, but also they will undergo some further training with the Judicial Commission, and I've spoken to Judge Price about this. The training will include more awareness of the issues from the child's perspective. The questions that need to be considered include things like whether a child psychology insight is needed. Is a developmental or medical insight needed? We want a full understanding of how these kids end up in court; all the steps that have to be gone through, how has the complaint been unearthed, and how the child deals with the ordeal of court? It is a holistic training of judges, recognising they are technical experts at the end of the day, but that they need to know as much as they can about the child that's come before them and how the system that has led to them coming into the court works.

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The children's champion is someone who is purposefully an advocate for that child – someone who will literally hold their hand through the justice process. They're not lawyers necessarily – although they could be – but it's a bigger manifestation of that context you want the judges to have. They might be developmental psychologists with a background in kids or they might have a medical background.

Bar News: Are they designed to help the children through the processes of the court?

Attorney General: That too. I won't define it narrowly, I won't say anything is in or out; that's why we have a taskforce looking at this at the moment. It has been used successfully in the UK, so there is a model for it, but we will always listen and adapt – same with the DVDS scheme; but the courts can be different, and the kids, will be different and have different backgrounds and experiences. Broadly speaking, what we are concerned about when we made that announcement is that kids when they are in the justice system probably need a bit more of a helping hand – someone who understands what they're going through,

someone who from their perspective, will sit on their side. The judge has to be independent but the champion is actually for the child, that is the purpose. What technical expertise they have is yet to be really locked down but the policy purpose, the outcome for this is hand-holding for the child through the justice system.

Bar News: There was recently a report in the *Sydney Morning Herald* about the backlog of criminal cases in the District Court and the length of time between committal and trial. Are you concerned about it, and are steps being taken to address whatever problem there might be in terms of numbers of criminal trials in the District Court and any delays?

Attorney General: Yes, I am concerned, and I do look at the statistics, and I do speak with Judge Price about it and I like to think I have a good relationship with the heads of each jurisdiction, because it's one system of justice. It's also connected to policing, with police being well-resourced, whatever the policy imperative there is about what types of crime, whatever they're focussed on, that does have an impact upon what comes inside the courts.

Clearly, there are challenges in that and I go back to the appointment of two district court judges, because when I sat down with Justice Price and we looked at some of the lists and what kinds of cases there were, in some regional areas there is a preponderance of child sexual assault matters. Part of it, and I hasten to say it's part of it, it's not the panacea, is the appointment of those two judges. However I have said to Justice Price they are primarily going to focus on CSA and that will help because a lot of regional courts have cases that need to be dealt with quickly, particularly with young kids being the victims, so judicial resourcing is part of it.

Part of the solution also involves having contemporary justice – by that I mean the appropriate use of technology. We put audio-visual links into a number of places and we upgraded it in a couple of regional places, particularly Lismore which I visited recently, where the quality of the AVL they have now allows them to hear from a person who is an offender in custody in, for example, Grafton Gaol, without the two hour round journey. That's two hours less that a person has to spend in court, a saving in transport time and costs, and minimises

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further distress to the victim and that kind of thing. Online filing of documents is another good use of technology. The efficiency of the courts can be improved by the right use of technology. There's been tens of millions of dollars committed over the term of forward estimates in technology to AVL, and about \$10 m this year for the AVL upgrade.

There is currently work going on, consultatively with all of the courts, on looking at how criminal justice matters can be more efficiently dealt with by the courts. That involves discussions with Legal Aid, the police, the ODPP, the Public Defender – because they're all part of making courts work. They all recognise this as an issue, everyone's been really reasonable at identifying this as an issue. There'll be call lists in courts – for example, there'll be special domestic violence hearing days. Appointing judges is important but it isn't a panacea to all the other things we need to look at.

I haven't met anyone in the justice system yet who's not willing to work towards solutions for decreasing delays. I don't pretend I have all the answers. I've encouraged all participants in the system to come to me with a brokered solution or options that they are all happy to sign up to. My job is to look at what's possible to deliver, and having the District Court judges, ODPP, Public Defender and Department of Justice saying 'we've got two options here to address this problem. It's not possible to change overnight, but here are some things you can do'. That makes my job easier and it also makes it more deliverable when I know I can bring all those people along with me.

Bar News: In a speech you gave recently at a Local Courts conference and dinner you mentioned that the government was going to be spending \$19m on upgrading technology in courts and you mentioned just then some of those improvements including AVLs, online filing etc particularly with reference to the criminal justice system. What can practitioners expect generally from these upgrades, particularly in the civil jurisdiction?

Attorney General: Further investment in technology is being done consultatively. There is more to do, and it would be nice if I had a blank cheque to write for that investment but I don't. Every dollar I get is hopefully from a successful argument to our expenditure review committee to Cabinet. I'm hoping our spend on technology will make practitioners' lives easier too. There's a lot of paper in law, and it's not only the criminal justice system, but I have a very strong interest in civil law as well because I have a background that has given me an appetite for looking at good ideas there. Most matters that appear before the Local Court are civil matters. Most people's experience of justice in the research

I've seen is that a significant number – over a third of people from the Law Foundation survey in 2014 – gave up because they thought it was not worth the bother and they didn't feel they could get justice inside the system. They were confused or overwhelmed by the formal documents, the names, the terms etc. We can demystify it a bit and I think that also helps clients of lawyers understand what's going on. There are other ways of getting justice too, so we have lots of ombudsmen, we have the Water Ombudsman, the Telecommunications Industry Ombudsman, the ombudsman; there are other ways in which justice can be served so that we can reach a higher level than 30 per cent saying they just gave up because they couldn't navigate the local courts. For the profession, I strongly believe that being a member of a profession is a higher commitment than just doing a job. You really believe in what you are doing, you take an oath, you are there to help your client, you have professional obligations. My genuine belief is that the profession will be open to these changes in technology because they want to see a good system that they're proud of being a part of. Whether it's a large matter in the Supreme Court or whether it's a local person who can't sort out a bill with their local council because their rates haven't been paid. I do believe the legal profession will embrace anything that makes sense that links into their higher calling of doing the job they do.

Bar News: We wanted to ask you about mandatory sentencing, even though it largely came up under the purview of your predecessors. In 2011 there was a mandatory minimum sentence brought in for killing a police officer. More controversially, the mandatory minimum eight years has been brought in for 'one-punch laws' – the Kieran Loveridge case – but initially the proposal was for a range of mandatory minimum sentences for a range of offences. One was assaulting a police officer when intoxicated, another was assault occasioning actual bodily harm if intoxicated – these didn't get the support of the Upper House. Are those proposals dead or are they still on the table for you to look at?

Attorney General: To take a step back from the specifics of it, mandatory sentencing is something used in very rare circumstances. My personal view is that mandatory minimum sentences should be rare, and that's the view of the government. There has to be a good public policy reason to be served by mandatory sentencing.

Those two things you've raised, one was responding to a concern within the community about police officers that I thought was a reasonable concern. Police are in public service, they put their bodies on the line every day – I think a mandatory minimum is justifiable for killing a police officer.

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My personal view is that mandatory minimum sentences should be rare, and that's the view of the government. There has to be a good public policy reason to be served by mandatory sentencing.

In respect of the 'one-punch laws', there was incredibly strong community sentiment at the sense of injustice of a young boy's life being so senselessly taken.

Bar News: There are obviously people who are against mandatory sentencing because they consider that it can lead to injustice, depending on the circumstances of the offender. One of the criticisms though of the mandatory sentencing law that did get passed was that it jumped the gun of the Court of Criminal Appeal, which imposed almost double the sentence that was imposed by the original judge (four years up to seven years). Did you have a view on that at the time?

Attorney General: Sometimes the community expectation is that government or parliament will act on injustice before a matter works its way through an appeal process. My overarching viewpoint though is that the judiciary on the whole does a very good job. They are independent of me and parliament and that's appropriate. They do a really difficult job and they have to consider the subjective factors in the cases that come before them. I think where we've achieved most is with standard non-parole periods. What the government and parliament has done here is set out what should generally be the appropriate sentence for certain serious crimes. There are something like 15 new child sexual assault standard non-parole periods, and six that relate to offences involving the use of firearms. These standard non-parole periods send a signal to the judiciary – and I think assist them – about community expectations regarding sentences for particular offences.

Bar News: They are almost akin to a legislative guideline judgment, aren't they?

Attorney General: Exactly. They provide an average about where sentences should come out at for particular crimes. We've done it with serious firearm offences because with gun and weapon crime we need to reflect the community's view that gun crime is something that we won't tolerate. It's not about mandatory minimums but the expression of an expectation concerning sentence, while recognising that in some cases there may be subjective factors that suggest a lower sentence might still achieve appropriate justice. We don't want to fetter the judiciary from being able to consider individual matters that

may not be the norm. I think that's a good balance; we can set the signals but we're not telling them exactly what to do, or impinging on the separation of powers.

To give you some examples, with child sexual assault offences, we brought some new standard non-parole sentences in and we increased two because there's been such a huge community focus and concern off the back of things that have recently been exposed and that's entirely appropriate. The firearms goes back to the issue of safe community. People don't want to see weapons on the street. I think that recognises that balance between judiciary being independent, government being accountable to community and giving them a framework they can work within, but recognising that when you read judgments, it's nuanced, they are made by real people in real time and you can't fetter the discretion of the judiciary to make judgments that are based on all of the facts.

Bar News: You've recently announced that victims in transition between the old Victims Compensation Scheme and the new Victims Support Scheme can have their claims reassessed and if they're found to be awarded a higher amount then they get the higher amount, and if it's a lower amount under the redetermination then they don't need to pay any money back. Do you know yet what the reassessment process will involve and is there a timeframe on how long that will take?

Attorney General: I announced that recently – it was a big focus of mine and an election commitment to make that right. It related to people who had put in claims under the old system but who were being treated under the new system. We're giving people a chance to be reassessed.

Claimants will have six months to provide evidence to support the claim which can be done from 1 September, and the program will run for basically three years, we're thinking, but it had to be budgeted on the administrative side and it had to be modelled actuarially, to understand on claims like this what was the cost of this to government so we could put it in the budget and get it approved. I talk to the head of the department probably once a week asking how it's going. On the first day there were ten callers, the second day there were eight, so we're not being inundated but that's appropriate and they're

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writing to everybody; we will put an advert in the paper, a really strong outreach because we don't want anybody not knowing this is available for them and to provide good information so they can decide if they want to do it.

Bar News: For a very short time your portfolio was in what was called the Department of Police and Justice. Then the Police Department dropped off the title. There is the police minister in the Justice Department, you as attorney general, and Corrections.

Attorney General: And Juvenile Justice.

Bar News: Is there something akin to what was the Attorney General's Department, and is that what gives advice to you, and how does the department work if on a policy issue you had a disagreement with the police minister, and wanted to give different advice to Cabinet? Is there a potential that the one department could give conflicting advice to parliament. How does that work?

For a very short time your portfolio was in what was called the Department of Police and Justice.

Attorney General: Andrew Cappie-Wood is the Secretary of the Justice Department. I have a very strong relationship with him which is one of mutual respect. He's a consummate public servant. He knows what he needs to do and he provides me with options. Whatever structures you set up, government and Cabinet rely on ministers knowing their portfolio, knowing what they're doing, making strong arguments to Cabinet. Cabinet involves robust debate and we are all equals in Cabinet, and when I formulate a policy to go before Cabinet, I formulate that as attorney general. We get robust advice from the department, but at the end of the day it's the will of the minister and the premier so, obviously the premier has a strong say in that discussion because he is the leader of us, first among equals if I can put it that way, but in terms of a practical sense of getting reforms up, that's up to the minister to make the point. There is no structural impediment to me doing what I think is appropriate in my portfolio as attorney general. That may involve robust debate with the minister for police. It also runs over with many of the other things I take an interest in, because some of the work we do in the justice system will impact upon lots of ministers, like the health minister. This is where my role is different from the other ministers, because I'm the

What I would say to barristers who want a return to the QC option is to tell me how this improves the experience of justice in NSW, because that's what I'm interested in.

chief law officer and I have powers that are important vestiges of what was a role where the attorney was actually the lawyer or barrister for government. There are things that go beyond our immediate portfolio and really are oversight roles that you have of the law across the portfolios outside of Justice, broadly described as I have from corrective services back to policing. I have a very active role and embrace talking across government about law reform and law proposals. So what I'm painting is the picture where, this role is beyond Justice in the organisational sense, and then within that portfolio cluster we do have robust debates, of course we're going to have them, but you expect that. To have those debates is democracy. The police do very good community work as we have said. They are out there putting their bodies on the line every day and there will always be a robust debate about what properly falls into their province and what is the court's. I think that is how it should and is going to be, because they are stakeholders, they are articulate stakeholders and they believe in what they do, so equally those robust policy debates will happen between the police minister and myself.

Bar News: In Queensland and Victoria, barristers who were senior counsel have now had the option of taking up the title queen's counsel. There are members of the New South Wales Bar who are SCs who are keen to take up the QC title. Equally there are probably juniors who when they take silk are keen to take up the QC title rather than SC. Is that a debate you are following and do you have any particular view at the moment about whether the administration of justice would be served in any way by allowing barristers to take up that option?

Attorney General: That's the test – the administration of justice and whether it would be improved or not. I'm happy to look at everything, I don't have all the answers, I don't know all the issues and so that's why we have regular meetings with all the key stakeholders.

Bar News: Some of the proponents are saying that competitiveness in Asia in the arbitration market in particular requires the title of QC.

Richard Beasley SC and Victoria Brigden, 'An interview with Attorney General Gabrielle Upton'

Attorney General: Yes, I've heard that. I think the profession is divided over it. We have the federal body saying no and the state body has had feverish debates over it. There is not one view. What I would say to barristers who want a return to the QC option is to tell me how this improves the experience of justice in NSW, because that's what I'm interested in. We do get emails from time to time from people but I wouldn't say there is any leadership group coming to me saying this is what the profession has resolved because I think the profession is divided on it.

Bar News: You have a wealth of professional experience as a solicitor and in the business world, and a wealth of personal experience as a wife and mother. You've been reported as saying that you think those roles bring special qualities to any role you do, but you believe in promotions based on merit and so on. What assistance do you think your professional and personal background brings to your role as attorney general?

Attorney General: A life experience and perspective, and I think that's really important when you're in a decision-making role. Technical experience is important and in politics you have such a range of people, doctors, nurses, helicopter pilots, for example. What I like to think I bring to the decisions I make is firstly the perspective and experience gained from my former ministry, because being the minister for Family and Community Services has helped me act quickly and knowledgeably on child sexual assault issues that I've seen from the side of that portfolio – the court is just one part of the solution for those poor kids who deserve every chance at a good life.

I'm also kept very honest by being a local member so you get that feedback in your own community every day, and I'll be out there each week and they'll be telling me 'you should do this, you should do that', and that's healthy. At the end of the day you make a judgment about it.

I was gratified, surprised and humbled by a call from the premier saying, 'how would you like to be the first female attorney general in the state?'.

Living and working in New York has been helpful. Having teenage kids is also 'educational'. Like most parents I have that practical insight of knowing the challenges of social media and having teenage kids these days. I'm the sum of the parts of my life. Inasmuch as this portfolio is about some really technical, detailed stuff, you have to have the ability to be able to go through some serious arguments and present them in an understandable way to the community which is the challenge of politics because things are very complicated, particularly when you're talking about the law. I've always been engaged with the community which I think is probably what eventually means you want to run for politics, although people who knew me said 'we always thought you'd run for parliament', but there wasn't any crystal-clear vision I had when I was 16 saying 'I'm going to be in parliament', so it's been an evolution. So I haven't done everything through the prism of politics either, which I think is very helpful, I haven't thought I'm doing this because I want to be an attorney general. I was gratified, surprised and humbled by a call from the premier saying, 'how would you like to be the first female attorney general in the state?'. I thought, 'wow, I wouldn't have dreamed this up'; it wasn't that I wouldn't have dared to dream, but it wasn't something I dreamt long and hard about – but it's been a great opportunity and privilege to seize.

Acting Justice Jane Mathews AO

Tina Jowett¹ spoke with Acting Justice Jane Mathews for *Bar News* about her experiences as one of the few women at the bar and the bench in the 1960s to 1980s.

Jane Mathews was born and raised in Wollongong. She boarded at the Frensham School in Mittagong until she completed the leaving certificate² and was only one of two girls who then attended university.

Bar News: What motivated you to study law?

Mathews: That's easy; when I was 14 years old my school showed the movie of the Terence Rattigan play, *The Winslow Boy*.³ It was about a school boy who was wrongly charged with stealing. The lawyer representing him, played by Robert Donat, got up before the House of Lords at the end of the movie and said, 'let justice be done.' And that just got to my idealistic 14 year old heart and the next holidays I went home and said to my parents, 'I'm going to study law.' My father, who was very conservative in some things said, 'No daughter of mine is going to do law.' He thought it would be a complete waste of time and I'd go off and get married and have babies.

My mother was delighted. She came from a family of lawyers. But my father wasn't happy about it. So I spent a couple of years persuading him to let me and he finally relented so I went to Sydney University. There were very few girls studying law then. There were only two others girls who started and finished in the same year as me.

