THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2016

barnews

Parental responsibilities and the bar

PLUS

‘Barristers work’ and ADR

The NSW Bar and the Red Cross Missing and Wounded Enquiry Bureau

William Lee

THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2015

barnews

Contents

ISSN 0817-0002

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

8th Floor Selborne Chambers
8/174 Phillip Street
Sydney 2000
DX 395 Sydney

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

Cover: Designed by Tim Hartrick

Editor's note

The feature story in this issue is Ingmar Taylor SC's piece on working flexible hours.

The issue is simple: how can barristers balance the demands of practice with managing the rest of their lives - most particularly, of course, with looking after young children.

Taylor SC first contributed a piece to *Bar News* on this topic in 2002. Much has changed since then. One of the most significant such changes is the way technology now makes it easier to work away from chambers.

The piece includes a number of individual case studies: each study consists of a practising barrister describing his or her method for carrying on a practice while working flexible hours. Each is different. Each has has been worked out to suit the needs of the individuals involved. Each is illuminative.

Elsewhere this issue contains the usual mix of bar history, features, opinion and recent developments.

Malcolm Oakes SC has written an account of William Lee, whose long and distinguished career at the NSW bar commenced on 27 May 1938; the *Sydney Morning Herald* of the day regarded the occasion of his admission as sufficiently noteworthy to publish a report of what it described as 'the first Chinese to become a barrister in New South Wales'.

It was a different world. Oakes SC describes the young Lee being taken for a visit to his father's village in China: He was carried in by palanquin with two bearers and escorted by a security guard of four armed with long-barrelled revolvers to protect against the risk of kidnapping.

This issue also includes pieces by Ian Davidson SC on whether a barrister's work extends, or should extend, to conducting a mediation or arbitration; by Caroline Dobraszczyk on the death penalty, including an interview with Tony McMahon, the Australian barrister who represented the two Australians recently executed in Indonesia; and by Tony Cunneen, who has continued his important series on the contribution of NSW lawyers to the war effort, with a piece on the Red Cross Missing and Wounded Enquiries Bureau.

Jeremy Stoljar SC

Editor

Technology, flexibility and the twenty-first century advocate

By Jane Needham SC

This is the first presidential column under the Legal Profession Uniform Law regime. While I was (possibly prudently) out of the country when the legislation commenced on 1 July 2015, I am reliably informed that, like the Y2K bug, much hard work meant that the sky did not fall that morning. The Bar Council is very much indebted to the efforts of, in particular, Philip Selth, Executive Director, and Jennifer Pearce, in-house counsel, who have put in superhuman efforts to ensure that the changeover was as smooth as possible.

I urge all members to read the Bar Association's updates, particularly on the new costs requirements, so that the sky continues to remain where it should be. There is a wealth of information on the association's website at http://www.nswbar.asn.au/for-members/uniform-law to assist members with the transition to the new regime.

In this issue of *Bar News* is an article written by Ingmar Taylor SC, which is an update on his 2002 article on part-time practice at the bar. When I asked him to consider writing this article, we discussed the changes which had taken place during those thirteen years. One of the major changes is the terminology; almost everyone now refers to 'flexible' rather than 'part-time' practice. The 2014 Bar Association practising certificate renewal survey has provided valuable insights into the practice of those working flexibly at the bar. Taylor SC was able to speak to a number of people who are, or were, practising outside the traditional boundaries of long days and weekends spent in chambers or in court. It is interesting to note that an increasing number of men are using the technology and flexibility available to them to spend more time with their families, a preserve which in 2002 was mainly (although not exclusively) female. I would be very interested in any feedback on how the various programs which seek to support flexible practice are working – the bar child care centre in Martin Place, the Best Practice Guidelines as to flexible practice, and the court protocols on predictability in sitting hours, in particular.

It is interesting to note that an increasing number of men are using the technology and flexibility available to them to spend more time with their families, a preserve which in 2002 was mainly (although not exclusively) female.

A theme of Taylor SC's article is the benefit of technology in allowing practice to be conducted remotely or at home. I am writing this column with the benefit of modern technology – using in-flight Wi-Fi on a flight from Boston to Los Angeles, returning from the Australian Bar Association conference in Boston.

The theme of the conference was 'Survival of the Fittest – Challenges for Advocates in the 21st Century'. One of the challenges which was discussed in various forums was the necessity to keep abreast of technological changes. On that topic, Bathurst CJ gave a most entertaining and relevant speech entitled 'iAdvocate v Rumpole – Who will survive? An analysis of advocates' ongoing relevance in the age of technology'. It may not require a spoiler alert to reveal that the Rumpole model was not the preferred one for the twenty-first century advocate.

The conference was fascinating, attracting barristers and judges from around Australia and providing insights into the American style of advocacy (including warnings against allowing courts to become the 'poor peoples' forum' while wealthy litigants turn to arbitration as a form of private justice) and to the challenges faced by other jurisdictions. Particularly memorable was Mark Mulholland QC's account of the personal security issues involved for barristers defending unpopular clients in Northern Ireland. Of more direct relevance to New South Wales was Alastair MacDonald QC's account of the attacks on legal aid and the unacceptably high level of court fees in England and Wales, resulting in significant barriers to access to justice.

On a different note, David Nolan SC of the Dublin Bar spoke movingly of the

Jane Needham SC, 'Technology, flexibility and the twenty-first century advocate'

barristers – Irish and Australian, twelve in all – who died at Gallipoli. The room was silent as he quoted Eric Bogle's moving song, 'And the Band Played Waltzing Matilda', about the experience of raw young men going off to the war. Doubtless Nolan SC would refer to it as the Pogues' moving song, but it is only fair to give credit where credit is due.

The conference attendees were lucky enough to have a number of illuminating and enjoyable excursions – to the JF Kennedy Library for the welcome speech by Keane J, to Harvard Law School, and to the US and the Commonwealth of Massachusetts courthouses. Congratulations are due to Fiona McLeod SC, the ABA president, and her team (including those members of the New South Wales Bar Association's staff, Chris D'Aeth and Bali Kaur, who were behind the organisation of the conference).

I am very grateful to the Bar Association for facilitating my attendance at this conference and I hope to use the insights gained to continue the efforts to ensure that barristers will not become, like the Tecopa pupfish of Bathurst CJ's paper, extinct.

Jane Needham SC

President

Opening of New Chambers

New Chambers held their grand opening on 14 May 2015. Roughly 400 guests gathered in the Assembly and were welcomed by the head of chambers, David Jackson QC. New Chambers, located on levels 33 and 34 of the Deutsche Building on 126 Phillip Street, has 45 members, 16 of whom are silks.

Bar Practice Course 01/2015

Back row, left to right: Taran Ramrakha, Jonathan Burnett, Tim Kane, Gideon Gee, Angus O'Brien, Nick Swan, Russ Johnson, Alexandra Rose, Sarah Warren, Stephen Lawrence, Andrew Byrne, Andrew Jordan. **Next row, left to right:** Alex Kaylinger, Gregg Stagg, Chris Parkin, Anton Duc, Maeve Curry, Andrew Edington, Will Tuckey, Marcel Fernandes, Corrie Goodhand, Meaghan Fleeton, Brent Michael. **Next row left to right:** Linda Clarke, James Smith, Catherine Bembrick, Ben Curtin, Ryan May, Matt O'Connor, Frances St John, Bryce Douglas-Baker, Gareth Christofi, Helen Roberts, Thomas Skinner. **Front row left to right:** Julie Kearney, Kate Madgwick, Hamish White, Tom Bagley, Emma Bathurst, Peter Fowler, Shanna Mahony, Jason Curtis, Belinda Baker, Felicity Graham, Sonia Tame.

Back row, left to right: Maeve Curry, Meaghan Fleeton, Alexandra Rose, Sarah Warren, Corrie Goodhand. **Next row left to right:** Kate Madgwick, Linda Clarke, Emma Bathurst, Helen Roberts, Sonia Tame, Catherine Bembrick. **Front row left to right:** Julie Kearney, Frances St John, Shanna Mahony, Belinda Baker, Felicity Graham.

Same-sex marriage protected by the US Constitution

Jonathan Redwood reports on *Obergefell v Hodges*, 135 S.Ct. 2584; 576 U.S.____(2015).

Introduction

On 26 June 2015, the United States Supreme Court handed down its landmark ruling in *Obergefell* in which it held in a 5-4 decision that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed in another state.

The decision is one of the most significant and controversial decisions delivered by the Supreme Court.

The petitioners were 14 same-sex couples and two men whose same-sex partners are deceased. They filed suits in the Federal District Court in their home states claiming that respondent state officials violated the Fourteenth Amendment's due process clause by denying them the right to marry or to have marriages lawfully performed in another state given full recognition. Each District Court ruled in the petitioners' favour but the Sixth Circuit reversed those decisions by a 2-1 majority. The Supreme Court granted *certiorari* and presented the following questions for determination:

- Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex;
- Does the Fourteenth Amendment require a state to recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed in another state?

The case attracted unprecedented national (and international) attention and a record 148 *amici curiae* briefs. At the time of the decision, 36 states issued marriage licences to same-sex couples.

Majority opinion

Writing for the majority, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, Justice Anthony Kennedy held that the right to marry constituted a liberty under the Constitution that could no longer be denied to same-sex couples. He concluded:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Justice Kennedy relied on a series of previous decisions recognising the right to marry as a fundamental right protected by the Due Process Clause of the Constitution and reasoned that 'the history of marriage is one of continuity and change' which in light of 'new insights' and 'a better informed understanding of how constitutional imperatives define a liberty' now extended to same-sex couples. Marriage constituted a key feature of the social order and it demeaned gays and lesbians to deny them access to that central societal institution. The majority viewed the right to personal choice regarding marriage as inherent in the concept of individual autonomy at the heart of the Constitution's recognition of a fundamental right to marry. That rationale applied equally to same-sex couples so excluding them from marriage conflicted with a central premise of the right to marry.

Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

This conclusion was buttressed by the constitutional imperatives of the Equal Protection Clause. Justice Kennedy said:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must further be acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all of the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.

Jonathan Redwood, 'Same-sex marriage protected by the US Constitution'

It also followed that there was no lawful basis for a state to refuse to recognise a same-sex marriage lawfully performed under the laws of another state.

The dissents

Chief Justice Roberts, Justice Scalia, Justice Thomas and Justice Alito delivered scathing dissents. To them, the majority had usurped and prematurely cut off the democratic process in circumstances where the democratic process had been working to produce change after sustained and respectful debate.

According to Chief Justice Roberts, the silent language of the Constitution did not mandate any one theory of marriage and although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for *requiring* such a change were not. He then said:

> Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens – through the democratic process – to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens – through the democratic process – to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.

In a blistering dissent Justice Scalia described the majority's opinion as a 'threat to democracy' and a 'Judicial Putsch'. He derided the majority's 'showy profundities' as 'profoundly incoherent' and said the following:

> If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

Criteria for identification of 'corporations' and 'trading corporations' under 51(xx) of the Constitution

Brent Michael reports on *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11.

The question presented for the High Court was whether the Queensland Rail Transit Authority ('the authority') was a 'trading … corporation formed within the limits of the Commonwealth', within the meaning of s 51(xx) of the Constitution. At stake in the answer to that question was whether the authority was subject to federal or state industrial relations laws.

In finding that the authority was indeed a 'trading corporation', the court applied the 'trading purpose' and 'trading activities' tests found in previous cases, but did not find it necessary to state exhaustively the features of 'trading corporations'. The court also considered the concept of a 'corporation' itself for the purposes of s 51(xx), finding that the term applies to any independent 'right and duty bearing' artificial entity, other than a body politic.

Background

The authority provided labour to operate railway services to Queensland Rail Limited, a corporation in which the authority held all of the shares. The constituting statute conferred on the authority 'all the powers of an individual',[1] and provided that the authority could create and be made subject to legal rights and duties, that it could sue and be sued in its name, and that it could own property.[2] However, the statute also provided that the authority 'is not a body corporate'.[3]

The plaintiffs, composed of various employee organisations, brought a special case seeking affirmative answers on two primary questions: (1) whether or not the authority was a 'corporation'; and (2) if so, whether or not it was a 'trading or financial corporation'. The plaintiffs also sought a determination that the *Fair Work Act 2009* (Cth) applied to the authority and its employees by operation of s 109 of the Constitution, to the exclusion of certain Queensland industrial laws.

Was the authority a 'corporation'?

The authority submitted that not all artificial entities with separate legal personality are 'corporations' within s 51(xx); and that the question turns on legislative intention. That intention was not present here, because the constituting statute provided that the authority was not a body corporate.

As a starting point, French CJ, Hayne, Kiefel, Bell, Keane, and Nettle JJ observed that in the years leading up to and after federation there had been much development in corporate regulation; and there was no reason to read s 51(xx) as empowering the legislature to deal with classes of artificial legal entities only having the features fixed at 1900.

The plurality then rejected the notion that the definition of 'corporation' turned simply on legislative intention. Such a test would be a labelling exercise and provided 'no satisfactory criterion for determining the content of federal legislative power'.[4]

In any event, the court found as a matter of construction that the constituting statute did not classify the authority as some type of artificial legal entity distinct from the artificial legal entities which are 'corporations' under s 51(xx). Rather, in providing that the authority was not a 'body corporate', the constituting statute was intended to affect the operation of various other Queensland statutes which use the language of 'body corporate'.[5]

The court held that the determinative consideration is not legislative intention but rather an entity's 'independent existence as a legal person' – that is, 'recognition as a right and duty bearing entity'.[6]

Gageler J came to the same conclusion. Different varieties of corporations had emerged prior to federation, and the term 'corporation' in s 51(xx) could encompass such entities in 1900. The power should be given a broad interpretation, and should be construed to include 'all entities, not being merely natural persons, invested by law with capacity for legal relations'.[7]

Was the authority a 'trading corporation'?

The court held that applying either a test of trading purpose or actual trading activity, the authority was a 'trading corporation'.

As for purpose, this could be seen in the authority's functions, which included 'managing railways', 'controlling rolling stock on railways', 'providing rail transport services, including passenger services' and 'providing services relating to rail transport services'.[8] The constituting statute provided that the authority was to 'carry out its functions as a commercial enterprise', with dividends payable to the state, and that the authority was liable to the state for amounts which the authority would have been liable if it had been liable to pay federal tax.[9]

As for activities, the plurality held that the supply of labour, even at a price for which the authority made no profit, did not mean that the authority was not a 'trading corporation'.

The plurality found that the combination of all of these features

Brent Michael, 'Criteria for identification of 'corporations' and 'trading corporations' under 51(xx) of the Constitution'

satisfied the definition in s 51(xx), but that it was unnecessary to determine which features were necessary or sufficient.

Gageler J reached the same conclusion. His Honour said that a corporation may satisfy the constitutional description of 'trading' either by its 'substantial trading purpose' or by its 'substantial trading activity'. His Honour rejected the submissions of Victoria, intervening, which advanced a test by reference to a corporation's 'true character' as revealed by its 'characteristic activity'. That alternative test was said to be counter to standard interpretive method that the subject matter of federal powers not be confined to a single or predominant characterisation.[10]

Having concluded that the authority was a 'trading corporation' for the purposes of s 51(xx), the court found that, generally, the *Fair Work Act 2009* (Cth) applied, to the exclusion of certain Queensland statutory provisions.

Conclusion

It is hardly surprising that the court did not leave the subject matter of a federal head of power to legislative intention.[11] The case nevertheless confirms the broad scope of the corporations power. It also illustrates the residual need where the text provides minimal assistance to fall back upon historical and prudential interpretive factors[12] which in most cases take second place to text, structure and context.

The continued recognition of the trading activity or purpose tests, or a combination of both, without specifying necessary conditions of such entities is also consistent with a modern trend to avoid the Aristotelian essentialism of defining the necessary elements of words, and instead to approach constitutional expressions along multifactorial, Wittgensteinian family-trait lines, whereby no single feature is determinative.

Endnotes

1. *Queensland Rail Transit Authority Act 2013* (Qld), s 7(1).
2. *Queensland Rail Transit Authority Act 2013* (Qld), ss 7, 7(4), and 7(1)(b).
3. *Queensland Rail Transit Authority Act 2013* (Qld), s 6(2). There was no issue as to whether the authority was the State of Queensland, because the statute provided that the authority did not represent the state: s 6(3).
4. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 at [23].
5. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 at [29].
6. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 at [36].
7. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 at [65].
8. *Queensland Rail Transit Authority Act 2013* (Qld), ss 9(1)(a)-(d).
9. *Queensland Rail Transit Authority Act 2013* (Qld), ss 10(1), 55, 56(1)(a), 62.
10. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 at [70]-[71].
11. *Australian Communist Party v The Commonwealth* (1950) 83 CLR 1 at 259.
12. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1984, Oxford University Press).

Contribution from co-sureties

Marcel Fernandes reports on *Lavin v Toppi* [2015] HCA 4.

Ms Lavin and Ms Toppi were co-sureties who jointly and severally guaranteed a company's loan from a bank. After the bank called on the guarantees and had commenced proceedings against the co-sureties, Ms Lavin settled with the bank for an amount less than half of the amount owed to the bank and obtained a covenant from the bank not to sue. Ms Toppi later discharged the balance, being more than half of the amount owing. Ms Toppi commenced proceedings for contribution against Ms Lavin for the shortfall. Ms Lavin resisted on the basis that her and Ms Toppi's liabilities as co-sureties were not coordinate because of the covenant not to sue.

Litigation history

At first instance[1] Ms Toppi succeeded. Rein J applied *Carr v Thomas*[2] to the effect that the covenant not to sue enjoyed by one co-surety did not deprive the other co-surety who has repaid the debt of the right to seek contribution and did not render the co-sureties' respective liabilities non-coordinate.

On appeal,[3] Ms Lavin's appeal was dismissed. Leeming JA, with whom Macfarlan and Emmett JJA agreed, reasoned that the covenant not to sue did not render the co-sureties' liabilities anything other than coordinate. A covenant not to sue, as a mere 'promise in respect of [the] primary liability'[4] will (usually) not alter or extinguish that liability or the underlying cause of action founded on it. Rather, it will only prevent, as a matter of contract, action being taken in respect of the liability or cause of action, neither of which is extinguished.[5] That is the premise of the covenant not to sue: that the liability continues to exist and a promise is made in relation to it. That is so even though the covenant may be pleaded in bar as a release or used as an equitable defence enforceable by injunction, if the covenantor pursues the underlying cause of action in breach of the covenant.[6] Thus, the bank's covenant with Ms Lavin did not alter the liabilities Ms Lavin and Ms Toppi both had as between themselves, which accordingly remained coordinate.[7]

Leeming JA noted that the right in equity to contribution of a co-surety in respect of coordinate liabilities arises before that co-surety had paid more than its fair share, whereas at common law the right to contribution arises in a co-surety only *after* that co-surety has paid more than its fair share. Ms Toppi had a right to contribution at least from when the bank demanded the whole amount of the company's debt from her and commenced proceedings against her.[8]

His Honour held further that it was not necessary for the resolution of the appeal 'to identify with precision the circumstances when relief is available in advance of payment, which at least in part reflects equity's power to grant relief *quia timet*'.[9] In the result, Ms Toppi's existing right to contribution could not have been lost by Ms Lavin settling with the bank.[10] In general, the right to contribution may be qualified or excluded by contract.[11] As such, it was necessary to construe the guarantee to see whether it altered the position. Here, it did not do so.

High Court

The High Court dismissed the appeal in a unanimous judgment (French CJ, Kiefel, Bell, Gageler and Keane JJ). The High Court agreed that the bank's covenant not to sue Ms Lavin did not release her from liability under the guarantee; the co-sureties continued to share coordinate liabilities under the guarantee and Ms Toppi had a right of contribution. The High Court stated that '[i]n addition, the Court of Appeal's conclusion is supported by a broader equitable view of the rights of co-sureties between each other'.[12] That broader view was that a co-surety's right to contribution 'was cognisable in equity even before [Ms Toppi] made [her] disproportionate payment' to the bank.[13]

The court held that from the moment the debtor company defaulted upon its loan to the bank, or at least from when the bank made demands of the guarantors, both Ms Lavin and Ms Toppi were 'under a common obligation' to pay the whole of the debt.[14] The court noted that '[t]he utility of the device of the covenant not to sue is that it does not discharge the liability of the covenantee under the guarantee'. This preserved the creditor's rights against other sureties since if a creditor releases one surety, all are released.[15] Accordingly, the covenant not to sue did not alter the liability.

The court noted that equity's recognition of the right to contribution before disproportionate payment is based on equity's ability to act *quia timet*. Thus, the equitable right to contribution will arise where a disproportionate payment by a co-surety, and thus that co-surety's loss, is 'imminent'[16] or 'sufficiently imminent'.[17] In contrast, the common law right to contribution arose only after disproportionate payment; such payment was 'an essential element of the right'.[18]

Here, there was clearly sufficient imminence from when the bank commenced proceedings against the co-sureties.[19] This was enough to dispose of the proceedings, since that occurred before the covenant not to sue was agreed.

The court commented further that the earliest time at which there was sufficient imminence was when the co-sureties 'were

called upon under the guarantee',[20] since at that time Ms Toppi's 'equity to recover contribution was sufficiently cognisable'. However, if Ms Toppi had at that time sought a declaration as to her right to equitable contribution, she would only have been entitled to one if she had been at least able to prove she was ready, willing and able to 'do equity' by paying her share of the principal debt.[21]

Conclusion

The case, with its simple factual scenario, provides a satisfying illustration of a principle of long-standing, confirming it to apply to the particular circumstance of a covenant not to sue. As Lord Eldon LC said,[22] quoted by the High Court:[23]

> [W]hether [co-sureties] are bound by several instruments, or not, whether the fact is or is not known, whether the number is more or less, the principle of Equity operates in both cases; upon the maxim, that *equality is Equity: the creditor, who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and upon the principle, requiring him to do justice, if he will not, the Court will do it for him.*

Endnotes

1. *Toppi v Lavin* [2013] NSWSC 1361.
2. [2009] NSWCA 208.
3. *Lavin v Toppi* [2014] NSWCA 160; (2014) 308 ALR 598.
4. *Lavin v Toppi* [2014] NSWCA 160; (2014) 308 ALR 598 at [73].
5. *Lavin v Toppi* [2014] NSWCA 160; (2014) 308 ALR 598 at [74].
6. *Lavin v Toppi* [2014] NSWCA 160; (2014) 308 ALR 598 at [73].
7. *Lavin v Toppi* [2014] NSWCA 160; (2014) 308 ALR 598 at [74].
8. *Lavin v Toppi* [2014] NSWCA 160; (2014) 308 ALR 598 at [46] – [47].
9. *Lavin v Toppi* [2014] NSWCA 160; (2014) 308 ALR 598 at [47].
10. *Lavin v Toppi* [2014] NSWCA 160; (2014) 308 ALR 598 at [48].
11. *Lavin v Toppi* [2014] NSWCA 160; (2014) 308 ALR 598 at [53]-[54].
12. *Lavin v Toppi* [2015] HCA 4 at [3].
13. *Lavin v Toppi* [2015] HCA 4 at [31].
14. *Lavin v Toppi* [2015] HCA 4 at [36].
15. *Lavin v Toppi* [2015] HCA 4 at [37], citing *Bateson v Gosling* (1871) LR 7 CP 9; *Murray-Oates v Jjadd Pty Ltd* (1999) 76 SASR 38 at 53 [83].
16. *McLean v Discount and Finance Ltd* (1939) 64 CLR 312 at 341, per Starke J.
17. *Friend v Brooker* (2009) 239 CLR 129 at [57].
18. *Lavin v Toppi* [2015] HCA 4 at [52].
19. *Lavin v Toppi* [2015] HCA 4 at [51].
20. *Lavin v Toppi* [2015] HCA 4 at [52].
21. *Lavin v Toppi* [2015] HCA 4 at [54].
22. *Craythorne v Swinburne* [1807] EngR 343; (1807) 14 Ves Jun 160 at 164-5; 33 ER 482 at 483-484 (emphasis added).
23. *Lavin v Toppi* [2015] HCA 4 at [44] – emphasis in original.

Limitation period for claims in respect of voidable transactions

Gideon Gee reports on *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* [2015] HCA 10 and *Grant Samuel Corporate Finance Pty Limited v Fletcher; JP Morgan Chase Bank, National Association v Fletcher* [2015] HCA 8.

Introduction

On 11 March 2015 the High Court delivered two judgments concerning the limitation period for claims by liquidators in respect of voidable transactions under s 588FF(1) of the *Corporations Act* 2001 (Cth) (the Act).

In *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* [2015] HCA 10 (*Fortress Credit*) the High Court held unanimously (French CJ, Hayne, Kiefel, Gageler and Keane JJ) that an order may be made under s 588FF(3) of the Act to extend the time generally for making an application in respect of a company's voidable transactions. This decision confirmed that the power is not limited to specific transactions; so-called 'shelf orders' are valid.

In *Grant Samuel Corporate Finance Pty Ltd v Fletcher; JP Morgan Chase Bank, National Association v Fletcher* [2015] HCA 8 ('*Grant Samuel*') the High Court held unanimously (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ) that an order for extension of the limitation period may only be made if the application is brought within the time specified in s 588FF(3)(a) of the Act (the 'par (a) period'). An order to extend the limitation period may not be made once the par (a) period has expired, even if time to apply under s 588FF(1) of the Act has not yet expired because of an earlier order under s 588FF(3)(b) of the Act. The High Court also held that s 588FF(3)(b) of the Act is the only basis to extend time to bring claims under s 588FF(1) – state and territory procedural laws cannot be used.

The provision

Section 588FF(1) of the Act provides that liquidators may apply for specified orders in respect of voidable transactions. The limitation period for these applications is set by subsection 588FF(3) of the Act which provides:

> An application under subsection (1) may only be made:
>
> (a) during the period beginning on the relation-back day and ending:
>
> (i) 3 years after the relation-back day; or
>
> (ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;
>
> whichever is the later; or
>
> (b) within such longer period as the court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.

The orders extending the limitation periods

The two proceedings arose out of the collapse of the Octaviar group, which operated a diversified travel, property and financial services business.

The time for claims by the liquidator in respect of Octaviar Limited (OL) was extended by a shelf order made within the par (a) period ('the OL extension order'). This period was extended subsequently by a second order, which was made after the expiry of the par (a) period but before the expiry of the OL extension order. This second order was made pursuant to r 36.16 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) ('the OL variation order').[1]

The time for claims in respect of Octaviar Administration Pty Limited (OA) was extended by a shelf order made within the par (a) period ('the OA extension order').[2]

The liquidators commenced proceedings seeking relief against Fortress, Grant Samuel and JP Morgan, including orders under s 588FF(1) of the Act. Fortress applied to set aside the OA extension order. Grant Samuel and JP Morgan applied to set aside the OL variation order.

Black J dismissed both of these applications at first instance.[3] The New South Wales Court of Appeal dismissed both appeals from those decisions.[4]

Fortress Credit – shelf orders are within power

The New South Wales Court of Appeal decision in *BP Australia Limited v Brown*[5] was followed by Black J and applied by the Court of Appeal (Bathurst CJ, Beazley P, Macfarlan, Barrett and Gleeson JJA) to dismiss Fortress' application and appeal below. In *BP Australia Limited v Brown* Spigelman CJ (with whom Mason P and Handley JA agreed) held that s 588FF(3)(b) of the Act allowed for a shelf order to be made in appropriate circumstances.