Bar News: Could you study law on its own at Sydney University or was it a combined degree?

Mathews: Law was a four year course then and you also had to do three years of articles. Your 3rd and 4th years at law school were combined with work doing articles. Then there was a further year of articles after graduation before we could be admitted to practice.

Bar News: Was it difficult to obtain an article clerkship?

Mathews: It was for women in those days, but I was really lucky as my father was chief engineer of the BHP⁴ steel works at Port Kembla. I don't like saying this, but Dawson Waldron Edwards & Nichols,⁵ did all the BHP work. So they agreed to take me on. I was their first female article clerk. At the very end of my articles I moved to a small firm. Then I was admitted as a solicitor in 1962. For a while I worked with a firm in Wollongong, and in early 1965 I returned to Sydney, and worked at Allen, Allen & Hemsley,⁶ doing defamation work for the Packer Press⁷ which was very interesting. Then I went to the bar in 1969.

Bar News: I wanted to ask you how people went about becoming a barrister and reading at that time?

Mathews: No such thing as reading. You'd say, 'I'm not going



to be a solicitor anymore, I'll be a barrister! You applied to be taken off the roll of solicitors and moved onto the roll of barristers and had another admission ceremony.

Bar News: How did you choose chambers?

Mathews: It was not easy. There was a room to rent in Forbes Chambers in Phillip Street. I couldn't afford to buy a room.

Bar News: I have looked at the Law Almanac from 1970, the year after you were admitted, to see how many women were practising as barristers and there were 16. I was wondering if you knew them and were they visible?

Mathews: I think probably in terms of women that were visible at the bar, it certainly would not have been more than 10.

Bar News: Were there Bar Association gatherings then?

Mathews: Downstairs in the common room of the Bar Association there was a lunch every day and the bar was open in the evenings after work. You could go down and have a glass of wine and socialise. I was probably the first woman to go down to the drinks on a regular basis.

Most of the women who were at the bar at the time were working in family law. Mary Gaudron was an exception. I did a couple of family law matters at the beginning but I didn't want to end up doing only family law. So I refused to do any more. It was very tough for a while. But then I discovered criminal law. There was a form of legal aid administered through the Bar Association, to represent accused people in District Court trials. The return was small so most people didn't want to do it.

INTERVIEW

Tina Jowett, 'An interview with Acting Justice Jane Mathews AO'

But for me it was work. That's what took me into the criminal law area.

Bar News: How did your appointment to the Royal Commission on Human Relationships⁸ between 1974–76 come about?

Mathews: I got a phone call from the Commonwealth crown solicitor offering me the brief. I was staggered.

Bar News: Do you think it had anything to do with being a woman?

Mathews: It had everything to do with me being a woman.

Mathews: The royal commission arose partly out of an abortion debate in the Australian Parliament. We dealt with all aspects of societal issues and I did the chapter in the final report relating to sexual offences. It was a huge eye opener for me and I realised just how much the legal processes victimised women who had been brave enough to report sexual offences.

After the royal commission I left my previous chambers and went to Wardell Chambers. Then I got a phone call from Trevor Haynes who was the head of the state Attorney General's Department offering me a Crown prosecutor's role which I agreed to take on.

Bar News: Did you enjoy that work?

Mathews: Yes and no. I enjoyed doing the court work. Early on I did a sexual assault case and the victim, of course, was a woman. Invariably, I was the only person with an active role in the court who was a woman. The juries then were all men. The very first time I did a sexual assault case the victim was almost in tears with joy at having a female representing her interests. I went back and asked to do more sexual assault cases, not because I particularly enjoyed them, but it made such a huge difference to the victims.

'I want to appoint you to the District Court and if you say 'no', I'll thump you.'

Bar News: In 1980 you were appointed as a District Court judge.

Mathews: It was a complete surprise. The call came from Frank Walker, the NSW attorney general. I'd been on the Bar Council and had got to know him. He rang and said, 'I want to appoint you to the District Court and if you say 'no', I'll thump you.' So, of course I didn't say 'no'.

It was a huge eye opener for me and I realised just how much the legal processes victimised women who had been brave enough to report sexual offences.

Bar News: You were 39? Very young to become a judge. Were you daunted by the concept of being a judge?

Mathews: Of course I was.

Bar News: Was there any judicial training then?

Mathews: None at all. I hadn't done civil work for a long time and I suddenly had to sit on civil cases. But I still did a lot of a criminal work and circuit work. I just loved it.

Bar News: Were the other judges helpful and did they provide you with assistance?

Mathews: It varied. The older more conservative ones were probably not all that happy about me being there, and there were quite a number of them then. They didn't say anything, but you could tell from their attitude. On the other hand, I made some really good friends on the court.

Bar News: When you were first appointed to the District Court you were the first female judicial appointment in New South Wales?

Mathews: I'm certain there was a female magistrate.⁹ But for full judicial office, yes.

Bar News: You were appointed a senior judicial member of the Equal Opportunity Tribunal from 1985 to 1987?

Mathews: It was part of the state anti-discrimination legislation. You don't often get a chance as a judge at first instance to make a real difference. But I was able to make decisions in all sorts of areas of disability and sexual harassment in the workplace. There was a fascinating case called *Leves v Minister for Education*¹⁰ that rectified the imbalance that then existed between elective subjects that were offered to girls and boys in single sex public schools. The girls were given all the domestic-based subjects. The boys were given the subjects that could equip them for big careers. I found discrimination. The minister appealed to the Court of Appeal.¹¹

Michael Kirby was on the Court of Appeal¹² and he pointed out that the boys were also being discriminated against because they might want to study the areas that were designated for girls. After that the full range of subjects had to be made available to both boys and girls.

INTERVIEW

Tina Jowett, 'An interview with Acting Justice Jane Mathews AO'

Bar News: Then you were the first woman appointed to the Supreme Court in 1987. How did that happen?

Mathews: I got a phone call from Terry Sheehan and he said, 'I want to offer you the Supreme Court.' I was enjoying my time on the District Court and I said, 'Well, look I'll have to think about it.' But when I did think about it I realised that I really had to take it.

Bar News: You were the second woman in Australia to be appointed to a Supreme Court after Roma Mitchell. How was the reception when you arrived at the Supreme Court?

Mathews: The chief justice was Laurence Street. He was terrific. But there were some very conservative judges on the court then. They clearly didn't like it.

But there were some I'll never forget, like Mervyn Finlay.¹³ He was wonderful. He was the list judge in Common Law. I don't know how I would've survived without Mervyn.

Bar News: You were at the Supreme Court from 1987 until 1994 and then you must have got another phone call?

Mathews: I did, from the Commonwealth attorney-general, Michael Lavarch. I had no idea. He offered me the presidency of the AAT¹⁴ which of course also meant being a Federal Court judge. I also said I would like to be on the recently formed National Native Title Tribunal. It was the beginning of a fascinating seven years.

By the beginning of 2001 I had been a judge for 21 years. I left the Federal Court because Jim Spigelman¹⁵ told me that I could return to the Supreme Court as an acting judge, and I have been doing that ever since.

Bar News: You have been the president of the Australian Association of Women Judges and I believe you were the founder?

Mathews: Yes, I was the founder. It started in 1989 when the American Association of Women Judges had its tenth birthday. They obtained funding to bring women from all over the world to a conference in Washington DC. I was the only woman Supreme Court judge in Australia at the time. So I went as the Australian representative and it changed my life.

I'd been really isolated. I'd been on the bench for nearly 10 years as the only woman on my court. To suddenly be among a whole group of women experiencing exactly the same thing was amazing. Out of the 1989 conference was born the International Association of Women Judges. We were very

lucky; our founding mother, as we called her, gave it very broad goals, not just about women judges or women in relation to law, but human rights. And it's a wonderful organisation that does huge things. I was treasurer and then later president of the International Association between 2004 and 2006.

I started the Australian Association of Women Judges in about 1991. In order to start it I had to get five female judicial officers together. Finally after court one day, I got Deirdre O'Connor from the Federal Court, Barbara Holborow who was a magistrate; there was one District Court judge and, I think, Elizabeth Evatt and me. It took me ages. I'm still closely involved.

Bar News: You are the patron of the Women Lawyers Association of New South Wales?

Mathews: Yes, I have long been concerned about issues regarding women in the legal profession, particularly women at the bar. There have been more women than men graduating in law for decades now. I'd always assumed that we'd have this surge from the bottom up, and that by now women would be equal all the way to the top. But the surge becomes a small trickle the higher you go.

One of the problems is that women aren't going to the bar, which is the usual pathway to the bench. Hence, the importance of the Women Lawyers' Association's Career Intentions Survey, to try and find out why women are not choosing the bar as a career. For only then can we start to address the reasons why.¹⁶

Bar News: Thank you for this interview. It has been a great pleasure having a conversation with you.

Endnotes

1. Tina Jowett is on 6th Floor Windeyer Chambers and was called to the bar in 2003. She was associate to Jane Mathews from 1995 to 1996.
2. The Leaving Certificate was the equivalent of the Higher School Certificate. At that time High School was for five years, not six years as it is now.
3. *The Winslow Boy* is a 1948 film adaptation of Terence Rattigan's play of the same name. The play focuses on a refusal to back down in the face of injustice. The entire Winslow family, and the barrister who represents them make great sacrifices in order that right be done.
4. Jane Mathews' father, Frank Mathews, worked for the Broken Hill Proprietary Company Limited (BHP), that was founded in 1885 to mine silver, lead and zinc deposits in far western New South Wales. In 1915, the company moved into steelmaking, opening a works at Newcastle and later Australian Iron & Steel Limited (AIS) was acquired by BHP in 1935 and it operated a steelworks at Port Kembla.
5. Now Ashursts.
6. Now Allens.
7. The 'Packer Press' was Australian Consolidated Press a company that Frank Packer created in 1936 by merging E.G. Theodore's Sydney Newspapers and Australian Associated Newspapers.

Tina Jowett, 'An interview with Acting Justice Jane Mathews AO'

8. The Royal Commission on Human Relationships was set up by the Whitlam government with the support of the opposition in 1974 until 1978. The commissioners were Anne Deveson, Elizabeth Evatt and Felix Arnott. The terms of reference for the commission were 'to inquire into and report upon the family, social, educational, legal and sexual aspects of male and female relationships'. The broad terms of reference allowed the royal commission to look at all aspects of society including the more controversial issues such as abortion, prostitution, rape, incest and homosexuality: Australian Federal Government, Royal Commission on Human Relationships: The interim report 1, 12th February 1976, Canberra.
9. Margaret Sleeman was appointed a NSW magistrate on 27 July 1970 and was Australia's first woman magistrate. At the time of her appointment she was 36 years old and had worked in the Justice Department for 21 years.
10. (1986) EOC.
11. *Haines v Leves* (1987) 8 NSWLR 442.
12. Among many other achievements Michael Kirby was a High Court judge from 1996–2009, president of the Court of Appeal from 1984–96 and Deputy president of the Australian Conciliation and Arbitration Commissioner from 1975–83.
13. Mervyn Finlay was admitted to the bar in 1952 and was a Supreme Court judge from 1984–94. He also represented Australia in the 1952 Helsinki Olympics as an eights rower.
14. Administrative Appeals Tribunal.
15. James Spigelman AC QC was the chief justice of NSW from 1998–2011. He is currently the chairman of the Australian Broadcasting Corporation.
16. The Women Lawyers' Association of NSW Career Intentions Survey is the first study in Australia with the capacity to measure and address the effectiveness of initiatives targeting diversity, retention of talent and leadership in the legal profession. 1,403 law graduates from all university law schools and the College of Law in NSW participated in the survey from 2010 to 2015. The reasons that women law students gave for not practicing at the bar were (1) because the bar involves too much stress and pressure; (2) it is too intimidating; (3) it is not family-friendly; and (4) it is too male-dominated.

Farewell Paul Daley OAM

By Christine Melis



Above: a 15 Bobber was held on 14 August 'to celebrate the appointment of Paul Daley OAM to the position of retired gentleman'. Images: Murray Harris Photography

Many of us have probably had several different jobs before coming to the bar. But for one man, one job and one job alone did the 'job' for a whopping 54 years. Paul Daley retired this year after serving as a barrister's clerk with Eleven Wentworth for 54 years. So I asked Paul what kept him in the same job. The answer was simple, 'I loved coming into work every single day. There was always something different happening.'

The clerk's role has changed and evolved over the decades. Paul has seen the change in all its different shades of colour. 'Fifty four years ago we would be doing the court listings', Paul reminisces. 'We would go to the Supreme Court and speak to the list clerk about what would go in tomorrow's list, then to the court of appeal to put our counsels' available dates into the diary. Now court dates are fixed in advance.' Paul fondly recalls what he calls a 'lovely chaotic' between the hours of 4–6pm every day. 'The amount of work that would flow between 4–6pm was amazing. There were so many briefs to be passed. Barristers and solicitors would be jammed with 1–3 matters listed on the one day. Solicitors would ring you and give you a number of matters that they had in the next month to find counsel for.' You don't have that period between 4–6pm anymore. 'Things are more orderly now', Paul reflects.

Things have indeed changed and the role of the clerk has had to respond to that change, Paul ponders. 'About 20 years ago the common law started changing and then a lot of floors went to only common law or commercial and public law. With that the dynamics of the bar started changing too.'

So what hasn't changed? Have there been any constants over

the five decades at the New South Wales Bar? 'Giving service to solicitors' Paul says defiantly, 'always being there and available anytime seven days a week and letting them know that you are available if they get into trouble.' Equally, running the floor has always been the same. 'The floor has to be a happy work place. Staff and barristers have to like being there. If you can achieve that it will be a happy place.' This is something Paul has always proudly tried to achieve and floor members and staff attest to his great success in this regard.

Not only a hard working clerk, Paul is known for his social nature and his sporting prowess. He remembers his time as the president of the Clerk's Association for four years in the 1990s. 'Back then it was more a social organisation' he says. There was the annual barristers and clerks cricket game at Rushcutters Bay. 'I loved watching it. But being a surfer I would get terribly bored. I remember going along and the other clerks wanted me to do the fielding 'Paul you go out and toss the coin' they told me 'and make sure you call heads. If it's heads make sure you select to bat first.' 'Why?' I asked. 'Because we gotta have first go at the keg in this heat!' I later realized it was a double headed coin!

For Paul the most satisfying thing has been to see readers start on the floor then buy a room and then progress through to junior, senior junior, silk, the bench, or have a long and satisfying career at the bar. Paul is proud have worked with some of the great minds in Australia with Eleven Wentworth Chambers. On 3 October 2015 a dinner was held in Paul's honour at Catalina's. Many speeches were given on the night. Here's what Eleven Wentworth member, Kate Williams, had to say.

Paul Daley: that kind of hero

Kate Williams delivered the following tribute to Paul Daley OAM at a dinner held in his honour on 3 October 2015 at Catalina Restaurant.



Murray Harris Photography

I came to the bar at the age of 27 with the usual mixture of ambition, excitement and nerves. I knew that a reader's spot on the Eleventh Floor was a great start, but I was anxious about whether I would be able to carve out a career at the bar with few solicitor contacts and little experience behind me.

My husband said to me: 'Look, don't worry. If you can't make a go of it with Paul Daley as your clerk, then we'll just know you're hopeless and you'll have to find something else to do.'

He was right.

In my early years, Paul didn't just arrange briefs for me – he worked to build up my confidence. This was everything to me because I soon learned that you can't win a case just with hard work – a barrister (especially a baby barrister) has to have confidence, or at least the appearance of confidence.

Whenever I headed down the rabbit hole to spend a day in the Local Court or a District Court arbitration, where my swaggering opponents would be bursting with confidence, Paul would have been in my room beforehand 'putting me through my paces' as he used to say.

He would appear in the doorway at about nine in the morning – 'Everything under control, Katie'

It wasn't a serious question. Paul had been clerking for barristers long enough to know that things were never entirely 'under control'. It was a conversation starter.

My husband said to me: 'Look, don't worry. If you can't make a go of it with Paul Daley as your clerk, then we'll just know you're hopeless and you'll have to find something else to do.'

Conversations in which Paul drew me into explaining in two minutes or less what the case was about, how I planned to run it and, of course, what I thought the odds were.

Conversations during which I learned to watch carefully for that ever so slightly raised eyebrow that told me I might need to re-think something.

Conversations that always ended the same way: 'You'll be right Katie.'

And then I would be on my way, often with a bit of re-thinking to do during the march down Elizabeth Street, but feeling that I'd be right, because Paul knew that I'd be right.

And I was all right, even when my opponent was a bully or my own client ambushed me from the witness box, because on the march back up Elizabeth Street, feeling a little deflated, I knew that I could tell the tale to Paul at the other end – over a glass

Kate Williams 'Paul Daley: that kind of hero'



Murray Harris Photography

of wine if necessary while he pretended to sip on a light beer.

Of course, things have changed as the years have gone by.

I don't need to be 'put through my paces' before court any more, but there have certainly been times when my back has been up against the wall and I have needed Paul to tell me 'You'll be right'.

I'm not talking about needing Paul to come and collect me from a long lunch and an unfinished bottle of red to return to a conference I had forgotten about. You have all heard those stories in other speeches about other barristers. Unfortunately for me, I don't get to enough long lunches to create that sort of drama for Paul.

My drama was of the more mundane kind that stems from trying to be a good mother, a wife and a barrister all at the same time – so many of us on the floor are trying to pull off some variation of this juggling act these days. I remember arriving in chambers well after nine one morning not too long ago, feeling and (no doubt) looking more harassed than usual. I rushed past reception and Paul's office and into my room.

Paul appeared in my doorway a moment later: 'Everything under control, Katie?'

'Not really, Paul.' I downloaded my domestic scenario that morning in bullet points. I was due in court at 10 o'clock. Paul looked at me. 'Oh geez', he said. Then fixed me with that firm gaze of his, and said: 'You'll be right, Katie.'

And in that moment, I knew that I would be.

What is remarkable is that Paul did this for all of us on the Eleventh Floor for so many years. He had an uncanny ability to detect any crisis – small or large – and to offer just the comfort, advice or encouragement the person most needed. In my case, the juggling act was (and is) just a fact of life and 'You'll be right' was code for – 'that's done now – stop thinking about it and get on with the job'. That was exactly what I needed at the time.

Over the years, we have all shared with Paul not just our little dramas but also our more significant personal triumphs, setbacks and tragedies. In between negotiating fees and filling up our diaries, he has been there for all of those, celebrating with us, helping us keep the show on the road when things were tough, or covering for us when we couldn't. And we have shared Paul's highs and lows – the wonderful times like the arrival of his grandchildren, and some terrible times, during which Paul has displayed grace and fortitude and has managed to maintain his wicked sense of humour.

I didn't write these words, but I think them appropriate for this occasion:

Some think that heroes are forged in the white heat of the dangerous moment. But there is another kind of hero, the person of quiet decency whose achievement is only built over an entire career.

Paul, you are that kind of hero.

Remembering Sir Kenneth Jacobs KBE QC

The Hon Robert French AC delivered the following tribute to Sir Kenneth Jacobs KBE QC at a special sitting of the High Court on Tuesday, 13 October 2015.



Sir Kenneth Jacobs KBE QC. The portrait by Ralph Heimans was commissioned by the Bar Association in 2011 and donated to the Supreme Court of NSW. Photo: Murray Harris Photography.

This special sitting of the court is convened to honour the memory of the late Sir Kenneth Sydney Jacobs KBE, a former judge of this court who died on 24 May 2015. We are joined on the bench today by the Hon William Gummow AC. Also present in court are the solicitor-general of the Commonwealth, Mr Selth representing the Law Council of Australia and the Australian Bar Association and other senior counsel and counsel at the bar table. The attorney-general for the Commonwealth who had hoped to be present today has sent his apology for being unable to attend.

The court extends its sympathy upon the death of Sir Kenneth to his daughter, Rosemary Henderson, his stepson, Peter Stewart, and his partner since 2008, Christopher Horodyski.

Kenneth Sydney Jacobs was born in Sydney on 5 October 1917, the eldest son of Albert Jacobs and Sarah Aggs. His father was a hat manufacturer and was, as Sir Kenneth said in an oral history interview with Peter Coleman in 1996, 'obviously comfortably off'.

He was educated at the Knox Grammar School. He was dux in his last year there in 1934. In 1935, he commenced studies

The Hon Robert French AC, 'Remembering Sir Kenneth Jacobs KBE QC'

at Sydney University, graduating in 1938 with the degree of Bachelor of Arts with honours in Latin and Greek. One of his fellow students in classics was Gough Whitlam, whose government was to appoint him to this court in 1974. He enrolled for the LLB degree in 1938. He completed his law exams for the year 1939 in February 1940, as was then the practice, at Sydney University. However, following the invasion of France in May 1940 he enlisted in the AIF. He served with the 9th Division in Egypt, including in the Battle of El Alamein in 1942. In 1943, he was sent to New Guinea and was at the landings at Lae and Finschhafen. He was appointed as an intelligence officer.

In late 1944, or early 1945, he was discharged from the army under an arrangement by which soldiers who had interrupted their professional studies to enlist could resume those studies. He returned to Sydney University and graduated with a LLB with first class honours. He was also awarded the University Medal. In his last year at the law school he served as an associate to Justice Leslie Herron, who was later to become chief justice of New South Wales.

In 1952 he married Eleanor Mary Stewart nee Neal. Her son, Peter Stewart, six years old at the time, became his stepson. He and Eleanor had a daughter, Rosemary, who was born in 1953.

While at the bar, Kenneth Jacobs was the Challis Lecturer in Equity at Sydney University from 1953 to 1960. He agreed with the legal publisher, Butterworths, to write a book about trusts. The writing of it became, he said, a millstone around his neck. It was published in 1958 under the title *The Law of Trusts in New South Wales*. Even though titled by reference to trusts in New South Wales, it was then the only Australian textbook on the topic and gained wide acceptance. It was even accepted in Victoria, as the chairman of the Victorian Bar Council, Richard McGarvie QC, was to point out many years later in 1974 when welcoming Sir Kenneth to the High Court at its first sitting in Melbourne after his appointment. Sir Kenneth later said that Butterworths was quite surprised when the book sold. He thought it was popular with the profession because he had included in it discussions of specific problems faced by trustees in particular situations. Later editions were appropriately retitled *The Law of Trusts in Australia*. They continued to bear

Kenneth Jacobs was approached to stand for the Liberal Party for a vacancy in the Legislative Council of New South Wales...He regarded membership of the Legislative Council as compatible with legal practice but had no intention, if elected, of devoting himself to politics. He said in his oral history: 'I didn't think that was what was expected of the Legislative Council'

Kenneth Jacobs was admitted to the bar in New South Wales in 1947. He read with Kenneth Asprey. One of his friends at the bar, who also read with Asprey, was Anthony Mason. He was conscious of enjoying two advantages. There was a lot of work and, being a little older than other newly admitted barristers and with the experiences of the war behind him, he had gained a certain insight into people. He practised, with notable success, particularly in the fields of commercial, taxation and equity law, and later in constitutional law. He was led in a number of cases by Garfield Barwick QC who many years later, as chief justice of this court, would swear him in as its 24th justice.

his name and became known to students as Jacobs on Trusts. He said in his oral history that he regarded the writing of the book as a dangerous undertaking because he risked being identified as a sort of chancery lawyer. History demonstrates it did not have that effect. He would not be so confined. The authors of subsequent editions were notable names in equity: Roddy Meagher, William Gummow, Dyson Heydon and Mark Leeming.

In or about 1958, Kenneth Jacobs was approached to stand for the Liberal Party for a vacancy in the Legislative Council of New South Wales. The party was divided at the time and he lost the ballot by one vote. His agreement to stand did not

The Hon Robert French AC, 'Remembering Sir Kenneth Jacobs KBE QC'

...there was prescience in his linkage of the historical conception of judicial power with basic rights, traditionally defended by what he called 'that independent judiciary which is the bulwark of freedom'

spring from any strong political commitment. He regarded membership of the Legislative Council as compatible with legal practice but had no intention, if elected, of devoting himself to politics. He said in his oral history: 'I didn't think that was what was expected of the Legislative Council'. He was appointed as a queen's counsel in 1958.

In March 1960, Kenneth Jacobs was appointed as a judge in Equity in the Supreme Court of New South Wales. He had served as an acting judge on that court for six months. Upon his appointment he relinquished the position of Challis Lecturer in Equity and was succeeded by his friend, Anthony Mason QC. Sir Anthony, who appeared before Jacobs as a trial judge in the Supreme Court was, much later, to describe him as a creative lawyer with wide-ranging interests. He described the quality of his judgments at first instance as excellent, noting that he frequently looked to the reason underlying an applicable rule rather than the rule itself.

In 1963, Garfield Barwick, who by that time was minister for external affairs, invited Kenneth Jacobs to accept appointment as president of the Constitutional Court of Cyprus. That court had been established as part of a settlement between Greece and Turkey. It comprised a Greek Cypriot judge, a Turkish Cypriot judge, and a president who came from neither community. The first president had been appointed but did not stay the full term of three years. Kenneth Jacobs agreed to accept the appointment which was announced, but before he could take up his position, fighting broke out again on the island and the court never sat again. He said in his oral history that had he taken up the appointment he would have had his wife and daughter live somewhere peaceful. He had in mind Beirut, which answered that description at that time.

In 1966, Kenneth Jacobs was appointed to the newly established Court of Appeal of the Supreme Court of New South Wales. One of the other founding members of that court was Cyril Walsh, who was to become a member of this court in 1969. In 1969, Anthony Mason joined him on that court.

Jacobs became its president in 1972, succeeding Sir Bernard Sugarman. He was, of course, on the court in 1970, when New South Wales decided to adopt the judicature system and replace the old division of jurisdiction between common law and equity, as had been done in the United Kingdom a century earlier. He famously observed that the Supreme Court Act 1970, enacted to give effect to that change, was 'a great leap forward to 1870'.

As appears from his oral history, Kenneth Jacobs took the trouble to seek out and appoint as his tipstaff, when on the Supreme Court, a promising young Aboriginal man with a Higher School Certificate, who later undertook law studies. As he recalled it, he was the first judge to make such an appointment.

While on the Court of Appeal, he wrote a comment for the *Sydney Law Review* on the late Professor Stone's well-known book *Legal System and Lawyers' Reasonings* published in 1965. He focussed upon Stone's formulation of the relationship between law and logic and disclosed some of his own judicial philosophy when he said: 'The law develops not by deductive logic alone but largely from judicial choices.'

He described what he called a change in the judicial climate between 1946 and 1966 in the willingness in the United States and in England, but hardly at that time in Australia, to recognise the forces which operate and have always operated in judicial decisions. His respect for Professor Stone reflected that which he held for the legal academy generally, not only in relation to particular aspects of the law, but also in relation to its broad approach to the judicial task.

On 11 February 1974, Sir Kenneth Jacobs was sworn in as a justice of the High Court of Australia to replace Sir Cyril Walsh who had died in office in November 1973. At his swearing in he was described by Mr Howard Snelling QC, the solicitor-general for New South Wales, as a person whose leadership of the Court of Appeal was impressive and many of whose judgments

The Hon Robert French AC, ‘Remembering Sir Kenneth Jacobs KBE QC’

He retired early because he had been diagnosed with an illness which led him to believe he would not be able to sit regularly on the court for some time. He did not wish to place a burden on the other judges.

were of lasting significance. His reputation as a judge of liberal views and wide cultural interests beyond the law, particularly in art and music, was also acknowledged. When he was subsequently welcomed in Melbourne by the chairman of the Victorian Bar, Richard McGarvie QC, he was described as a judge of independent and forward-looking mind who placed great importance on civil liberties.

Sir Kenneth Jacobs served as a justice of this court until 6 April 1979. He retired early because he had been diagnosed with an illness which led him to believe he would not be able to sit regularly on the court for some time. He did not wish to place a burden on the other judges.

His first substantive judgment appearing in the *Commonwealth Law Reports* was a case arising under section 92 of the Constitution: *Pilkington v Frank Hammond Pty Ltd*. He gave early an interesting consideration to the executive power of the Commonwealth to request another country to detain and return a fugitive in *Barton v The Commonwealth*. He subsequently sat on most of the significant constitutional cases which arose out of the political contests of 1974 and 1975. The last reported case on which he participated was *Bradken Consolidated Ltd v The Broken Hill Pty Co Ltd*, judgment in which was delivered on 5 April 1979, the day before he resigned from the court. His judgment in that case was a joint judgment with his long-time friend, Sir Anthony Mason.

Sir Kenneth Jacobs’ judgments have variously been described as reflecting a ‘principled yet pragmatic approach to democracy’, a conception of Commonwealth legislative power as ‘sovereign’

and ‘plenary’ within its specified heads of power, and a respect for legal method and precedent. In a dissenting judgment in *HC Sleigh Ltd v South Australia*, he said:

The judicial process requires that the inevitable choices which fall to be made by judges be confined within the limits which training, tradition, respect for the opinions of other members of the court, past and present, and the ordinary intellectual processes of argument impose.

As is pointed out in the entry relating to him in *The Oxford Companion to the High Court of Australia*, there was prescience in his linkage of the historical conception of judicial power with basic rights, traditionally defended by what he called ‘that independent judiciary which is the bulwark of freedom’. He often gave the leading judgment in cases involving trusts, although sometimes he was in dissent appealing to what he called ‘a fair and reasonable interpretation’ of community experience and business expectations by judges ‘representing the community of which they are part’ or to ‘business sense’ and ‘[s]ubstance, not legal form’.

Sir Kenneth Jacobs’ judgments were of lasting quality. They are still quoted in the judgments of this court. While their quality marks the contribution he made while he served on the court, it also tells us something of the loss to the court and the community occasioned by his early departure from it. He will long be remembered for the textbook that bears his name, and in the *New South Wales Law Reports* and the *Commonwealth Law Reports* that contain his judicial legacy.

Anecdotes and fables of the judges of the 'fifties

The Hon J P Bryson QC

Else-Mitchell

Rae Else-Mitchell was a judge of the Supreme Court from 1958 to 1974. He was tall, a handsome man with a powerful frame, a powerful intellect and a powerful self-regard.

I first encountered him when he lectured on Australian Constitution law in my second law school year in 1955. The principal subject of Constitutional law then was the freedom of interstate trade under Constitution section 92. Section 92 cases closely succeeded each other in the High Court, bewildering to a student new to the law and remaining bewildering after years of study, until their bewildering incertitudes were swept away by *Cole v Whitfield* in 1988. State legislative schemes pursued mercantilist isolation and protection of producers against competition from other states. Often these were enforced by marketing boards which brought intrusive, uncommercial bureaucracies into the details of primary production and distribution. For some reason dried fruit reappeared in Constitutional law time and time again. Public opinion strongly supported these measures on the view that, say, sale north of the Murray of milk produced in Victoria was profoundly unfair, obviously so. These measures were flatly contrary to Constitution section 92. At the Commonwealth level mercantilist ideas protected primary producers, manufacturers and all who spoke in aggrieved tones against the knavish tricks of foreign producers. Unlike the states the Commonwealth was armed with duties, excise and bounties. The total effect was extraordinarily unlike the Australian economy today.

The doctrines of the High Court expounding section 92 were weirdly strange and remote from its language: even more so, the doctrines of the Privy Council. Beneath the mercantilist undercurrent was a socialist undercurrent in which section 92 was regarded as a bulwark defending capitalism. This inspired possibly the strangest passage in Australian jurisprudence, observations of the Privy Council at 79 CLR 640–641 worthy of Orwell's dystopia. No one can ever have known what their Lordships were talking about: that less is not more, but in some circumstances nothing may be everything.

Else-Mitchell's lectures expounded the whole Constitution lightly and dealt mainly with the section 92 cases then being fought over state schemes to impede transport of goods by road taxes and to funnel traffic to state-owned railways (which, incidentally, could not cope). Else-Mitchell was engaged professionally in these contests, and freely expressed his disdain or contempt for views adverse to his briefs. For me this was an early encounter with a strongly-engaged source of instruction.

In his university years Else-Mitchell had been well recognised

as a Coming Man, a Man of the Left. He was widely known and widely admired for his superb ability and immediate grasp, which won honours and prizes. He was a vigorous and adventurous bushwalker, dangerously breaking new ground in the Blue Mountains well beyond Mount Solitary, on the margin between bushwalking and exploration. He rose rapidly in the large bureaucracy of the war effort, and became secretary of the Commonwealth Rationing Commission when aged thirty. He soon became a powerful figure at the bar, and organised his own chambers, Oxford Chambers, with only one or two other barristers. He took silk in 1955 and was one of the bar's leaders, frequently appearing in the High Court where, to me and others, it seemed his destiny lay.

He was able to communicate to counsel, and often did, that their talents were disappointingly unequal to the business in hand and that the claims they made on his attention were undue.

Else-Mitchell caused surprise in 1958 by going to the Supreme Court, where in his first years he usually sat in common-law causes. Wherever he was, in the courtroom or anywhere else, he was the dominant person present and events revolved around him. His disdain was no less lofty than his physique and his tone often conveyed more asperity than his words expressed. When hearing cases the just outcome often presented itself to his mind early and with certitude, and from then on all debate was mere exasperation to him. He was able to communicate to counsel, and often did, that their talents were disappointingly unequal to the business in hand and that the claims they made on his attention were undue. I do not know whether he sat on criminal trials, where there is some call for patience and forbearance and there is something for the jury to do. He did not progress as he felt appropriate to take much part in hearing appeals, and was not included in the initial appointments to the Court of Appeal: he resented its creation and opposed it with vigour, and was never a member of that court. As a participant he was a direct and important source for Michael Kirby's important history published at (2008) 30 *Sydney Law Review* 177: see page 200 note 79. With clear recollection after almost forty years he poured details and a full vial of wrath into the historian's ear, re-enacting the great crime in *Hamlet* to good effect for history. He became a judge of the Land and Valuation Court and heard most of its work, principally valuation on

resumption and rating appeals, and the slowly-dying Crown Lands Acts: his own small conquered province, distant from colleagues and subjected to limited appellate power. Sometimes he heard Equity business in related controversies. With no difficulty he attained dominance in the law special to his court, enhancing his ascendancy and his disdain for counsel. In a resumption claim he would call on counsel for the reference to the resumed property in the street directory, and proceed there and inspect the property as soon as could be arranged, and later events in the proceedings were visibly tiresome to him. He sat there for some years, attended by a small bar who knew his ways and had learnt to operate in the limited terrain available, with occasional unfortunate appearances by the less adept, such as myself.