On appeal to the High Court, the *Fortress Credit* appellants relied upon the repeated use of the definite article in the subsections of s 588FF(1). The appellants submitted that under s 588FF(3)(b) the court may make an order for a longer period in which an application may be made for orders under s 588FF(1) in relation to *the* transaction. This required the identification of the transaction and the naming of the parties to that transaction as respondents on the application for the order under s 588FF(3)(b).[6]

The High Court considered that the text of s 588FF(3)(b) left the two opposing constructions open.[7] Nothing in the text lent itself to one construction over the other.[8]

To resolve the issue the High Court considered the function of the provision. The 'immediate purpose' of s 588FF(3)(b) is to confer a discretion on the court in an appropriate case to mitigate the rigours of the par (a) period. That discretion is to be exercised having regard to two policies. First, the policy of avoiding unfair transactions by insolvent companies. Secondly, the policy of providing certainty for those who have transacted with companies during periods in which transactions may be voidable. Allowing for the broad construction would not lead to unreasonable prolongation of uncertainty.[9] The various 'policy factors' relied upon by the appellants to militate against the broad construction may be used as considerations that inform the exercise of the discretion in a particular case.[10]

The High Court also considered the legislative history of s 588FF(3).[11] The High Court found it difficult to imagine that the judgments in *BP Australia Limited v Brown* were not known by those involved in the 2007 amendment of s 588FF(3) of the Act.[12] The liquidators argued that nothing in this amendment altered the basis for which the Court of Appeal in *BP Australia Limited v Brown* preferred the broad construction.[13] The High Court considered that this 're-enactment presumption' can be used as a 'factor … if such a construction is reasonably open from the text'.[14]

Grant Samuel – an extension may only be granted during the par (a) period

The High Court stated the general question on the appeal to be whether on an application outside the par (a) period, but within an extended period ordered under s 588FF(3)(b) on an application made in the par (a) period, a court may exercise power under the UCPR to further extend the time for making an application under s 588FF(1).[15] This raised the question of whether s 588FF(3) of the Act was inconsistent with the rules for variation of time in the UCPR. If so, s 588FF(3) 'otherwise provided' for the variation of time. Section 79 of the *Judiciary Act 1903* (Cth) would therefore not pick up the UCPR in this context.[16]

The High Court held that by prescribing that an application under s 588FF(1) 'may only be made' within the periods set out in s 588FF(3)(a) and (b), it is an essential condition of the right conferred by s 588FF(1) that it is exercised within the time specified. It followed that, in answer to both the general and particular questions:[17]

The only power given to a court to vary the par (a) period is that given by s 588FF(3)(b). That power may not be supplemented, nor varied, by rules of procedure of the court to which an application for extension of time is made.

Beazley P, who was the only member of the Court of Appeal who considered this question, reached this same conclusion.[18]

The majority in the Court of Appeal (Macfarlan and Gleeson JJA) and Black J at first instance followed the decision of the High Court in *Gordon v Tolcher*[19]. In that case the High Court held that once an application is made under s 588FF(1) of the Act the procedural regulation of the litigation is a matter for state procedural law.[20] In *Grant Samuel* the High Court referred to two distinguishing aspects of *Gordon v Tolcher*. First, no extension of time was required in that case because the application was brought in the par (a) period.[21] Secondly, the procedural rule at issue in *Gordon v Tolcher* was the power to extend the time for service of an originating process. This was not a matter on which s 588FF(3) 'otherwise provides'.[22]

Is only one extension possible?

In *BP Australia Limited v Brown* Spigelman CJ commented on the policy which underlies s 588FF(3) of the Act as one that favours certainty. In that context, according to Spigelman CJ, a liquidator could only make a single application to extend the limitation period under s 588FF(3)(b) of the Act for a determinate period of time.[23]

Whilst not disputing the importance of certainty, in *Grant Samuel* Beazley P did not 'foreclose the possibility' that more than one application for an extension could be brought under s 588FF(3)(b), provided that each such application is commenced within the par (a) period.[24]

The High Court did not specifically address this question in *Grant Samuel*. The High Court did, however, comment that the addition of s 588FF(3)(a)(ii) since *BP Australia Limited v Brown* 'does not detract from the force of what was said in that case concerning the statutory aim of certainty evident in s 588FF(3)'.[25]

Gideon Gee, 'Limitation period for claims in respect of voidable transactions'

Endnotes

1. In the matters of *Octaviar Ltd (recs and mgrs apptd) (in liq) and Octaviar Administration Pty Ltd (in liq)* [2011] NSWSC 1691 per Ward J.
2. Ibid.
3. In the matter of *Octaviar Limited (receivers and managers appointed) (in liquidation)* and in the matter of *Octaviar Administration Pty Limited (in liquidation)* [2012] NSWSC 1460; (2012) 271 FLR 413 and in the matter of *Octaviar Limited (receivers and managers appointed) (in liquidation) and Octaviar Administration Pty Limited (in liquidation)* [2013] NSWSC 62; (2013) 272 FLR 398; 93 ACSR 316.
4. *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2014) 87 NSWLR 728; [2014] NSWCA 148 and *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Limited v Fletcher* (2014) 85 NSWLR 644; [2014] NSWCA 31.
5. [2003] NSWCA 216; (2003) 58 NSWLR 322.
6. *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2015] HCA 10 at [20]–[22].
7. Ibid. at [21].
8. Ibid. at [23].
9. Ibid. at [24].
10. Ibid. at [26].
11. Ibid. at [11]–[16].
12. *The Corporations Amendment (Insolvency) Act 2007* saw the introduction of s 588FF(3)(a)(ii) and the substitution of the words 'during the paragraph (a) period' for 'within those 3 years' in s 555FF(3)(b).
13. Ibid. at [14].
14. Ibid. at [16].
15. *Grant Samuel Corporate Finance Pty Ltd v Fletcher; JPMorgan Chase Bank, National Association v Fletcher* [2015] HCA 8 at [6].
16. Ibid. at [7]. Section 79 of the *Judiciary Act 1903* (Cth) relevantly provides that the procedural laws of a state shall apply in courts exercising federal jurisdiction in that state except 'as otherwise provided' by the Constitution or Commonwealth laws.
17. *Grant Samuel Corporate Finance Pty Ltd v Fletcher; JPMorgan Chase Bank, National Association v Fletcher* [2015] HCA 8 at [23].
18. *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Limited v Fletcher* [2014] NSWCA 31 at [89] per Beazley P.
19. [2006] HCA 62; (2006) 231 CLR 334.
20. Ibid., per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at [32]–[33], [40].
21. Ibid. at [13].
22. Ibid. at [14]–[15].
23. *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 345.
24. *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Limited v Fletcher* [2014] NSWCA 31 at [84] per Beazley P.
25. *Grant Samuel Corporate Finance Pty Ltd v Fletcher; JPMorgan Chase Bank, National Association v Fletcher* [2015] HCA 8 at [21].

Fraud and the indefeasibility of a joint tenant's title

James Willis reports on *Cassegrain v Gerard Cassegrain & Co Pty Limited* [2015] HCA 2.

In *Cassegrain v Gerard Cassegrain & Co Pty Limited* [2015] HCA 2 (Cassegrain), the High Court gave consideration to the fraud exception to indefeasibility of title under the *Real Property Act 1900* (NSW) (RPA). In particular, the court found that a person's proprietary interest as a joint tenant in real property was not defeasible merely on account of a fraudulent act committed by a second joint tenant, to which the first joint tenant was not a party.

The facts

The proceedings concerned, *inter alia*, whether or not the proprietary interest held by the appellant, Felicity Cassegrain (Felicity), in real property known as the 'Dairy Farm', was defeasible on account of a fraudulent act committed by her husband, Claude Cassegrain (Claude). A brief summary of the facts are as follows.

Gerard Cassegrain & Co Pty Limited (GC&Co), the respondent in the proceedings, was registered under the RPA as the proprietor in fee simple of the Dairy Farm.[1] In 1997, Claude and Felicity acquired the Dairy Farm which was held by them as joint tenants.[2] This acquisition was brought about, in part, by Claude and his sister, Anne-Marie Cameron, who were both directors of GC&Co at the time, passing a company resolution to sell the Dairy Farm to Claude and Felicity as joint tenants for an agreed consideration of $1 million. It was further resolved that the consideration for the purchase would be effected by a journal entry in a loan account.[3] The loan account purported to record a loan from Claude to GC&Co in the amount of $4.25 million and the entry in the account purported to reduce the amount outstanding under the loan by $1 million. In about March 1997, the transfer of the Dairy Farm was registered.

It was not in dispute before the High Court that the alleged debt recorded in the loan account did not represent a genuine debt owed by GC&Co to Claude and that, accordingly, Claude was acting fraudulently by causing an entry to be made in the loan account in respect of the purported $1 million consideration. The loan account arose in circumstances where, in 1993, GC&Co sought to structure a payment made to GC&Co by the CSIRO, by way of a settlement, to bring about an apparent

reduction in the proceeds of the settlement accruing to GC & Co (and a corresponding increase in the proceeds of settlement accruing to Claude), on the basis of an understanding that only the monies received by the company would attract a capital gains tax liability.

On 24 March 2000, Claude caused his interest in the Dairy Farm to be transferred to Felicity for nominal consideration (such that Felicity then held the whole of the title, in fee simple, to the Dairy Farm).[4]

Court of Appeal proceedings

By majority (comprised of Beazley P and Macfarlan JA; Basten JA dissenting), the New South Wales Court of Appeal found that Felicity held the Dairy Farm on trust for GC&Co absolutely and ordered her to execute a transfer of the land to GC&Co.[5] Felicity appealed the decision of the Court of Appeal to the High Court.

High Court proceedings

The High Court found, by majority (comprised of French CJ, Hayne, Bell and Gageler JJ; Keane J dissenting) that Felicity's title as joint proprietor in the Dairy Farm was not defeasible on account of Claude's fraud. However, as Felicity had acquired Claude's interest in the Dairy Farm for nominal consideration, she was not a bona fide purchaser for value and accordingly, the proprietary interest she had acquired from Claude was defeasible and could be recovered by GC&Co.[6] In coming to this conclusion, the court considered, inter alia, both the concepts of agency and joint tenancy in the context of the RPA.

Agency

One of the issues which arose for determination was whether the High Court should disturb the Court of Appeal's finding that Claude was acting as Felicity's agent in causing an interest in the Dairy Farm to be transferred to Felicity. In this respect, the court had regard to the well-known statement of Lord Lindley[7] that 'the fraud which must be proved in order to invalidate the title of a registered purchaser for value…must be *brought home* to the person whose registered title is impeached *or to his agents*'.[8] The majority found that this statement should be understood as posing, in the case of an agent, questions concerning the scope of authority and whether the agent's knowledge of the fraud can be imputed to the principal.[9]

The majority found that the evidence supported no more than the proposition that Felicity was a passive recipient of an interest in land which Claude had agreed to buy and accordingly, the fraud was not 'brought home' to her.[10]

Joint tenants

The High Court found that the fraudulent actions of one joint tenant should not be imputed to another joint tenant who has not themselves participated in the fraud.[11] In making this finding, the majority endorsed the finding of Basten JA in the court below that it was 'preferable in principle to treat the shares of the joint tenants, holding title under the [RPA], prior to any severance, as differentially affected by the fraud of one, to which the other was not a party'.[12]

In coming to this conclusion, the majority considered, inter alia, the interaction between ss 42(1) and 100(1) of the RPA. Relevantly, s 42(1) states, subject to some exceptions which were not relevant to this case:

> Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded.

Section 100(1) of the RPA provides that:

> Two or more persons who may be registered as joint proprietors of an estate or interest in land under the provisions of this Act, shall be deemed to be entitled to the same as joint tenants.

The gravamen of the enquiry undertaken by the High Court was whether the deeming effected by s 100(1) of the RPA necessarily had the effect that the fraud of one joint tenant would necessarily deny *all* joint tenants the protection afforded under s 42(1) of the RPA. The majority found that s 100(1) does not operate in this manner and, if it were to do so, it would constitute a significant departure from the accepted principle that actual fraud needs to be 'brought home' to the person whose proprietary interest is being impeached.[13]

Fraud and the interaction between ss 42(1) and 118(1)

A further issue which the court considered was the interaction between ss 42(1) and 118(1) of the RPA. Relevantly, s 118(1) provides that:

> Proceedings for the possession or recovery of land do not lie against the registered proprietor of the land, except as follows:
>
> ...
>
> (d) proceedings brought by a person deprived of land by fraud against:
>
> (i) a person who has been registered as proprietor of the land through fraud, or
>
> (ii) a person deriving (otherwise than as a transferee bona fide for valuable consideration) from or through a person registered as proprietor of the land through fraud'.

In relation to s 118(1)(d)(i), the majority found that this subsection is co-extensive with the rights under s 42(1) of the RPA (in that it does not diminish or enlarge on those rights).[14] Relevantly, where a person has been registered as a proprietor of land through fraud, their title is defeasible (by operation of s 42(1)) and proceedings may be brought by the person deprived of the land by fraud to recover that land (by operation of s 118(1)(d)(i)). Further, the majority held that s 118(1)(d)(i) should not be read as being limited to fraud being effected through the process of registration.[15]

By contrast, s 118(1)(d)(ii) does enlarge on the rights afforded to a person deprived of their land by fraud as the deprived party may bring proceedings to recover their land in circumstances where the registered proprietor of the land did not participate in the fraud but equally, was not a bona fide transferee for valuable consideration.[16]

Findings of the High Court

In the circumstances, the majority found that Felicity's title as joint tenant in the Dairy Farm was not defeasible on account of Claude's fraudulent conduct (as the fraud had not been 'brought home' to her in either her capacity as principal, with Claude being the agent, or as a joint tenant). However, the interest which Felicity derived through Claude was defeasible by operation of s 118(1)(d)(ii) of the RPA as Felicity was not a bona fide purchaser for value of Claude's interest in the Dairy Farm.[17]

Accordingly, the court declared that Felicity held a half interest in the Dairy Farm on trust for GC&Co absolutely and ordered her to transfer that interest to GC&Co.

Endnotes

1. *Cassegrain*, at [5].
2. Ibid., at [8].
3. Ibid., at [7].
4. Ibid., at [11].
5. Ibid., at [29].
6. Ibid., at [3].
7. *Assets Co Limited v Mere Roihi* [1905] AC 176 at 210.
8. *Cassegrain*, at [32] – emphasis added by High Court.
9. Ibid., at [40].
10. Ibid., at [41].
11. Ibid., at [45].
12. Ibid., at [44]; (2013) 305 ALR 612 at 641 [138] per Basten JA.
13. Ibid., at [53].
14. Ibid., at [60].
15. Ibid., at [59].
16. Ibid., at [61].
17. Ibid., at [65]–[66].

Knowing assistance: the meaning of 'dishonest and fraudulent design'

James Willis reports on *Hasler v Singtel Optus Pty Ltd; Curtis v Singtel Optus Pty Ltd; Singtel Optus Pty LTd v Almad Pty Ltd* [2014] NSWCA 266.

In *Hasler v Singtel Optus Pty Ltd; Curtis v Singtel Optus Pty Ltd; Singtel Optus Pty LTd v Almad Pty Ltd* [2014] NSWCA 266 (*Hasler*), the New South Wales Court of Appeal considered, inter alia, the meaning of the phrase 'dishonest asnd fraudulent design', in the context of a claim under the 'second limb' of *Barnes v Addy* (1874) LR 9 Ch App 244 (known as the 'knowing assistance' limb). The Court of Appeal was invited to depart from what was described as the 'more relaxed test' for knowing assistance adopted by the Western Australian Court of Appeal in *Westpac Banking Corporation v Bell Group Ltd (No 3)* [2012] WASCA 157 (*Bell)* In declining to follow the reasoning in *Bell*, the New South Wales Court of Appeal concluded that the High Court, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22(*Farah*), had not changed the meaning of the phrase 'dishonest and fraudulent design' in such a way that it would encompass all breaches of fiduciary duty more serious than a trivial breach that was excusable by reference to various (and inconsistent) statutory standards.

Background

The judgment in *Hasler* arose out of three separate appeals and two cross-appeals. The matters for determination in these appeals were distilled concisely by Leeming JA into five separate issues.[1] This article will focus on the second of these issues, being whether the conduct of Mr Curtis, one of the defendants at first instance, amounted to a dishonest and fraudulent breach of duty.

A brief summary of the factual circumstances which are relevant to this issue is as follows. Mr Curtis was an employee of one of the three defendant companies and, in that capacity, was responsible for supervising a considerable number of staff. At first instance, a finding was made that Mr Curtis owed fiduciary duties to all three of the defendant companies (which were related Optus companies) and that Mr Curtis had breached those fiduciary duties. The gravamen of the breach was that Mr Curtis had put his personal interests in conflict with the defendants by causing a company (Sumo) of which he was a shadow director to offer warehousing services to the defendants without obtaining the defendant's fully informed consent.

Mr Hasler, a further defendant at first instance, who was previously an employee of Optus (reporting to Mr Curtis) had, at the relevant time, worked for Sumo and managed its day-to-day operations. On the basis of these facts, the court at first instance found that:

(a) Mr Curtis' breach of his fiduciary duties to the defendant companies amounted to a 'dishonest and fraudulent design' within the meaning of the 'second limb' of liability under *Barnes v Addy*; and

(b) Mr Hasler had knowingly participated in that breach of fiduciary duties.

The issue at sub-paragraph (a) involved a consideration of both the meaning of 'dishonest and fraudulent design' and whether or not Mr Curtis' conduct fell within that meaning. The Court of Appeal found, that on any view of the meaning of 'dishonest and fraudulent design', Mr Curtis' conduct was caught. However, for the reasons discussed below, Gleeson and Leeming JJA gave further consideration to the meaning of 'dishonest and fraudulent design'.

The *Bell* decision

As identified by Leeming JA,[2] there had been some uncertainty as to the meaning of 'dishonest and fraudulent design', in the context of a 'knowing assistance' claim, following the decision in *Bell*.

In *Bell*, Drummond AJA considered the explication of the phrase 'dishonest and fraudulent design' by the High Court in *Farah*. Relevantly, his Honour found that the following considerations applied to the meaning of the phrase:

(a) it is not necessary to show that the trustee or fiduciary 'acted with a conscious awareness that what he [or she] was doing was wrong: the breach of duty can be characterised as dishonest or fraudulent according to equitable principles and that will suffice for liability';[3]

(b) it will be sufficient 'if the breach of duty is more than a trivial breach and is also too serious to be excusable because the fiduciary has acted honestly, reasonably and ought fairly be excused';[4]

(c) in determining when a breach of duty is excusable, 'the court should take an approach analogous to that of courts under provisions such as s 75 of the *Trustees Act 1962* (WA) and s 1318 of the *Corporations Act 2001 (Cth).*'[5]

After giving due regard to matters of judicial comity,[6] Leeming JA (with whom Gleeson JA agreed) came to the view that there were good reasons for determining whether the decision in *Bell*, in respect of this issue, was correctly decided.[7] These reasons included the fact that the issue was of general importance,[8] the uncertainty was giving rise to considerable difficulty throughout Australia[9] and that the High Court had granted special leave to appeal *Bell*, in circumstances where one of the issues at the forefront of the appeal was a challenge to the formulation of the second limb of *Barnes v Addy*.[10]

In applying the High Court's test in respect of the departure by intermediate appellate courts from the decisions of other intermediate appellate courts,[11]Leeming JA (with Gleeson JA agreeing[12]) held that the decision in *Bell* was 'plainly wrong'.[13] In agreeing with the comment of Leeming JA that the issue of whether *Bell* was correctly decided did not *need* to be decided to determine the appeal, Barrett JA stated that he preferred 'to let the matter rest for the time being'.[14]

Reasons for not following the *Bell* decision

The following is a summary of some of the detailed reasons given by Leeming JA and Gleeson JA in respect of their decision not to follow the decision of the Western Australian Court of Appeal in *Bell*.

1. Farah did not dilute the meaning of 'dishonest and fraudulent'

Leeming JA found that there was no suggestion in *Farah* that the High Court intended 'substantially' to expand the class of breaches of fiduciary duty to which the second limb of *Barnes v Addy* would apply. Relevantly, his Honour noted that the High Court was at pains to preclude the Australian courts below itself from following the more relaxed formulation of the test adopted by the Privy Council in *Royal Brunei Airlines SdnBhd v Tan* [1995] 2 AC 378.[15]

Gleeson JA identified the critical error in *Bell* as misconstruing the rejection in *Farah* of the 'submission that a breach of trust or breach of fiduciary duty had to be 'significant' (to come within the second limb of *Barnes v Addy*), as in some way diluting the *quality* of conduct that is sufficient to answer the description 'dishonest and fraudulent". His Honour noted that the High Court made it clear that in rejecting the 'significant' formulation of the test, the High Court was 'not adopting the suggested abandonment of the 'dishonest and fraudulent design' integer as part of an accessorial liability claim'.[16]

2. The meaning accorded to 'dishonest and fraudulent' in *Bell* is not well defined

Leeming JA identified a further anomaly which would arise if the standard of a trustee or fiduciary's conduct were to be measured by reference to the standards set out in s 75 of the *Trustees Act 1962* (WA) and s 1318 of the *Corporations Act 2001* (Cth). Relevantly, his Honour examined the legislative history of these provisions and came to the conclusion that for the last three decades, two separate, different, tests have applied under these two provisions.[17] Accordingly, the application of such a standard would create significant uncertainty.

Concluding comments

Following the Court of Appeal's decision in *Hasler*, it would seem that the meaning of 'dishonest and fraudulent' has been settled in New South Wales. However, it is less clear what position will be taken by other state Supreme courts. It may be that the issue in those states remains unresolved until such time as the High Court has occasion to consider the standard.

Endnotes

1. *Hasler*, at [35].
2. *Hasler*, at [57].
3. *Bell*, at [2112(b)].
4. *Bell*, at [2112(c)].
5. *Bell*, at [2112(c)].
6. *Hasler,* at [99], [101].
7. *Hasler,* at [58].
8. *Hasler,* at [59].
9. *Hasler,* at [60].
10. *Hasler,* at [62].
11. *Farah*, at [135]; *Hasler*, at [92].
12. *Hasler,* at [9]–[10].
13. *Hasler,* at [102].
14. *Hasler,* at [4].
15. *Hasler*, at [105].
16. *Hasler*, at [11].
17. *Hasler*, at [111] – [114].

Validity of cancelling mining licences without compensation

Gideon Gee reports on *Duncan v New South Wales; NuCoal Resources Limited v New South Wales; Cascade Coal Pty Limited v New South Wales* [2015] HCA 13.

In a recent unanimous decision, the High Court (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ) confirmed the extent of the law making power of the New South Wales Parliament.

The Amendment Act

The New South Wales Parliament enacted the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW) (Amendment Act) to amend the *Mining Act 1992* (NSW) (Mining Act) in order to cancel, without compensation, three exploration licences that had been granted under the Mining Act.

The Amendment Act followed consideration of the Operations Jasper and Acacia reports laid before parliament by ICAC in 2013 and January 2014 (ICAC reports). In the ICAC reports, ICAC found that corrupt conduct had occurred in events leading to the grant of the three exploration licences and expressed the view that the licences were 'so tainted by corruption that [they] should be expunged or cancelled and any pending applications regarding them should be refused'.

The challenge

The licensees brought separate proceedings against the state in the original jurisdiction of the High Court challenging the validity of the cancellation of the licences. The Commonwealth and several states intervened.

There were three grounds to the challenge:

- The Amendment Act was not a 'law' within the competence of the New South Wales Parliament.
- The Amendment Act was an impermissible exercise of judicial power.
- Clause 11 of the Amendment Act was inconsistent with the *Copyright Act 1968* (Cth) (Copyright Act) and inoperative by force of s 109 of the Constitution.

None of these grounds was established.

The Amendment Act is a law

Section 5 of the *Constitution Act 1902* (NSW) (Constitution Act) provides:

> The legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.

The plaintiffs submitted that Amendment Act involved an exercise of judicial power in the nature of a bill of pains and penalties, which was an impermissible exercise of judicial power by the state parliament.

Two of the plaintiffs submitted that the Amendment Act was not a law because it destroyed existing rights by way of punishment for what parliament had judged to be serious corruption.[1]

The High Court held that the word 'laws' in s 5 of the Constitution Act 'implies no relevant limitation as to the content of an enactment of the New South Wales Parliament', including no limit to the specificity of such enactments.[2]

This confirmed the view expressed in *Kable v Director of Public Prosecutions (NSW)*[3] by Brennan CJ[4] and Dawson J[5] (both in dissent) and adopted by McHugh J.[6] It was also said to be consistent with the holding of the majority in *Kable*, which rendered invalid the enactment in issue by operation of Ch III of the Constitution.[7]

The Amendment Act is not an exercise of judicial power

This was the principal and common ground to all three proceedings. The plaintiffs submitted that the Amendment Act involved an exercise of judicial power in the nature of a bill of pains and penalties, which was an impermissible exercise of judicial power by the state parliament. This limit on state legislative power was said to be derived either from Ch III of the Constitution or from an historical limit on colonial and state legislative power which was not overtaken by the *Australia Act 1986*.[8]

The plaintiffs relied on two elements of the purposes and objects clause of the Amendment Act to characterise the Amendment Act as an exercise of judicial power.

The first element was that parliament expressed that it was 'satisfied' that the grant of the exploration licences was 'tainted by serious corruption'. One of the plaintiffs, NuCoal, submitted that this reference should be understood as parliament being satisfied of the existence of facts that would amount, if proved on admissible evidence to the criminal standard, to one of the criminal offences identified in the ICAC reports. The other

The High Court disagreed. The termination of a right conferred by statute is not an exercise of judicial power, even if the basis for the termination is satisfaction of the occurrence of conduct that could constitute a criminal offence.

plaintiffs, Mr Duncan and the Cascade parties, submitted that it should be understood as parliament finding that the holders of the three specified licences had contravened a novel norm of conduct being the 'norm of not being involved in 'serious corruption", which had been retrospectively imposed by the Amendment Act.[9]

The second element was that one of the express purposes of the Amendment Act was to deter future corruption. The plaintiffs submitted that it was an important purpose of the Amendment Act 'to punish transgression and instil fear of similar punishment in those who might similarly transgress'.[10] This punitive purpose was achieved by the avoidance of renewal applications in respect of their licences under cl 5 of the Amendment Act and the confiscation of their intellectual property under cl 11 of the Amendment Act.

The High Court disagreed. The termination of a right conferred by statute is not an exercise of judicial power, even if the basis for the termination is satisfaction of the occurrence of conduct that could constitute a criminal offence.[11] The termination of the exploration licences did not exhibit any of the typical features of the exercise of judicial power. It did not quell any controversy or preclude future determination by a court of criminal or civil liability. Immunity from civil liability for the state and its employees did not alter this characterisation.[12]

The Amendment Act also did not bear two features that are commonly associated with the characterisation of a law as a bill of pains and penalties.[13] First, it did not involve legislative determination of breach of an antecedent standard of conduct. The individuals referred to in the ICAC reports remain subject to the criminal law.[14] Secondly, it did not involve a legislative imposition of punishment. Depriving the plaintiffs of the benefit of the exploration licences may have been a legislative detriment, but '[l]egislative detriment cannot be equated with legislative punishment'.[15]

Accordingly, this ground fell at the first hurdle and the High Court did not need to consider whether there was an implied limitation on state legislative power.[16]

The question of inconsistency did not arise

Clause 11 of the Amendment Act relevantly provides that no intellectual property right would prevent the state from using or disclosing any information it obtained under the Mining Act in relation to the three exploration licences for any further application or tender of the area the subject of those licences.