In the Whitlam years he went off to shake other spheres, and for almost fifteen years he had Olympian disposition of the

finances and fates of mendicant states in the Commonwealth Grants Commission: how much is fair for this state and for that and what does the state really need, not unlike the Rationing Commission. The resumption cases went to judges with readier accessibility to evidence and argument.

Else-Mitchell's activities and talents would overfill several ordinary lifetimes. He held many public offices and received many honours and distinctions. His interests were very wide, and related to history, public administration and the welfare and affairs of the public in many ways. He brought his energy and ability to bear on many organisations, usually from the chair. Those who wish to write generous appraisals have much material, and readers can readily find generous appraisals elsewhere. While his ability shone in the court room as elsewhere, his sour impatience made an even stronger impression on the bar. Superb ability is not enough.

Kinsella and his tipstaff, Captain Adams

Edward Parnell Kinsella was appointed to the Supreme Court on 18 January 1950 and retired on 9 June 1963. Kinsella J was a tall man, and his deportment embodied a classic concept of a grave and serious judge. The manner of his walk expressed his gravity, and he was described by the bar as a one-man procession. He had a lofty aristocratic manner, austere and dignified, careful in speech and clear in diction.

There were never moments of lightness in a hearing before him. His gravity was never broken by a smile, and only occasionally broken by a brief expression of disapproval. In his courtroom the atmosphere was cold, decorum prevailed and counsel whose behaviour in other places may have been rather theatrical assumed a gravity which distantly shadowed that of the judge. He spoke 'for the printer' in language that could have been printed without revision. Everything Kinsella J said was clear but not vernacular, and no slang or vogue words crept into his summing-up to the jury. Many jurymen would not have been accustomed to so elevated a tone, and so may have found what he said a little difficult to follow. He almost always sat hearing common-law trials with juries and in criminal business. He may also have heard some commercial causes. He did not hear many appeals and his work did not leave much impression in the law reports. In my understanding however he was very little challenged by appeals.

When Kinsella J held the Circuit Court at Bathurst he first attended a church service and afterwards processed across the square to the courthouse, wearing his judicial robe and long

There were never moments of lightness in a hearing before him. His gravity was never broken by a smile, and only occasionally broken by a brief expression of disapproval.

wig, preceded by his tipstaff in his long black coat and ribbons bearing the white staff, in a procession of two persons only. The tipstaff's deportment and gravity matched those of the judge.

Kinsella J became a witness himself when he went walking with a lawyer friend in Hyde Park one lunch time, and crossed the road in Chancery Square between Hyde Park and Hyde Park Barracks. He did not cross in the marked foot crossing. There were tramlines in the middle of the road, and the claims on a pedestrian's attention included taking care not to trip on the tramlines. A motorist managed to knock down Kinsella J's companion who was standing beside him in the middle of the road waiting for traffic to clear. The injured companion sued for damages and must have felt that he had a splendid witness, as the judge was immediately beside him and saw the whole affair. However, some hapless counsel had the duty of defending the claim, which involved cross-examining the judge with attempted ferocity to suggest that his observation was defective, he was really looking at something else, he had not really seen anything, the true facts were entirely different and so forth: a Micawber cross-examination, something may turn up. The judge resisted this onslaught with cold dignity and complete

success. I do not know who cross-examining counsel was, but this brief cannot have helped his career.

There were juries in almost all common-law trials. On a rare occasion when the jury was dispensed with Kinsella J awarded damages to a man who had been injured in a motor accident. Part of the plaintiff's claim was that he was less able to travel and take advantage of his right to visit his children in the weekends, influence their lives and enjoy their company; and that this sounded in damages as part of his loss of enjoyment of life. Kinsella J said that it had been accepted that loss of the ability to hear and enjoy chamber music was a ground for damages for loss of enjoyment of life, and the loss of enjoyment of the company of the plaintiff's children was analogous. I suppose that this was what the plaintiff wanted to hear, but it sounded lacking in warmth and sympathy.

The jury could be dispensed with only with the consent of both parties, and bar folklore was that no injured plaintiff should ever consent to trial by judge alone. The thinking was that he would not get a sympathetic hearing; whereas insurance companies wanted their cases to be heard by the judge alone, but could never get plaintiffs to agree. After 1966 changes began which increased, in several stages, the number of cases heard by a single judge, and a common-law jury eventually became very rare. At times in this era I heard a somewhat different story, when insurance companies complained that no judge would ever make a finding that the insured had deliberately set his own house on fire, and looked about for ways to get a jury in fire claims.

John Henry McClemens

John Henry McClemens, usually spoken of as Jock, was a judge of the Supreme Court from 1951 to 1975, a long time during which he carried a huge burden of trial work, an unending train of jury trials which required and received his close application and left little mark in law reports. He sat where his experience, interests and abilities lay, in common law civil trials and in criminal trials and appeals. He was a most humane man, and the impact of injuries on workers and road users, and of crimes on victims engaged his emotions profoundly. He was essentially kindly. He found severity difficult, but could manage it when duty required. He did not conform with the traditional manner of urbane brutality, which Sir Maurice Byers attributed to the Supreme Court. Urbane, distant, aloof, unengaged, intellectual: he was none of these, and his feelings and his being were clearly engaged in giving justice.

John Adams MC and Bar was Kinsella J's tipstaff for about ten years and was a notable figure himself. His invariable manner was one of severe dignity, as was that of the judge. Adams was well-known and respected, and usually spoken of as Captain Adams. He served in the AIF throughout the First World War and was severely wounded. Kinsella also served in the AIF throughout the war, and the two were lieutenants in the 54th Battalion at the same time. It seems certain that they knew each other then. There were many people still in practice and on the bench who had served in the Great War, and several senior lawyers pointed Adams out to me and told me of his Military Cross and Bar. Adams always wore a long coat, then a tipstaff's uniform, with his many ribbons won on war service, most notably the ribbons of the Military Cross and Bar and oak leaves awarded when mentioned in dispatches. To win the Military Cross twice and return home was no mean feat.

Adams first appeared as tipstaff in the *Law Almanac* for 1951, and it seems that he was Kinsella's first Tipstaff. Adams continued to appear in the *Almanac* as tipstaff to Kinsella J until he was shown in the 1960 *Almanac* as tipstaff to Collins J. Kinsella J had other tipstaves and retired in 1963. Adams continued to be shown as tipstaff to Collins J until 1967 when Adams was 77 years old. I infer that Adams then retired, as after then Collins J had another tipstaff.

McClemens must have been a very effective jury advocate, although I did not see him in those days. He had easy and full communication with the common man, the man on the Bondi tram and also on the jury, spoke his language and thought his thoughts; and he analysed claims of justice in his way. His analysis of negligence questions and of claims for damages was more emotional than intellectual: not inappropriately, as both call for decision outside syllogism. He had little patience with any remotely technical argument, and when it was argued that a time bar applied and the writ was issued too late I heard him respond: 'Do you mean it's a windfall for the insurance company?'

McClemens resembled a chubby rubicund middle-aged teddy bear, the resemblance enhanced by the shape of his ears. When

I particularly remember a shouting match between McClemens J and Athol Moffitt QC which erupted, it seemed out of nothing, on a hot summer afternoon in Newcastle, both shouting without control until the judge rose and left. Counsel proceeded to the judge's chambers and after a while calm returned and the hearing proceeded without undue event.

his attention was not engaged he wore the benign indifferent expression which old masters paint on the faces of cherubs. During a hearing the current states of his thoughts passed across his face like a moving film: approval, sympathy or sorrow could be seen at once. He was aware and sensitive for the feelings of persons in the courtroom, including those whom most would think had no claim for sympathy. Sometimes, but not often, his feelings got the better of him and he engaged in wrangles with counsel whose conduct disappointed him, by ranging the periphery and not engaging with the nub of the case which the jury needed to grasp. I particularly remember a shouting match between McClemens J and Athol Moffitt QC which erupted, it seemed out of nothing, on a hot summer afternoon in Newcastle, both shouting without control until the judge rose and left. Counsel proceeded to the judge's chambers and after a while calm returned and the hearing proceeded without undue event.

My only criminal trial before McClemens seemed to me to end badly, but my client accepted that his ten-year sentence was just. He seemed to be of the same understanding as the judge. I indirectly trod on his toes in *Cheetham v McGeechan* [1971] 2 NSWLR 222 when I took regulations entitling a prisoner to remission of sentence into Equity under a recently extended power to make declaratory orders. LW Street J declared that

the prisoner had the entitlement, and reputedly thirteen black sheep in like case were released that afternoon. It drifted back to me indirectly that McClemens had complained to the chief justice about this intrusion on Common Law business.

McClemens conducted the Royal Commission of Inquiry into the Callan Park Mental Hospital, which took most of 1961. Callan Park had been the source of controversies and complaints for generations. McClemens gave patient careful hearings to people to whom it had seemed that no-one would listen or give any attention. He made searching detailed investigations of many specific complaints about the conduct of staff and events affecting patients, and the inquiry disclosed generally the deficiencies in the mental hospital system. It was a total review of the role and problems of mental hospital care. During and after the inquiry there were large changes in personnel and administration. Mental health administration and mental hospitals have since been through several more convulsions, reforms and changes of direction, always remaining a Vale of Tears.

It is probably too much to say of any judge that the profession and the public loved him, but it should be said that they had warm feelings towards this warm and industrious human being.

Sir William Owen and Justice Myers

Sir William Francis Langer Owen was a judge of the Supreme Court from 1937 until 1961, and was elevated to the High Court where he served until he died in 1972. He was in appearance and demeanour the model of a judge of an old school, ever solemn and serious in manner and very learned, without any flourishes in expression or behaviour. After sitting in Equity when first appointed, he became one of the strengths of the full court which heard appellate business at common law and in equity, and sat on many appeals to the Court of Criminal Appeal. The usual course for many years was for the court to comprise KW Street C J, Owen J and Herron J. He was one of the judges of the Royal Commission on Espionage,

with Philp J from Queensland and Ligertwood J from South Australia. The challenges to the commission included antics and defiance from Dr HV Evatt who felt deep involvement in the interest of the commission in the activities of people who were or had been on Evatt's staff. Evatt conducted himself to serve the maxim 'If you don't run it, wreck it,' to a point where the commissioners would not allow him to continue to appear.

For all his solemnity, bar folklore told that Owen had returned from the Western Front in 1919 and so behaved while staying at the Kosciuszko Chalet (then the only accommodation on the ski fields) that he and a raucous friend were expelled in the small hours and left to their own devices without anywhere to stay.

Eventually Owen was appointed to the High Court. He felt that at this point he was free to commence an equity suit against his neighbour to redress long-held grievances over the right of way next to his house.

They drove down to Cooma and in the early dawn they crept up to the circus camp, fired off their pistols and stampeded the elephants.

Eventually Owen was appointed to the High Court. He felt that at this point he was free to commence an equity suit against his neighbour to redress long-held grievances over the right of way next to his house. While a judge of the court which would hear the suit, he had not regarded this as appropriate. One evening soon after his elevation Owen arrived unannounced at the home of Mr Justice Frederick George Myers, an Equity judge, accompanied by his counsel and solicitor, and received a welcome full of expressions of friendship and congratulation, as part of which Myers dredged in his pocket and produced a small key with which he unlocked his cabinet, and produced whisky. This was not the direction in which Owen wished to go, and he diffidently broke it to Myers that the call was not social and that he wanted an interlocutory injunction to stop his neighbour obstructing the right of way. Myers' manner altered at once to extreme formality; the key was produced again and the cabinet was locked. He took his seat with great solemnity and attended while counsel read out the affidavits, as counsel then knew they should do, and put the reasons for the injunction. Myers listened with solemn patience, and then said, in the politest way, 'I can't give you an injunction, Bill, because you have been guilty of laches. You should have started this case years ago.' His mood reverted to the welcoming and convivial, the key and the whisky appeared again, but the high mood of the earlier welcome could not be brought back.

Mr Justice Myers was a judge of the Supreme Court from 1953 until he retired in 1971. For some years he sat at Common Law and in criminal trials, where he was in no way comfortable, and from about 1960 he sat in Equity and Probate. He was an exacting judge, with an approach to business which was entirely unaccommodating to practicality or to anything else. He brought a full stock of learning to bear on discerning difficulties

which had not occurred to anyone else, difficulties often enough on which their apparent beneficiaries did not wish to rely, for fear of what might be attributed to them on appeal. There was no breadth in his concept of relevance; the relevance of every question was tested on a close reading of the pleadings and his readings of pleadings were exacting. His approach to proposed amendments was openly hostile. It was not uncommon for him to rule that an amendment was to be allowed on terms that all the opponent's costs of the proceedings up to the time of the amendment were to be paid by the amending party, and this could lead to rejection of the terms and dogged pursuit of justice on the original pleading. While expounding an obscure difficulty or pronouncing an adverse ruling he would wear an inappropriate beaming smile. His manner and approach earned him the soubriquet 'Funnelweb,' reflecting the suddenness and unpredictability of his incursions.

He was an exacting judge, with an approach to business which was entirely unaccommodating to practicality or to anything else.

Those who had known Myers before elevation said that his earlier personality had been altogether different, a barrister with a great stock of learning, who was pleasant company and helpful to any colleague who sought his aid. He was admired for his service in the army in New Guinea as a staff officer, in the course of which he was said to have walked across the Owen Stanley Range, carrying a bottle of whisky in his pack which was used to bring the American staff officer with whom he had to deal around to an amenable frame of mind. As he had a disability, a club foot, the walk was not an easy thing to do, and he would not have been open to criticism if he had stayed out of the army. The change of personality and the emergence of the Funnelweb surprised those who had known him earlier.

The Hon Justice Brigitte Markovic

Justice Brigitte Markovic was sworn in as a judge of the Federal Court of Australia on 24 August 2015.

Justice Markovic grew up in Sydney, attending Ascham School, and then UNSW, where her Honour graduated with degrees in commerce and law. Senator Fierravanti-Wells, representing the Commonwealth Attorney-General, Senator the Hon George Brandis QC, mentioned in the course of her remarks:

‘Your Honour, like me, is a first generation Australian. Our parents came to this country to build a better life for themselves and for their children. Your parents migrated from Europe, and I understand your father came from what is now the Slovak Republic, and your mother is from France. Your Honour’s success is the embodiment of that successful migrant story.’

Her Honour was a partner in Clayton Utz, having joined the firm 27 years ago as a summer clerk. At the age of 32, her Honour became one of the youngest partners in the firm. Her Honour quickly developed a busy practice in Corporations Law matters. One of the barristers her Honour worked with as a solicitor at Clayton Utz was Michael Slattery QC, now Justice Slattery of the Supreme Court of New South Wales. Mr Stuart Clark, president-elect of the Law Council of Australia, observed that a note from her Honour’s personnel file at Clayton Utz records Justice Slattery as describing her Honour as ‘brilliant’ and ‘always in control’. He went on to say: ‘Ms Markovic is one of the best solicitors who instructs me and one of the best you have got’. He added that, with her grace under pressure and tactical acumen, her Honour would have been a great military commander.

ASIC had a similar view when her Honour worked with the regulator on a secondment. It later retained her Honour to act on the HIH and James Hardie litigation, both of which were highly complex and difficult commercial cases.

Her Honour made a substantial contribution to developing the firm’s Canberra office, introducing the firm to the Australian Government and developing a practice across a broad range of areas, including immigration, social security and aged care. Her Honour developed expertise in administrative law while developing the firm’s practice in the area.

In 2010, her Honour became a managing partner in the Litigation and Dispute Resolution group of Clayton Utz. Mr Clark noted that in this role, her Honour:

set an example as a senior lawyer with a professional life who was not afraid to take time out for your children – for example, to leave the office to attend events at school.

Senator Fierravanti-Wells noted her Honour’s involvement in high profile commercial litigation, her prodigious work ethic, tenacity and commitment to leading by example. Speaking for

the New South Wales Bar, Arthur Moses SC continued the theme:

By my imperfect count, there were six High Court appeals in which you had involvement. If the Australian Government is to be considered a model litigant then there needs to be a model litigator. By all accounts, your Honour fulfils that role with distinction. One person familiar with your work at the time described you as the perfect lawyer for a minister. You were aware of the political pressures concerning matters but at all times you gave fearless and frank advice. You were also fair and conscious of the disparity and resources between parties to a dispute, which is very important, of course, in immigration matters.

Mr Moses also acknowledged her Honour’s involvement on the bar’s equitable briefing working party, which recently completed its report reviewing the application in NSW of the Law Council of Australia’s equitable briefing policy.

Her Honour has a rich life outside of the law, enjoying theatre, classical music and the visual arts.

Her Honour concluded her own remarks by stating:

Today I have the honour of joining this Court, but also the honour of becoming a colleague of many distinguished female judges. After the announcement of my appointment, I received a number of emails and cards from young women, who generously commented on the inspiration they took from my career. Every woman who becomes a partner of a law firm, becomes a Senior Counsel, or becomes a judge is a potent symbol of what women can achieve in our profession. I have been extraordinarily fortunate to work with supportive colleagues, both men and women, throughout my career. That good fortune extended to working with men who never regarded my gender as relevant to my progress in the profession. They properly judged me by how I did the job and no other measure. I recognise that is not always the case. To those young women who have written to me and others, I would like to say with skill, endurance, focus and some luck, you can achieve what you strive for. Always seek to be judged by what you do.

His Honour Judge Gregory Farmer SC

Gregory Farmer SC was sworn in as a judge of the District Court on 15 September 2015. Attorney General Gabrielle Upton spoke on behalf of the New South Wales Bar.



Photo: Gilliane Tedder

His Honour graduated from Macquarie University in 1983 with a Bachelor of Laws while working full-time with the Magistrates Courts Administration. In the early years of his Honour's practise as a solicitor he worked as a legal officer with the Department of Corrective Services. He later worked as a solicitor at the office of the Commonwealth Director of Public Prosecutions. His Honour was called to the bar in 1990.

Just prior to becoming a barrister, his Honour instructed Barry Toomey QC in the matter of a solicitor who was found to have committed fraud to the extent of \$4 million. Mr Toomey, with whom his Honour subsequently joined in private practice in the same chambers, has said that his Honour is a calm and judicious lawyer and that he has never known anyone who could be more perfectly suited in temperament and in conduct to be a judge.

After being admitted as a barrister, his Honour was appointed to the position of in-house counsel at the DPP, appearing on behalf of the Crown in jury trials in the District Court and as junior counsel in Supreme Court trials, and on many occasions in the Court of Criminal Appeal. His Honour also appeared in the Federal Court, the Supreme Court and the District Court in sentence matters, appeals and proceeds of crime matters. His work contributed to the development of case law and legislative amendment in one instance.

His Honour was also briefed by the Directors of Public Prosecutions for the Commonwealth, New South Wales, ACT

and the Northern Territory, and by the Australian and New South Wales Crime Commissions. His Honour, after coming to the private bar, also acted as counsel for the defence and developed a civil practice; was involved in numerous public inquiries including as counsel assisting the Independent Commission Against Corruption and the Police Integrity Commission; and appeared for plaintiffs and defendants in the Dust Diseases Tribunal and related appeals to the Court of Appeal. He was appointed senior counsel in October 2011.

Ms Upton noted that Judge Henson, chief magistrate of New South Wales (whose friendship with his Honour stretches back to the days his Honour and Judge Henson played cricket together in the late 70s and early 80s at the Petty Sessions Justice Cricket Club, of which Judge Henson was the captain) has commented that his Honour is a 'good bloke'. Ms Upton also noted that Judge Henson also described his Honour as a laconic and a laid back individual with the ability to see humour in life.

Ms Upton stated:

Your Honour understands what it is like to navigate the entire criminal process, something that will be appreciated by those who appear before you in the District Court, I am sure.

One particular case that has been brought to my attention was where your Honour was lead counsel in relation to 14 prosecutions arising from the Villawood Detention Centre riots; not many barristers could claim to having dealt with 14 different opponents in one trial. The instructing solicitor at the Commonwealth DPP has noted that the constant composure that you maintained in dealing with the demands of all those legal representatives was admirable.

Mr Eades echoed the Attorney's remarks on behalf of the many solicitors with whom his Honour had worked.

His Honour, in the course of thanking many who have provided friendship and support during his professional life, paid tribute to his mother who parented a large family in difficult circumstances. His Honour aspired, in this next phase of his professional life - as he had since childhood - to live up to his mother's favourite challenge: 'Answer the question'.

Ms Upton's concluding remarks were a fitting summation:

It goes without saying that your Honour's appointment was only a natural progression of your legal career. Given your outstanding ability, your intelligence, your reserve and vast experience, I have no doubt when I say this, for the great benefit of the people of this State that you have taken the robes of a judge of the District Court.

Her Honour Judge Catherine Margaret Traill

Her Honour Judge Traill was sworn in as a judge of the District Court of New South Wales on 24 August 2015. Hon Gabrielle Upton, attorney general for New South Wales, spoke on behalf of the bar.

Judge Traill graduated from the University of Sydney with a degree in Arts, with Honours in Politics and Fine Arts and a Diploma of Law from the Barristers Admission Board.

Colleagues have described her Honour as one of the finest jury advocates at the bar.

Her Honour was called to the bar in 1987 and developed an impressive practice in criminal law, inquiries, defamation, administrative law, equity and military law.

Ms Upton said:

What is admirable about your criminal practice is that you have served both ends of the bar table as defence and prosecution. You have represented the Crown and accused alike, serving as defence for a number of years before taking up a position as a Crown Prosecutor from 2009 to 2010.

Her Honour's passion for travel has allowed her to work as a legal practitioner in the UK and as a lecturer in Law and Advocacy in Bangladesh. Her Honour's contribution to the practice and teaching of law around the world earned her the distinction of being ordained a Dame of the Equestrian Order of the Holy Sepulchre in 2002.

Her Honour also helped establish the New South Wales Bar Association's Duty Barrister Scheme.

Her Honour has served as a member of Bar Council since 1990.

Her Honour has also served the broader community through her extra-curricular activities, having served as an elected councillor on Mosman Council from 2004 to 2008, Aide-De-Camp to the current and the most recent former NSW Governor and member of the Dental Board of Australia. Her Honour also continues to serve as Lieutenant Commander in the Royal Australian Naval Reserves.

Ms Upton noted that her Honour's colleagues at St James' Hall will miss her sense of humour, lively discussions about the law, dedication to clients and 'penchant for a smart pair of shoes'; and concluded by saying that:

'Your practical approaches to problems and your sense of empathy will stand you in good stead for dealing with the varying challenges of judicial office. Your professional and personal qualities will help better protect and deliver justice for our children and for our young people. There is no higher nor more important calling.'



Photo: Gilliane Tedder

Her Honour paid tribute to the support and example of her family, educators, mentors and colleagues. She enthusiastically described the interactive demands, inspirations and enjoyment of professional practice in diverse fields of engagement.

Judge Traill will dedicate most of her Honour's time to the conduct of child sexual assault matters before the court.

Her Honour Judge Jennie Anne Girdham SC

Her Honour Judge Girdham SC was sworn in as a judge of the District Court on 24 August 2015. Attorney General Gabrielle Upton spoke on behalf of the New South Wales Bar.

Judge Girdham grew up in Tasmania. Her Honour graduated from the University of Tasmania before beginning work as a civil litigation lawyer in Hobart. Her Honour became well known in the close-knit Tasmanian legal circles, not only for her readily apparent legal skills but also for her bright and engaging personality.

After several years of post-admission work her Honour moved to London for what was initially a working holiday but stayed for several years working, first, as a complaints lawyer with the Law Society of England and Wales, and later becoming a prosecutor with the Crown Prosecution Service in London. Her Honour's work as a prosecutor in London resulted in meeting some colourful characters and having some interesting experiences in the Old Bailey, which Ms Upton noted gave her Honour a keen empathy with those caught up in the criminal justice system.

Her Honour later relocated to Australia, moving to Western Australia to work for the Western Australian DPP. After seven years working in Western Australia on difficult and high profile matters including the Easton Affair, her Honour moved to Sydney in March 2002 taking up an appointment as a New South Wales Crown Prosecutor.

Ms Upton noted her Honour's courageous and spirited advocacy, including the occasion when her Honour received applause after a trial from the jury that had witnessed her vigorous cross-examination.

From 2004 her Honour worked at the Sydney Crown Chambers undertaking appellate work in the High Court, the Court of Criminal Appeal and Court of Appeal. Her Honour has appeared in some of the most complex criminal appeals including *Carroll v The Queen* and *Keli Lane v The Queen*. Her Honour has led many appeals in the court of Criminal Appeal often serving as a contradictor. She was appointed senior counsel in 2012.

Her Honour has continuously served as a member of Bar Council.

Ms Upton said:

Your Honour's colleagues at the DPP, Crown Prosecutor and Public Defender have told me that if there was a dictionary definition for 'down-to-earth' that would be one word: 'Jennie'. You have always been inclusive and you have taken the time to talk to your colleagues, especially junior lawyers to ensure they feel part of the team and that their input is valued.

You have been described as someone who is generous, humble, courageous, downright wonderful and intellectually superior without being superior in attitude or approach. I am told the DPP and Crown Prosecutor will miss your finely honed whistling skills and anticipate the District Court being the next beneficiary of your passion for interior design.

Her Honour acknowledged the strong dedicated leadership which had mentored and supported her at the DPP and in Crown Prosecutors' Chambers. She pointed to what she perceived overall as change for the better in the NSW justice system during her professional involvement with it, particularly in accessibility and responsiveness to the needs of victims, with of course, always more remaining to be done.

Judge Girdham will dedicate most of her Honour's time to the conduct of child sexual assault matters before the court.

His Honour Judge Steven Middleton

His Honour Judge Steven Middleton was welcomed to the Federal Circuit Court of Australia during a ceremonial sitting in the Newcastle Registry on 24 November 2015.

Speaking on behalf of the New South Wales Bar, Peter Cummings SC welcomed the appointment as a 'valuable addition to the bench of this hard-pressed court'. Cummings SC said:

It seemed that following the retirement of Judge Coakes four months ago litigants from across the Hunter region and beyond might overwhelm the Newcastle registry of the Federal Circuit Court. Disputes needed resolution. People sought protection. Lives were left on hold. Now, the whole of the New South Wales Bar, and the Newcastle Bar in particular, greets this appointment with enthusiasm enhanced by relief. ... While we wished this day had come sooner, we congratulate the Commonwealth attorney-general for making what is clearly an astute appointment.

Judge Middleton's career in the law began in earnest, as it did for many judicial officers before him, when he joined the NSW Police in 1985 and entered the ranks of Police prosecutors. He graduated with a Diploma of Law from the NSW Legal Practitioners' Admissions Board in 1995. He completed his practical legal training at the College of Law in 1996 before his admission as a solicitor of the Supreme Court of NSW that same year.

In the ensuing decade his Honour built up a very successful practice consisting mainly of criminal and family law – first in New South Wales and then on Queensland's Sunshine Coast.

His Honour was admitted to the Queensland Bar in July 2007 under the pupillage of Catherine McMillan QC and Mark Stunden. He took a room and practised at the Inns of Court in Maroochydore. In 2013 he relocated his practice to Brisbane Chambers.

Although the antecedents of his private practice lay in criminal law, his Honour was increasingly drawn to family law – defined broadly to include cases in child protection, domestic violence and mediation. Often, he appeared as an independent children's lawyer. Cummings SC noted that his Honour's suitability for judicial office was based on more than knowledge of the law:

You are said to have an innately judicial temperament: calm and considered; empathetic yet realistic; firm but fair. There is a widespread expectation among barristers on both sides of the Tweed that your Honour will relish the role of Federal Circuit Court judge and approach the burdens of this new office with your characteristic vim and vigour.

The latter was a reference to his Honour's reputation for 'daunting powers of physical and mental endurance'. Cummings SC continued:

[Y]our colleagues are full of admiration for your ability to compete in ironman triathlons and a six-day 251 km ultra-marathon in the Sahara Desert. There may be days ahead when your Honour longs for the relative ease of the half way mark in the Sahara! Though your Honour's achievements are undoubtedly feats of endurance, they are also manifestations of discipline and focus on the task at hand.

...

[T]he bar is satisfied that you will bring a formidable capacity for hard work and efficiency to bear upon the workload that lies before you.

Appointments to the Local Court

Magistrates Paul Hayes and Ross Hudson were sworn-in on 23 November 2015.

Magistrate Paul Hayes graduated from Macquarie University with a Bachelor of Arts and a Bachelor of Laws in 1986. He was admitted as a solicitor of the Supreme Court of New South Wales on 18 December 1987 and began his career in the law working as a solicitor at Marsdens. After a stint with the Crown Prosecution Service in the UK in the first half of 1990, he returned to Australia and in September of that year accepted a position at Legal Aid NSW.

His Honour ascended through the ranks of Legal Aid, from legal officer in the Central Sydney, Liverpool, Burwood and Fairfield offices. In 2000 his Honour featured in Bernard Lagan's poignant article on 'cheap drugs and hurried justice'. In it, you are described as the 'harassed but always polite Legal Aid lawyer', who tries to put his mind to rest as he travels home to his family. The article concludes with a quote from your Honour: 'Winning is not what it is about. It's about ensuring that the system does, at the end of the day, spit out justice'.

APPOINTMENTS

'Appointments to the Local Court'

In January 2004 he became regional program coordinator, assisting the executive director of the Criminal Law Division in delivering legal services throughout NSW. By 2006 he was a deputy director of the Criminal Law Division and then deputy executive director, criminal law. He oversaw the rollout of Legal Aid's audio-visual facilities and oversaw delivery of Legal Aid services through special jurisdictions, particularly the Drug Court. His Honour didn't allow his advocacy skills to wither away and he remained rostered to appear in weekend bail hearings in Parramatta.

Magistrate Ross Hudson graduated from the University of Sydney with a Bachelor of Arts (Honours) in 1998. His honours thesis was on *The History of Long Bay Gaol*. In 1999 he enrolled in Sydney Law School and began working as a paralegal in Carl Shannon Chambers for Peter Zahra and Richard Button,

as their Honours then were. In 2001 he completed a Bachelor of Laws (also with Honours). While attending the College of Law he worked as a paralegal for William O'Brien Solicitors, before his admission in May 2002. At the time, his Honour was an accomplished 400m hurdler, 1500m runner and surfer. He was offered a position at the firm and remained there until the time of his appointment, rising to associate and then in the last five years as partner. During that time, his practice thrived and he briefed many leading criminal defence barristers, including Phil Boulten SC. Among your many notable cases were *Luke Sparos v R*; *R v Henry*; *R v Swansson*; and when he negotiated on behalf of his client, Senad Kaminic, indemnity against the more serious charge of being an accessory after the fact of murder following the death of Michael McGurk.

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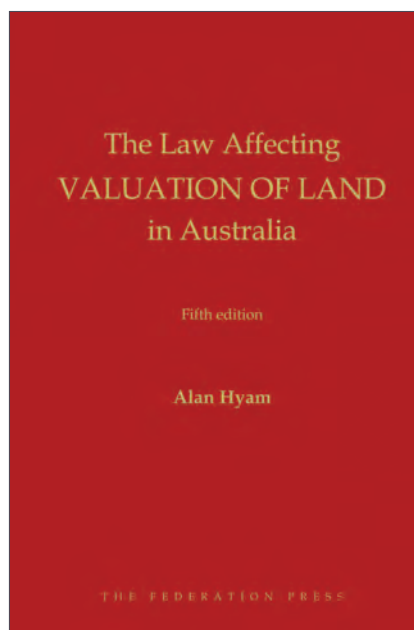
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The Law Affecting Rent Review Determinations (2nd ed); The Law Affecting Valuation of Land in Australia (5th ed)

By A Hyam | The Federation Press | 2014



Hyam's approach to the specialised topic of rent review is in the form, effectively, of a casebook. Principles are expounded by direct quotation from case law with occasional reference to commentaries.

Thus, Chapter 1 summarises the rationale for rent review by way of expert determination. Chapter 2, titled 'Basis of Assessment', expounds the principles of interpretation and the case law on definitional terms that one is likely to find in rent review clauses. Chapter 3 sets out the controversy in how to take into account lease incentives. Chapter 4 examines the scope of available challenge (largely dependent on the drafting of the rent review mechanism) to an expert determination. Chapter 5 examines how the principles discussed in preceding chapters are applied in relation to specific matters: loan repayments to lessor for tenant works; specific classes of tenant; future rent reviews; caps and floors on reviewed rent, and ratchets in options; lessee improvements, tenants' and other fixtures; symbiotic adjacent

premises, whether leased or otherwise used by the tenant; GST; permitted use clauses and relation, with highest and best use under planning permissions; any special considerations in rent review in Crown land leases. Chapter 6 expounds special considerations, including commercial implications of balance of term and retail tenancy legislation, for retail shop leases. Chapter 7 describes the history of 'speaking valuations' requiring reasons for rent review determination. Chapter 8 addresses appointment of the valuer, the duties of a valuer in rent review determinations, and the scope of redress by way of compensation for mistakes by the valuer. There are helpful tables and an index.

The book is valuable as a source of relevant case law and, if that is its intended sole purpose, it will continue to be valuable in future editions because it seems to be comprehensively updated. It would be improved in this reviewer's mind if there was a critique of principle, including reasoned discussion of preferred case law where there is lack of clarity or controversy. If that is beyond what the book is intended to do, it would still be improved by some reorganisation so that sub-topics that go together are presented together; for instance, in Chapter 5 the discussion of caps and floors on reviewed rent is interspersed with treatment of improvements which itself overlaps between sub-sections, and ratchets in options are presented later.