In performing any such acts, the state indicated it would rely on its statutory licence under s 183(3) of the Copyright Act and would discharge its obligation to pay equitable remuneration under s 183A of the Copyright Act.

The High Court found that in these circumstances it was not necessary to decide this question.

Endnotes

1. *Duncan v New South Wales; NuCoal Resources Limited v New South Wales; Cascade Coal Pty Limited v New South Wales* [2015] HCA 13 at [34].
2. Ibid., at [39].
3. (1996) 189 CLR 15; [1996] HCA 24.
4. (1996) 189 CLR 15 at 64.
5. Ibid., at 77.
6. Ibid., at 109.
7. Supra note 2.
8. Supra note 1 at [31].
9. Ibid., at [32].
10. Ibid., at [33].
11. Ibid., at [41].
12. Ibid., at [42].
13. Ibid., at [43].
14. Ibid., at [44].
15. Ibid., at [46].
16. For previous discussion, see *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 15 at 65 per Brennan CJ, 77 per Dawson J, 92 per Toohey J and 109 per McHugh J.

Proportionate liability under the Corporations Act and the ASIC Act

Chris Parkin reports on *Selig v Wealthsure Pty Limited* [2015] HCA 18.

In *Selig v Wealthsure Pty Limited* [2015] HCA 18, the High Court considered the circumstances in which the proportionate liability regimes under the *Corporations Act* 2001 (Cth) (Corporations Act) and the *Australian Securities and Investments Commission Act* 2001 (Cth) (ASIC Act) would apply to claims under those Acts. In doing so, the High Court resolved the confusion created by two contradictory Full Federal Court decisions, namely, *Wealthsure Pty Limited v Selig*[1] (the decision under appeal) and *ABN AMRO Bank NV v Bathurst Regional Council*.[2]

The two regimes are identical in all relevant respects and, accordingly, for convenience the provisions of the Corporations Act only will be referred to.

The claim

Mr and Mrs Selig invested in a scheme proposed by Neovest Limited (Neovest) which was, in effect, a Ponzi scheme. They did so on the advice of an authorised representative of Wealthsure Pty Limited (Wealthsure). The investment scheme failed.

The Seligs sought damages in tort and in contract against Wealthsure and its representative, as well against as a number of other defendants who did not participate in the appeal, including two directors of Neovest. In addition, the Seligs claimed damages under s 1041I(1) of the Corporations Act in respect of loss caused by a contravention of s 1041H. Section 1041H prohibited conduct, in relation to a financial product or service, that was misleading or deceptive, or was likely to mislead or deceive.

Proportionate liability

Division 2A of Part 7.10 of the Corporations Act creates a regime of 'proportionate liability'. Section 1041N provides that the liability of a defendant who was a 'concurrent wrongdoer' in relation to an 'apportionable claim' was limited to an amount reflecting that proportion of the damage or loss that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss.

Section 1041L of the Corporations Act defines 'apportionable claim' and 'concurrent wrongdoer'. Section 1041L provides, relevantly, as follows:

This Division applies to a claim (an apportionable claim) if the claim is a claim for damages made under section 1041I for:

- economic loss; or
- damage to property;

caused by a conduct that was done in a contravention of section 1041H.

For the purposes of this Division, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

In this Division, a *concurrent wrongdoer,* in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

For the purposes of this Division, apportionable claims are limited to those claims specified in subsection (1).

First instance

At first instance, the Seligs succeeded in making out their claims in negligence, breach of contract and under the Corporations Act against Wealthsure and its representative. However, Lander J held that the proportionate liability regime applied only where there had been a contravention of s 1041H and had no application where the plaintiff succeeded on other statutory and common law causes of action.[3]

His Honour accordingly gave judgment for the full amount of the loss against Wealthsure and its representative and also against two directors of Neovest jointly – rather than limiting their liability to the extent of their respective contributions to the Seligs' loss.

Appeal to the Full Federal Court

On appeal, the full court of the Federal Court (Mansfield and Besanko JJ, White J dissenting) concluded that whether or not the proportionate liability scheme applied depended on the nature of the loss or damage suffered, rather than the nature of the cause(s) of action available.[4] Accordingly, the full court found that Lander J should have treated the claims in tort and contract – causing the same loss as that sued for as resulting from a contravention of s 1041H – as apportionable.

In reaching this conclusion the full court focussed on two aspects of s 1041L(2). The first was that the subsection required that the loss or damage the subject of the causes of action be the same. The second was the recognition within the subsection that there may be multiple causes of action of differing kinds.

The High Court's decision

The High Court reversed the decision of the full court. In a

Chris Parkin, 'Proportionate liability under the Corporations Act and the ASIC Act'

joint judgment, French CJ, Kiefel, Bell and Keane JJ (with whose reasoning Gageler J agreed[5]), held that an apportionable claim for the purposes of the proportionate liability regime was limited to a claim under s 1041I based upon a contravention of s 1041H.[6]

Their Honours found that the expression 'claim', as deployed in each of subsections (1) and (2) of s 1041L, should be given the same meaning. As such, the reference to a 'claim' in subsection (2) could only mean a claim for damages as described in subsection (1), which meant a claim under s 1041I for damage suffered by reason of a contravention of s 1041H.[7]

Their Honours stated that the function of s 1041L(2) was to explain that regardless of the various causes of action pleaded with respect to s 1041H, the responsibility of the defendants would be apportioned by reference to a notional single claim.[8] This position was reinforced by the fact that s 1041N(2) required that liability for an 'apportionable claim' was to be determined in accordance with the proportionate liability provisions, and liability for other claims were to be determined in accordance with the legal rules relevant to those claims.[9]

Finally, the court determined that any reduction in damages under s 1041I(1B), which allows the court to reduce the plaintiff's damages for contributory negligence, was to occur before any apportionment between concurrent wrongdoers.[10]

Endnotes

1. (2014) 221 FCR 1.
2. (2014) 224 FCR 1.
3. *Selig v Wealthsure Pty Ltd* [2013] FCA 348, [1084], [1097].
4. (2014) 221 FCR 1, [10], [77].
5. [2015] HCA 18, [50].
6. [2015] HCA 18, [37].
7. [2015] HCA 18, [29].
8. [2015] HCA 18, [31].
9. [2015] HCA 18, [32].
10. [2015] HCA 18, [33]–[34].

Verbatim

On 16 June 2015 Grahame Richardson SC spoke on behalf of the New South Wales Bar at the swearing-in of the Hon Justice Robert McClelland as a judge of the Family Court. As well as being highly complimentary of his Honour's suitability for the position, the chair of the Bar Association's Family Law Committee wished to say something about the Australian Government's funding for the Family Court.

Your Honour is a brave man in taking on this appointment. You know that this court is chronically under-resourced. You soon will be met by the looks of dismay from litigants whose families are often in turmoil and uncertainty whilst they grapple with the realisation that the court will not be able to provide them with a hearing for three years or more.

You will be struck by the irony and tragedy on occasion of awarding urgent financial relief to a mother with young children, who has waited 2–3 months and sometimes more to be able to have her urgent application listed, whilst we all will be embarrassed by knowledge that her application was every bit as urgent on the date it was filed as it is on the day months later when it is determined.

You will share in the anguish of litigants who wait months for a listing of a short and urgent matter in a duty to list to find that they are one of a dozen or more and only two or three can be heard. If they are lucky they are then given a short hearing fixture when the list co-ordinator can find a slot – a task which itself often involves weeks and months waiting for the phone call. It is just appalling.

You will feel embarrassed. You will feel stressed at being unable to ensure that members of the community are provided with a workable system of justice. These elements will place pressure on you – you will suffer the tension of finding time to write judgments as opposed to finding time to hear yet another from the never ending queue. You will do your best – your efforts will make a difference – but without resources the problem will not be resolved.

The heartache and tragedy faced by families sitting in limbo in a queue is appalling.

This is not a criticism of the court but the lack of resources to enable it to function as it should.

Whilst the attorney is to be congratulated on your appointment in the manner I have described, in circumstances where this court is stumbling and the community so desperately needs it to function, the delay between the retirement of Justice Fowler who your Honour replaces, in November 2013 is inexplicable.

Measure of damages in actions for tort

Zoë Hillman reports on *Gray v Richards* [2014] HCA 40.

Introduction

As a result of the respondent's admitted negligence, the appellant, Rhiannon Gray, suffered a traumatic brain injury. Ms Gray was left in need of constant care, with no prospect of future remunerative employment and in need of assistance in managing the lump sum payment that was awarded to her as damages. Two issues arose for the High Court's consideration:

- Was Ms Gray entitled to recover costs associated with managing that component of damages which had been awarded to meet the cost of managing the remainder of the lump sum awarded to her?; and
- Was Ms Gray entitled to recover the costs associated with managing the predicted future income of the managed fund?

Revisiting the principles regulating the assessment of damages for personal injury

Four principles are applicable to the assessment of damages for personal injury. Those principles were summarised in *Todorovic v Waller* [1]:

1. The sum of damages to be awarded shall, as nearly as possible, place the injured party in the same position as if they had not sustained the injury;
2. Damages are to be recovered once and forever, typically as a lump sum (subject to statutory exceptions);
3. The court is not concerned with how the plaintiff uses the sum they have been awarded; and
4. The plaintiff carries the burden of proving the injury or loss in respect of which they seek damages.

In considering the application of these principles, the High Court previously had determined that the cost of managing a lump sum damages payment is not in turn recoverable as damages if the injury sustained by the plaintiff did not cause the need for assistance in managing the fund[2].

However, if the injury sustained by a plaintiff had impaired the plaintiff's intellectual ability, thereby necessitating assistance to manage the damages fund, the cost of such assistance is recoverable as damages flowing from the defendant's conduct[3].

Application of the principles to Ms Gray's case

1. Terms of settlement agreed by the parties

Ms Gray, through her mother as tutor, originally had brought proceedings against Mr Richards in the District Court. Those proceedings has been settled on terms that the defendant would pay to Ms Gray:

- $10 million (referred to in the High Court's judgment as the 'compromise moneys'); and
- a sum to be assessed at a later date to cover the expenses associated with managing the compromise moneys (referred to as the 'fund management damages').

2. First instance assessment of fund management damages

As a threshold issue, s 76 of the *Civil Procedure Act 2005* (NSW) required that the settlement agreed by the parties be approved by the court because Ms Gray was under a legal incapacity. In the course of the Supreme Court proceedings in which Ms Gray's settlement was approved, the defendant conceded, among other things, that the compromise moneys and the fund management damages would be paid to a fund manager. A declaration was made that Ms Gray was incapable of managing her own affairs and The Trust Company Limited (TCL) was to be appointed manager of Ms Gray's estate.

Proceedings for the assessment of the fund management damages ensued[4]. Two key findings were made.

First, in considering amounts to be included in the fund management damages assessment, the primary judge held that the defendant was liable to pay the costs associated with managing the fund management damages. The judge accepted that Ms Gray, by reason of her incapacity, was not able to manage that component of her damages which was to account for the costs of managing the compromise moneys. Consequently, the cost of managing the fund management damages was to be included as part of the assessment of the fund management damages. That amount was capable of being determined by an actuary, and expert evidence on quantum was accepted. In the course of making her decision, the primary judge found that the decision of Ms Gray's tutor to appoint TCL as fund manager 'was entirely reasonable'.

Secondly, the primary judge determined that an amount of damages also was to be awarded to cover the cost of managing the future income of the plaintiff's funds under management. Her Honour held that any income derived from the management of the fund and reinvested by the manager would be subject to management fees and an amount should be allowed for those fees. In reaching that conclusion, the primary judge considered that the discount rate applicable under the *Motor Accidents*

Compensation Act 1999 (NSW) to the value to be attributed to future economic loss was supportive of the assumption that the plaintiff's damages fund was likely to generate income that would be reinvested.

3. Decision of the Court of Appeal

The Court of Appeal overturned the decision of the primary judge on both issues.[5]

Insofar as the costs associated with managing the fund management damages was concerned, the court considered that to allow such costs would require the court to proceed on an assumption that the fees that had been negotiated (that is, fees on the amount set aside for fund management costs) were reasonable. Further, the uncertainty associated with attempting to estimate such fees was unacceptable.

Turning to the question of whether an amount should be allowed for the cost of managing the income of the fund, the court emphasised that the discount rate to be applied in determining the current value of future economic loss could not be used to ground an assumption as to the actual income that would be earned from the fund in the future. To do so entailed the court speculating as to future income of the fund and then attempting to assess a management fee on the basis of its speculation. Such an exercise was not permissible.

4. High Court's decision

In considering the arguments before it, the High Court[6] confirmed that the compromise moneys are not to be understood to be the whole of the damages arising from Ms Gray's injuries. The compromise moneys are simply one component of the damages amount that the defendant was liable to pay, with the remainder of the damages award to be assessed by the court.[7]

The High Court determined that '[t]he ascertainment of the cost of managing the fund management damages is not an exercise separate and distinct from assessing the present value of fund management expenses as part of [Ms Gray's] future outgoings'.[8] The cost of managing the fund management damages was itself an integral part of the overall cost of management of the fund, and ought to have been included in the court's assessment in accordance with the first of the *Todorovic* principles.

Further, the court was not to be concerned with regulation of the fund management market or, absent evidence, to determine that the amount charged by TCL was excessive. In particular, given the primary judge's finding the decision to engage TCL was 'entirely reasonable', the court was obliged to incorporate the actual cost of TCL in managing the fund management damages as part of its assessment. Consequently, the cost of managing the fund management damages was compensable and the decision of the Court of Appeal on this point was overturned.

However, the High Court upheld the Court of Appeal's decision not to allow an amount of damages in respect of the cost of managing future income of the fund.It was not safe to make the underpinning assumption, that income derived from the fund would be reinvested. The High Court reaffirmed statements made in *Nominal Defendant v Gardikiotis*[9] that a discount rate, adopted under the *Motor Accidents Compensation Act 1999* (NSW) for example, is to be understood as a conceptual tool that provides a hypothetical construct by which a Court can attribute a present value to future economic loss[10]. It does not ground an assumption that a lump sum damages payment will generate income that will be reinvested. To make such an assumption is inconsistent with the third of the *Todorovic* principles. Moreover, there was not sufficient causative connection between any management costs associated with income generated by the fund and the defendant's conduct. Consequently, those costs could not be seen as integral to Ms Gray's loss consequent upon her injury.

Comment

In assessing the damages that are to be awarded in respect of injuries sustained by a plaintiff where such injuries have necessitated assistance to manage the plaintiff's damages fund:

- the cost of managing fund management damages is itself compensable; however
- the cost that may arise if fund income is required to be managed is not to be included in the court's damages assessment.

Endnotes

1. (1981) 150 CLR 402.
2. *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49.
3. *Willett v Futcher* (2005) 221 CLR 627.
4. The first instance decision is reported as *Gray v Richards* (2011) 59 MVR 85.
5. *Richards v Gray* (2013) Aust Torts Reports 82–153.
6. French CJ, Hayne, Bell, Gageler and Keane JJ.
7. At [10].
8. At [45].
9. (1996) 186 CLR 49.
10. At [64].

Onus in a Crown appeal

Belinda Baker reports on *CMB v Attorney General (NSW)* (2015) 317 ALR 308.*

The High Court's decision in *CMB v Attorney General (NSW)* (2015) 317 ALR 308; [2015] HCA 9 concerns an appeal lodged by the attorney general in respect of sentences imposed for sexual offences committed by CMB upon his daughter when she was aged between 11 and 12 years. The decision clarifies that the onus in negating the residual discretion rests with the Crown. The judgment also discusses the proper approach to dealing with assistance to authorities in a Crown appeal.

Procedural history

In 2011, CMB's daughter made a report to police that CMB had sexually assaulted her on a number of occasions when she was between 10 and 13 years of age. CMB was charged and pleaded guilty to those offences. Following his guilty plea, CMB was referred to a Pre-trial Diversion of Offenders Program.[1] The enabling legislation of the diversion program required CMB to enter into an undertaking to comply with the program. It further provided that upon the undertaking being given, CMB would be convicted, but would not be sentenced or otherwise dealt with in relation to the offence provided he complied with the undertaking and other statutory requirements.[2]

In the course of the diversion program, CMB disclosed that he had committed a number of additional sexual offences against his daughter. CMB subsequently attended a police interview and made voluntary admissions in respect of the additional offences. CMB was charged by police in respect of the additional offences. However, prior to the additional charges being laid, the regulation that enabled the diversionary program was repealed. This meant that there was no opportunity for the additional charges to be considered for referral to the diversion program. Accordingly, CMB was required to be dealt with 'at law' in respect of the new charges.

When the proceedings came before the District Court, the representative of the director of public prosecutions ('DPP') submitted that, in view of the repeal of the regulation, it would be 'unfair' and 'against the spirit of the program' for CMB to be sentenced to a term of imprisonment. The DPP representative also inadvertently misled the court as to the operation of the regulation prior to its repeal. With the agreement of the DPP, the District Court sentenced CMB to two three-year good behaviour bonds and one two-year good behaviour bond.

When the DPP declined to appeal the sentence, the attorney general appealed the sentence pursuant to s 5D of the *Criminal Appeal Act 1912* (NSW).

The Court of Criminal Appeal ('CCA') upheld the attorney general's appeal, finding that the sentencing judge had erroneously taken into account how CMB's disclosures of the additional offences would have been dealt with had the regulation not been repealed, and that the sentences imposed were manifestly inadequate.[3]

As the CCA was satisfied of error, it was required to determine whether or not to exercise its 'residual discretion' to dismiss the attorney general's appeal, notwithstanding its finding of error. As to the exercise of this residual discretion, the court stated:

> We are ultimately not satisfied that there is any basis upon which, or reason why, this Court should exercise its residual discretion not to intervene. We take the law to be that 'the onus lies upon the respondent to establish that the discretion ought to be exercised in his favour'.'[4]

The CCA acknowledged that there were a number of matters in CMB's favour that were relevant to the exercise of the residual discretion, but held that the respondent had not discharged his onus. The CCA allowed the attorney general's appeal, set aside the good behaviour bonds and imposed sentences amounting to an aggregate term of imprisonment of five years and six months, with a non-parole period of three years.

CMB was granted leave to appeal to the High Court on two grounds – first, that the CCA erred in imposing an onus on him to establish that the residual discretion ought to be exercised in his favour, and secondly, that the CCA erred in its consideration of the assistance that he had given to authorities.

High Court decision

The High Court allowed CMB's appeal on both grounds.

In respect of the first ground of appeal, the High Court unanimously held that the CCA had erred in finding that there was an onus on the CMB to negate the exercise of the residual discretion. In so holding, all members of the court affirmed the statement of Heydon J in *R v Hernando*[5] that:

> [I]f this Court is to accede to the Crown's desire that the respondent be sentenced more heavily, it must surmount two hurdles. The first is to locate an appellable error in the sentencing judge's discretionary decision. The second is to negate any reason why the residual discretion of the Court of Criminal Appeal not to interfere should be exercised.[6]

In respect of the respondent's second ground of appeal, a majority of the court (Kiefel, Bell and Keane JJ; French CJ and Gageler JJ dissenting) held that the CCA had erred by misapplying s 23(3) of the *Crimes (Sentencing Procedure) Act*

1999 (*CSP Act*) and the principle in *R v Ellis*[7] when assessing whether the sentence imposed by the District Court was manifestly inadequate.

Section 23(1) of the CSP Act relevantly provides that a court may impose a 'lesser penalty than it would otherwise impose on an offender', having regard to the degree to which the offender has assisted law enforcement authorities in the investigation of the offence concerned. Section 23(3) of the CSP Act provides that a lesser penalty imposed under s 23 'must not be unreasonably disproportionate to the nature and circumstances of the offence'. The decision in *Ellis* is to similar effect.[8]

Justices Kiefel, Bell and Keane emphasised that the 'mandate' of s 23(3) is that a lesser penalty imposed with respect to an offender's assistance to authorities must not be 'unreasonably disproportionate' to the nature and circumstances of the offence. Their Honours observed that the term 'unreasonably' has been 'given a wide operation', and that it was a question 'about which reasonable minds might differ'.[9] Their Honours continued:

> In determining whether the sentences imposed by [the sentencing judge] were manifestly inadequate, the issue for the Court of Criminal Appeal was not whether it regarded non-custodial sentences as unreasonably disproportionate to the nature and circumstances of the offences but whether, in the exercise of the discretion that the law reposed in [the sentencing judge], it was open to his Honour upon his unchallenged findings to determine that they were not.[10]

The High Court remitted the proceedings to the CCA for determination according to law. On 25 June 2015, the CCA determined the remitted proceedings: *Attorney General for New South Wales v CMB* [2015] NSWCCA 166. The CCA found that the District Court had erroneously taken into account how CMB's disclosures would have been dealt with if the regulation had not been repealed (at [48]). However, having regard, in particular to CMB's time in custody whilst the High Court decision was pending and other subjective circumstances (including health issues), the court determined not to interfere with the sentences imposed in the exercise of its residual discretion.

Endnotes

*The author appeared as junior counsel for the attorney general in the High Court.

1. *Pre-Trial Diversion of Offenders Act 1985* (NSW).
2. *Pre-Trial Diversion of Offenders Act 1985,* ss 24 and 30.
3. *R v CMB* [2014] NSWCCA 5.
4. *R v CMB* [2014] NSWCCA 5 at [110] (internal reference omitted).
5. [2002] NSWCCA 489; (2002) 136 A Crim R 451 at 458 [12].
6. [2015] HCA 9 at [34], per French CJ and Gageler J; at [66], per Kiefel, Bell and Keane JJ.
7. (1986) 6 NSWLR 603.
8. *R v Ellis* (1986) 6 NSWLR 603 at 604.
9. [2015] HCA 9 at [78].
10. [2015] HCA 9 at [78].

Cruel and unusual punishment

Caroline Dobraszczyk reports on *Glossip v Gross*, 576 U.S. ___ (2015); 135 S.Ct. 2726 a decision by the Supreme Court of the United States on what constitutes cruel and unusual punishment.

On the same day that two Australians were executed in Indonesia, a very important case was being argued in the Supreme Court of the US. *Glossip v Gross* deals with a fundamental issue relevant to US death penalty cases, i.e. whether a very specific three-drug protocol, which is to be used in Oklahoma in the execution of numerous prisoners on death row, would constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Essentially, the Eighth Amendment prohibits the federal government from imposing excessive bail, excessive fines or cruel and unusual punishments, including torture. The US Supreme Court has ruled that the cruel and unusual punishment clause also applies to the states. The phrase originated from the English Bill of Rights of 1689.[1]

In *Blaze v Rees* 553 US 35 (2008) the Supreme Court held that Kentucky's three drug execution protocol was constitutional, based on the uncontested fact that 'proper administration of the first drug', which is a 'fast acting barbiturate' that created 'a deep coma-like unconsciousness', will mean that the prisoner will not experience the known pain and suffering from the administration of the second and third drugs, pancuronium bromide and potassium chloride – at 44. In *Blaze*, the plurality stated that a stay of execution would not be granted

absent a showing of a 'demonstrated risk of severe pain' that was 'substantial when compared to the known and available alternatives'– at 61.

In *Glossip*, it was argued on behalf of the petitioners, that Oklahoma intends to execute the petitioners using a three-drug protocol where only the second and third drugs to be used are the same as in *Blaze.* Importantly, and critical to the argument is the fact that Oklahoma will use as the first drug, midazolam, which is not a fast acting barbiturate. It has no pain relieving properties and the scientific evidence establishes that this drug cannot maintain a deep, coma-like unconsciousness.

The questions for the Supreme Court are as follows:

1. Is it constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, coma-like unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious.
2. Does the *Blaze* plurality stay standard apply when states are not using a protocol substantially similar to the one that this court considered in *Blaze*?
3. Must a prisoner establish the availability of an alternative drug formula even if the states' lethal injection protocol, as properly administered, will violate the Eighth Amendment?[2]

The brief background facts are that sodium thiopental, an anaesthetic which was the first drug used in *Blaze,* and which was described by Chief Justice Roberts as the key to an uncruel execution, has become increasingly difficult to get in the US. American drug manufacturers have stopped making it and European laws have banned exporting it.[3] However, this has not stopped executions, which can more appropriately be described as 'botched', with states using experimental drugs, with disastrous results. The execution of Clayton Lockett in Oklahoma on 29 April 2014, was one of the most serious. During the procedure, he stayed awake longer than expected, breathing heavily, clenching his teeth, rolling his head, trying to speak and trying to get off the gurney. A prisoner executed before him, Michael Lee Wilson had said, during the procedure 'I feel my whole body burning'. During Charles Warner's execution on 15 January 2015, after the midazolam was administered, he said 'My body is on fire'.[4]

During the hearing of the Glossip case, Justice Alito said to the counsel for the petitioners:

> Let's be honest about what's really going on here…. Oklahoma and the other States could carry out executions painlessly….is it appropriate for the judiciary to countenance what amounts to a guerrilla war against the death penalty?'
>
> …
>
> the States have gone through two different drugs, and those drugs have been rendered unavailable by the abolitionist movement, putting pressure on the companies that manufacture them so that the States cannot obtain those two other drugs…now you want to come before the Court and say, well, this third drug is not 100 per cent sure. The reason it isn't 100 per cent sure is because the abolitionists have rendered it impossible to get the 100 per cent sure drugs, and you think we should not view that as…relevant to the decision that you're putting before us?

But counsel for Oklahoma got an equally difficult time. He was bombarded with questions about whether midazolam would render the prisoner unconscious so that he wouldn't feel the pain from the other two drugs. Justice Kagan suggested to counsel that the facts on which the lower court's decision was based on were either 'gobbledygook' or 'irrelevant' and she referred to the evidence as to what could happen if the execution did not go properly, i.e. when the potassium chloride is administered to stop the inmate's heart 'it gives the feeling of being burned alive.' Justice Sotomayor told counsel that she was 'substantially disturbed' by statements in the state's brief that were not only 'not supported' by the sources on which it relied but 'in fact directly contradicted' by them.[5]

On 29 June 2015, the Supreme Court held that the petitioners had failed to establish that the use of midazolam violates the Eighth Amendment (Roberts CJ; Alito, Scalia, Kennedy and Thomas – Alito J delivered the opinion of the court. Breyer, Ginsburg, Sotomayor and Kagan were in dissent). The plurality held that the petitioners failed to establish that any risk of harm was substantial when compared to a known and available alternative method of execution; that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative; and that the District Court did not commit error when it found that midazolam is likely to render a person unable to feel pain associated with administration of the paralytic agent and potassium chloride. It is interesting to note that they also stated that:

> challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts. Although we must invalidate a lethal injection protocol if it violates the Eighth Amendment, federal courts should

> not 'embroil [themselves] in ongoing scientific controversies beyond their expertise…Accordingly an inmate challenging a protocol bears the burden to show, based on evidence presented to the court, that there is a substantial risk of severe pain.[6]

Justice Stephen Breyer (with whom Justice Ruth Bader Ginsburg agreed) held that 'the death penalty, in and out of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment". He stated:

> The imposition and implementation of the death penalty seems capricious, random, indeed arbitrary. From a defendant's perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?[7]

There is no doubt that this topic presents even more challenging issues than ever before and is still one of the most hotly debated areas of law.