The other work updates (since the last edition in 2009) what is a standard respected and comprehensive text in Australia. It does not change the structure of the work. Thus, Chapters 1 and 2 deal with how land (including fixtures and interests in land such as

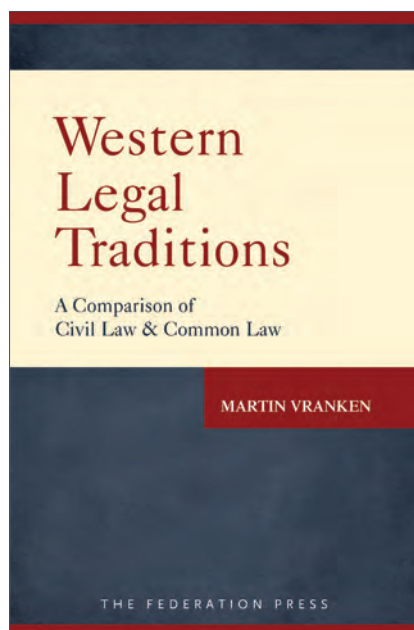
leases and mortgages) and value are defined in contractual and statutory contexts; the various terminologies used to describe the type of value sought to be ascertained; and the impact of planning permission, statutory constraints and other contextual matters, are expounded. Chapters 3 and 4 describe valuation principles and methods. How specific types of property – rural land, goodwill and business disturbance, subdivision potential, mineral deposits, licensed premises, strata, heritage-listed – are valued is set out in Chapters 5 to 11. Chapters 12 to 18 focus on the specialised principles of valuation for compulsory acquisition. Chapter 19 discusses the qualifications and duties of a valuer, including requirements for expert witness reports and evidence and dealing with comparability and other sources for valuation conclusion. Chapter 20 is titled 'Valuation Appeals Procedure' but also looks at how a court is required to use valuation evidence in its findings. Again, tables and index are helpful.

As with the text on rent review, the approach is essentially that of a casebook. The same comments in relation to greater critique of principle apply. However, the organisation of this text is clear and logical, except perhaps for a greater integration in the final chapter of how a court is entitled to use valuation evidence, which is a little scattered between the description of various review and appellate procedures.

**Reviewed by Gregory Burton SC,
FCI Arb**

Western Legal Traditions: A Comparison of Civil Law & Common Law

By Martin Vranken | The Federation Press | 2015



The length of the book alone (less than 200pp) indicates that it is not an encyclopaedic analysis of the civil and common law traditions. Nonetheless, the book serves as a useful introduction to students, legal researchers and others with an interest in the history and method of law.

an interest in the history and method of law. Each chapter usefully provides a list of further reading material.

Although the book is of limited utility for a legal practitioner in her or his day-to-day practice, it serves as a useful opportunity to step back from the 'coalface' to view the place of law in its broader context and to think about certain assumptions and attitudes that inhere in differing legal principles and legal systems.

A striking example of this can be seen in the extent of the scope of a person's duty of care to avoid harm to others. Under civil law systems, such as under the French *Code Civil*, the obligation to be careful to avoid harm to others has been formulated by the legislature in absolute terms. In principle, it is a legal duty owed to the world at large. At common law, a legal duty to be careful is a relative concept, being a duty the scope of which is limited to one's legal 'neighbour'. Both approaches shed light on the broader question of the relationship between the state and the individual; the state in common law systems is clearly less regulatory and avoids placing what it regards as excessive burdens on its members.

Another difference is the focus of fact-finding in the common law system, on which an inductive case-by-case approach to the development of the law depends. By contrast, in the civil system, involving a deductive 'top down' approach applying broad and far reaching obligations

contained in a code, facts (or more accurately fact-finding) are less important given the generality of the civil and criminal codes.

The book is structured in three parts. Part A (chapters 1 to 3), is the most abstract and theoretical of the book. It outlines the core concepts and themes necessary for a comparative method, including the approach to comparative law, and the key principles of a civil law (the role of codes and codification generally) and common law (the doctrine of precedent, concepts of *ratio decidendi* and *obiter dicta* and so on). The chapters on the key features of the civil law and common law systems are, generally, dealt with simply and efficiently. The chapter on the common law also contains a useful description of the court hierarchy in Australia. However, the chapter does not engage (or does so superficially) with the complexities involved in the exercise of federal jurisdiction by those different courts, being dealt with glibly by the statement that the way in which a subject matter of a dispute attracts jurisdiction, in practice, 'defies logic' (p32). While it may be said that questions of federal jurisdiction can at times be less than straightforward and indeed complex¹ owing to Australian Constitutional arrangements, it is not illogical.

Part B (chapters 4 to 9), deals with the 'Law in Action', looking at the legal solutions to certain problems in substantive law areas, including tort law, court procedure, good faith in contract

Although the grand title to the book suggests a vast and broad ranging exploration of the rule of law in Western society, such is not the focus of this small volume. *Western Legal Traditions: A Comparison of Civil Law & Common Law* nonetheless sets an ambitious task for itself: to examine, by use of the comparative legal method, the differing legal solutions to selected legal problems in their broader historical, economic, political and social contexts by focussing on the differing responses to those problems. No doubt such an approach is a more manageable task, likely borne from the author's own experience having had his legal training in a civil law system, but now teaching, as an associate professor of law at Melbourne University, in a common law system.

In this more discrete, although not unambitious task, the book mostly succeeds. The length of the book alone (less than 200pp) indicates that it is not an encyclopaedic analysis of the civil and common law traditions. Nonetheless, the book serves as a useful introduction to students, legal researchers and others with

BOOK REVIEWS

Western Legal Traditions: A Comparison of Civil Law & Common Law, (Federation Press, 2015)

law and labour law. This is the most interesting part of the book, especially the chapter on court procedure. The chapter demonstrates most starkly the profound differences in the common law and civil law systems, most notably where a judge (in curial proceedings) remains impartial in the common law system, as opposed to in the civil law system where a judge may be involved in the investigation of matters leading up to a hearing. Not surprisingly in a system where judge-made law is less important, the role of a judge is viewed differently too. According to Vranken the key actor in the civil law tradition is the professor (rather than the judge) whose legal scholarship elaborates on the meaning of civil law doctrine (and upon which the codes were originally based).

Accordingly legal scholarship has a far more important role in judicial decision-making in the civil law system.

Part C (chapters 10 and 11) deals with European Union law. Although interesting, this is perhaps the least relevant part of the book for an Australian audience. While the European Union represents a significant and remarkable development in the law and politics of supranational integration, it is also, arguably, *sui generis*, given the relative commonality of political philosophy and unity of political purpose that led to the creation of the EU. The same cannot be said for the Asia-Pacific region of which Australia is a part. That the operation and institutional make-up of the EU

had its genesis in the civil law roots of the founding countries makes it an even less fruitful model for any supranational institutional developments in our region. This part of the book clearly reflects the author's background and academic training, however, more work needs to be done to explain its relationship to the civil and common law traditions and its relevance to Anglo-Australian law.

Reviewed by Radhika Withana

Endnotes

1. For a particularly good example of the complexities involved in attracting federal jurisdiction, see: *Mok v Director of Public Prosecutions* (NSW) [2015] NSWCA 98.

Australian Consumer Law

By Adrian Coorey | LexisNexis Butterworths | 2015



The new text by Adrian Coorey, *Australian Consumer Law*, is a significant contribution to an area of law that is of increasing significance in Australia. The Australian Consumer Law (ACL) which is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (the Act) establishes a national law concerning consumer protection and fair trading and contains some of the most frequently litigated provisions in all of Australia's courts.

Mr Coorey has over a decade of experience both as a practitioner and as an academic in the fields of competition and consumer law and his experience is reflected in a text that will be useful to practitioners, academics and students alike.

... this book is more comprehensive than other texts on the market that cover competition as well as consumer law or simply annotate the ACL.

With its sole focus on the ACL, this book is more comprehensive than other texts on the market that cover competition as well as consumer law or simply annotate the ACL.

The depth of analysis contained in this text will appeal to both practitioners unfamiliar with the ACL as well as to experienced consumer protection

A particular strength of this text is that it addresses in detail a number of the more complicated areas of the ACL, including statutory unconscionable conduct and the consumer guarantee regime.

litigators who require ready access to more detailed information and analysis beyond the existing texts.

The text is a complete analysis of the ACL. Each chapter addresses a discrete area of law, for example: Misleading or Deceptive Conduct, Unconscionable Conduct, Unfair Contract Terms, Remedies; and contains an elemental analysis of the relevant statutory provisions from first principles to the most recent published decisions.

The writing is precise and propositional and allows the reader to easily identify the important principles and the cases relating to them.

A particular strength of this text is that it addresses in detail a number of the more complicated areas of the ACL, including statutory unconscionable conduct and the consumer guarantee regime.

The text clearly explains the continuing evolution of the concept of statutory unconscionable conduct from common law notions of moral obloquy to more recent interpretations involving 'acceptable standards of commercial dealings', which can include honesty and fairness in dealing with consumers: see, for example, *ACCC v Lux Distributors*

Pty Ltd [2013] FCAFC 90 at [63]–[68]. The text also traverses the emerging case law regarding systemic unconscionable conduct pursuant to s 21(4) of the ACL.

Australian Consumer Law contains detailed coverage of the consumer guarantee regime set out in Part 3–2 of the ACL, which was introduced from 1 January 2011 to replace the implied statutory warranties and conditions which were contained in state and territory fair trading legislation and the Act (then the *Trade Practices Act 1974* (Cth)). Under the present regime, consumers can rely on statutory remedies for breach of the consumer guarantee provisions, rather than needing to enforce their rights as a breach of contract, as was previously the case. This text provides a simplified yet detailed explanation of this regime, explaining, for example, which consumer guarantees apply to goods and services, who is responsible for providing these guarantees and when a remedy, including a refund, repair or replacement, may be available.

The text provides an excellent overview of the ACCC's enforcement powers and procedures under the ACL and also under the Act, insofar as the powers in the Act interact with the operation

of the ACL. For example, the chapter entitled 'Enforcement Powers' addresses in some detail the scope of the ACCC's investigative powers to compel parties to give oral evidence, furnish information and produce documents under s 155 of the Act and the means by which litigants can challenge notices issued under those powers. These topics, in particular, should appeal to practitioners engaged in litigation on behalf of, or against, the ACCC.

The text also has significant relevance beyond the regulatory context, with four chapters dedicated to a detailed analysis of the law on misleading and deceptive conduct. This will be useful to practitioners involved in private litigation. It contains in-depth coverage of the remedies available under the ACL including damages, pecuniary penalties, injunctions, declarations and disqualification orders.

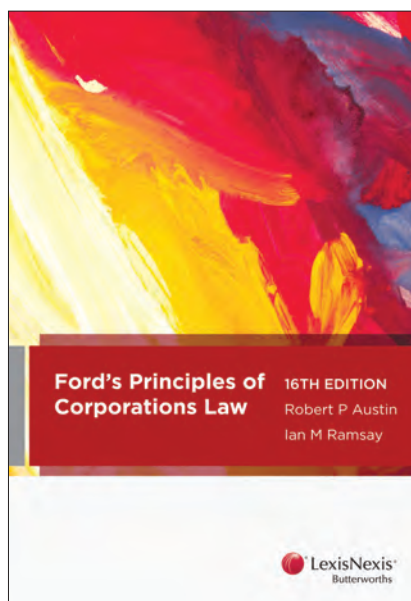
In the short time since the first edition of this book has been published, I have made use of it in court and in preparing written submissions.

This text is not simply a companion to existing texts; its content goes beyond the scope of texts currently available and would make a useful addition to the library of any practitioner involved in commercial or regulatory advocacy, as well as academics and students alike.

Reviewed by Daniel Tynan

Ford, Austin and Ramsay's Principles of Corporations Law (16th ed)

LexisNexis Butterworths | 2015



This text is principally designed with law and business students in mind. It is the smaller, more concentrated, sibling of the loose-leaf practice which is published for practitioners. But, for those practitioners for whom corporations law is not a focus, its value cannot be underestimated.

loose-leaf practice which is published for practitioners. But, for those practitioners for whom corporations law is not a focus, its value cannot be underestimated.

The corporation, being the commonest commercial vehicle, has worked its way into every crevice of the law. Common law practitioners need to grapple with questions concerning the extent to which a director of a closely-held ('one-man-band') company is liable for conduct (such as negligent building work) done by that director. Family lawyers will come across issues relating to the control and obligations of a corporate trustee. *Principles of Corporations Law* provides, if not a complete answer, then a convenient starting point for researching the answer.

The Structure

Principles of Corporations Law comprises 28 chapters divided into seven parts.

Part I is comprised of three chapters dealing with the nature of companies, the history of company law and an overview of the statutory regulatory environment including the Corporations Act, the ASIC Act and discussion of various other committees and panels charged with some form of corporate oversight.

Part II deals with incorporation and its consequences and the formation, promotion and establishment of companies.

Part III contains six chapters which get to the heart of corporate governance. Chapters focus on corporate governance

rules; the governing organs of the company: the board of directors and the general meeting; directors' duties; conflicts of interest; members' remedies and accounts, audit and disclosure. Questions concerning the formalities of holding a board meeting, the validity of directors' decisions and the rights that members may exercise (as a derivative action, oppressive conduct or fraud on the minority) are explored in detail.

Part IV is entitled 'Corporate Liability'. This part contains five chapters which explore the nature of corporate capacity and the ability to bind a corporation as well as the ratification of defective transactions and a company's liability for civil and criminal wrongs.

Part V is devoted to corporate finance: equity finance, dividends and debt finance. This part also contains chapters on creditors' protection, security holders and fundraising by issuing shares.

Part VI is concerned with corporate restructuring including takeovers and reorganisations and elimination of minority holdings.

Part VII is, of course, concerned with the end of the corporate story: external administration. Chapters are devoted to general principles of administration and insolvency, receiverships, voluntary administrations and winding up. These chapters are preoccupied with the various forms of external administration, the duties of the directors and external administrators, a basic overview of the

This year marks the 40th Anniversary of the first edition of this textbook. In this sixteenth edition, the authors, Dr Austin and Professor Ramsay, have taken the opportunity to update the fifteenth edition (2013) by reference to some significant changes to corporations law, both legislative and in decided cases.

Legislative changes include the enactment of the:

- Personal Liability for *Corporate Fault Reform Act 2012* (Cth);
- *Directors' Liability Reform Amendment Act 2013* (Qld);
- *Corporations and Financial Sector Legislation Amendment Act 2013* (Cth);
- *Corporations Legislation Amendment (Derivative Transactions) Act 2012* (Cth); and
- *Corporations Amendment (Simpler Corporate Bond and Other Measures) Act 2014* (Cth).

This text is principally designed with law and business students in mind. It is the smaller, more concentrated, sibling of the

BOOK REVIEWS

Ford, Austin and Ramsay's Principles of Corporations Law (16th ed) (LexisNexis Butterworths, 2015)

procedure for winding up companies and the effect of a winding up order.

Conclusion

Principles of Corporations Law is part of the academic furniture. Practitioners who have access to its kindred loose-leaf service will find more answers and deeper analysis there. This book, though almost

2000 closely-typed pages, is not ashamed to admit that it is written with the student, not the barrister, in mind.

But are we not still all students of the law? Who among us can say that we would not benefit from the practical guidance offered by these most erudite experts of company law? This book has

been augmented and refined over 40 years and 16 editions. Due to the breadth of the subject, practitioners will often need to go elsewhere to explore a topic in more detail, but this book is full of signposts that will point the practitioner down the right path.

Reviewed by Nicolas Kirby

Electronic Contracts (2nd ed)

By Simon Blount | LexisNexis Butterworths | 2015



Simon Blount's *Electronic Contracts* re-enters the arena at a time when courts across all common law jurisdictions are increasingly open to adapting contract principles to accommodate the digital age.

In 2007, for example, the District Court of Illinois found that a relatively informal email exchange between the parties amounted to an offer and acceptance and thus was an enforceable agreement.¹ The next year in *Jafra v Ezemvelo KZN Wildlife*² the South Africa Labour Court held that a text message was an

unequivocal acceptance of all the terms of a contract sent via email.

A year earlier in *eBay International AG v Creative Festival Entertainment Pty Limited*³ the Federal Court of Australia seamlessly welded practicalities of online festival ticket purchases to general principles and consumer legislation when Rares J held an online purchase to be 'a contract in writing signed by the parties.'⁴ On the particular facts this excluded terms found on paper tickets. Rares J held:

By clicking on the relevant buttons and, by the computer bringing up all the terms needed to purchase a ticket...the whole transaction was in writing, signed and agreed by the parties.⁵

Blount discusses significant NSW first instance decisions grappling with the changing landscape. Examples include *Smythe v Thomas*⁶ a decision of Rein AJ (as his Honour then was) which reviewed classic auction principles contextualised by eBay.

Likewise Fullerton J's analysis of whether or when software may be 'goods' in *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd*⁷ balanced incompatibility

Blount continues to provide valuable academic insight into a rapidly emerging area of law that is underserved by existing resources.

between 'intangible' software and consumer protection legislation with the need to preserve consumers rights in an environment where 'online download is a method of distribution that is likely to become the preferred method of distribution.'⁸

Evidently, courts have been willing to solve the problems associated with virtual reality by adjusting the principles of contract law accordingly. But still, Blount writes in the introduction, 'it is the problems, rather than the solutions, that have continued to inspire this second edition.'⁹

True to his word Blount's second book tackles the ongoing legal challenges faced by common law courts with the emergence of electronic contracts. In this edition Blount continues to provide valuable academic insight into a rapidly emerging area of law that is underserved by existing resources.

Expanding on the first edition published in 2008 Blount purports to identify and discuss the major heads of contract law that are challenged by the digitisation of trade and commerce.

The book investigates a number of important questions raised in the recent case law: Does a retinal scan amount to a valid signature? Do hyperlinks provide sufficient notice of terms? Does a school policy requiring students to submit homework via the 'Turnitin' website amount to duress?

The book is divided into ten chapters covering all aspects of contract law that have been impacted by recent digitisation. The first five chapters investigate issues of formation, building on the previous edition by analysing recent case law from a number of common law jurisdictions. In particular Blount examines decisions out of New Zealand, Singapore, South Africa, Canada and Ireland to present a comprehensive picture of the common law of electronic contracts as it stands in all common law jurisdictions.

In Chapter 6 ('Shrinkwrap, Clickwrap and Browsewrap Agreements') Blount investigates the legality of popular e-contract forms. This chapter will prove useful to those seeking to navigate the complex jargon raised in electronic contract disputes.

A number of recent cases have turned on the issues of incorporation of terms and implication, raised by Blount in Chapter 7 ('Incorporation of Terms'). In particular he considers a number of superior court and appellate decisions in a variety of common law jurisdictions to make insightful predictions as to the future interaction between electronic agreements and principles of incorporation.

Vitiating factors and an analysis of legislation applying to misleading

and deceptive conduct are dealt with respectively in chapters 8 ('Vitiating Factors') and 9 ('Misrepresentation, Misleading and Deceptive Conduct and Jurisdiction').

The second edition has also inserted a new Chapter 10 ('International Conventions and Model Laws') that deals with international agreements that have formed in response to technological influences on contract law. This chapter responds to mounting global awareness of the difficulties presented by electronic dealings, though ultimately comes to the conclusion that 'the problems may be more apparent than real.'

Since the first edition of Blount's book there have been a number of major developments in the law of electronic contracts. Online shopping, for example, is now more familiar to consumers than the weekly grocery shop. With this in mind Blount consciously reiterates the process of casualisation that serves as a backdrop to recent developments in the law. His keen awareness of the risks associated with such a familiarity demonstrates his understanding of the behaviour of Internet natives who have become complacent in their digital landscape. In particular he cautions courts on potential exploitation of unwary web-users. He advises common law courts to be 'alert to the circumstance that a click signatory, in the course of browsing the internet, may not reasonably know that a webpage is contractual in nature.'¹⁰

An aspect of this book worth noting is the way in which Blount has segmented issues into digestible sections making it an ideal resource for students and professionals wanting a clear and accurate statement of the law. Exhaustive referencing, however, makes it an equally useful starting point for those interested in further research.

Another triumph is the simplified but comprehensive way that Blount deals with the jargon and technical language abundant in electronic contract disputes. An example is the term 'clickwrap' contract that describes an agreement where users assent to terms presented on a screen by clicking on a virtual button. More recently in the United States a new category of 'modified clickwrap contracts' has emerged where terms are presented in hyperlinks near a virtual assent button. Blount deals with these and other complex issues in an accessible way without losing the depth of analysis expected of such a text. The detailed table of contents supports such a balance. By providing a detailed snapshot of the major issues Blount easily keeps the bigger picture in mind when dealing with the finer points.

It is of credit to the author and all involved that a book covering such complex material is both factually accurate and coherently written from front to back. At only 232 pages long, *Electronic Contracts* will make a fitting handbook for law students and practitioners alike.

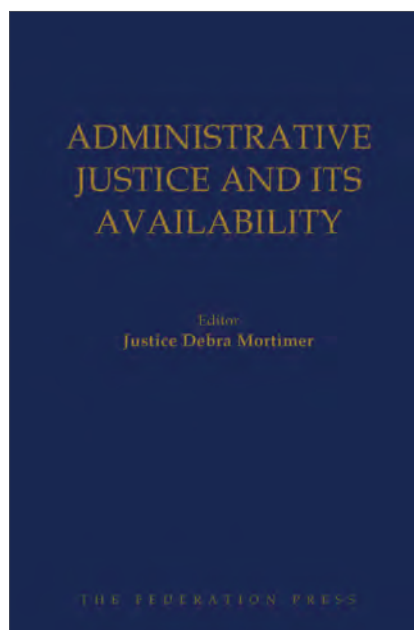
Reviewed by Richard Bell

Endnotes

1. *SEKO Worldwide LLC v Four Soft Limited* (2007) 503 F Supp 2d 1059.
2. *Jafra v Ezemvelo KZN Wildlife* [2008] ZALC 84.
3. *eBay International AG v Creative Festival Entertainment Pty Limited* [2006] FCA 1768.
4. *eBay International AG v Creative Festival Entertainment Pty Limited* [2006] FCA 1768 [49].
5. *Ibid* [49].
6. *Peter Smythe v Vincent Thomas* [2007] NSWSC 844.
7. *Gammasonics Institute for Medical Research Pty Ltd v Conrad Medical Systems Pty Ltd* (2010) 77 NSWLR 479.
8. *Ibid* [44].
9. Simon Blount, *Electronic Contracts*, (LexisNexis Butterworths, 2nd ed, 2015) 9.
10. *Ibid* 161.

Administrative Justice and Its Availability

Debra Mortimer (ed) | The Federation Press | 2015



The Federal Court and the Law Council of Australia hosted a conference in August 2014 on administrative law - the 10th anniversary since they first convened a conference on the same topic. The 2014 conference attracted much interest and space was limited, so it was by invitation only. The quality of the papers led to their publication under the guidance of Justice Debra Mortimer. The essay authors include a former High Court justice, a Western Cape High Court justice, a Federal Court justice, and six silks.

This collection is a snapshot of current matters of legal, social, and political significance in administrative law. Chief Justice James Allsop writes in one of two forewords (the other is by the president of the Law Council of Australia, Duncan McConnel) that the papers at the 2014 conference revealed 'the centrality of the subject of administrative law and its concern with the proper exercise of power'. Since its publication in June 2015, the book has been referenced in two judgments of Australian courts: the first by the full court of Jessup, Tracey,

and Katzmann JJ in *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCAFC 105; and the second in the NSW Court of Appeal judgment of Sackville AJA, with whom both Adamson and Leeming JJ agreed, in *Navazi v New South Wales Land and Housing Corporation* [2015] NSWCA 308. Both references were to the article by Professor Margaret Allars SC, 'The Distinction between Jurisdictional and Non-jurisdictional errors: Its Significance and Rationale', the longest chapter by far, at 42 pages. (The other chapters range from between seven and 20 pages.) Margaret Allars SC analyses the High Court's judgments in *Craig v South Australia* (1995) 184 CLR 163 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531. It ends with a discussion of the claimed rationales for the distinction between jurisdictional and non-jurisdictional errors and suggests the distinction is 'supported by none'.

Justice Dennis Davis writes in the book's first chapter on 'Administrative Law: The Challenge of the 21st Century'. As a judge of the Western Cape High Court and an honorary professor in law at the University of Cape Town, where he teaches constitutional and tax law, Justice Davis queries whether core values of judicial review transcend national boundaries. He highlights the increasing political context of disputes coming before South African courts, before offering a tentative, highly theoretical framework for administrative law generally: it is a good introduction to the balance of the essays, which all focus on Australia.

The next three chapters interrelate: the first, by the Hon William Gummow AC, titled 'Rationality and Reasonableness as Grounds for Review', discusses, as the title suggests, the significance

of rationality and reasonableness to judicial review in Australia. It traverses the separation of powers under the Constitution and comments on changes in the UK as a result of the *Human Rights Act 1998* (UK), before commenting on the legacy of Sir Owen Dixon. It examines reasonableness in determining the limits of powers by reference to Australian municipal by-law cases. Professor Gummow ends with a consideration of reasonableness as it relates to the exercise of discretions, touching on the obscurities in the reasons of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 and finally with an analysis of Australian law following *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

Justice Davis queries whether core values of judicial review transcend national boundaries. He highlights the increasing political context of disputes coming before South African courts ...

The solicitor-general of the Commonwealth, Justin Gleeson SC, then responds, in 'Taking Stock after *Li*'; and Kristen Walker QC uses Professor Gummow's essay to offer a consideration, based on the judgments in *Li*, of the role of proportionality in review for unreasonableness, and the relevance of the distinction between power and discretion to the application of concepts such as rationality, reasonableness, and proportionality.

Justice Alan Robertson's chapter titled 'The Contemporary Approach to Jurisdictional Error' ends poetically by referencing John Stuart Mill's, *On Liberty*. Justice Robertson (who, when he moved to the Sydney Bar in 1983, read with Professor Gummow) gives a fascinating account, in an afterword to his essay, of the history of the *Sunday Entertainments Act 1932*, the legislation at the centre of *Wednesbury*. It was a lady living at South Hackney, Miss Millie Orpen, who sought writs to be issued in 1930 as a common informer claiming penalties against the owners of cinemas in Central London for opening their theatres on a Sunday. In *Orpen v Haymarket Capitol Ltd* [1931] All ER 360 it was noted that Miss Orpen had, only two days before the issue of the writ, changed her name from Offenheim to Orpen 'under which designation, perhaps, she could more colourably come forward as the champion of the English Sunday'. It is with reference to Miss Orpen's zeal that Justice Robertson quotes Mill: 'It remains to be proved that society or any of its officers holds a commission from on high to avenge any supposed offence to Omnipotence'.

Stephen McLeish SC in 'Reasons, Reasoning and Jurisdictional Error' gives

... it was noted that Miss Orpen had, only two days before the issue of the writ, changed her name from Offenheim to Orpen 'under which designation, perhaps, she could more colourably come forward as the champion of the English Sunday'

a short, sharp analysis of jurisdictional error as it applies to the failure to provide adequate reasons.

Melinda Richards SC in 'Accessibility, Merits Review and Self-Represented Litigants' provides a very practical discussion of aspects that emerge in merit review cases involving self-represented litigants: the concept for the article arose out of the author's own experience as a self-represented litigant in the Planning and Environment List in the Victorian Civil and Administrative Tribunal relating to a development next to her home. And in the last of the essays, Neil Williams SC, in eight pages, concisely compares Constitutional writ review with that available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), in 'Constitutional Writ Review and the ADJR Act'.

The last third of the book relates to 'Reports on Panel Sessions'. There are

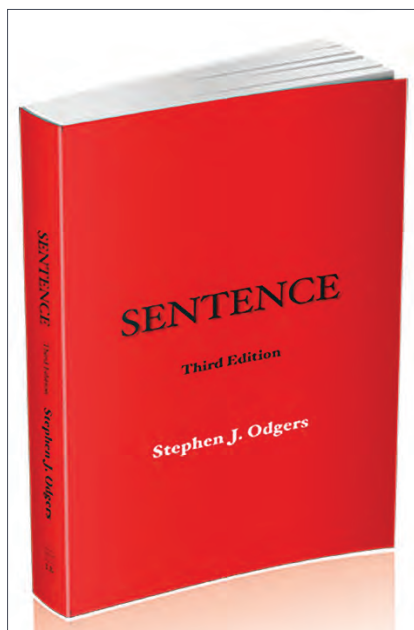
four of them, each by a separate author all of whom practise at the Victorian Bar, and each gives the author's personal account of papers by other conference panel speakers and the questions and discussions that followed. These final chapters add to the substance of the chapters at the beginning of the book, and include illuminating new material, such as Mark Costello's chapter 'Administrative Review in Other Jurisdictions', which includes an account of Professor Jiunn-rong Yeh's reflections on the Taiwanese constitutional and administrative law system.

Overall the book is a detailed account of current issues in administrative law that will enthuse experienced practitioners.

Reviewed by Charles Gregory

Sentence: The Law of Sentencing in NSW Courts for State and Federal Offences (3rd ed)

By Stephen J Odgers | 2015



importance of this branch of the law. Sentence proceedings and judgments have become progressively more complex and lengthy. Long gone are the days of the pithy sentence pronouncement numbering but a few pages. The systematic online publication of unreported sentence appeal decisions no doubt has had an effect here. Sentencing jurisprudence is a crowded and sometimes confusing space. The High Court also appears to be less disinclined to intervene in sentence appeals, to reorientate the law of sentence upon its proper course. *Hili*, *Muldock*, *Barbaro* and *Kentwell*³ are recent examples of paradigm shifts in what were hitherto thought to be well-settled areas of sentencing principle.

expressed are usually insightful and lively, occasionally unorthodox.

The second virtue of the text is found in its copious footnotes. The degree of research and referencing to applicable authority is most impressive. This is clearly a book written by a practitioner who methodically analyses and tabulates appellate sentence decisions across the jurisdictions. The book is also written for practitioners. Find the relevant footnote and there is good chance that you will find the applicable case to advance a good argument, or put an end to an untenable one. This is a book that I invariably and extensively consult in the preparation of sentence submissions.

The vast majority of matters adjudicated in the criminal courts in this country result in imposition of a sentence. In the period 2013–14, about 93 per cent of adjudicated matters in the higher criminal courts (including those involving guilty pleas) resulted in the passing of a sentence. The corresponding figure for local courts was about 98 per cent. New South Wales boasted the highest median length of sentences involving actual custody.¹ It may not be surprising to hear that the figure was more than double the duration achieved by the clement Victorians. It may cause some consternation, however, to learn that we bettered our punitive-minded neighbours to the immediate north by a very healthy margin. A recent comparative study of custodial sentences rated our state as ‘one of the harshest jurisdictions in Australia’.²

Arresting statistics indeed. They explain why sentencing law and practice lies at the core of any criminal practice at the bar. But there are other measures of the

A recent comparative study of custodial sentences rated our state as ‘one of the harshest jurisdictions in Australia’.

With all this in mind, barristers practising in the criminal law and related areas have need for a lucid and comprehensive text on sentencing law. The latest edition of *Sentence* is such a work.

The book has two notable virtues. The first is the clarity with which principles are extracted and discussed. Each topic commences with a summary of the fundamental, often competing, principles that operate in the area. The analysis assists the practitioner to think beyond the catalogue of relevant circumstances and to engage with the deeper questions of how the circumstances interact with the overarching purposes of the sentencing exercise and inform the ultimate determination. The views

The organisation of the text is logical. The chapter titled ‘Principles’ provides an exegesis of twenty general principles that inform the sentencing discretion (for example, ‘factors relevant to the determination of sentence must be taken into account in an instinctive synthesis’, ‘there must be reasonable consistency in sentences’, ‘there must not be double punishment’, etc). The chapter at the centre of the work, ‘Factors’, provides a commentary on thirty-four issues or circumstances that are likely to require consideration in a sentencing exercise. Examples include: objective seriousness, mental illness, good character, assistance to the authorities, delay and non-curial punishment. There are also dedicated chapters on procedure, sentencing

BOOK REVIEWS

Sentence: The Law of Sentencing in NSW Courts for State and Federal Offences (3rd ed)

The book is also written for practitioners. Find the relevant footnote and there is good chance that you will find the applicable case to advance a good argument, or put an end to an untenable one.

options, specialist courts, sentence appeals (including Crown appeals) and sentencing reform.

The third edition contains some timely and pertinent additions to its predecessor. It discusses recent High Court decisions including *Filippou v The Queen*⁴, *CMB v Attorney General (NSW)*⁵, *Achurch v The Queen*⁶ and *Barbaro v The Queen*⁷. There are significant updates to the commentary on topics such as minimum sentences, the relevance of intoxication, the *Ellis* discount, delay, double punishment for individuals and companies and parity in sentencing. Recent changes in Commonwealth law and practice have also been addressed, including the use of victim impact statements and proposed legislative amendments concerning assistance to authorities and intensive correction orders in federal matters.

My one criticism of the work concerns its inadequate cross-referencing and indexing. The table of contents does not descend to the detail of particular topics. The list of specific topics is tucked away in the introductory chapter. Use of the index generally requires working out the relevant chapter heading first (although the two-stage sentencing process is widely regarded as erroneous, the author requires his reader to engage in two-stage searching). Importantly, there is only a table of references to High Court decisions, which makes searching for intermediate appellate court decisions an arduous task. While these deficiencies may have something to do with the perils of self-publication, they can frustrate swift deployment of the very useful information contained in the book in the heat of litigation. The digital version of the book overcomes some of these problems.

A final sentence: this is an important and valuable text for any barrister practising in the criminal law and related areas.