Endnotes

1. From Wikipedia, 'Eighth Amendment to the United States Constitution'.
2. From Brief of the Petitioners filed on 9 March 2015-www.scotusblog.com/case-files/cases/glossip v gloss.
3. From vox.com 'What you need to know before the Supreme Court's death penalty ruling' Dara Lind.
4. 'The Cruel and unusual execution of Clayton Lockett' by Jeffrey Stern, *The Atlantic*, June 2015 issue.
5. SCOTUSblog.com/2015/04/justices-debate-lethal-injection-and-the-death-penalty-in-plain-english by Amy Howe.
6. *Glossip v Gloss* 576 US (2015) at 1–2; 17–18.
7. from www.slate.com/blogs 'In a Brave, Powerful Dissent, Justice Breyer Calls for the Abolition of the Death Penalty' by Mark Joseph Stern.

Interview with Julian McMahon

Australians were confronted by the death penalty when Andrew Chan and Myuran Sukumaran were executed in Indonesia on 29 April 2015. Once again the arguments in favour of and against the death penalty were debated in the media and no doubt privately by many Australians. Carolyn Dobraszczyk spoke to Julian McMahon who is a barrister at the Victorian Bar, and who was one of the main Australian lawyers who acted for the two Australians.

Photo: Kate Geraghty / Fairfax

Julian McMahon: Sukumaran and Chan were arrested on 17 April 2005; they were sentenced to death on 14 February 2006; again in April; and again in August or early September 2006. In September, Lex Lasry QC who is now a Supreme Court Judge, and I were heading to Indonesia, having just been asked by the families to help. Our first job was to identify local lawyers. We have worked on cases in a number of countries and we always retain a local lawyer to run the case in court.... sometimes that is obligatory, and, even if it is not obligatory, it's generally a better idea than trying to get in as some kind of outsider and all of the problems that generates.

We need a local lawyer who is happy to work on behalf of our client and to work with the assistance of the Australian lawyers. These days we have a team, about eight of us, who work together as a group or in smaller numbers, and what we do is try to provide support to the local lawyer. That support would typically be similar to the role of junior counsel in a large brief on whom much reliance is placed, where senior counsel, whom we would call our local lawyer, is really asking junior counsel, 'what do you see as being the issues; is there other law around the world which can help us; have you analysed the brief; where can we go with these ideas?' Our job is to approach the case with a view to providing as much support as possible to the local lawyer.

In the case of Sukumaran and Chan, I asked friends and colleagues in a number of countries, around the world actually, who would be the best lawyer in Indonesia to work for my clients in circumstances where they had already been sentenced to death three times and I was given one name ahead of all the others constantly which was Todung Mulya Lubis, who runs a very successful commercial law firm – but like some of our Silks in Australia, and some commercial firms, he also has a human rights side to his life…and his career. He is internationally educated, an extremely competent lawyer and is briefed by the largest corporations in the world when they have problems in Indonesia. He is also famous for being scrupulously honest… He is a person whom I regard as being of great courage and integrity.

In 2007 the Indonesian lawyers ran a case in the Constitutional Court on the question of whether executions breached the Constitution, which had some important human rights provisions. After the fall of Suharto there was a period in Indonesia known as Reformasi and one of the developments early in this century was the significant amendments to the Indonesian Constitution. Indonesia adopted and placed within the Constitution important parts of the ICCPR (the International Covenant on Civil and Political Rights).

Also in 2005 Indonesia actually adopted the ICCPR domestic legislation, so the ground was fertile to challenge the death penalty. The Indonesian lawyers ran a very large case in 2007. They brought in experts from around the world, including Professor William Schabas who is one of the two leading world experts. The other is Professor Hood, he was unavailable. There were experts from America, United Nations and so on. The Constitutional Court was very pleased to have all of these experts because it meant that there were good hearings with really the most qualified people in the world to talk about the death penalty, international law, the United Nations, human rights, and so on.

What happened was the court was divided on a 5:4 basis in favour of retaining the death penalty. The chief justice was one of the minority, however he voted with the majority so it became 6:3. He later said that he felt it was his role as the chief justice, to decide with the majority so the final ruling was 6:3 not 5:4. The case came very close to abolishing the death penalty. The Indonesian lawyers then ran an appeal in the Supreme Court. I should explain that Indonesia has a court hierarchy which resembles the Australian pyramid structure but outside that structure it also has a Constitutional Court. There is a strange co-existence at the peak of the legal structure…the Constitutional Court and the Supreme Court. The two courts don't sit together and deal with different issues. Sometimes they contradict each other.

Sometimes the various courts welcomed the Australian lawyers and made arrangements for us and sometimes they ignored us. But we were never made to feel unwelcome and at all times, virtually at every occasion we were allowed to be present. We would usually sit near or behind the bar table. There were a couple of things that happened in chambers over the years which understandably we weren't invited to, that was all fine.

Bar News: **Could you and the Australian lawyers remain as the researchers in relation to all of arguments or did the Indonesian lawyer do a lot of it himself?**

JM: The Indonesian lawyer and his firm are eminent lawyers, they certainly could have managed all of this on their own. Like any group of hard working, good lawyers any work was welcomed by the other so essentially every document that came to exist had a fusion of the work of quite a few lawyers working in harmony, but the final decision on everything resides with the Indonesian lawyers. Within the group of Australian lawyers we had counsel who have appeared or worked at the Hague or other countries and have lots of relevant experience so we were able to contribute.

Bar News: **Were there a lot of written documents prepared ?**

JM: Absolutely, the Constitutional Court case, as an example, was very substantial. I think the documents would be similar in length to any major litigation in Australia. The Constitutional Court decision was 450 pages. There was a lot of hard work.

Bar News: **Are there any particular laws/procedural issues, that lawyers have to know in order to do these cases?**

JM: I have worked in a number of very different jurisdictions now and what has surprised me really was the value of our training and education in law. Sometimes you have to learn things that are completely new but once you have trained in our legal jurisdiction it is not that hard to move into another one, certainly as an assistant or adjunct person…you might not want to be the front man or woman but you can certainly provide value…

Bar News: **Skills needed?**

JM: For every jurisdiction that we have worked in, the critical law is found within three or four pieces of legislation and the Constitution… going by whatever name, i.e. the Crimes Act, the Evidence Act, the Procedure Act, whatever they are called in that particular country, you start with those and then you also rely upon international law. Basically, once you know how to analyse evidence and apply principles and law you can do this in any jurisdiction. Those skills are very transportable. In the case of Sukumaran and Chan, at no time has there ever been a judgment which finally dealt with the merits of the clemency application. Indeed no Court has dealt with most of the merits of the legal argument put as to why there should be a lesser penalty than the death penalty. When the Indonesian lawyers went to the Administrative Court to review the apparent failure of the president to even read the documents …..jurisdiction was denied. When they went to appeal this decision, the same problem was identified. The Administrative Court said it was a constitutional matter. The Indonesian lawyers went to the Constitutional Court and prior to that coming on in the Constitutional Court, our clients were executed.

Parental responsibilities and the bar

Ingmar Taylor SC, in a reprise of his seminal 2002 *Bar News* article, asks: Can you succeed at the bar while having child care responsibilities?

In 2002 I wrote an article for *Bar News*, which posed the question 'If I came to the bar, could I work part-time?'

The article concluded that while it might not suit everyone, it can be done, and done successfully. The flexibility of being your own boss, the per hour pay basis, and the fact that work at the bar can (with willpower) be accepted only in bite-size pieces, makes the bar ideal for many who wish to work part-time so they can take on other responsibilities.

This has been borne out by a survey conducted by the New South Wales Bar Association in 2014 which over 1170 barristers completed ('2014 survey'). It revealed over 10 per cent of barristers work less than 35 hours a week; the majority of these being older men.[1]

The article also made the obvious point that juggling part-time work with child care responsibilities is not easy. You cannot take on the long-running cases. You must carry fixed overheads with a reduced income. You need flexible child care. And you must suffer the slings and arrows of negative assumptions about your ability (or undertake the charade of pretending to be full-time).

I finished the article by saying:

> Questions of what can be done to make it easier to work part-time have perhaps not traditionally been important to the bar, made up as it is overwhelmingly by full-time, primary income earning, men. However an examination of the various structural and other factors that prevent more working part-time might well be something the bar will need to consider in the future if more women are to come to the bar.

Thirteen years later I return to the subject to examine those structural barriers and what has been done about them, as part of considering a broader question: Can you succeed at the bar while having child care responsibilities?

These questions arise for both men and women. They are particularly acute for women who are more likely to take parental leave and thereafter are more likely to take on a significant role in child care. They arise against a background of increasing numbers of women coming to the bar, but continued difficulty in retaining them. In 2014, 59 per cent of women at the bar were in their first 10 years of practice, compared to 26.5 per cent of men.[2] A key aspect to retaining women at the bar is addressing issues that make it harder to succeed at the bar with child care responsibilities.

The author, in chambers with his family.

The pressure of having to keep it secret

Anecdotally, the bar and solicitors are more understanding of barristers having parental responsibilities today than in the past. Yet the perception that you cannot have significant child care responsibilities and be a successful barrister remains.

My 2002 article started as follows:

> There are a significant number of barristers who work part-time. Not that you would know.
>
> '*Who told you I work part-time? I don't work part-time*', was the initial reaction of many I contacted.

Not much has changed. There were many barristers who were very happy to speak to me on the record about working flexibly and about periods in the past when they were part-time. But none of the barristers I spoke to who *currently* work part-time at the private bar were prepared to be named.

...there is a perception held by many that if a lawyer has accessed flexible working arrangements, their priorities have lain outside work.

Penny Thew, a senior junior at 8th Floor Wentworth Chambers said: 'I can understand why some barristers would want to speak to you on an anonymous basis given the stigma often attached to women having children at the bar. When I fell pregnant I delayed for as long as possible telling barristers and solicitors with whom I worked that I was pregnant. Even now I talk as

Brett Hatfield gets some help with his chamber work.

little as possible about having had children and never use carer's responsibilities as a reason for being in any way unavailable for work.'

Why do those who work reduced hours for child care reasons keep it secret? As the Law Council's National Attrition and Re-engagements Study (NARS) Report concluded, there is a perception held by many that if a lawyer has accessed flexible working arrangements, their priorities have lain outside work.

One male barrister I spoke to said the perception that if you are part-time you are not seriously committed to your career at the bar is perhaps one of the most significant issues that women face if they are considering working part-time.

Most I spoke to thought solicitors would brief them less if the solicitors knew they worked part-time. A senior junior working in commercial and equity who works three days a week told me, 'If people think you work part-time they may not take you as seriously because you are not there full-time, even if you are in court as much as other barristers.'

But is the perception warranted?

Some barristers I spoke to were genuinely surprised that anyone could be at the bar part-time. They do exist. And each of those I spoke to has a very successful practice.

There is, of course, no good reason why a person who has child care responsibilities will not be able to do as good a job as one who does not. In the 2002 article, Kylie Nomchong SC, of Denman Chambers addressed the perception held by some that a mother with young children is not the best person to brief, particularly in relation to complicated matters. 'If those people only opened their eyes they would realise that the very *best* person to brief in a complicated matter is a mother. Mothers are excellent time managers and have great project management skills and logistical skills. If you have got four young children, a household and a career and you are managing all reasonably successfully, you are clearly a very capable person.'

Case study

Sally Dowling SC, Crown prosecutor

I came to the bar in 1997. I had my first child in 2001.

I was appointed a Crown prosecutor in 2002 on a part-time basis. At the time I was appointed a Crown prosecutor I had returned to the bar after my first child was born and was working three days a week doing commercial/intellectual property work. I was initially offered a full-time position which I turned down because I preferred the flexibility that I could get at the private bar. I was then offered a position on the basis that I worked three weeks on and two weeks off, or six weeks on and three weeks off, which I accepted. That enabled me to do trial work. To do that I had I had a full-time nanny who worked flexibly. She worked fewer hours in the weeks that I was off.

In 2010 I took an appellate position within the Crown Prosecutor's Office. Since then I have worked three and a half days a week every week. I work fixed days. My matters tend to be all heard in one day. Usually the office can arrange matters such that no matters I am in are listed for the one and a half days that I am not in chambers.

I tend to do four or five appeals before the Court of Criminal Appeal on the one day. Most of my working time is preparing submissions and preparing for hearing. I would have on average one hearing day every three or four weeks.

In 2013 I took silk. I was one of the first to be appointed silk while part-time.

Sally Dowling SC is a Crown prosecutor who works part-time: 'Working part-time promotes efficiency. If you have to leave at 5.30pm you become good at prioritising what has to be done and getting it done before you go. Those who are staying at work until midnight or are arriving at chambers at 6am are not necessarily the best or most efficient during the hours they are actually at work.'

Will working reduced hours affect your career?

There is little doubt that working reduced hours is likely to cause some delay in progression. Theresa Baw, a junior at Frederick Jordan worked part-time for a year after returning from eight months parental leave. 'I accept that if you work part-time after returning from months of parental leave your career may not progress as quickly, but that is the choice that you make. It affects your career because as a breastfeeding mum with a baby I did not stay late, I did not say yes to urgent requests to settle something overnight or some matter that required urgent preparation for the next day. I wanted to be there for my young baby.'

But ultimately working part-time is not a barrier to advancement. I spoke to four barristers who were appointed silk at a time when they were part-time. Two were at the private bar, Jane Needham and Anthony McGrath, and two were employed to work part-time in government practice – Sally Dowling at the DPP and Belinda Rigg, public defender. Others I spoke to acknowledged that their time working part-time delayed their progress, but did not ultimately prevent them succeeding.

What are part-time hours?

The NARS report identified that while female barristers had a high degree of control over their work, a common view was that it was often a heavy workload. Barristers reported working longer hours than lawyers in private practice or in-house. The research suggests it can be very difficult for barristers to balance the demands of their role with other responsibilities, such as family responsibilities. Aspects of the legal system (such as the inflexibility of trial schedules) also make achieving this balance difficult.

The NSW Bar's 2014 Survey recorded that 24.6 per cent of respondent barristers worked less than 45 hours per week, and 10.6 per cent less than 35 hours a week. The majority of those working less than 35 hours were men, primarily men over 50 years. Anecdotally, women with parental responsibilities, even those who work 'part-time', tend to work more than 35 hours a week.

On the days that I am at home with the children I still work about five hours per day: I will get up very early in the morning before they are awake and work and at the end of the day I will work again once they have gone to bed.'

One barrister I spoke to works 50 hours a week while juggling child care two days a week: 'One or other of us are at home with the children on Monday and Tuesday of each week. On the other three days a week one or other of us drops them off at school/child care at 9.00am and picks them up at 3.00pm. On those days when my husband drops the children in school/child care, I will get to chambers very early in the morning and then work through until about 2.30pm and then leave to pick them up. On the days that I am at home with the children I still work about five hours per day: I will get up very early in the morning before they are awake and work, and at the end of the day I will work again once they have gone to bed.'

A number of the barristers I spoke to work more than 60 hours a week, while still ensuring that they are at home every day with their young children for a couple of hours before they go to sleep.

Penny Thew told me: 'In essence, unless you hand over your child care to someone else almost entirely, at least 20 per cent to 30 per cent of the time each day that you once performed work will be simply unavailable to you once you have kids. This is even if you have your children in full time commercial care from a very young age. For me that means that on average at least a couple of nights a week I work four or five hours (or more) after 9.00pm in addition to all of the daytime hours worked.'

Bret Walker SC was president of the Bar Association in 2002 when I interviewed him for the earlier article. He said he believed the bar should be the ideal place to work part-time. 'By part-time work I mean a person who works less than 60 hours a week, six to seven days a week. However that theory tends to fall to pieces under the excessive burdens laid by barristers on themselves. Barristers tend to define success by how constantly busy they are. That is a superficial measure of success. People who are forever busy have failed to properly schedule and do the work in a way that is civilised.'

Case studies

Anthony McGrath SC 12th Floor Selborne/Wentworth Chambers

Anthony was appointed silk after working part-time.

Whilst at the bar I have had two long periods away from chambers when I was the primary carer for my daughter. The first from November 2001 to April 2002 when she was 8–12 months old. The second from January 2010 to October 2010 when she was nine years old.

In May 2002 my wife, Kathryn, was diagnosed with breast cancer which then developed to metastatic breast cancer in 2009. From the time that Kathryn was first diagnosed in 2002 I worked flexibly in my career at the bar to ensure that I was able to support her through the numerous surgeries and treatments she underwent.

In the period from January to July 2013 I considerably reduced my practice to enable me to care for Kathryn, who was then dying from her cancer. During that period I worked part-time, not working on Wednesdays which was her treatment day and working reduced hours on each Thursday when she was recovering from her treatment. Kathryn died on 27 June 2013 and I subsequently returned to full-time practice.

I wrote my silk application the day after Kathryn's funeral. While I had been working reduced hours for some time I thought 'what the hell, just do it'. I finalised the application a month later and was fortunate to be appointed silk that year.

I was very open with those who were instructing me and made quite clear what days and hours I was working. Everyone was very understanding. With judges however I did not tell them anything as to why I was not available. I did not give a reason; I just said I was not available. Similarly, with offers of new briefs I did not give reasons; I just said I was not available to take the brief. Now that I am back at the bar I still try to work flexibly, but for me working flexibly mostly means working long periods of time and then taking a longer leave period. I have just finished a long trial and will now take a month off. I also do a lot more work at home these days. I have to be home every day by 7.30pm without fail to relieve the person who cares for Megan and does general home help. Then I will usually commence work again at 9.30pm – 10pm. On the weekends I will work at home whilst Megan is in the house. Technology has allowed that to be done. For example the whole transcript of my current long trial is contained on a drive on my key ring.

Anonymous senior junior #1

A male senior junior with a substantial commercial practice

I have a wife who works five days a week, and a young son. About two days a week I will not be in chambers. I would average 35–40 hours work per week. I am responsible for our son in the mornings until the nanny arrives on her days, and on the other two days I drop him off at child care. Normally, the nanny arrives at 9.00am. Depending on my work I will either then leave for work after 9.00am, or if I can, I will leave for chambers later, sometimes not until midday and not at all on those days when I do not need to come in.

Where I do not have meetings or court commitments I will stay at home. I find it quite easy to work at home with the nanny present. I can drift in and out. My wife takes responsibility for being home at 5.30pm although I will also aim to be home between 5.30–6pm where I can, and then do work after dinner. Sometimes I am in court for a week, in which case I will do the handover at 8.00am and then be home at 5.30pm or 6.00pm.

We pay for the child care whether we use it or not. I could not do it on the basis that I am committed to a particular day or period of time – that would be too stressful. Because we have a good income we have the capacity to pay for that flexibility.

My regular solicitors know that I try to work flexibly and do not work in chambers every day of the week. I would tell them for example if I am not in chambers and take a call that I was taking a day off to be with my son. I tell them it is something I try and do on a consistent basis. I make clear that does not mean I am not available. Frankly it is no-one else's business how I choose to arrange my hours.

Success at the bar

Ultimately each of us at the bar work hours that reflect choices we make about what constitutes 'success' for us.

One senior junior with a substantial commercial practice who works reduced hours told me: 'Taking on an extra five cases a year may advance your career, but it may also just be five cases too many. By not taking them on you might be so much happier. I see other barristers who take on those cases. I used to be that person. Now I might have fewer cases but I do not think the work I do is any less in quality.'

When I interviewed him in 2002 Walker SC said: 'If you are successful at the bar the most obvious side of that success is that people want to brief you all the time. I have never heard of anyone who can so finely calibrate their practice such that no one wants to brief them for more or less hours than they have available to do work. So if you are successful you will always be saying no to work. They would have you working 24 hours a day, 365 days a year, and one more day every fourth year, if you kept saying yes. Some people fall into the trap by thinking that the only limit to how much work they can take on is the biological need for sleep.'

Walker SC said, if you want to be part-time you can't do long cases. 'But that may be acceptable to those who work part-time. They can, like many of us do, decline to take cases that run more than a certain length because of the impact on their life. They are quite entitled to do that. So one can simply say you are 'not available' for the cases that last, say, more than two days. And in my opinion, in any event, cases that are less than two days are the best ones to run.'

That view was echoed by a number of barristers I spoke to with family responsibilities. Even those who work full-time were very content to avoid long-running matters that tend to make it hard to be at home on a regular basis when children are awake.

A senior junior who works reduced hours said to me: 'There are some at the bar who are seen as very successful and are the fashionable barristers to brief. They are often exhausted and it is not uncommon for them to be underdone when they are in court because of the multitude of matters that they are juggling. My definition of professional success is doing the best possible job in court. That involves careful preparation. That can be achieved by planning and ensuring you do not take on too many matters close to each other and leaving sufficient time between them for preparation.'

She continued: 'I see people who are my peers who do more cases than me. Because they work longer hours they may be going faster in their career. My barometer of success is whether I am doing a good job in the cases I appear in.'

Another junior who works part-time three days a week told me: 'Success in my view is to be judged on the nature and quality of the work. Not necessarily on the quantity. But it is also important to have balance: to have intellectual challenges and to also have a family and relax on the weekends. If you can do those two things successfully then in my view you are 'successful'.'

Working flexibly rather than part-time

Louise Clegg worked part-time at the bar for a short period many years ago. After more than a decade of mostly full-time practice, she is now combining academic life at the ANU with the bar. When I interviewed her in 2002 she told me that before coming to the bar she had thought a part-time barrister was a 'pretend' barrister, but having become a barrister she thought that women with child care responsibilities could take advantage of the flexibility of the bar. 'You just have to be confident enough to say 'no' to some work that comes in the door. The way I look at it is that I have got 20 years to do my time at the bar. I do not need to prove myself to anyone in my first year or two.'

There are some at the bar who are seen as very successful and are the fashionable barristers to brief. They are often exhausted and it is not uncommon for them to be underdone when they are in court because of the multitude of matters that they are juggling.

I contacted Louise again for this article and she sent an email, in which she said: 'I don't really know anyone who practises 'part-time' at the bar who is a really serious barrister. I don't think it can really be done in the true sense of the 'part-time' word – for the same reason that you cannot job-share as a barrister. You cannot simply clock-off for two days a week. That might not be a PC thing to say but it is the truth. However, many serious barristers – men and women – do practise 'flexibly', and while it is always a massive balancing act, it is quite doable.'

Some aim to take all of the school holidays off. Others try to maintain hours that permit them to see their children every day, but still get the work done.

I put Louise's proposition to a number I spoke to. All agreed that it is very hard to work part-time if that means fixed days, unless you have flexible child care that can be accessed at short notice.

Georgina Wright on 12 Selborne/Wentworth worked reduced hours for a time after her first child was born. She told me: 'I imagine that it would not be that hard to work part-time at the bar without children. It is hard to do if you have children. That is because without children you could maintain flexibility as to what days you work – something which is very difficult when you have children.'

Flexible child care can be expensive. One senior male junior works on average 35 hours a week over 3.5 days. He and his wife can afford to remove the stress that would be associated by having fixed child care days by paying for child care five days a week but not utilising it when he can stay home.

Practising 'flexibly' rather than part-time is something that many barristers with children do. Some aim to take all of the school holidays off. Others try to maintain hours that permit them to see their children every day, but still get the work done.

Anecdotally, the more senior the barrister the more likely they can successfully work flexible hours. They can afford to work fewer hours because of a higher charge-out rate, they are more confident of their ability to do the work in a compressed time period and they have established a reputation and so have the confidence that their solicitors/clients will not be overly concerned if they reveal they have a child care responsibility that makes them unavailable at a particular time.

Key to working flexibly is controlling the amount of work you take on.

Jeremy Kirk SC at Eleven Wentworth Chambers works full time. However he leaves chambers by 4.45pm so he can spend an hour or two with his children who are now six and eight years old. Having spent that time with them he then continues to work at home. He can usually do that five days a week.

Advances in technology make flexible hours feasible. Kirk SC said: 'I find that I can usually get away with only taking one or two slim folders home and otherwise do work by accessing online materials, emails and other online resources. It is only rarely that I have to go back into chambers of an evening to get work done.'

Case study

Anonymous senior junior #2

A highly regarded female senior junior

I have been at the bar 10 years and have two children.

I try to be at home one to two days per week if possible, during which time I often work and work during the night to enable being out of chambers. When both of my children were in child care I had them booked in on a permanent basis three days a week although could access extra days whenever necessary with almost no notice.

My working week in the first year or so after having each child averaged at least 35 hours. Several years on, however, it averages at around 50 hours but can be significantly more than that, depending on workload. It is essential to have trusted, reliable back up child care available at little notice for additional work.

In the early years, after my first child was born, I tried to be home by 5.00pm or 6.00pm every night (my partner has almost always done the drop off and pickup). These days it's closer to 6.30 most nights and I'm able to ensure that I'm almost always home before my children go to sleep (other than when I'm outside Sydney for work). I like to be able to do the bath, dinner and bed routine if possible.

Paul Daley has recently retired as clerk of 11 Wentworth and 5th Floor St James Hall after working as a clerk for 54 years. He identified a noticeable change over the years: 'If you go back a couple of decades it would never happen that there would be barristers working flexible hours. Now it happens frequently. It is a question of time management. Many barristers have adjusted their working hours. There are many who leave earlier or come in later having dropped the young ones off or leaving early to pick them up.

Daley continued: 'In my view it all works smoothly. I have very busy barristers who manage their child care responsibilities in that way. They include couples who share the responsibilities for either dropping off their children or picking them up. Weekends now for many are different. Now 90 per cent would usually spend their weekends not working, but being with their family.'

Daley said he was not aware of barristers who have a regular day or more off per week. 'Rather there are more who are in chambers working for shorter periods of time each day of the week.'

Barriers to working reduced hours

There are entrenched structural barriers that make it difficult for barristers to work reduced hours at the private bar.

Sally Dowling SC worked part-time at the private bar briefly before being appointed a Crown prosecutor. 'Whilst the bar can assist barristers who wish to work part-time there are structural reasons why it is more difficult for barristers to work part-time than it would be at a solicitor firm or in other businesses. The nature of the private bar is that each person is responsible separately for their share of the costs and expenses of maintaining chambers. Expenses are not shared based on income. It is the nature of the bar in that respect which makes it more difficult from a financial point of view for barristers to work fewer hours because of child care responsibilities.'

Indeed the bar is set up on the assumption of full time practice. Room rent, floor fees, practising certificate and professional indemnity insurance are all costs that do not reduce for those working part-time. Add to that the cost of funding child care out of after-tax dollars and it is very difficult for those without a high-income partner or a high hourly rate to be able to afford to work part-time at the bar.

Dowling SC identified the issue this way: 'Thinking about the costs at the private bar, I would think that those at some of the more expensive chambers would have fixed costs ranging up to $150,000 a year or more. Add to that the cost of child care in after-tax dollars and barristers would need to be earning something above $200,000 per annum before they have made any money after expenses. That means that for those who are starting at the bar it is very difficult to work part-time and earn enough to meet expenses.

This is borne out by the 2014 survey statistics. It revealed 77 per cent of women in their first five years at the bar and 34 per cent of women with 5–10 years at the bar had gross fees of less than $200,000 pa, while average practice expenses were $77,000 pa. That suggests income after expenses for many women in their early years at the bar will fall into a range of around $100,000 to $150,000 pa (presumably at the lower end for those who work reduced hours).

Penny Thew has two children in long-day care three days a week, with occasional additional days. Her child care costs (funded out of after-tax dollars) were $60,000 per year (and more when she had a nanny) although she could claim $7,500 per child in child rebate when they were in approved commercial care.

On those figures one can readily understand that some leave the bar once they start a family.

A senior junior I spoke to who does predominantly government work told me: 'If I was on commercial rates I would be more confident of staying at the bar. At my current rates I question whether I can stay at the bar with the child care costs and practice costs that I have. There is a real financial barrier being at the bar and working part-time. You do need to earn a reasonable sum merely to meet the fixed practice expenses plus pay for child care out of after-tax dollars.'