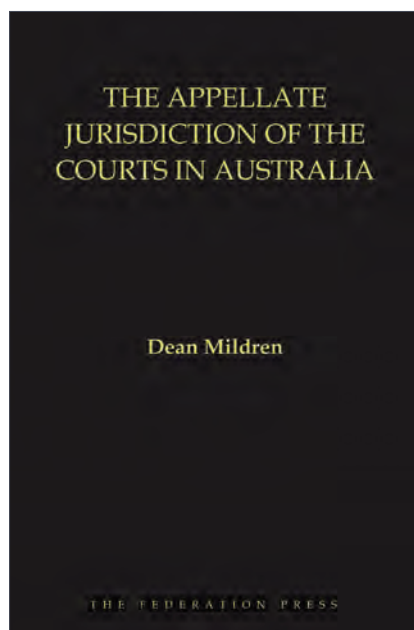
Reviewed by Simon Buchen

Endnotes

1. Australian Bureau of Statistics, Criminal Courts, Australia, 2013–14 (15 March 2015).
2. G. Brignell & H. Donnelly, Sentencing in NSW: A cross-jurisdictional comparison of full-time imprisonment (Judicial Commission of NSW, Research Monograph 39, March 2015).
3. *Hili v The Queen* (2010) 242 CLR 520; *Muldock v The Queen* (2011) 244 CLR 120; *Barbaro v The Queen* (2014) 253 CLR 58; *Kentwell v The Queen* (2014) 252 CLR 601.
4. [2015] HCA 29; (2015) 89 ALJR 776.
5. [2015] HCA 9; (2015) 89 ALJR 407.
6. [2014] HCA 10; (2014) 253 CLR 141.
7. [2014] HCA 2; (2014) 253 CLR 58.

The Appellate Jurisdiction of the Courts in Australia

By Dean Mildren AM RFD QC | The Federation Press | 2015



Especially for junior counsel with an interest in developing an appellate practice, this book is a welcome addition. Indeed, its author (previously a judge of the Supreme Court of Northern Territory and of the Northern Territory Court of Criminal Appeal) states that his text was written for lawyers and barristers who are new to appellate work. Equally though, the text offers helpful insights for seasoned veterans of the appellate arena.

From cover to cover, Mildren offers an astute dissection of his subject that gives credence to his title, *'The Appellate Jurisdiction of the Courts in Australia'*. The text identifies the principles and procedures of Australia's appellate courts and fora, including both civil and criminal appeals from the perspective of both the appellant and the respondent. It canvasses the breadth of jurisdictions in Australia (there is even a dedicated chapter on lesser known appellate fora such as the Defence Force Discipline Tribunal, of which Mildren was a member for nearly two decades). Many of the references to different jurisdictions are short and introductory. By contrast, considerable detail is afforded to

articulating the appellate process in the High Court of Australia, including special leave applications. This includes a useful list of the most common reasons for granting and refusing leave to appeal to the High Court of Australia (page 175).

The introductory chapters succinctly walk through foundational issues such as the question of the right to appeal (Chapter 1) and types of appeal (such as appeals *de novo*, appeals by way of rehearing and appeals against discretionary decisions) (Chapter 2).

The book is a useful resource for procedural requirements involved in appellate work. For instance, the common requirements for lodging an appeal (Chapter 4), the task of preparing written submissions (Chapter 5) and responding to an appeal (Chapter 6). While much of the book has generic application to any appeal in any court, it also helpfully distinguishes some of the procedural aspects particular to criminal appeals and civil appeals. For instance, chapters 9 and 10 are dedicated to criminal appeals (including sentencing appeals) whereas chapter 11 refers to civil appeals.

The chapter concerning written submissions provides a useful outline of how to structure and write effective written submissions for an appeal. Sound advice is offered to urge written discipline and accuracy. For instance:

You should carefully consider every sentence in it. Remove anything which is unnecessary, repetitive, or which might otherwise detract from your case or cause the court to spend time chasing down points which go nowhere. Remember too, that after the court has reserved its decision it will be the written submissions that the members of the court are most likely to go to first when crafting their judgments.

The book concludes with a didactic and

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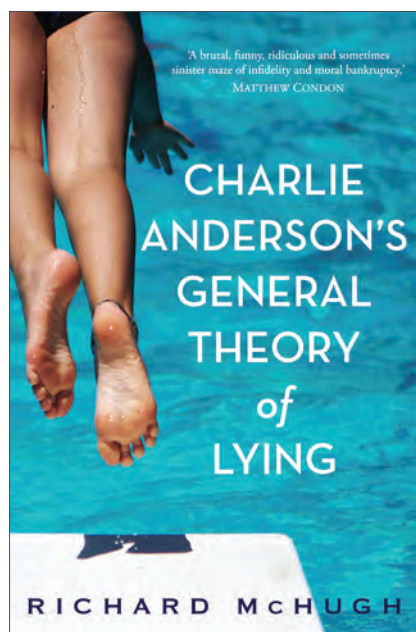
encouraging reflection on the advocacy of 'arguing an appeal'. Numerous tips are given on a variety of subjects including court appearance, apparel, opening statements, demeanour, body language and breathing techniques. In Mildren's opinion, the purpose of the oral hearing is for counsel and the bench to engage in Socratic dialogue to test the various propositions in issue. Accordingly, counsel should anticipate questions that are likely to arise, and how they will effectively respond to them, including being able to immediately take the court to relevant written passages as required. Similarly, helpful (and somewhat reassuring) guidance is given for a situation in which an answer might not be immediately apparent during questions from the bench, and how counsel can effectively deal with that situation to best assist the court as well as advance their submissions.

Although the chapters of the text are relatively short in ambit (arguably though, its brevity is its strength) the chapters are well referenced and exactly footnoted with leading current authorities cited which makes the text both a helpful overview as well as an invaluable resource for work in the appellate jurisdictions of Australia.

Reviewed by Talitha Fishburn

Charlie Anderson's General Theory of Lying

By Richard McHugh | Viking | 2015



This novel, which is the author's first, concerns events affecting Charlie Anderson, his wife Anna Kyriakou and their three daughters over a period of several months. It is set in Sydney. Charlie runs his own, very successful, consultancy business. Anna is the head of retail at one of the major banks. The eldest daughter is at university, the younger two at school.

The novel is broken generally into relatively short chapters which makes it an ideal novel for a bus or ferry ride from Middle Harbour, where the protagonists reside. The chapters are themselves gathered into four parts and there is an epilogue, although the story flows from one part into the next directly. Although some paragraphs and sentences are lengthy (the longest of which *Bar News* can recall being aware is a paragraph of more than two pages within which is a sentence of 18 lines), this does not interrupt unduly the flow of the narrative.

Many readers will find particularly enjoyable the author's telling of everyday matters. For example, the difficulty of trying to get a parking spot at Westfield on a Saturday morning. Or, when seeing a

film, the fact that it was 'outrageous how much a choc-top costs these days'. Most readers will have had the same reactions. For those readers who are current or former members of the bar, the author's description of Samuel Lawson of senior counsel, whose chambers are on the Eight Floor of Wilberforce Chambers and whom Charlie Anderson is required to visit towards the end of the novel, will give much food for thought: who, or of what amalgam of personalities, is he?

In a similar vein, some of the most humorous aspects of the novel are contained within certain of the events told which have no direct relevance to the primary story. For example, in the first part of the novel, there is a father-daughter school camping trip. The description of the various characters on the trip is set out in an amusing manner. Indeed, the various analyses set out of different characteristics of the parents of children – and of the children themselves – at private schools is particularly witty. Many readers are likely to be able to identify some parent or child who fits one or other of the descriptions. Many readers, equally, will have sat through a concert akin to the Hettie Hope Concert: 'It was always a long, long night. Every girl in every ensemble ... had to play ... it was exceptionally poor form to laugh at a performance at the Hettie Hope. You could never know if the po-faced woman sitting next to you was that tone-deaf French horn's mother.'

There is some delightful language employed: a guest at a party is an 'Ayn Randian Tory, whose twenty-eight years had got lost in his navy sports jacket, gold buttons and paunch'; how much more pleasant is the word 'antimacassar', which the author uses, than some prosaic equivalent such as 'chair cover'. Equally, however, there is a very liberal use of the 'f' word and its derivatives – and worse

– which will not be to every reader's taste. The most intriguing expression is 'frisson of hardness'. Austlii suggests that that phrase does not come up often in arguments before the High Court.

There are a couple of curiosities about the novel. The first is that although Charlie Anderson is portrayed as a philanderer, that aspect of his character is not the main story thread in the novel. The author outlines Charlie's set of 'Rules for Dealing with Women' with which Charlie does not comply entirely in the novel. However, the rules and his dalliances are almost *en passant* to the events which precipitate the primary story and which events themselves occur towards halfway through the novel. There is a moment when the author creates cleverly a situation of great unease whereby the counterparty to one of Charlie's affairs becomes mixed into Charlie's family dealings. It is a skilfully-presented twist. However, that twist does not develop into a significant, stand alone issue.

The second curiosity concerns the title of the novel, *Charlie Anderson's General Theory of Lying*. The 'General Theory' is referred to only three times, so far as *Bar News* could identify. It is explained on page 60. It is referred to again in the middle of the novel and, then, on the second last page of the novel with a modification following the events narrated. It is clear that Charlie Anderson tells lies. However, that fact also does not form the basis of the actions leading to what becomes the primary story of the novel.

The novel is an entertaining romp of intrigue. Richard McHugh is to be commended for *Charlie Anderson's General Theory of Lying*.

Reviewed by Daniel Klineberg

Football's world order is restored

Anthony Lo Surdo SC reports on NSW Bar FC's success in 2015



The victorious NSW Bar FC team.

Introduction

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

New members

In 2015 NSW Bar FC welcomed new members Justin Hogan-Doran, Mahmoud Mando, Bilal Rauf and David Larish.

Domain Soccer League: Bar FC dips out in the semis

NSW Bar FC defended its premiership title in the 7th successive year of the DSL competition, which was held at lunchtime between April and September in the Domain.

NSW Bar FC dominated the leaderboard for much of the home and away series but after a few disappointing draws and losses finished the series in third place, booking itself a sudden death semi-final berth for the third consecutive year against a lean outfit from Sydney Business School. Interestingly, NSW Bar FC dominated Sydney Business School in the last game of the regular season to win

3–2 and secure it semi-final spot. In his post-game review, Manager David (Sir Alex) Stanton prophesised that Sydney Business School were a ‘handy team who will prove to be a difficult opponent.’ And so it was to be.

In the knock-out match, the score was level at the end of normal time after Richard Di Michiel finished a beautiful pass from Shereef Habib SC. Sydney Business School countered with a goal in the dying seconds against the run of play. Chances to NSW Bar FC were coming thick and fast particularly after heeding Sir Alex’s advice to play the ball on the ground and quickly. Notwithstanding that dominance, Sydney Business School defended well, led by a large English contingent.

Extra time saw more chances fall NSW Bar FC’s way, however the finishing touch eluded it. A special mention should be made of the exemplary defensive work of both Ivan Griscti and Jonathan Clarke who managed to extinguish much of the opposition’s attacking play. After 60 minutes of hot and gruelling work the fate of the semi-final was to be decided on the dreaded penalty shoot-out. Unfortunately, Sydney Business School defeated NSW Bar FC 4–1 on penalties.

5th Annual Sports Law Conference

On 10 October 2015 around 30 barristers convened in Melbourne at the Neil McPhee Room, Owen Dixon Chambers East, to attend the 5th Annual Sports Law Conference chaired by Anthony Klotz of the Victoria Bar.

Chris Nikou, partner, K & L Gates, and director of Melbourne Victory and of Football Federation Australia, spoke about the state of football in Australia. Some interesting facts to emerge from that presentation included that football has 7.7 million fans in Australia and is the number one sport of choice for 16–34 year olds, boasts over 1,983,000 participants in Australia of which over 630,000 are female and is the fastest growing team sport in the country.

Chances to NSW Bar FC were coming thick and fast particularly after heeding Sir Alex’s advice to play the ball on the ground and quickly.

Scott Munn CEO Melbourne City spoke about ‘The City Group and A-League participation’. Interestingly, Melbourne City (formerly Melbourne Heart) has enjoyed a 55 per cent increase in membership since the City Group acquired the club in 2014.

Anthony Nolan QC of the Victorian Bar spoke about a number of legal issues associated with and arising from the ‘Blackest Day in Australian Sport’.

Rodrigo Vargas, ex-Melbourne Victory and Socceroo player, spoke about the challenges faced by a professional athlete after sport and the work that he is undertaking in the community including

with young offenders in prison.

A special thanks to Anthony Klotz, Chris Nikou, Scott Munn, Anthony Nolan QC and Rodrigo Vargas for giving generously of their time to ensure the success of the conference.

Bar Football 'State of Origin'

Immediately following the Sports Law Conference, 45 barristers drawn from Queensland, Victoria and NSW met at the Green Gully Soccer Club at St Albans to take part in the 8th Annual Suncorp NSW Bar v Vic Bar Annual Challenge Cup and the 6th Annual Suncorp NSW Bar v Victorian Bar v Queensland Bar Annual Football Challenge Cup.

The touring squad, keen on avenging the series defeat of 2014, comprised Adrian Canceri, Rohan de Meyrick, John Harris (captain), Geoff O'Shea, Simon Philips (acting manager), Greg Watkins, Anais d'Arville, Colin Magee, Graham Turnbull SC, David (Patchaldino) Patch, Scott Goodman, Michael Fordham SC, Sebastian Hartford Davis, Richard Sergi, Oshie Fagir, Angus Lang and Anthony Lo Surdo SC. Important duties in Madrid and Barcelona (holidays) prevented Manager David (Sir Alex) Stanton from attending this year.

The first game was between a depleted Queensland team consisting of only 6 regular members (Lee Clark, Andrew Luchich, Andrew Skoien, David Purcell, Michael Hodge and David Chesterman) but ably assisted by NSW Bar FC members de Meyrick, Fagir, O'Shea, Fordham SC and Capt Harris (in goals) against a somewhat youthful and numerically strong Victorian team (consisting of Anthony Klotz (captain), Andrew Barbayannis, Jim Fitzpatrick, Matthew Albert, Hamish Austin, Christopher Archibald, Adrian Bates, Michael Biviano, Douglas James, Con Lichnakis, Alexander Solomon-Bridge,

Adrian Strauch, Gorjan Nikolovski, Cameron Charnley, Andrew Yuile, Adrian Anderson, Nicholas Phillpot, Daniel Nguyen, Lionel Wirth, Nichola Rhyder (Keeper), Angel Aleksov and Jenny Si).

Despite some individual brilliance, the Victorians were unable to convert with Queensland defeating Victoria 3 – 0 (with goals to de Meyrick and Fagir [NSW] and Lee Clark [Qld]). Best on ground for Victoria went to newcomer Angel Alexsov and for Queensland, the goal scorer, Lee Clark.

The second game was between NSW and Queensland whose numbers were swelled by Victorian barristers who had already played an hour of football in warm conditions. NSW proved too strong for Queensland running in 3 goals (Di Michiel, Philips and Lang) to nil. Special mention must be made of the rock-solid defence provided by Magee, Philips, Fordham SC, de Meyrick, O'Shea and d'Arville. Best on ground for NSW was Angus Lang and for Queensland Andrew Luchich.

The last game saw NSW backing up for a second hour of football against a rested Victorian team in 28 degree plus temperatures and with storm clouds ominously building. NSW started strong with an opening goal within minutes of the whistle to Di Michiel. Though the Victorians exhibited moments of brilliant passing football with occasional counter-attacks which sent the NSW backline scurrying to cover, very few if any serious attempts on goal materialised and the Victorian defence crumbled under the sustained pressure of the NSW mid-field shared by Lang, Watkins, Fagir and Sergi and of the forward line of Canceri, Di Michiel, Hartford Davis, and David (Patchaldino) Patch (before heroically hobbling off injured in late in the second half). Di Michiel bagged a hat-trick and

Canceri scored twice to hand NSW a resounding 5–0 victory. Best on ground for NSW was Richard Di Michiel and for Victoria, Andrew Barbayannis.

Thanks also to Peter Agardy, Graham Turnbull SC and Anthony Lo Surdo SC for officiating.

On a final note, many thanks to those whose support made the conference and the games possible. Special mention should be made of Tony Klotz from the Victorian Bar, David Chesterman of the Queensland Bar and Simon Philips, David Stanton and (captain) John Harris of the NSW Bar for organising the teams and to Tony Klotz for his fine work in putting together a successful and informative conference. Thank you also to the Victorian Bar Association for making the conference facilities available.

Acknowledgements

NSW Bar FC acknowledges Suncorp for its support.

The future

The Bar Football 'State of Origin' and Sports Law Conference will be held in Queensland next year before the bumper 10 year celebrations in Sydney in 2017.

Like all good football sides, NSW Bar FC will be recruiting heavily in the off-season. We look forward to welcoming new members to the squad in 2016. If you are interested in joining the team please email David Stanton (d.stanton@mauricebyers.com) to join the mailing list. If you would like to attend or speak at the 6th Annual Sports Law Conference in 2016 please email Anthony Lo Surdo SC (losurdo@12thfloor.com.au).