The 38 per cent gender pay gap

The difficulties in affording to stay at the bar while working reduced hours is exaggerated by the fact that women at the bar on average earn substantially less than men.

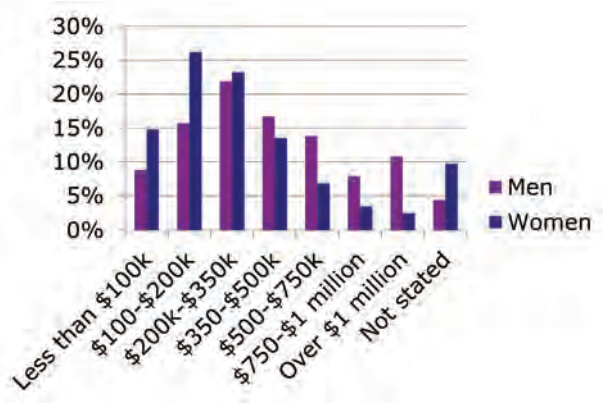
Arthur Moses SC, senior vice-president, speaking recently on equitable briefing, drew on the 2014 survey data to identify a staggering 38 per cent gender pay gap at the bar: average fees for men in 2014 were $437,450 and for women were $269,958.

It is not because women work fewer hours than men. The 2014 survey data reveals the same percentages of men and women work more than 55 hours a week (50 per cent of women and 47.5 per cent of men), and fewer than 45 hours a week (25 per cent of women and 22 per cent of men).

The difference appears to arise from two factors. First, most women have less than 10 years at the bar. Second, women on average charge less for the same number of years at the bar.

Of all women at the bar, 59 per cent have been at the bar less than 10 years, while the equivalent statistic is 26.5 per cent of all men. That makes a huge difference when calculating overall average fees because those who have more than 10 years at the bar earn considerably more on average than those with less seniority. The 2014 survey reveals that the majority of those with more than 10 years seniority earn gross fees of more than $350,000 (51 per cent of women, 60 per cent of men).

The second reason that women earn less is that, on average, they charge a lower hourly rate given the same seniority, as the table below demonstrates. There are a number of possible reasons for the hourly rate differential including: the nature of the work (e.g., more government work); attitudes of clients; women perhaps being in greater numbers at the lower part of each seniority band; and more controversially, differing self-assessments of worth.



The difficulties in affording to stay at the bar while working reduced hours is exaggerated by the fact that women at the bar on average earn substantially less than men.

Seniority	Men - hourly rate	Women - hourly rate
1–5 years	55% over $250/hr	45% over $250/hr
5–10 years	26% over $400/hr	7% over $400/hr
10–20 years	60% over $400/hr 16% over $600/hr	38% over $400/hr 6% over $600/hr

Case study

Kate Richardson, Banco Chambers

I came to the bar in 2002. In 2009 I had my first child. I now have two children, aged five and three.

I don't work part-time but I do work flexibly. I aim to work four or five days a week. I do not aim to take particular days off.

I try and avoid work that would prevent me from sequencing cases with sufficient time between them for preparation. That way I can properly prepare without having to work huge hours outside normal hours.

Before I had children I tended to say yes to everything and I would be working nights and weekends on a regular basis.

I tend to mark holidays out of my diary in advance and when hearing dates are being set down, do my best to avoid them being set down during holidays.

Working flexibly involves a compromise. I now want balance at the bar. When I was a baby barrister I wanted to try and be in every matter, but after being at the bar a while I came to realise there are different definitions of success.

Barrister Stephen Free at the Martin Place Early Learning Centre. Photo: Murray Harris Photography.

What can be done to assist those who want to work flexibly?

In her president's column for the *Bar News* winter 2014 edition Jane Needham SC said that while she had received support from the bar when she was working reduced hours after having children, she was saddened to hear stories from other barristers who were not so supported, and who have had to sell their rooms, curtail their practices, or even leave the bar as a result of having children.

In response to those concerns the Bar Association has developed Best Practice Guidelines including a Guideline on Extended Leave which contains a number of proposals to assist those who have parental responsibilities including:

- Permitting sub-licensing of rooms;
- Providing that rooms remain open to return to for a period of at least one year;
- Six months free of rent and chambers fees (optional);
- Encouraging those on leave to maintain contact by ensuring the floor communicates as to all floor activities and invites the barrister to floor functions and events;
- Assisting with setting up home-based work arrangements; and
- On return from leave, permitting room sharing (optional).

Needham SC said: 'Such measures are important not just to attract barristers but also to retain them. One of the major issues for the bar in this regard is retaining women once they have had children at the bar. Some women choose at that point to either move to become in-house counsel or become solicitors. In respect of women with older children the hours worked by judicial officers are attractive, both in terms of the amount of leave and the lack of need to be in chambers at fixed times before and after court hours.

'To the extent to which chambers can adopt policies which encourage young parents to remain at the bar, that is good for the bar generally, and for those chambers in particular – it's in their long term interest to retain the best quality candidates.

'I'm aware that some floors have pushed back from some or all aspects of the Best Practice Guidelines. In effect the attitude of some is: 'Why should we fund a lifestyle choice?'

'I don't understand that attitude. Barristers have to work very hard to get to a point where they can come to the bar, and then work very hard in their initial years at the bar to succeed. It seems to me inherently unlikely that they would be trying to take advantage of the floor's goodwill.

One senior junior echoed these sentiments when speaking about the obvious sense in allowing barristers to sub-licence rooms when on parental leave and share rooms on their return: 'chambers with a formal or informal policy of not allowing these relatively straightforward practices (including simply because it's never been done before or is 'not the done thing') make having children unnecessarily onerous and women may avoid such chambers for that reason.'

Sharing rooms

Some chambers do not allow for rooms to be shared. No-one I spoke to could identify a rationale for that approach other than 'it isn't done'.

Following the birth of her first child Georgina Wright of 12th Floor Selborne/Wentworth Chambers worked about three days a week and shared a room. 'The 12th Floor was great. The clerk suggested I share a room. It meant we both paid half of the full rent and fees. The person I shared with had a practice which meant he was often away. It was absolutely brilliant. We hardly ever were in chambers at the same time.'

Theresa Baw of Frederick Jordan Chambers would have been interested in sharing a room if that had been an option to reduce her practice costs. 'Sharing a room might have allowed me to take another day off per week during the year that I returned part-time after parental leave.'

Wright made an interesting suggestion: the Bar Association could create a register of barristers interested in sharing a room.

In Victoria every barrister shares a room during their time at the bar, usually more than once, because of their practice of having readers sit in their mentor's room during their reading period. That might be why sharing rooms following a period of parental leave is more accepted there. Rachel Doyle SC of the Victorian Bar told me: 'A number of junior barristers say to me that they really enjoy sharing because they enjoy the company of having someone else in the room with them. Personally I prefer to have my own room but I can see what a positive thing it can be for those who are seeking to reduce practice expenses – it certainly can help them reduce their working hours.'

Child care

The New South Wales Bar Association commenced a major initiative in 2014 to assist those with parental responsibilities. It contracted to reserve 50 places per week (10 per day) at the Martin Place Early Learning Centre for Bar Association members. The centre is located at level 1, 39 Martin Place. It can usually accept additional days at short notice (including on the day) for Bar Association members who have a child there or who are pre-registered. That helps address one of the fundamental difficulties for barristers who work part-time – the need for reliable, quality child care at short notice if you are required to work on a day that is not a usual working day.

Case study

Richard Scruby, 10th Floor, Selborne/Wentworth Chambers

My wife Vanessa Whittaker is on 11th Floor. We have two girls, one six years old and one eight years old.

When our first child was born Vanessa had been at the bar one year and I had been at the bar three years.

We initially had a full-time nanny, then for a few months we tried to work part-time on the basis that each of us would spend one day a week at home. We found that was not manageable for us. It was too hard to predict in advance what day each of us could be at home and our nanny was not one who could maintain the flexibility to be told at short notice what days we would need her.

After that period of attempted part-time work we reverted back to full time nannies, with one working three days and a second working two days. The nanny would start at 7.30am or 8am and finish at 6pm. Vanessa and I would then share the responsibility for one of us to be home by 6pm. We continue to share the job of being home by the time the nanny finishes.

In 2014 we took a year off from the bar and lived in New Zealand as stay-at-home parents with our children going to the local school.

Now that our children are in school we have nannies only in the afternoon from school pickup through to 7pm. Vanessa and I deal with the school drop off ourselves. That is very hard. Your head is in the day ahead, you are trying to leave to get away on time, you cannot find a child's shoes and, well, the child *simply does not care*.

Other steps the Bar Association has taken

In her first year as president Jane Needham SC spoke to the heads of jurisdiction about the importance of predictable sitting hours. 'Nowadays everyone has their timetable so carefully organised that it creates real difficulties for many if there is an unexpected change to a sitting hour. Most people would have seen counsel quickly getting their phone out and sending messages under the bar table following the judge announcing that the proceeding will sit beyond the expected hour. All the courts have given a very positive response – ironically other than the Family Court which indicated that the nature of its jurisdiction is so unpredictable that it is not possible to sit only fixed hours.'

The Bar Association has also been supportive of the need for federal government policy review in two key areas affecting barristers, namely the tax deductibility of the costs of child care and the government funded paid parental leave scheme.

Pregnancy

A barrister who had been at the bar for a short period of time asked Needham SC about when would be a good time to start a family. 'I said to her that I thought it was best to have been at the bar four or five years before having a first child so that you have had time to establish a practice. It was only then that she told me that she was in fact already pregnant. I quickly switched to discussing plan B, having a child after less than five years' practice.'

Taking parental leave before you have established yourself at the bar means having to re-establish yourself again. One female barrister described having children as the equivalent of 'a Mack truck to your career (albeit from which it can recover)'.

A senior junior said: 'I would strongly recommend that women who are considering a family wait if they can until they are well established at the bar. I know of women who had their children in their first three years at the bar and found it very difficult. Some of them have left the bar now.'

The 2014 survey revealed 60 per cent of barristers who responded have had a child while at the bar and 36 per cent of respondents have taken some parental leave. For men the majority of the leave was less than a month. 16.5 per cent of women and 2.2 per cent of men who responded had taken 6 months or more parental leave.

Kristen Deards came to the bar in 2006 having been a solicitor for seven years. She had her first child after five years and her second child three years later. On each occasion she had a substantial period out of chambers but re-established her practice quickly. 'My experience may have been different if I had not been at the bar for five years before I had my first child. That is why I came to the bar when I did and had my first child when I did. I worked hard in that first five years to establish a practice.'

Anthony McGrath SC took two periods of parental leave: five months leave after being at the bar for two years and eight months after being at the bar 10 years. He found that the time it took to re-establish his practice the second time was much shorter.

Taking parental leave

Taking leave at the private bar means your income stops, but your expenses do not.

Increasingly solicitors have access to paid parental leave. Even if not paid, they do not incur work expenses while on leave. In that respect the bar is at a disadvantage in its goal of attracting and retaining the best and brightest lawyers.

A large part of those expenses are rent and chambers' fees. They are not expenses that are easy to address, given the nature of our bar, since the burden of relieving barristers of that expense falls on the individual chambers, some of which are comparatively small. It can perhaps only truly be addressed by a 'whole of bar' response.

All of those I spoke to who took extended parental leave sought to licence their room while they were away. Most succeeded, but a number had to continue to pay rent on an empty room for part or all of their time off.

The UK Bar mandates that all chambers offer a rent free period of at least six months to those taking parental leave.[3]

The New South Wales Bar Association Best Practice on Extended Leave includes an optional provision which if adopted would provide a right for a member or licensee to have six months free of rent and chambers fees when taking parental or other extended leave.

Needham SC said: 'The Best Practice Guidelines are in part aimed at trying to encourage chambers to adopt measures to assist parents who take time off because of their parental responsibilities. If chambers want to attract and, equally importantly, retain the best and the brightest they should be adopting policies which assist barristers who, whilst at the bar, will start a family. That should apply to both men and women of course. Those initiatives include assisting barristers to relieve themselves of their floor fee/rental costs whilst on parental leave. That could be done by the floor having a policy

of charging reduced or no floor fees during a period of parental leave. That, I acknowledge, is more difficult to achieve for an individual floor than it is in Victoria where the costs of doing so are in effect borne by the bar as a whole. In lieu of that, chambers can at least assist such barristers taking such leave to licence their rooms and, either whilst on leave, or on return, or both, to share a room and so share the costs. Encouraging floors to have conference rooms which can be used by barristers who are sharing, or indeed (like I did) spending some or all time working from home, also assists.'

Victoria's different system makes it easier for rent relief to be offered. In Victoria most barristers are in chambers owned by Barristers Chambers Pty Ltd (BCL). Tenancy is month by month. Barristers do not 'buy' a room and can let one go by giving a month's notice. Barristers however may not want to give up their room when taking extended leave. Licensing is more difficult to arrange than in NSW because barristers who want a room can apply for the next available room. Those taking leave will usually want to maintain that room and their connection to the floor.

Rachel Doyle SC of the Victorian Bar explained the steps taken by the Victorian Bar to address problems of attraction and retention of women:

'More than nine years ago the Victorian Bar adopted a policy which I still think is astounding. The policy was that a barrister with primary care of a child could for six months retain their room whilst on parental leave and pay only 25 per cent of the rent that would otherwise be payable. BCL carries the remaining 75 per cent of that room's rent. Since it has been introduced this has been used by many barristers, predominantly women, immediately following the birth of a child.

'Of course the value of that reduction was greater for those with larger rooms where the rent is higher. At some point a view was formed amongst some that there were women who were 'rorting' the system. They had in mind senior women with large rooms who I think they considered were getting pregnant, or at the very least taking time off, at the expense of the bar as a whole. That led to the scheme being modified so that the subsidiary is now capped at 75 per cent of rent or $1,300 a month whichever is lower.

'The scheme originally worked on the basis that a barrister receiving that subsidiary could not work for more than eight hours a week. When the subsidy was capped, that policy was improved so that a barrister could work 16 hours a week either from home or chambers.

'The motivation for bringing in the subsidy policy was to address the difficulty of women leaving the bar after having practised for five to seven years. Surveys identified that barristers taking maternity leave had to give up a room and then financially and psychologically it was very difficult to come back to the bar and

Case study

Anonymous barrister #4

In 2010, having been at the bar five years, I had my first child. I was at home for eight months. After four months I hired a nanny and started working part-time before returning to the bar. I had my second child in 2013. I had six months at home. In the last two months of the six month period I started working part-time from home.

I would estimate I work about 50–55 hours per week in chambers plus a further 12–15 hours a week at home.

Unlike before, when I might routinely work in chambers late, I leave chambers by 5.30pm at the latest. I 'block out' the time between 5.30pm and 8pm. From around 8.30pm I go back to doing work at home for two to three hours.

I tell people who wish to speak to me after 5.30pm that I will be available to speak to them at about 8.30pm. Funnily enough even if the call was 'urgent' they usually then prefer to speak to me the next morning.

On weekends I used to work long hours, sometimes both days. Since I have had children I try to only do work on the weekends in the evenings when they are asleep. Occasionally I will come into chambers if I have to and my husband will then look after the children. I prefer, however, to work from home as much as I can.

Before I had children I would spend whole days of the weekend in chambers, but I was not as efficient then as I am now. I now get the work done in a shorter amount of time.

Case study

Theresa Baw, Frederick Jordan Chambers

I started at the bar in 2006. I had a child in November 2010. I took eight months off. I returned to the bar in June 2011 and then worked on a part-time basis for one year.

During the year that I was part-time I tried not to work on Fridays. I was sometimes doing extra hours at other times to compensate, such as on weekends. However, overall I was certainly working fewer hours. That is in part because I made a deliberate decision that I would always be home by 6pm.

My clerk knew that I did not want to work on Fridays and so would try to avoid matters being set down on those days and would check with me before setting anything down on a Friday. But my clerk did not tell solicitors that I had Fridays off. She would simply say that I was busy on those days.

I would often take calls on a Friday – which meant that I could not really hide the fact that I was not in chambers. It is a bit hard to take a telephone call in a playground and that not be clear to the person at the other end of the line.

When it came to matters being set down I would simply say in respect of a day that was a Friday that I was 'not available'. There are some courts who do not take into account counsel availability, in which case the court would not ask about availability and the issue would not arise. Those courts that do take into account counsel availability do not generally ask for a reason why you are not available.

Thinking back on that year I am quite happy I arranged it in the way I did. The reason I wanted to do it was because I wanted to spend more time with my daughter.

Being at the bar there is always inbuilt flexibility. I am full-time now, but where I can I am happy to manage my time so I can spend more time at home with my daughter. That is the thing about the bar – you are your own boss and so you have more control over your own hours.

in effect start again. Permitting barristers to retain their room whilst on leave whilst making it financially viable for them to do so was seen, correctly, as an important way to both make it easier for barristers to stay at the bar and to send a signal that the bar wanted them to stay at the bar. I believe that has been an important factor in substantially increasing the percentage of women commencing at the bar until the point where now about 50 per cent of new barristers are women.

'It's perhaps ironic that the counsel chambers system of making it easy to come to the bar at a low cost was designed by men for junior men, but is now being embraced and used to assist women to both attract them to the bar and retain them. It is extraordinary that barristers, pooling together, have agreed to effectively fund the parental leave to be taken by their colleagues.

Waiver of practising certificate fee

A number of those I spoke to had taken extended leave were unaware of the policy that has been applied for some years now whereby on application the treasurer waives 100 per cent of the practising certificate fee in respect of the year in which parental leave is taken with the first child; 50 per cent for the second child; and 25 per cent for the third child. It does not matter how much leave the parent wishes to take, if any. I understand the policy will be reviewed as part of the association's response to the Law Council's Diversity and Equity Plan.

Professional indemnity insurers do not waive or reduce premium costs for those taking long leave, although they do base premiums on income and as such there is indirectly a lower cost for those who have taken leave.

Pregnancy – What to tell your clients

Some women I spoke to were slow to reveal they were pregnant to their colleagues and clients. One senior junior told me: 'When I fell pregnant I delayed for as long as possible telling barristers and solicitors with whom I worked that I was pregnant. Even now I talk as little as possible about having

Case study

Jane Needham SC, president of the Bar Association

Jane was appointed silk when working part-time.

After my first child was born in 2002 I licensed my room for 12 months and worked part-time from home; during that period coming in when necessary for conferences and Court appearances. For the first three months I was not working. Then during the course of the year I gradually increased from two days a week to three days a week and then finally four days a week. On the days that I was working I worked primarily from home from 9.00am to 5.00pm and had a nanny on those days. I worked very intensely on those days that the nanny was there. Otherwise I did work where I could whilst my daughter was asleep.

The second year after my daughter was born I came to chambers four days a week and had one day at home. I shared a room for most of that year, which reduced my practice costs.

During those two years I had fixed days where I was not working. I was able to achieve this in part by being quite clear with judges as to my availability given my child care responsibilities. My husband at that time was self-employed and could where necessary, re-arrange his work. Otherwise I triaged work as best I could on the days I was not working. I recall being at Rushcutters Bay with a baby in a pram taking instructions for something that was happening the next day and wondering at how my life had changed.

I took silk in 2004. I disclosed to the silk committee that I had been part-time in the previous two years.

After the twins were born in 2006 I took six months before I returned to chambers. Having by that stage already established child care I returned almost immediately to working five days a week.

When the children were older I would usually get into chambers at 9.30am having dropped my daughter off at primary school on the way. We had a nanny after school so I had more flexibility in the afternoons to work later. No doubt there were some who saw me arriving at 9.30am who thought I must have a fairly relaxed lifestyle. They didn't know that I'd already spent three hours getting three children up and ready for their day.

Kate Guilfoyle (left) and Jane Needham (right) with their girls Imogen and Stella in 2004. Photo: Wade Laube / Fairfaxphotos

Juggling a busy practice and child care responsibilities has its stresses. I was in the midst of a six week trial in Newcastle when my nanny resigned. Most of the counsel and solicitors involved in that trial were themselves parents of young children. I remember telling them that morning what I had learnt overnight and them all saying with incredible concern 'are you okay?'. That day I posted an ad. On Friday as I came back on the train I worked through the responses and that weekend I interviewed and managed to have a new nanny start the following week.

Case study

Georgina Wright, 12th Floor Selborne/Wentworth Chambers

I had my first child in 2011. I had almost a year off. On my return I worked about three days a week.

In 2013 I had my second child. I then had about nine months maternity leave before I returned to chambers. During that time I did a couple of short trials and some advice work.

The hours I am in chambers have reduced. In the past I would be in chambers before 8am. Now it is not uncommon for me to arrive quite late if I do not need to be in chambers earlier. Likewise, before I had children it would not be unusual for me to be still in chambers after 9.00pm. Now I often try to leave by 5.00pm. The children are in a child care centre two days a week and need to be picked up before 6.00pm by my husband or me.

I have not found leaving chambers at that time too hard. The children are usually down by about 7.00pm and I can then do work. In effect I can postpone work that would otherwise be done between 5.00–6.30pm and do that later that evening.

Am I more efficient now? Absolutely. I have to digest large amounts of information very quickly and I have become adept at doing that. Having said that, I am conscious that I do not have the luxury any more of being able to spend many hours reading cases just in case they may be raised.

had children and never use carer's responsibilities as a reason for being in any way unavailable for work. I have spoken to other women who have become pregnant while at the bar and their experience appears to have been similar to mine in that some solicitors stop briefing women upon finding out they're pregnant. As a result, in my experience, many women at the bar hide their pregnancies until a point where it is no longer able to be unnoticed.'

Another senior junior who was quite junior at the time said: 'When I fell pregnant I was concerned to conceal my pregnancy from the floor and solicitors because I was concerned of the impact it might have on the work coming in. I thought perhaps that I might be able to do some work while I was on maternity leave, although that did not eventuate.'

Rachel Doyle SC told me: 'Prior to my first child I shut up shop completely. I was a junior counsel and did not know whether I would have any capacity to do work whilst I was on maternity leave and so returned all my briefs. I realised that after the first two to three months I had capacity to do some level of work. Now that I'm on maternity leave for the second time I made a decision to retain a lot of my work (although happily taking the opportunity to return some matters!). I speak to juniors involved in my matters to check how they're going. From time to time that might involve an hour or two hours of work for which I would charge. I have also come in for the occasional matter, such as a special leave application. As the maternity leave gets closer to ending I will increase the amount of work I am doing before returning to chambers. I think it makes sense for those on parental leave to keep at least some of the work that they have rather than return it all.'

Georgina Wright said: 'When I went on maternity leave the first time I gave some briefs back, which in retrospect I should have kept. For example I had a matter that was a one day appeal in the Court of Appeal which in retrospect I could have done. But before the birth of my first child I did not know whether I would be in a position to do the work on the briefs. In contrast, when I was pregnant the second time I did not even tell some solicitors that I would be taking maternity leave for some matters as I knew I would be able to do the work.'

Concluding remarks

There are structural issues that make working at the bar while also having child care responsibilities difficult. Key among them are costs that do not fluctuate with income and the demand of clients and courts to be available on any day of the week.

Yet, as the case studies included in this article demonstrate, it can be done successfully. It might be difficult to earn gross fees of over $1m. It might be difficult to run back-to-back long trials. But if 'success' is defined as doing high quality work well, it is very achievable. Perhaps the best evidence of that are the four members of the bar who were appointed silk while working part-time.

Despite the odd second-hand anecdote to the contrary, most I spoke to said how accommodating the bar is to those who have child care responsibilities. Kate Richardson was one of those: 'I often say to young women who are thinking of starting a family that being a barrister is much better in that regard than being a litigation solicitor. At the bar you are your own boss and can create flexibility. Further, barristers are comparatively well paid and can often afford good options for child care. Further, because barristers are not sharing income they do not have pressures in the way that partners in law firms have placed on them as to how much work and income they are earning.'

Yet more can be done to attract and retain those who plan to take on parental responsibilities.

Chambers need to facilitate the licensing of rooms during periods of parental leave. Perhaps there needs to be a 'whole of bar' approach to assist chambers to ensure a rent free period is available to all those who take parental leave.

Chambers need to permit the sharing of rooms for those who work on a reduced hour basis. A register of those looking to share might further encourage that trend. Having ready access to a meeting room would also assist.

These and similar steps contained in the Best Practice Guideline on Extended Leave are not radical steps. Nor are they purely altruistic. If a set of chambers in particular and the bar in general want to attract and retain a greater share of the best and the brightest they are necessary steps.

The bar at its essence is defined by its collegiality. Barristers will, unthinkingly, put aside what they are doing to assist other barristers when requested. It doesn't seem a major extension of that for the bar as a whole, or a floor in particular, to seek to assist young barristers to meet the challenges of balancing their professional and family life.

Endnotes

1. 2014 Survey results: 80 per cent of barristers working less than 35 hours were men; 74 per cent of barristers working less than 35 hours a week were over 50yrs. These men would not necessarily describe themselves as 'part-time'.
2. 2014 Survey data.
3. Bar Standards Board Rules, C110(3)(k); See the BSB Handbook Equality Rules.

Case study

Anonymous senior junior #3

The fact that I work part-time is not for general consumption. If someone calls me on a day that I am not in chambers, Reception simply tells them that I am presently unavailable and a message is taken for me to return their call. I do not disclose my part-time status largely because of a belief on my part that there persists an overwhelming expectation amongst solicitors for counsel to be constantly available and that, by reason of my child care responsibilities, I might be overlooked.

In general, I am in chambers three days a week, although I will come in on one or both of the other days if unavoidable. Otherwise, I work remotely from home if and when necessary. On the days that I am in chambers, my child is looked after variously by my parents and the Bar Association child care scheme. If I require additional child care days, I am fortunate enough to be able to rely upon both my parents and the Bar Association child care scheme. Once a child attends the Bar Association child care scheme, additional days outside the set days may be booked at short notice if required.

Given my current working arrangements, it is not feasible for me to take on large matters. I generally only accept matters that run a couple of days, maximum one week. But having said that, if I were offered a long-running matter that I found to be particularly compelling, I would accept it because of the flexibility I do have in obtaining additional child care.

When I went on maternity leave, I licensed my room to a former reader. The Floor had no difficulty with that arrangement. In the event, my room was vacated before I ultimately returned to chambers which meant that I paid floor fees and Counsels' Chambers fees for a few months thereafter.

Whilst I work part-time, there is no abatement in my expenses. Sometimes it feels like a rather decadent hobby. However, because I do intend to return to the Bar on a full time basis in due course, I see my current arrangement as necessary.

The powers of the ICAC to investigate

Marcel Fernandes reports on *Independent Commission Against Corruption v Cunneen* [2015] HCA 14

The issue in these judicial review proceedings was the extent of the powers of the Independent Commission Against Corruption (ICAC) to investigate individuals under the *Independent Commission Against Corruption Act 1988* (Act). That depended upon the statutory definition of 'corrupt conduct' in s 8 of the Act.

Background

The first respondent, Ms Margaret Cunneen SC (Respondent) was a deputy senior Crown prosecutor. ICAC served her with a summons to appear to give evidence at an enquiry in relation to an allegation that she counselled a person to act in such a way so as to prevent police officers from obtaining evidence, with the intention to pervert the course of justice (alleged misconduct). The respondent instituted proceedings seeking a declaration that the alleged misconduct was not 'corrupt conduct' under the Act and that ICAC's issuance of the summons was beyond power.

The case turned on the construction of 'corrupt conduct' in s 8 of the Act and in particular the construction of s 8(2) and its relationship to s 8(1). ICAC argued that the alleged misconduct, not done as a public official but as an ordinary citizen, was corrupt conduct under s 8(2) because it could adversely affect the exercise of official functions of a police officer and was conduct that involved an attempt to pervert the course of justice.

ICAC argued that the alleged misconduct, not done as a public official but as an ordinary citizen, was corrupt conduct under s 8(2) because it could adversely affect the exercise of official functions of a police officer and was conduct that involved an attempt to pervert the course of justice.

By majority (French CJ, Hayne, Kiefel and Nettle JJ), the High Court held that ICAC's jurisdiction did not extend to the alleged misconduct as that conduct did not fall under s 8(2). This was because the alleged misconduct only went to the efficacy of the police officer's exercise of his or her functions, whereas, on its proper construction, s 8(2) defined 'corrupt conduct' as conduct with the capacity to adversely affect the probity of a public official's exercise of his or her functions, due to the effect of s 8(1) on s 8(2).

In contrast, Gageler J (and Bathurst CJ in the New South Wales Court of Appeal) in dissent held that 'adversely affects' in s 8(2) was properly construed as only requiring that the efficacy of the public official's exercise of his or her functions be adversely affected.

The Act

Section 8(1) of the Act sets out four instances of misconduct which are defined as 'corrupt conduct'. Subsections 8(1)(b), (c) and (d) refer to certain conduct done actively by a public official: dishonest or partial exercise of official functions; breach of public trust; or misuse of material acquired in the course of official functions, whether or not for anyone's benefit.

In contrast, section 8(1)(a)defines 'corrupt conduct' in a more general way, namely, as conduct of any person (not only of a public official) 'that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority'.

Section 8(2) provides, relevantly, as follows:

> Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which involves any of the following matters …

Section 8(2), thus, has two limbs.[1] The first limb (the 'that could adversely affect' limb), is in identical terms to s 8(1)(a) except that it adds the word 'also' and removes the adjectives 'honest or impartial'. The second limb (the 'and which involves' limb') provides a list of 25 instances of misconduct, including perverting the course of justice in subsection 8(2)(g) and any attempt to do so in subsection 8(2)(y).

Section 8(6) provides that '[t]he specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section'.

Section 9 limited s 8 by providing that even if conduct fell within s 8, it would 'not amount to corrupt conduct unless it could constitute or involve' a criminal or similar offence. Section 12A also limited ICAC's investigative powers by requiring it to direct its attention 'to serious and systemic corrupt conduct' and 'to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct'. The Act's objects clause, s 2A, provided that the Act's 'principal objects' were 'to promote the integrity and accountability of public administration by constituting [ICAC]

… to investigate, expose and prevent corruption involving or affecting public authorities and public officials'.

Litigation history

At first instance, Hoeben CJ at CL held that the alleged misconduct fell within s 8(2). His Honour rejected the Respondent's reliance on the principle of legality as s 8(2) was composed of 'ordinary English words and there is no ambiguity about them'.[2]

The Court of Appeal overturned that decision (Basten and Ward JJA; Bathurst CJ dissenting). In separate judgments, Basten and Ward JJA held that having regard to s 2A, the alleged misconduct did not fall within s 8(2) because 'adversely affects' meant conduct that 'has the capacity to compromise the integrity of public administration'[3] or that has 'the potential to cause … 'corruption' in the exercise by the public official of his or her functions' or could 'have [an] adverse outcome when viewed from a public corruption perspective.[4]

In dissent, Bathurst CJ held that the alleged misconduct fell under s 8(2) because, due to s 8(6), s 8(2) was not limited by any of the provisions in s 8(1)[5] and 'adversely affects' in s 8(2) simply meant 'limits or prevents the proper performance of the public official's functions'.[6]

High Court majority

French CJ, Hayne, Kiefel and Nettle JJ held that 'adversely affect', in the first limb of s 8(2), meant to adversely affect the probity of the exercise of an official function by a public official. This was because 'adversely affects' in s 8(2) was to be read as being qualified by s 8(1)(b) to (d) of the Act. 'Adversely affect' could go to probity or efficacy,[7] but the former was the preferable construction as this 'accord[ed] with the ordinary understanding of corruption in public administration and consequently with the principal objects of the [Act] as set out in s 2A'.[8] The 'efficacy' construction would mean the Act's definition of 'corrupt conduct', and thus ICAC's jurisdiction, would extend to criminal offences beyond corruption in public administration.[9]

The majority said that Bathurst CJ's approach, for which ICAC contended in the High Court, 'assume[d] that the plain and ordinary meaning of 'adversely affect' is its broadest possible meaning and does not attempt any kind of reconciliation of the meaning of that expression with the statutory context in which it appears'.[10]

The approaches of Basten and Ward JJA, for which the Respondent contended, were 'susceptible to circularity'[11] because they 'assum[ed] the purpose of the Act and then reason[ed], as if syllogistically, that, because a meaning of 'adversely affect' limited to an adverse effect on [the integrity of public administration or a public corruption perspective was] more consonant with the assumed purpose of the Act, that meaning should be preferred'.[12] The majority said it was 'not logically open to apply that kind of syllogistic reasoning' here because it was impossible to identify the Act's purpose 'without reference to the scope of operation of the Act as defined by ss 8 and 9'.[13]

The majority stated that the issue of circularity meant that it was not open to express a conclusion as to the meaning of 'adversely affect' in s 8(2) in terms of absolute validity.[14] The majority referred to principles of statutory construction set out in *Project Blue Sky*[15] and held that:

> The best that can be done is to reason in terms of relative consistency – internal logical consistency and overall consistency in accordance with the principles of statutory interpretation adumbrated in *Project Blue Sky* – to determine which of the two competing constructions of 'adversely affect' is more harmonious overall.[16]

The majority did not articulate how s 8(6) fitted in with the above reasoning by relative consistency. Their Honours did not deal with s 8(6) in any detail but commented that s 8(6) 'makes clear that the categories so described in s 8(1) and s 8(2) are not to be read as limiting each other'.[17]

The majority defined the question to be whether 'adversely affects' in s 8(2) was limited to 'corruption in public administration' or what it described as 'something more'.[18] Their Honours accepted that it would not be right to read s 8(2) in a way that gave it no work to do beyond that already done by s 8(1)(a)[19] although their Honours did not refer to s 8(6). The majority said that viewed in the context of ss 8(1)(b) to (d) and the interrelationship between ss 8(1)(b) to (d) and 8(2), 'it will be seen that what was intended is an adverse effect upon the exercise of an official function by a public official such that the exercise constitutes or involves conduct of the kind identified in s 8(1)(b) to (d)'.[20]

The majority held further that s 8(1)(b) to (d) limit a public official's conduct that may be 'corrupt conduct' and so 'define the nature of improbity of public officials'.[21] In turn, s 8(1)(b) to (d) limited 'adversely affects' in s 8(2) to conduct that 'constitutes or involves conduct … identified in s 8(1)(b) to (d)'.[22] Thus, it would be 'inherently improbable' for s 8(2) to be

read as directed at any broader range of improbity than that, as it was 'more logical and textually symmetrical to read 'adversely affect' in s 8(2) as confined to having an injurious effect upon or otherwise detracting from the probity of the exercise of the official function in any of the senses defined in s 8(1)(b) to (d)'.[23] Their Honours stated that the narrower construction of s 8(2) was 'also more consonant with the language of ss 2A and 9 in that it embraces offences which could affect the integrity of public administration and excludes those which could not'.[24]

Given the breadth of conduct outlined in the second limb of s 8(2), the majority noted that the broader construction of the first limb would extend to many different kinds of misconduct, such as telling lies to a police officer.[25] In that context, the majority applied the principle of legality to prefer the narrower construction.[26]

Gageler J's dissent

His Honour stated that his reasons accorded substantially with those of Bathurst CJ.[27] His Honour accepted the majority's identification of a choice between the 'efficacy' and the 'probity' construction of 'adversely affects', but considered it sufficient for the alleged criminal conduct to have the potential to impair the efficacy of a public official's official functions for it to be 'corrupt conduct' such that ICAC had the power to investigate.

His Honour considered that the ordinary grammatical meaning of 'could adversely affect' connoted' nothing more than impediment or impairment' and 'import[ed] no unexpressed qualitative element into the nature of that impediment or impairment', particularly one 'not expressed in the text of s 8(2), but which is expressed, at least in part, in the text of s 8(1)(a) (doing so would appear to be contrary to s 8(6)).[28] The 'efficacy' construction gave s 8(2) a 'relatively precise operation which depends entirely on the language of that sub-section', which 'in turn gives the defined term 'corrupt conduct' a relatively precise operation which does not depend on drawing some negative implication from the undefined and indefinite concept of corruption'.[29]

In relation to the principle of legality, Gageler J said that it was not clear why the principle had any work to to in construing provisions defining the scope of ICAC's jurisdiction, as opposed to particular coercive powers that might derogate from a particular common law right. No particular right or principle had been identified that could be said to be jeopardised by the 'efficacy' construction.[30]

Conclusion

Accordingly, by majority, the High Court granted special leave but dismissed the appeal.

Endnotes

1. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [7].
2. *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 1571 at [63].
3. *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [71].
4. *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [189].
5. *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [15].
6. *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [22].
7. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [2].
8. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [3].
9. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [3].
10. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [32].
11. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [33].
12. Ibid.
13. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [35].
14. Ibid.
15. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] and [70] per McHugh, Gummow, Kirby and Hayne JJ.
16. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14at [35].
17. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [78].
18. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [36].
19. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [38].
20. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [46].
21. Ibid.
22. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [45].
23. Ibid.
24. Ibid.
25. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [52].
26. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [54].
27. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [75].
28. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [82].
29. Ibid.
30. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [86].

Corrupt conduct: the ICAC's Cunneen inquiry

By the Hon Peter Heerey AM QC*

The New South Wales Independent Commission Against Corruption commenced an inquiry into alleged corrupt conduct by Margaret Cunneen SC, the state's deputy senior crown prosecutor.

The alleged corrupt conduct was that Ms Cunneen 'with the intention to pervert the course of justice, counselled Sophia Tilley to pretend to have chest pains, … to prevent investigating police officers from obtaining evidence of Ms Tilley's blood alcohol at the scene of a motor vehicle accident.'

Ms Tilley was the girlfriend of Ms Cunneen's son. In fact a blood alcohol test was conducted at a hospital and showed zero alcohol.

The ICAC's inquiry, on its face, was not concerned with any conduct by Ms Cuneen in her official capacity as deputy senior crown prosecutor. In theory, the same conduct would have provoked inquiry by ICAC had it been engaged in by Bruce from Bondi or Cheryl from Chatswood. However, as Gageler J in the High Court delicately put it, the question before the courts was 'not about the propriety or prudence of the ICAC choosing to undertake the particular investigation in this case.'[1]

Ms Cunneen challenged the legality of the inquiry in the Supreme Court of New South Wales. She failed at first instance before Hoeben CJ at CL[2] but succeeded in the Court of Appeal (Basten and Ward JJA, Bathurst CJ dissenting).[3] The ICAC sought special leave to appeal to the High Court of Australia. Special leave was granted but the appeal was dismissed (French CJ, Hayne, Kiefel and Nettle JJ, Gageler J dissenting).[4]

The central point of the majority judgment in the High Court was that the expression in the definition of 'corrupt conduct' in s 8(2) of the *Independent Commission Against Corruption Act* 1988 (NSW), viz conduct which 'adversely affects, or could adversely affect … the exercise of official functions by any public official,' was confined to conduct which affected the *probity* of the official, as distinct from the *efficacy* of the exercise of an official function. In other words, conduct causing an official to act in a way which was without fault or lack of probity on the part of that official was not within the Act. Since in the instant case any police officer whom Ms Tilley deceived would be acting innocently, her conduct, and that of Ms Cunneen in counselling her to engage in it, was outside ICAC's jurisdiction.

Defining corrupt conduct

At common law 'corruption' is not a term of art, so drafters of the Act had to define the term with care since it would be the gateway to the exercise of what the High Court majority referred to as ICAC's 'extraordinary coercive powers (with consequent abrogation of fundamental rights and privileges)'.[5]

Section 8 commences with sub-s (1) which provides:

> (1) Corrupt conduct is—
>
> (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority; or
>
> (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions; or
>
> (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust; or
>
> (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

This seems to accord with the general understanding of corruption, that is to say conduct involving dishonest or improper conduct by a public official.

Sub-section (2) however goes on to provide:

> (2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which involves any of the following matters:
>
> (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition);
>
> (b) bribery;
>
> (c) blackmail;
>
> (d) obtaining or offering secret commissions;
>
> (e) fraud;
>
> (f) theft;
>
> (g) perverting the course of justice;
>
> (h) embezzlement;
>
> (i) election bribery;
>
> (j) election funding offences;
>
> (k) election fraud;
>
> (l) treating;
>
> (m) tax evasion;
>
> (n) revenue evasion;

(o) currency violations;

(p) illegal drug dealings;

(q) illegal gambling;

(r) obtaining financial benefit by vice engaged in by others;

(s) bankruptcy and company violations;

(t) harbouring criminals;

(u) forgery;

(v) treason or other offences against the Sovereign;

(w) homicide or violence;

(x) matters of the same or a similar nature to any listed above;

(y) any conspiracy or attempt in relation to any of the above.

These offences will be referred to as 'the s 8(2) offences'.

It will be observed at the outset that not all of the s 8(2) offences necessarily involve dishonesty or wrongdoing on behalf of the public official. Indeed with some of them, e.g. tax and revenue evasion, it is of the essence that the public official is innocent.

Tax evasion usually involves conduct such as concealing income which should be reported in tax returns, constructing false documents and the like, essentially for the purpose of deceiving innocent tax authorities, with a consequent loss to public revenue.

Another example is homicide or violence, which in this context would primarily bring to mind the murder or assault of a public official.

Other s 8(2) offences, such as perverting the course of justice, might or might not involve wrongdoing on the part of a public official. For example, essential exhibits in a court case might be destroyed with, or without, the connivance of a public official.

The only other part of s 8 which need be mentioned for present purposes is sub-s (6) which provides:

> The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

Section 9(1) provides an overall limitation on s 8:

> Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve –
>
> (a) a criminal offence; or
>
> (b) a disciplinary offence; or
>
> (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

There is obviously some overlapping between sub-sections (1) and (2). Both extend to 'any person (whether or not a public official)'. It is not difficult to hypothesise conduct which could fall within both. Nevertheless, provisions of a statute are not necessarily to be treated as separate, watertight compartments, as s 8(6) explicitly reminds the reader.

In s 8 there appears to be a logic in the relationship between the two sub-sections (1) and (2) and a different emphasis in each. Sub-section (1) is primarily directed at the conduct of public officials themselves. Impropriety of such persons is at the forefront, both in paragraph (a)'s 'honest or impartial exercise of official functions' and paragraphs (b), (c) and (d), all of which specify different kinds of wrongful or improper conduct by an official.

By contrast, sub-s (2) aims at the conduct of someone *other than* the public official the exercise of whose official functions is adversely affected, even though that other person may be a public official. But whether that other person happens to be a public official is not relevant. What is relevant is that such 'other person'

- has engaged in conduct which involves any of the s 8(2) offences, and
- that conduct adversely affects, or could adversely affect, the exercise of official functions by a public official.

The drafters' strategy seems to be to provide for some element of illegality or impropriety in each limb of the definition of 'corrupt conduct'; cf 9. In sub-s (1) it is in the conduct of the person whose conduct adversely affects the honest and impartial exercise of official functions or who, as a public official, engages in the wrongful or improper conduct in (b)–(d). In sub-s (2) it is the commission of a s 8(2) offence which adversely affects the exercise of official functions by someone else, who is a public official.

The majority of the High Court held that the expression 'adversely affect' in s 8(2) meant 'to adversely affect the exercise of an official function by a public official in such a way that the exercise constitutes or involves conduct of the kind identified in s 8(1)(b)–(d).'[6]

There are problems with this reading.

First, the plain meaning of the expression 'the exercise of official functions' in s 8(2) is not limited by any qualification as to the legality or propriety of such exercise, whether good, bad or indifferent.

Secondly, the majority read into s 8(2) words that are not there. One is reminded of the oft-cited[7] passage in the speech of Lord Mersey in *Thompson v Goold & Co*[8]

> It is a strong thing to read into an Act of parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.

See also *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service*.[9] In the present case s 8(2) conveys a rational meaning without any such insertion.

Thirdly, the immediately preceding sub-s (1) speaks of 'the *honest or impartial* exercise of official functions.' (Emphasis added.) There must have been some reason for the drafters omitting those qualifications in sub-s (2). Presumably it was some reason other than absent-mindedness. The most likely explanation is that the drafters intended the expression 'exercise of official functions' in sub-s (2) not to be concerned with the honesty or impartiality of such exercise.

Fourthly, it does violence to the syntax of the sub-sections to drag pars (b)–(d) of sub-s (1) across to do, as it were, double duty in sub-s (2) – especially when that sub-section already has the s 8(2) offences.

Fifthly, if the true intention was to restrict the definition of 'corrupt conduct' to official conduct that was not honest and impartial, there would be no need for s 8(2) at all. Sub-section (1) could simply be written differently. The target would be conduct which adversely affects the honest or impartial exercise of official functions by a public official. The (rewritten) sub-section would cover:

- such conduct by the public official himself or herself;
- the type of conduct presently described in pars (c) and (d);
- conduct involving what are now the s 8(2) offences.

'Corrupt conduct'; a taker as well as a giver?

At an early stage of the argument before the High Court, Hayne J put to ICAC's counsel the proposition:

> Well, corruption has a giver and a taker and this Act is directed against both conduct which would be the giving of and the taking of, is it not?[10]

Once it is assumed that parliament had the same assumption, that corrupt conduct must involve a taker as well as a giver, the reading of the majority would follow. But is this assumption correct? Bear in mind that the critical words are not so much 'corrupt conduct' but 'the exercise of official functions' and the suggested qualifying insertion of 'honest or impartial'. It is a question whether those qualifications are 'clearly required by [the provision's] terms or its context.'[11]

Competing absurdities

A familiar forensic technique is to argue that an opponent's case, say on the construction of a statute, would logically lead to absurd results. *Ergo*, it is argued, such a construction could not have been intended by the legislature.

The majority judgment contains no less than ten examples of what are said to be absurd results if ICAC's construction is correct.[12] My favourite is number two: the contention that the theft of a garbage truck would qualify as corrupt conduct since the garbage collecting authority could be rendered less able to discharge its official function of collecting garbage.

However, Gageler J in dissent counters with some equally surprising counter-absurdities.[13] His Honour points out:

> At the other extreme is that to which the narrower *probity* reading of s 8(2) leads: ICAC having no power to investigate, expose, prevent or educate about state-wide endemic collusion among tenderers in tendering for government contracts; as well as ICAC having no power to investigate, expose, prevent or educate about serious and systemic fraud in the making of applications for licences, permits or clearances issued under New South Wales statutes designed to protect health or safety (such as the *Child Protection (Working with Children) Act* 2012 (NSW) or the *Work Health and Safety Act 2011* (NSW)) or under New South Wales statutes designed to facilitate the management and commercial exploitation of valuable State-owned natural resources (such as the *Mining Act 1992* (NSW), the *Fisheries Management Act 1994* (NSW) or the *Forestry Act 2012* (NSW)).

It may be conceded that either construction of s 8(2) could produce some surprising hypothetical applications. So the suggested absurdities rather cancel each other out. The expression 'exercise of official functions' must mean *something*.

It might be accepted that a general understanding of the concept of corrupt conduct involves some dishonesty or lack of probity by a public official. However, parliament was entitled to take the view that the integrity and accountability of public administration could also be affected by unlawful or improper conduct which affected the exercise of official functions even though the public officials themselves were innocent of any unlawfulness or impropriety. The numerous ways in which this could occur are powerfully demonstrated in the passage from the judgment of Gageler J cited above.

'Serious and systemic conduct'

Section 12A introduces the concept of 'serious and systemic corrupt conduct' as follows:

> In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

Encouraging a family member to invent an excuse to a police officer to avoid a breath test is conduct to be deprecated, but would stand rather towards the bottom end of the scale of human wickedness. When it turns out there was no alcohol anyway, the possibility of societal harm is minimised. And there is no suggestion that Ms Cunneen was part of some organisation which regularly used or promoted such tactics.

The 'responsibility and role of other public authorities and public officials' brings to mind the normal functions of the NSW Police Force, who would seem to be the logical authority to pursue such a complaint, bearing in mind that the conduct alleged would involve the deception of its members.

It does not seem to have been argued that any failure of the alleged conduct to satisfy s 12A went to the jurisdiction of ICAC to launch the inquiry against Ms Cunneen. Such considerations go rather to the 'propriety or prudence' of the Commission's conduct. It might also be noted in this context s 20(3) of the Act provides:

> The Commission may, in considering whether or not to conduct, continue or discontinue an investigation (other than in relation to a matter referred by both Houses of Parliament), have regard to such matters as it thinks fit, including whether or not (in the Commission's opinion):
>
> (a) the subject-matter of the investigation is trivial; or
>
> (b) the conduct concerned occurred at too remote a time to justify investigation; or
>
> (c) if the investigation was initiated as a result of a complaint – the complaint was frivolous, vexatious or not in good faith.

Parliament must be taken to have been fully aware that the Act would confer extraordinary coercive powers with consequent abrogation of fundamental rights and privileges. Also, that its reach might extend to conduct perhaps not falling within the popular understanding of the meaning of the term 'corrupt conduct'.

Perhaps there was discussion along these lines in the parliamentary Drafting Office:

> Drafter 1: This draft of the Act is going pretty far. Taken literally it would apply to somebody stealing a garbage truck.
>
> Drafter 2: True, but if we limit it to 'adversely affecting the honest or impartial exercise of official functions' it wouldn't catch, for example, widespread collusion amongst tenderers for government contracts, or fraud in applications for mining licences.
>
> Drafter 1: I suppose that's right. But what if we put something in the Act making it clear ICAC should only investigate corruption, as we define it, that is serious? After all, it will be an eminent body, staffed with experienced people, so the public can rely on them to act sensibly.
>
> Drafter 2: Good idea. We could also say something to the effect that ICAC should confine itself to serious conduct that was somehow extensive and extending beyond an individual – what's the word?
>
> Drafter 1: Systemic?
>
> Drafter 2: That's it. And we could say ICAC should leave something better investigated by another body.
>
> Drafter 2: Great. I think it's time for morning tea.

ICAC appear to have ignored the statutory advice in s 12A and 20(3). In the absence of any explanation perhaps the charitable conclusion is that there is such a high level of purity in the public administration of New South Wales that ICAC has nothing better to do than investigate *l'affaire Cunneen*.

Endnotes

* Victorian Bar, former judge of the Federal Court of Australia.

1. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [73].
2. *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 1571.
3. *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421.
4. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.
5. [2015] HCA at [3], [8].
6. [2015] HCA 14 at [45].
7. Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed, 2014, at 69.
8. [1910] AC 409 at 420.
9. (1995) 184 CLR 301 at 310 per Brennan CJ, Gaudron and McHugh JJ.
10. [2015] HCA Trans 47.
11. PMT Partners, ibid.
12. [2015]HCA 14 at [52].
13. [2015] HCA 14 at [92].

Alternatives to Australia's War on Drugs

On Friday, 29 May 2015 the Criminal Law Committee of the New South Wales Bar Association hosted a full day conference on the topic of drug law reform in the Common Room. The Conference was opened by the president of the Bar Association, Jane Needham SC. The keynote presentation was given by Sir Grant Hammond KNZM, president of the New Zealand Law Commission and lead commissioner on the Law Commission's 2011 report *Controlling and Regulating Drugs – A Review of the Misuse of Drugs Act*.

Sir Grant's presentation was followed by a presentation by Nicholas Cowdery AM QC, former director of public prosecutions, on the topic of cannabis regulation in the United States and then by Dr Caitlin Hughes from the University of New South Wales and the National Drug and Alcohol Research Centre, on the topic of the Portuguese experience with decriminalisation. A general discussion of the committee's Drug Law Reform Discussion Paper followed the formal presentations.

Attendees at the conference included representatives from the medical profession, academia, the legal profession, the courts, government and the community, and included the Noffs Foundation, the Australian Injecting and Illicit Drug Users League, Unharm, the Alcohol and other Drugs Council, the Penington Institute, the Australian Taxpayer's Alliance, the Nurses and Midwives' Association, the National Rural Law and Justice Alliance, and the Australian Medical Association.

President Jane Needham SC in discussion with Sir Grant Hammond, president of the New Zealand Law Commission.

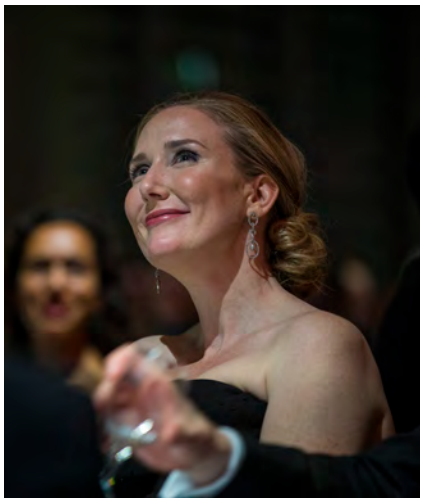
Associate Professor Nick Lintzeris, an addiction medicine specialist from the University of Sydney, in discussion with Nick Cowdery AM QC.

Bench and Bar Dinner

The Bench and Bar Dinner 2015 was held on Friday, 8 May in the ballroom of the Hilton Sydney. The guest of honour was the Hon Justice MJ Beazley AO, Ms Senior was Julia Lonergan SC and Mr Junior was Warwick Hunt.

Left: Tim Carmody, CJ of Qld Supreme Court, Robyn Martin (CEO, Qld Bar), Geoffrey Diehm QC, Noel Hutley SC.

Below, L to R: Jane Needham SC, Warwick Hunt, Julia Lonergan SC.



Top left: Julia Lonergan SC, Jane Needham SC.

Top right: The Hon Michael Walton, Martyn Hagan (Law Council), John Eades (Law Society of NSW).

Middle left: Dean Elliott, Deborah Robinson, Talitha Fishburn, Susan Cirillo.

Middle right: Back row, L to R: Steven Golledge, Kate Traill, Sophie York, Felicity Rogers, Joanne Little. Front row, L to R: the Hon Justice Wigney, Phil English, David Elliott, Tony Yeh.

Bottom left: Elisa Tringalli, Gordon Babe.

Bottom right: Bridie Nolan.

‘A storm in a teacup’ or ‘damage from friendly fire’? Uniform Rule 11, ‘barristers’ work’ and barristers conducting ADR processes

In May 2015 the Bar Association’s Alternative Dispute Resolution (ADR) Committee unanimously resolved (not for the first time and consistently with the views of many other NSW and Victorian barristers) that the Uniform Rules should specifically include barristers *conducting* (rather than just representing a client in) a mediation or arbitration or other method of alternative dispute resolution as ‘barristers’ work’. Ian Davidson SC, since 1 July 2015 chair of the ADR Committee, suggests this reflection of reality and return to the true historical position would enhance, rather than damage, the essence of an independent referral bar.

The current controversy

Readers of *Bar News* will be aware of controversy before the *Legal Profession Uniform Conduct (Barristers Rules) 2015* (Uniform Rules) came into force on 1 July 2015 about the exclusion from clause 11(d) of conducting a mediation or arbitration or other method of alternative dispute resolution as ‘barristers’ work’.

Clause 11 of the Uniform Rules (only currently applicable to NSW and Victorian barristers) provides:

> Barristers’ work consists of:
>
> (a) appearing as an advocate;
>
> (b) preparing to appear as an advocate;
>
> (c) negotiating for a client with an opponent to compromise a case;
>
> (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
>
> (e) giving legal advice;
>
> (f) preparing or advising on documents to be used by a client or by others in relation to the client’s case or other affairs;
>
> (g) carrying out work properly incidental to the kinds of work referred to in (a)–(f); and
>
> (h) such other work as is from time to time commonly carried out by barristers.

For present purposes, the critical paragraphs of this definition are (d) and (h).

On 12 May 2015, five senior counsel[1] in NSW circulated a detailed memorandum suggesting that the proposed ‘barristers’ work’ definition (then numbered rule 15, also the number in the immediately prior NSW Rules) ought to be amended at least to provide in paragraph (d):

(d) representing a client in *or conducting* a mediation or arbitration or other method of alternative dispute resolution;

because, both historically and practically, it was inaccurate to omit all reference to a major part of many barristers’ work, as recognised by all bars and the Australian Bar Association, from the definition.

To date, more than 70 other NSW silks have expressly indicated their specific support for conducting ADR to be specifically included as ‘barristers’ work’, in addition to support from juniors. Many members of the Victorian Bar also responded in support of that proposition.

On 13 May 2015, *InBrief* contained a message from President Jane Needham SC in response to the numerous communications she had received on this issue. This message included:

> The conduct rules for barristers have been the focus of efforts to achieve national uniformity since around 2007. Since then, the Australian Bar Association has been developing rules which reflect the specialised nature of ‘barristers’ work’. The New South Wales Barristers’ Rule in question has been in place since 2011. Since then it has always been the Council’s view – and that view has been publicised in *In Brief* from time to time – that bar rule 15(h) recognises that barristers do work, such as conducting mediations or arbitrations, which is not specifically included in the definition of ‘barristers’ work’. The reason for the wording of the current rule is to assist in ensuring that the bar remain as an independent branch of the profession and maintaining a focus on the work which sets barristers apart from other legal professionals.
>
> ….
>
> The current rules are in the same, or substantially similar, form as our current rules have been since 2011.
>
> I make these points only to note that even if the Council takes the view that a new rule is necessary, no change is guaranteed, because we are now subject (from 1 July 2015) to uniform rules. However, the question of whether the amendment proposed should be sought is the subject of discussion at an upcoming Council meeting. The views already expressed to me will of course be taken into account. Additionally, the Council will have input from the ADR Committee of the Association on this topic.

Later on 13 May 2015, the ADR Committee (which coincidentally already had a regular meeting scheduled that evening) unanimously passed the following resolution:

> The Alternative Dispute Resolution Committee continues to endorse its Memorandum to Bar Council dated 1 December 2011 attached to the email sent by the Chair of the ADR Committee to Philip Selth and Alastair McConnachie at 2.30pm on 12 May 2015.
>
> The ADR Committee's unanimous recommendation is that Rule 15(d) or the equivalent rule in the *Legal Profession Uniform Conduct (Barristers) Rules 2015* be amended to include the underlined words:
>
> > representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution.

As suggested by the reference to its 1 December 2011 Memorandum, the views of the ADR Committee (despite changes in individual members over the years) have remained consistent on the current controversy.

The question of whether the amendments proposed should be sought was not able to be dealt with at the next Bar Council meeting after the *InBrief* article, due to time pressures with other agenda items that day. However, this issue was discussed by Bar Council on 16 July (after the deadline for submission of this article but before page proofs were finalised) and, very encouragingly, that evening Bar Council resolved to approach the ABA to seek the amendment of Rule 11(d) by including 'or conducting' as recommended by the ADR Committee.[2]

The May 2015 *Australian Alternative Dispute Resolution Bulletin* article by Nigel Cotman SC 'Proposed uniform r 15 – definition of barristers' work'[3], among other things, responded to the 13 May 2015 *InBrief* commentary and suggested what is now clause 11 of the Uniform Rules was inconsistent with what the Australian Bar Association's own website described as the role of barristers in being ADR providers. Concerns expressed in that article, consistent with the 12 May 2015 Memorandum, included: uncertainty as to whether the omission in paragraph (d) was sufficiently picked up by the reference in paragraph (h) to 'other work as is from time to time commonly carried out by barristers' (given previously permitted local variations which had clarified the position in NSW and Victoria are no longer permitted under the Uniform Rules); whether barrister arbitrators and mediators might be in breach of the prohibition (in what is now clause 10) of the Uniform Rules of using or permitting 'the use of the professional qualification as a barrister for the advancement of any other occupation or activity'; and issues of professional indemnity insurance coverage for barrister arbitrators and mediators; and concluded that clause 11 will inhibit one part of the aspiration of a modern bar that it be expert, and recognised as expert, at ADR delivery.

The Updates section on the Bar Association's web page on the Uniform Rules as accessed on 6 July 2015[4] states '11 June 2015: The president of the Australian Bar Association, Fiona McLeod SC, has made a statement concerning the *Legal Profession Uniform Conduct (Barristers) Rules 2015* and the wording of clause 11 'the work of a barrister'.'

That five page statement, headed '28 May 2015 *Legal Profession Uniform Conduct (Barristers Rules) 2015* and mediators' (the statement), examined briefly below, tried to assuage concerns previously expressed and encouragingly concluded:

> Were a problem to arise in practice, rather than being raised as a mere possibility, the Australian Bar Council would immediately take up the matter with the Legal Services Council.

Is this worth worrying about now that the Uniform Rules are in force?

That was this commentator's initial reaction, when requested by the editor to address this controversy. Is the ABA statement correct to suggest the concerns of so many NSW and Victorian barristers about the omission is a mere 'storm in a teacup' of purely theoretical issues that really will not cause problems in practice for the many barristers who conduct forms of ADR, or is there a more fundamental issue? Should those concerned about the omission of conducting a mediation or arbitration or other method of alternative dispute resolution as being specifically stated to be 'barristers' work' just get over it, in light of the comforting words emanating from both the ABA and NSW Bar presidents to the effect that paragraph (h) of clause 11 of the Uniform Rules will continue to 'permit' barristers to conduct arbitrations, mediations and other forms of ADR, just as they have for very many years?

Or, have the crafters of clause 11 of the Uniform Rules, while no doubt they have always acted with the best of motives, changed the historic position in a way that, if not remedied by at least clause 11(d) being expanded, will damage the long term interests of the bar as the independent referral branch of the legal profession with relevance to an expanding area of legal practice in dispute resolution?

Some matters of history that require correction

It is appropriate to correct any suggestions that might be made that the current definition simply maintains the 'status quo'

and that no one has really complained about it since August 2011. Neither proposition would be correct.

The real position in NSW is as follows:

From 20 June 1997 to August 2011, a barrister's work was defined in NSW in the following terms:

> 74. A barrister must confine the barrister's professional work to:
>
> a. appearing as an advocate;
> b. preparing to appear as an advocate;
> c. negotiating for the client with the opponent to compromise the case;
> d. representing the client in a mediation;
> e. giving legal advice;
> f. preparing or advising on documents to be used by the clients or by others in the client's affairs;
> g. *acting as a referee, arbitrator or mediator*; and
> h. carrying out work properly incidental to the kinds of work referred to in (a)–(g).
>
> (Emphasis added)

Thus, there was for well over a decade before 2011 an express recognition in paragraph (g) that acting as a referee, arbitrator or mediator *was* a part of barristers' work. That rule reflected reality, although other emerging forms of ADR were not specifically mentioned.

The ABA Model Rules from 2002 were to the same effect and reproduced the NSW Rule 74(g).

The ADR Committee by memorandum dated 11 March 2008 recommended an expansion to Rule 74(g) to cover barristers conducting additional ADR processes to the three specifically dealt with in Rule 74(g).

However, in 2011 the ABA proposed new national Conduct Rules. Proposed Rule 15 (in the same terms as clause 11 of the Uniform Rules) did not include an acknowledgement of barristers' work as an ADR provider as previously provided in Rule 74(g). No explanation was given for this change.

On 24 March 2011 Bar Council discussed the proposed new national Conduct Rules. Bar Council asked that the Australian Bar Association Rules Committee give further consideration to amending clause 15(d) so that work of mediators, referees or others conducting ADR proceedings was specifically included within the term barristers' work. However, clause 15(d) was not so amended when it became a part of the New South Wales Barristers' Rules in August 2011. Instead, clause 15(h) was introduced.

That omission of an express acknowledgement of barristers' work as an ADR provider, was first not generally accepted by NSW barristers and, second, was ameliorated to some extent by a specific (and at that time permitted) local ruling by the NSW Bar Council.

The ADR Committee by a memorandum to Bar Council dated 1 December 2011 proposed the same amendment to Rule 15(d), of adding 'or conducting' before 'a mediation'.

At its meeting on 8 December 2011, Bar Council considered the ADR Committee Memorandum of 1 December 2011 and RESOLVED that:

- the Alternative Dispute Resolution Committee's suggested amendments to rule 15(d) and Rule 116 of the NSW Barristers rules be forwarded to the Australian Bar Association's Rules Committee for consideration.
- this issue be reconsidered if no decision has been made in this regard by the Rules Committee by 1 April 2012.
- it accepts that *conducting alternative dispute resolution proceedings such as mediations does constitute 'barristers work' for the purposes of the New South Wales Barristers' Rules of 8 August 2011*, (emphasis added) and that a note be circulated to the bar via *InBrief* advising them of Bar Council's resolution. A note containing this last resolution was duly circulated to the bar via *InBrief* on 13 December 2011.

That acceptance resolution on 8 December 2011, while less satisfactory than a formal amendment to the recently changed Barristers' Rules, at least ameliorated some of the immediate concerns from the changed Rule 15.

The recent statement records that the ABA Council was requested by the New South Wales Bar Council to consider the issue of amending the rules concerning barristers' work and ADR 'on four occasions' (since 2011), but does not explain how that consideration proceeded or why there was no amendment to Rule 15. This might suggest the 2011 ABA Rules changed the position in NSW and did so over the objection and continued objection of the New South Wales Bar, which had resolved to the contrary of the ABA Rules. Or it might have been considered that the reference in Rule 15(h) to other work 'commonly carried out by barristers' adequately dealt with barristers who conduct any ADR procedures - not just the three listed in the prior Rule 74(g).

While this article does not purport to deal in detail with the position of our Victorian Bar colleagues, in 2012, after the publication of the original ABA Uniform Rules, the Victorian

Bar published 'Vic Bar Draft Practice Rules Part A & Part B - 26 July 2012', which, in Part B (the Victoria specific rules), addressed the ABA Rule 15 issue. It provided as a 'local variation' (then permitted by the proposed national rules) to Rule 15:

> Barristers' Work
>
> 151.Without limiting the generality of Rule 15(h), work commonly carried out by barristers shall be taken to include *acting as an arbitrator, adjudicator, expert determiner, mediator, conciliator or otherwise in a role independent of a party, in any determinative or nondeterminative alternate dispute resolution process.'* (Emphasis added)

As is well known, clause 11(d) remained unchanged in the Uniform Rules now in force. However, the Local Variations, reflected in Victoria and the benefit immediately available in NSW from the Bar Council 8 December 2011 resolutions, no longer have any force.

The fundamental flaw in the ABA statement

These comments accept without hesitation that all those responsible for the current form of the Uniform Rules, when not specifically including conducting ADR proceedings as barristers' work', were motivated by the worthwhile aim of enhancing and preserving the special features of an independent referral bar that are from time to time the subject of attack. This critic shares that aim.

That said, it is difficult to see a logical reason how that can work when there was express recognition from as long ago as 1997 that conducting mediations or arbitrations or acting as a referee was barrister's work and all that has occurred is that reference to that obvious fact has been removed in the Uniform Rules.That is, there is no apparent connection between the independence of the bar and the bar acknowledging what it in fact asserts now and has done for a long time, which is, that barristers are expert at arbitration, expert in determination, mediation and so forth, and do that work.

There is also an issue of principle at stake. Are we prepared to state clearly what we do as barristers?

At the practical level, no barrister would like to be the test case if there was ever an argument whether conducting perhaps an innovative form of alternative dispute resolution was 'barrister's work' under clause 11(h) of the Uniform Rules. Would conducting a novel form of ADR be work sufficiently 'commonly carried out by barristers' to be included? Since it is understood that providers of compulsory indemnity insurance have accepted that conducting ADR is protected by current insurance policies, it may indeed be correct that there are no immediate practical problems.

So, let it be assumed that none of those previously expressed practical concerns will ultimately eventuate.

Looking at the issue of principle, if there is a sound justification for the rule it arguably ought to be found in the reasoning in the ABA statement.

Unfortunately, one struggles to find it. For example, the statement reasons:

> To assert now in statutory Rules [i.e. Rule 11] that this particular work is "barristers work' – as distinct from work barristers (and others) undertake – is ahistorical and not useful. …
>
> and
>
> The Australian Bar Association has accordingly taken the view that it is inappropriate to claim that conducting an ADR process should be described as being 'barrister's work'; rather, it is work that many barristers do because they are barristers. Many others do that work.

However, it is plainly not 'ahistorical' to say that conducting arbitrations and mediations, which barristers have been doing for decades, with express recognition in NSW of that work since 1997, is barristers' work. The ABA itself did say just that in its Model Rules from 2002 to 2010.

Further, the distinction between 'barristers' work' and 'work that many barristers do because they *are* barristers' is not obvious. Appearing or preparing to appear 'as an advocate' is the work that very many barristers do because they *are* barristers. More particularly, that others also do advocacy work cannot be an objection to calling it 'barristers' work'. Advocacy work is both done by solicitors and, given the volume of self-represented litigants, by others outside the legal profession, as is advising, preparing matters for trial, drafting documents, and so forth. Everything in clause 11 has this character.

If, as the statement also suggests, 'The rule as drafted in no way prevents a barrister from undertaking any type of ADR work …', then why not make that explicitly clear in clause 11 of the Uniform Rules that it is work that barristers do? Moreover, that statement cannot be right, in that, ADR (or, indeed, any) work not expressly mentioned in clause 11 is only within the rule if it is work 'commonly carried out by barristers'. How, a new form of ADR can develop with the involvement of barristers is not clear since, by definition, it could not at first be 'commonly' carried out by barristers or carried out by barristers practising as such at all.

The real concern underlying the statement may well be the concern expressed that:

> Characterising as 'barristers' work' an ADR process carried out by a wide range of people could promote a blurring of the hard-fought distinction between the Bar and the solicitors' arm of the legal profession – and the pressure from some quarters for there to be a single fused profession may again be raised (as it *was* a few years ago in the COAG process.)

How this concern squares the history, referred to above, and the present position where the ABA and the local bars are actively and loudly promoting barristers as ADR providers, is not adequately explained by the statement. It simply cannot be that the absence of an express reference to ADR in the definition is the bulwark against fusion, particularly when the definition is factually incorrect and the statement claims ADR is picked up in 11(h), so that conducting ADR processes is in the definition. Conducting ADR cannot both be in and not in the definition and if it is in implicitly, why not make it explicit?

A primarily referral profession like the bar will only obtain work, whether in-court advocacy and ADR advocacy (both expressly stated to be part of barristers' work in clause 11) or conducting ADR processes, to the extent that the solicitors' branch considers referring that work to barristers to be in their clients' best interests. The statement correctly notes 'it is usually solicitors who nominate barristers to be involved in an ADR process'. The same applies to advocacy: it is usually solicitors who nominate barristers to be involved as advocates, whether in a court or ADR process.

Expressly recognising that part of the skill set of many barristers includes them conducting arbitrations, mediations and other ADR processes will not cause us to be confused with solicitors. That did not happen in NSW between 1997 and 2011. There is no evidence of even a risk of that happening if clause 11 of the Conduct Rules was more explicit about what barristers do.

Admittedly, not expressly recognising this fact may well not immediately, or even ever, cause those solicitors who already nominate barristers to conduct ADR processes to stop recommending barristers or to only recommend former judges who are not barristers or other solicitors to conduct ADR processes. However, the omission raises the question: why are we as barristers embarrassed to state what is manifestly true and stake a claim to do the work we do and do well?

The current form of clause 11 cannot help persuade those solicitors who may be tempted only to recommend former judges who are not barristers or who cling to the idea that barristers are not capable of conducting innovative ADR proceedings to consider recommending barristers. It also could appear disrespectful of the large number of barristers who do practise as ADR providers and is ahistorical, having regard to the long involvement of the bar in arbitration and mediation.

The current form of clause 11 is unlikely to assist the NSW or Victorian bars (or any other bars contemplating adopting the Uniform Rules) to participate fully in the development of an actually growing area of legal work for which the qualities of independence, intellectual rigour and the sole practitioner rule (reducing the prospect of conflicts of interest) particularly suit barristers to conduct this work.

The rule as stated makes the bar look either churlish or carelessly blind, to not recognise the present and future fact, that in-court advocacy is not the only form of dispute resolution that lawyers generally, and the bar in particular, are participating in. That apparent position cannot help the bars' constructive participation in ADR development in the legal and wider community. It incorrectly suggests we are solely wedded to the adversarial model while the world changes under our feet.

In short, why continue to damage ourselves by our own 'friendly fire' in response to a threat that is unrelated, assuming it exists?

Conclusion

The ABA statement does not provide sufficient compelling or coherent reasons for the omission of an express reference to conducting ADR processes from the description of barristers' work. Clause 11 should be amended to restore the true historical position of expressly recognising that barristers subject to the Uniform Rules may conduct ADR proceedings like (but not limited to) arbitrations and mediations. The Australian Bar Council should, consistent with the New South Wales Bar Council 16 July 2015 resolutions, take up the matter with the Legal Services Council to ensure that occurs.

Endnotes

1. West QC, Jacobson QC, Bridge SC (then also a member of the ADR Committee), Cotman SC and Inatey SC.
2. The full text of the 16 July 2015 resolutions was advised to members the very next day in the 17 July 2015 *InBrief*.
3. General Editor Richard Weinstein SC, vol 2 No 2 at pp 38-42.
4. http://www.nswbar.asn.au/for-members/uniform-law.

Expected value and decision making under conditions of uncertainty

By Simon White SC*

The purpose of this article is to explain the importance of expected value (also known as mathematical expectation) in the context of decision making under conditions of uncertainty. Whether it is a game of cards, horse racing, investing, litigation or any other field of human endeavour involving probabilistic outcomes an optimal decision cannot be made unless the decision maker has regard to expected value.

Expected value is both a qualitative and a quantitative approach to decision making where the outcome is uncertain. It requires the decision maker to consider the following. First, the range of expected outcomes if a decision is made. Secondly, allocating to each of the expected outcomes a probability (in percentage terms) which reflects the decision maker's belief as to the chances of that outcome in fact occurring. Thirdly, multiplying the probability by the expected outcome which identifies the expected payoff for that particular outcome. Fourthly, adding the various expected payoffs to determine expected value which may be positive or negative.

Approaching decision making in this way requires the decision maker to focus not merely on probable outcomes (the frequency of the outcome) but the expected value (the frequency of the outcome multiplied by the payoff). This provides the decision maker with a better understanding of the upside/downside potential when making the decision.

Prior to discussing expected value in the context of litigation a brief history of its discovery is set out below. Perhaps unsurprisingly it was the context of games of chance that expected value was conceived.

Until the mid-seventeenth century the problem of the points also known as the problem of division of the stakes remained without a satisfactory answer. Its resolution by two Frenchmen in a series of letters commencing in 1654 created for the first time a theory of probability that was capable of mathematical solution.

The problem of the points concerns a game of chance with two players who have equal chances of winning each round. The players contribute equally to a prize pot and agree in advance the first player to have won a certain number of rounds will collect the entire prize. Now suppose the game is interrupted by external circumstances before either player has achieved victory. How does one divide the pot fairly?

Luca Pacioli (c1447–1517) an Italian mathematician and the first to publish a work on double entry system of book keeping (hence referred to as the father of accounting) considered the problem of the points in 1494. He proposed the answer was to divide the stakes in proportion to the number of rounds won by each player[1]. The number of rounds needed to win did not enter Pacioli's calculations.

In the mid-sixteenth century Niccolo Tartagia (1500–1557) observed that according to Pacioli's method if the game was interrupted when only one round had been played the entire pot would be awarded to the winner of the single round albeit a one round lead in a long game was far from decisive. Tartagia was unsure whether the problem was soluble at all in a way that would convince both players of its fairness: 'In whatever way the decision is made there will be a cause for litigation'[2].

One hundred years after Tartagia's pessimistic observation (albeit perhaps not to the ears of a lawyer) Blaise Pascal (1623–1662) and Pierre de Fermat (c1601–1665) resolved the problem of the points. Pascal was amongst other things a mathematician, inventor and the author of a note that became known as Pascal's Wager. Fermat was a French lawyer, mathematician and credited with contributing to the early development of calculus.

Following their introduction in 1654 Pascal and Fermat discussed in a series of letters the problem of the points. Their solution laid the groundwork for the theory of probability.[3] Pascal and Fermat constructed a systematic method for analysing future outcomes. They provided a procedure for determining the likelihood of each of the possible outcomes assuming the outcomes could be measured mathematically.

The insight of Pascal and Fermat was that the division of the pot should depend not so much on the history of the game to the time of interruption but on the possible ways the game might have continued were it not interrupted. As stated by Pascal in a letter to Fermat: '…the rule determining that which will belong to them [when the game is terminated] will be proportional to that which they had the right to expect from fortune'[4]. In other words the value of a future gain should be directly proportional to the chance of getting it.

John Maynard Keynes in his *Treatise on Probability* published in 1920 states that mathematical expectation represents the product of the possible gain with the probability of attaining it[5]. He states:

> In order to obtain, therefore, a measure of what ought to be our preference in regard to various alternative courses of action, we must sum for each course of action a series of terms made up of the amounts of good which may attach to each of its possible consequences, each multiplied by its appropriate probability.[6]

Keynes considered the conception of mathematical expectation could be claimed by Gottfried Leibniz (1646–1716) based on

a 1678 publication. Whilst Keynes refers in the bibliography appearing in his Treatise to the letters passing between Pascal and Fermat he dates them also as at 1678. Relevantly for our purposes Keynes refers to a letter from Leibniz to Vincent Placcius (1642–1699) dated 1687 in which he applied mathematical expectation to jurisprudence. The letter gives an example of two litigants who lay claim to a sum of money, and if the claim of one is twice as probable as that of the other, the sum should be divided between them in that proportion. Keynes notes that whilst the doctrine seems sensible 'I am not aware it has ever been acted on'.

Whilst Pascal and Fermat were concerned with the problem of the points, their solution transcends gambling and constitutes a framework which can be used in situations that involve decision making under conditions of uncertainty. Litigation is an example par excellence that requires decisions to be made under such conditions.

All decisions involve the weighing of probabilities. This involves (as found by Pascal and Fermat) balancing the probability of an outcome (frequency) with the outcome's payoff (magnitude). There are, however, two types of probabilistic decisions. The first is one in which the probability of the outcome (frequency) and the outcome's payoff (magnitude) are symmetrical. For example two persons (A and B) bet each other $1, even money, on the flip of a coin. Each time it comes up heads A wins (B loses) and each time it comes up tails B wins (A loses). In this example the expected value is zero because the probability of gain by the outcome (0.5 x $1) minus the probability of loss by the outcome (0.5 x $1) equals zero. This is not to say that after a number of tosses A will not be ahead of B or vice versa. Expected value is the mathematical amount a bet will average winning or losing. It has nothing to do with results. Player A might win five tosses in a row but in the long run the tosses will reflect the sum of the players' expectations.

The second scenario, however, occurs in situations where the probability and the payoff are skewed or asymmetrical. By way of example, returning to the coin game referred to above, let us assume A is willing to bet $2 to B's $1 on the flip of the coin. Now there is asymmetry between probability and outcome which also gives rise to positive expected value (for B) because the probability of gain by the outcome ($2 x 0.5) minus the probability of loss by the outcome (0.5 x $1) is 50 cents.[7] This is an example of asymmetric outcomes (the probability remains constant in both games). Of course one can also have asymmetric probabilities where the probabilities are not 50 per cent for each event but the probability on one side is higher than the probability on the other.

The failure to differentiate between probability and expectation (probability x payoff) can lead to poor decision making. Some high probability propositions are unattractive and some low probability propositions are very attractive on an expected value basis. An example of the former is as follows. A gamble has a 999 chance in 1,000 of making me $1 (event A) and 1 chance in 1,000 of losing me $10,000 (event B). Should I take the bet? If I consider the probability only and ignore expected value (probability x outcome) then the gamble seems a sure winner. However, closer analysis says otherwise. The expectation of event A is about $1(999/1,000 x $1) and the expectation of event B is -$10 (1/1,000 x -$10,000) being a total expected value of about -$9.[8]

The failure to differentiate between probability and expectation (probability x payoff) can lead to poor decision making.

In a world where there are few if any provable certainties the key to reaching the best decision is to identify all possible outcomes and decide what odds to attach to each. This involves an ability to estimate probabilities, which in turn depends in part on the range and nature of potential outcomes.

Litigation deals largely with uncertainty whereas gambling in a casino deals largely with risk. In each case the outcomes are unknown but in the case of uncertainty the underlying distribution of outcomes is undefined, while with risk we know what the distribution looks like (for example a dice has a one in six chance of landing on a three).[9] In the context of advising a client in relation to the potential outcome of litigation it requires the lawyer to carefully consider the range of outcomes and pay regard to the degrees of uncertainty that attach to each. This in turn enables the lawyer to advise the client as to the outcome in quantified terms.

The ability to advise a client in quantified terms, namely, a percentage is important for a number of reasons. First, it compels the lawyer to go through the process of identifying the range of possible outcomes and attach probabilities to each. Whilst this process may be difficult and uncertain and some may argue artificial it is far better that the alternative. To advise a client that she has 'reasonable prospects' or 'arguable prospects' or 'poor prospects' is of little utility. What do such vague notions mean and how are they to be understood by the client? Unless the advice conveys the numerical probability of risk there is the prospect the client may attach a different probability range

to the verbal label than what was intended.[10] Presumably the lawyer attaches some percentage or range to the words 'reasonable prospects' and if so would it not be appropriate to inform the client of that matter thereby providing the client with information that is clear and comprehensible?

Secondly, if a client is advised she has 'reasonable prospects' of being awarded damages of $100,000 she is likely to make decisions including whether or not to commence or continue litigation on a false premise. That is because the client is unable to determine based on the advice what is the expected value of the litigation. If, however, the client had been advised her chances of being awarded $100,000 was 60 per cent then the lawyer and client could discuss the merits or otherwise of commencing or continuing the litigation on the basis the expected value was $60,000. Such matters are also relevant to the issue of settlement. By considering risk in this way the client can approach settlement with the knowledge of what her case is worth in terms of expected value and use that as the benchmark in settlement discussions.

Thus when advising a client whether to commence litigation the lawyer needs to have an understanding of the range of possible outcomes and attach probabilities to each. If the advice to the client is that she has a 70 per cent probability in relation to a claim for $100,000 then the expected value is $70,000 (EV= 0.7 x $100,000) - (0.3 x $0). However, in most jurisdictions in this country legal costs follow the event. Thus the expected value must take into account the risk the client may be required to pay her own costs and that of the defendant. Therefore the lawyer needs to estimate the costs of the client and those of the defendant. If the lawyer assumes the costs for each party are $20,000 the calculation appears as follows: EV= (0.7 x $120,000) – (0.3 x $40,000) being $72,000. An advice in terms of expected value of $72,000 enables the client to consider whether the litigation is worth the time, stress and anxiety and will also enable the client to give meaningful consideration to any offers of settlement.

From the perspective of the defendant let us assume she has been advised there is a 60 per cent chance of defending the litigation referred to above (and therefore a 60 per cent chance of having her costs of $20,000 paid by the plaintiff) but that if she loses she will be required to pay the damages of $100,000 and her costs and those of the plaintiff totalling $40,000. The expected value is $44,000 because EV= (0.4 x $140,000) – (0.6 x $20,000). To advise a defendant in the above example that she has 'reasonable prospects' does not enable the client to have an understanding of the risk of exposure, namely, $44,000. Expected value seeks to better inform the client of the risk even when the probability is that she may win.

The above example assumed the outcome was either an award of $100,000 or $0. However, it is often the case the quantum of damages that may be awarded is itself uncertain. In such circumstances expected value can assist the client in having a better understanding of the likely outcome should she establish liability. Let us assume the lawyer for the plaintiff in the above example, having regard to her experience, the legal principles and the facts, considers the range of damages in the event her client establishes liability to be between $100,000 and $25,000. The lawyer might then consider the various outcomes as having the following probabilities: $100,000 x 0.50; $75,000 x 0.30; $50,000 x 0.20 and $25,000 x 0.10. This gives an expected value of $85,000. By analysing the range of potential outcomes in this way the client is clearly in a better position to weigh up the risks of commencing or continuing the litigation.

In the event litigation is commenced and as new facts come to light the lawyer can increase or reduce the probabilities attaching to the various outcomes as the circumstances require. Expected value is not static and must reflect new information as it comes to hand.

Thinking of litigation and its outcome in terms of expected value is an important means by which parties can have a better understanding of the risks attaching to the uncertainty of litigation. It enables a client to consider the chances of success and the financial exposure in a rigorous and disciplined way which can only assist in the making of decisions under conditions of uncertainty.

Endnotes

*The author would like to thank Antony Whitlam QC and Daniel Tynan for their helpful comments in relation to the draft of this paper.

1. VJ Katz, *A History of Mathematics*, 1993, Section 11.3.1.
2. Tantagia, quoted by Katz, op cit.
3. For those interested, the full text of the correspondence, translated into English, appears in David, Florence Nightingale, 1962, *Games, Gods and Gambling*, Hefner Publishing Co.
4. P Bernstein, *The Remarkable Story of Risk*, 1998 p67.
5. Ibid., p311.
6. Ibid.
7. This example and the application of expected value in the context of poker appears in Sklansky, *The Theory of Poker*, 1999, Chapter 2.
8. For this example and expected value in the context of share trading see Nassim Taleb, *Fooled by Randomness*, 2005, Chapter 6. For the application of expected value in the context of horse racing see *Crist on Value* by Steven Crist, Chapter 3 in *Bet with the Best*, 2001.
9. Mauboussin, *More Than You Know, Finding Financial Wisdom in Unconventional Places*, 2008, p11.
10. D Evans, *Risk Intelligence*, 2012, p.117.

Learning the art of court performance

Ben Katekar, barrister, interviews Lucy Cornell about the value of performance coaching for advocates.

Advocacy is a skill. It is also an art.

The skills can be taught. Lessons can be given for things like how to structure an opening; how to frame your questions during examination in chief by asking open questions but getting exactly what you want from a witness; how to control your witness in cross-examination. The list is endless.

But there are those among us who possess a certain magnetism and aura. They are spellbinding. There is a magic about what they do. An artistry.

Many of us, including me, are not blessed with natural thespian gifts, so we search for the secret to this magic. This search is the topic of this article.

Artistry can be taught

There is a school of thought that the art of advocacy is a natural gift, which is un-teachable.

That is, with respect, simply wrong.

My search for the techniques that enable artistry to be expressed through advocacy has led me to the art of the actor. Not for acting as we might experience it on stage, but for the heightened mode of speaking that is required for court.

In the right hands, the techniques of actors can be translated into what we do as advocates in the courtroom.

Institutes of dramatic art devote themselves to developing and teaching the art of speaking and moving an audience. There is an ocean of learning in those institutions, drawing on literally centuries of practised and highly developed methods.

Barristers – like actors – need to communicate with their audience in a way that captivates them, and engenders a sympathetic reaction, so the audience is carried along with the argument. The barrister commands rapt attention and engenders a sympathetic response in the bench or jury. This aspect of the art of the advocate lies in subtle and invisible persuasion.

Acquiring the capacity to express this art can take us to another level as barristers. It can also bring exhilaration and joy to the work.

Are acting methods any use to barristers?

Absolutely.

But the methods need to be translated. This has to be done in a sophisticated way, by an experienced practitioner who has a good handle on the idiosyncrasies of the court environment.

Many barristers fear that an acting coach will make them pretend to be a tree. There's an expectation that the acting coach will suggest exercises that are useless, and make you feel totally uncomfortable.

When Phil Greenwood SC first introduced performance coaches into the Australian Bar Association's (ABA's) Advanced Trial Advocacy Intensive in 2008, the leaders of the International Advocacy Training Council were sceptical. Edwin Glasgow QC is a pioneer of international advocacy training, particularly the course at Keble College, Oxford – a rite of passage for all London counsel. He arrived to teach at the Sydney course in 2008, imagining that Phil Greenwood's experiment with Lucy Cornell and Josephine O'Reilly, voice and performance specialists, would meet with the same kind of failure he had seen elsewhere. His view was quickly transformed.

Doubtless, acting techniques do not apply directly to barristers. The context is different, the audience has a different role, and the participants (i.e. the barristers) are in a different emotional place from most actors. Barristers are seeking to get across a difficult message in a challenging environment, against an opponent whose goal is to tear him or her down.

Often, a barrister has no particular aptitude for performance, nor any desire to participate in asking questions about it, or experimenting with it. It is a foreign, uncomfortable concept. Yet it is an inescapable fact that all barristers perform.

So a performance coach for barristers needs to translate all of the methods, concepts, techniques, and teaching strategies, into an entirely new educational environment.

In reality, what is required of a performance coach for barristers is a completely new set of techniques and teaching skills, which are carefully adapted to the nature of the students and the challenges they confront.

Performance coaching at the ABA Advanced Trial Advocacy Intensive

Since 2007, the ABA has conducted an Advanced Trial Advocacy Intensive. An Appellate Advocacy Course has also been conducted by the ABA each year since 2012. The Advanced Trial Advocacy Intensive has been modelled by Phil Greenwood on the South Eastern Circuit's annual course at Keble College, Oxford. It is a vital source of advocacy training available to experienced Australian barristers.

Phil Greenwood's introduction of performance coaching to the ABA Advanced Trial Advocacy Intensive in 2008 was a courageous initiative. Edwin Glasgow is now an ardent believer, and was instrumental in the introduction of performance coaching at the Keble course in 2011.

From the start, Phil was acutely aware of the need to substantially modify the methods of performance in the thespian space into advocacy training for barristers. He took a firm and dedicated hand. Hours and hours of consultation and planning were spent with Lucy Cornell and Josephine O'Reilly before they were given permission to work with a single barrister.

Those hours have been spent each year since 2008, crafting and experimenting with performance coaching strategies, which are useful and palatable for Australian barristers. The language of actor performance has been simplified and modified so that barristers can understand the concepts and have confidence to assimilate them in their practice. It is a process of continuous learning and improvement.

The outcome has been extraordinarily successful. Performance coaching has made a substantial contribution to Advanced Trial Advocacy Intensive, and has proved to be immensely appealing and valuable to many who have attended the course. It is an innovation which has since been successfully introduced at Keble in 2011, and has been fully implemented at the South African course at Stellenbosch since 2012 – in each case under the guidance of Lucy Cornell with the imprimatur of the respective course leaders. The Australian performance faculty has set the benchmark, and the strategies, which have been developed and applied at the Australian course, are being exported to those courses.

The drive for excellence

Phil Greenwood does not suffer mediocrity. All the performance coaches permitted to teach at the ABA courses are carefully screened, selected and supervised.

Lucy Cornell has coached at each of the ABA courses for the past 8 years, and has taught at Keble and Stellenbosch. Along with the other remarkably talented and capable coaches teaching at the ABA courses, including regular coaches Josephine O'Reilly, Tanya Gerstle, Shannon Dolan and Corinna May, this performance faculty has spent those years re-crafting techniques, improvising and experimenting, to develop a sophisticated approach to performance skills for advocates. Each of these faculty members has a remarkable pedigree as a performer, as well as a trainer of actors, and mainstream executives and professionals.

Lucy Cornell on the lawns of Keble College with, from left, Sir Charles Haddon-Cave, Edwin Glasgow QC and Justice Glenn Martin of the Queensland Supreme Court.

Sir Charles Haddon-Cave, now a judge of the High Court in England, was Chairman of the Advocacy Training Council of the Bar of England and Wales from 2007 to 2010. He was a faculty member at the ABA's 2010 course in Brisbane, at which he became a passionate convert. He offers this:

> Performance coaching has been an inspiration to barristers in England and Australia. It helps them make their voices heard, and their presence felt, in court. The brilliant techniques have been a revelation and are highly recommended to all those who aspire to practise the art of advocacy.

Performance coaching is crafted to the individual needs of each barrister

Each performance coach has a vast array of techniques and ideas available to them. Performance coaching is an individual art, so how it works applies differently to each and every barrister.

Working with a barrister is a delicate process. It can be deeply personal, and sometimes confronting for the barrister. In that soft moment where the particular issue for the barrister is identified and explained, careful sensitivity is needed. The performance coach needs to find something to offer, that the barrister is capable of hearing, reaching beyond the barrister's defensive emotional wall. The barrister needs to permit that to happen. Then the barrister needs to take the next step, and try to assimilate the lesson into what they do.

Thus the task of a performance coach is a subtle and sophisticated craft. It takes a special breed of individual to do it well.

At my first ABA Advanced Trial Advocacy Intensive as a participant in 2008, I was wooden, anxious and timid. In one of my court performances, I had been given some feedback that I

needed to be more committed and stronger in my performance. So the focus for the performance coaching session was to speak with clearer intention. Together with another barrister – who had similar issues – we were asked to walk around a room with a piece of paper crumpled up into a ball, and throw it to each other each time we asked a question.

This seems a random, aimless, 'acting' exercise on the surface, but it was incisive and deeply impactful. The physical movement kept us both energetically alive, the throwing of the paper ball as we spoke the words suddenly brought a brilliance to the words, lifting their dynamic. As we had to throw to each other, there was an immediacy in the desire to be heard. The physical action motivated the vocal and intellectual charge of the words spoken.

Once we had experienced our words 'in action', it opened us up to injecting that same energy and intention when we brought it back to the bar table and spoke as we would as barristers (without the ball of paper, of course). It helped me speak more boldly and succinctly. It gave me time to stop and think about what I planned to say next, instead of racing ahead and not really listening to the response. My imperative to speak was stronger. My communication was richer. My advocacy came to life.

I have not seen this exercise deployed again over the eight advocacy courses in which I have been involved, in Australia, England and South Africa, firstly as a participant and now as a coach. Perhaps this highlights the depth of skills and technical agility of a skilled performance coach. At the time I did this exercise in 2008, I was perfectly open to it and ready for that bit of kookiness – which the performance coach would have sensed. It was a simple and memorable approach, and an incredibly effective piece of teaching.

The role of a performance coach

Lucy Cornell explains the role of a performance coach this way:

> Of course, we look at the mechanical aspects of speaking performance: voice, pace, pause, breath, body, gesture, dynamics, impact of words, expanding into your physical space. But, more significantly, we dig underneath these mechanical aspects to explore what is required for a meaningful communication, to ensure that the argument is received as intended.

Often, this means we discuss the advocate's personal understanding of their role in the communication. Are they really looking for a response from the judge? Do they allow

Lucy Cornell with Edwin Glasgow QC and Sir Charles Haddon-Cave at Keble in 2011.

space for an exchange to happen in order to truly assist the judge in his/her understanding of the argument? Do they really want to be heard? Are they really committed to this argument?

The answers to these questions will fuel the approach we take with each individual, ensuring we tap into the core of what is driving a mechanical performance issue.

Moreover, we offer more than an observation of a performance issue. We offer tailored strategies to manage it. As we are dealing with behavioural change, we must support a strategy with an ongoing practice plan, so that the practical experience they have with us has an opportunity to be repeated and embedded neurologically.

Hundreds of barristers have attended the ABA Advanced Trial Advocacy Intensives over the years. Many of them will attest to the profound insights they have obtained from their performance coach. They will be able to repeat what they learned, and explain how they have assimilated the lesson into their practice, and what a difference it has made.

Performance coaching engages with different concepts

Lucy Cornell's many qualifications include her designation as a Linklater voice coach. In the Linklater work, it is a fundamental premise that how you feel about what you say is transmitted through your voice, whether you know it or not. If you don't believe what you are saying, you cannot be persuasive.

It is well understood that the words you say in an oral presentation are less than half of what is communicated. The rest is through your body and your voice.

Effective performance extends beyond the script and lies in the energetic space between the performer and the audience. The

performer must have the courage and vulnerability to move into this space and expose themselves to scrutiny. To me, this is where the thrill is, and where magic can happen.

These principles are an essential part of performance coaching.

Making yourself available to participate in the drama in the courtroom

Lucy Cornell considers that this is one of the central issues for many barristers.

The biggest performance mistake I see barristers make in court is to blindly know where they are going and not adjust their performance based on what is required in that moment: a judge's glance, a moment of intuition, an unexpected rise in a witness' voice, a difficult question from the judge.

This is the skill: being able to adjust with agility and therefore stay in control. Control in these situations does not come from clinging onto your argument. It comes from relaxing and letting go of where you are heading, so you can find a wise response and move in that direction.

The art is in what you do in these moments. This is where you can make creative, artistic choices to serve your need to persuade. This is the art of persuasion.

When an advocate shifts their understanding of advocacy from imparting information to sharing information in real time, then the exchange becomes meaningful and persuasive.

In my experience, in almost every trial, there is a moment of persuasion. It's a tiny, fleeting moment, a spontaneous confluence of information and emotion, when the tribunal has a sudden change of heart, or is ephemerally available to make it. There is no telling when that moment may arrive. A skilled advocate has the availability to meet that moment and turn it in the right direction.

Availability in that fleeting moment requires attention, breath, physical relaxation, connection and responsiveness to what is happening in the room at every single moment.

Here lies the key to artistry in advocacy. Performance coaching helps you unlock your capacity to be available.

Lucy Cornell explains:

> As with any art form, an artist improves with practice. Barristers practise their art by appearing in court. But what sets an excellent artist apart is their continuing investigation of their art form through training, feedback and support.
>
> The artistry of advocacy depends on examining moments and by making adjustments. It is an endless quest for self-examination and self-improvement.
>
> Performance coaching is not something to be done just once. It is an ongoing exploration. All professional sportspeople have coaches. All leading actors continue to train throughout their careers. Improvement is a perpetual quest.

Performance coaching is now an integral part of advocacy training

Johann Kriegler is a legend in the South African legal profession. Before he retired, he was a member of the country's highest court, the Constitutional Court. While there, he withstood all kinds of political pressure and interference to uphold the principles of human rights, which he held inviolable. He is held in universally high esteem in all quarters in his divided country. In December 1993 he was appointed chairperson of the Independent Electoral Commission, whose task it was to deliver South Africa's first elections based on universal adult suffrage.

Mr Kriegler is now in his 80s, but he continues to teach advocacy in his country. I had the pleasure of meeting him when I was teaching at Stellenbosch a few years ago. He is a man of wondrous insight and humility.

Mr Kriegler is an unqualified and vocal supporter of performance coaching. He asked to be quoted about it in this way:

> Voice and performance coaching should in my view form an integral part of all advocacy training.

While thorough research and careful preparation of a barrister's case are certainly important, the acid test lies in its presentation.

Advocacy is not merely a cerebral exercise; ultimately – and crucially – it is about persuasion. Persuasion, finally, through personal presentation, employing the whole panoply of rhetorical tools.

Since 2008, performance coaching has become increasingly accepted as a hugely valuable component of advocacy training for experienced barristers. It began here, with Phil Greenwood's courage, diligence and persistence.

The highly developed skills of the ABA's performance coaching faculty are available to all those who attend the ABA's Advanced Trial Advocacy Intensive each January.

Chambers employment with a difference

By Fiona Roughley

Jobsupport works with people with moderate intellectual disabilities to train and place them into jobs in the regular workforce. Since August 2014 one of its clients, Casey, has been employed by Banco Chambers to assist with administrative tasks. The employment arrangement has been a success for both Banco and Casey. Here is an edited extract of Casey's recent interview with *Bar News*.

What do you do at Banco?

I work at Banco Chambers Monday to Friday, 8:30am – 12pm. I work at Banco Chambers in the Reserve Bank Building first, and then in the Chifley building afterwards. I clean both kitchens (emptying the dishwashers, cleaning the fridges, the coffee machines and the bench-tops), re-stock the drinks, tea and biscuit containers in the kitchens, and do the monthly stock-take. I also get and sort the mail into barristers' pigeon-holes. I fill up the paper supplies in the photocopiers. My favourite job is taking trolleys to Court.

Do you like working at Banco?

Yes. I really like it. I like having a job. Working in an office environment has helped me to be able to live independently [Casey started living independently two months ago]. The wage helps me pay the bills. I also like getting dressed up and coming to the city. Everyone at Banco is nice and helpful and friendly.

Who do you report to at Banco?

Elizabeth Notman [clerk of Banco] is my boss. I also have a Maintenance Officer from Jobsupport, Lora, who checks in with Elizabeth and me weekly to see how things are going. I call Lora, or she comes in, if I need more support.

What did you do before you started working at Banco?

I worked in a factory for people with disabilities, run by Civic (an Australian Disability Enterprise). I have been working for seven years.

What are your interests outside Banco?

I like going out with friends to the movies. I also compete in ten-pin bowling and swimming at the Special Olympics. Last year I represented NSW for ten-pin bowling for the National Team at the Special Olympics.

Fiona Roughley, 'Chambers employment with a difference'

Jobsupport

Jobsupport matches a client with an intellectual disability with a job designed for him or her.

Jobs are specifically designed by an employer, in consultation with Jobsupport, to ensure that each placement works well for both employer and the client.

Placements typically involve repetitive or routine work. It is the kind of work that is ideal for Jobsupport's clients but which frequently can lead to high-turnover of other staff. It is also the kind of work that all employers need done, but which can divert other staff's attention from other, more complex tasks. Many employers use a Jobsupport placement as a way to release under-utilised staff for other tasks, and also to assist with lowering staff-turnover.

Currently Jobsupport has 640 clients placed with employers in Sydney and Melbourne.

When a client first starts with an employer, Jobsupport provides free intensive on-site training to the client. Thereafter each client has a Maintenance Officer who provides ongoing support on an as-needs basis, usually weekly or fortnightly. The ongoing training is also provided at no cost to the employer.

More information?

For more information on Jobsupport or how a placement might work for your chambers, contact:

Elizabeth Notman
Clerk, Banco Chambers
8931 0200

or

Sally Trotter
Manager
Jobsupport
9150 8888

The Best Practice Guidelines

In June 2014, the Bar Council approved four sets of Best Practice Guidelines (BPGs). While adoption of the BPGs is voluntary, the Bar Association encourages its members and their individual chambers or floors to adopt them. The BPGs apply to the Bar Association in respect of the services it provides and to barristers attending any Bar Association event, or serving on any Bar Association committees, as well as to Bar Association examination candidates. The BPGs are as follows:

- **the Model Harassment, Discrimination, Vilification and Victimisation BPG;**
- **the Model Bullying BPG;**
- **the Model Parental and Other Extended Leave BPG; and**
- **the Model Grievance Handling Procedure BPG.**

One year has now passed since the Bar Association launched the BPGs and some 27 floors have adopted them, including Level 22 Chambers. Juliet Curtin met with Janet McDonald, a member of Level 22 Chambers, to discuss Level 22 Chambers' adoption of the BPGs.

Bar News: Has your floor adopted all four of the Best Practice Guidelines?

Janet McDonald: Yes, our board resolved to adopt all four of the BPGs on 12 August 2014. We did not choose to adopt the optional clauses in the Model Parental and Other Extended Leave BPG (clauses 12 and 14 (c)) or clause 11 of that BPG. Those clauses relate to the sub-licensing of rooms while a member or licensee is on parental or other extended leave. Our constitution, which was only very recently adopted (as Level 22 Chambers was only established in September 2013) already contained clauses relating to the sub-licensing of rooms and those clauses were not inconsistent with the Model Parental and Other Extended Leave BPG. However, our constitution does provide that written board approval is required to sub-license a room, whereas the equivalent clauses in the Model Parental and Other Extended Leave BPG do not contain that requirement, so we elected to reserve that discretion for the Board to decide whether or not to approve a sub-licensing arrangement. Additionally, in clause 13 of the Model Parental and Other Extended Leave BPG there is a requirement that when a member or licensee is on leave, the clerk and/or 'floor contact officer' will maintain communications with that person for the duration of their leave. We removed the requirement that the 'floor contact officer' be obliged to communicate with the member or licensee on leave, so that only our clerk is obliged to communicate with floor members on extended leave.

Bar News: Adoption of the BPGs is voluntary. Could you describe Level 22 Chambers' rationale and motivation in choosing to adopt them?

Janet McDonald: Yes, firstly, because ours is a new floor, we had a clean slate and the opportunity, upon establishing the floor, to do everything according to Hoyle, and get our practices and structures set up properly from the outset. Although the Bar Council adopted the BPGs in June 2014 (around nine months after we had formally established) at that point we were still in the process of establishing the practices of the floor. The BPGs were a ready-made model set of practices, and it seemed to us that in adopting them we could ensure that we were establishing practices which were compliant with all the relevant New South Wales and Commonwealth laws. So, being a new floor was definitely a catalyst for adopting the BPGs. However, an additional motivating factor was that we have a comparatively large number of women on our floor. Seven of the 34 barristers on the floor are women, six of whom are members. There was perhaps, therefore, more of a push than there might have otherwise been on other floors to ensure that we avoided direct or indirect discriminatory practices and that we created an equal opportunity workplace.

Bar News: The Bar Association's Explanatory Memorandum, issued at the time of launching the BPGs, indicates that the BPGs were introduced with two overarching goals in mind. One goal was to assist barristers to comply with (and manage risk associated with) their obligations under New South Wales and Commonwealth discrimination and employment laws, as well as the new Rule 117. The other goal was to assist and encourage barristers to meet community expectations as to appropriate workplace and professional standards of conduct. Broadly speaking, these twin goals could perhaps be characterised as ensuring compliance on the one hand and effecting cultural

Level 22 Chambers: Photograph by Aran Anderson

Greg's idea was that if the floor did not require key money we would be able to select the best and the brightest regardless of their bank balance.

change on the other. Is that what your floor had in mind in adopting the BPGS?

Janet McDonald: Yes, compliance was definitely a primary motivation. The other motivating factor could be described as cultural. Greg Curtin SC is the founding father of the floor, and one of the fundamental tenets that he wanted to introduce was what he calls a 'no key money principle'. So to get onto this floor, there is no requirement to pay any money up front. Greg's idea was that when key money is a requirement for entry onto a floor, there is a risk that you will only bring on board those people who have the cash, yet it is not always the case that someone who can afford to buy in is the best barrister. Greg's idea was that if the floor did not require key money we would be able to select the best and the brightest regardless of their bank balance. So we were trying to develop a floor that was a little bit different, that was going to be more of an equal opportunity workplace, on a number of levels, and adopting the BPGs complemented, and contributed towards us achieving, that goal.

In addition to adopting the BPGs, we were the first floor to provide an opportunity to those who might otherwise be struggling to find permanent employment due to the fact that they suffer from a mild intellectual disability. The junior position on a floor can be an ideal role for a lot of people who are quite employable but perhaps can't be given too much responsibility. We took on two juniors who fell into that that category. The board's view was that, aside from any other considerations, providing these employment opportunities could lead to greater staff stability, dedication and enthusiasm. One of the juniors we employed didn't work out, but the other junior we employed is still working with us, is very capable, and in his case, the board's expectations about the potential positive impact of providing such an employment opportunity have certainly proven correct. Having such an employee working with us did make it even more important for our floor to adopt and ensure compliance with the BPGs.

Bar News: How has your floor ensured that members of the floor and licensees and staff are aware of the BPGs and their content?

Janet McDonald: I gave a presentation to the floor. We adopted the BPGs in August 2014, and then in October 2014 I delivered a CPD to the floor, which was really well attended. All members of our staff were invited to the CPD and were expressly told to come, including our juniors and receptionists. In the presentation I explained each BPG and covered the legislative requirements that they are intended to meet. The BPGs were also distributed by email to everyone on the floor. Our clerk has a copy available, and they are also included in our induction package that our clerk gives to people starting out on the floor.

Bar News: What about instructing solicitors? Has there been any communication with them about your floor's adoption of the BPGs?

Janet McDonald: We've not had any direct communication with solicitors about our adoption of the BPGs. However, the fact that we have adopted the BPGs, and that our floor has chosen to be bound by them, has caused a few conversations to happen amongst our members about the behaviour of people visiting our chambers at our invitation, for example, solicitors who attend the CPDs that we deliver from time to time on the floor. Following one such CPD someone on our floor brought up the fact that as we are bound by the BPGs and that the workplace we are trying to cultivate is one in keeping with those guidelines, we need to be prepared, should a visitor to our floor engage in behaviour which is in conflict with the BPGs, to alert them to the fact that the behaviour is inappropriate and not tolerated in our chambers.

Pursuant to the Model Grievance Handling BPG, we have appointed a floor grievance officer, and we made a deliberate decision that the person appointed would not be a member of the board, so that they would be seen as independent to the powers that be and, hopefully separate from whatever politics might happen to be at play on the floor at any one time. One thing that appointing a grievance officer has achieved is that whenever a discussion starts up at Friday night drinks or other floor functions which might perhaps be on the cusp of being, say, a little bit sexist or a little bit racist, people will – in a nice way and done more in humour than anything else – point out that our grievance policy handler is present or that a report will have to go to the grievance policy handler, and it reins the conversation in. We joke about it, but even the fact that this tends to happen does mean that our adoption of the BPGs has a tangible, albeit gentle, impact.

Bar News: Does your board have some intention of reminding people in a more formal way about the BPGs, in due course?

Janet McDonald: Not at the moment, but that is because they are still so new. However, at some point the board may decide to have a refresher on the guidelines, probably through the delivery of another CPD.

Bar News: It is the Model Grievance Handling Procedure BPG which really ties the BPGs together, in that it provides a mechanism and structure by which enquiries, concerns, or complaints made or related to the remaining BPGs may be handled and resolved by floors who have adopted the BPGs. Can you describe what your floor has put in place?

Janet McDonald: We appointed a floor grievance handling officer who, as I said, is not a member of our board, and at the time of adopting the BPGs I made everyone aware of who the grievance handling officer was and that he would be available to discuss any of the issues affecting the BPGs. To my knowledge, the grievance handling procedure has not been invoked, although an essential element of the procedure, of course, is that the communications that might occur in connection with it are confidential.

...the grievance handling officer is not a board member, he, or she as the case may be, is not part of the hierarchy of the floor's power and control

Bar News: Notwithstanding your adoption of the Model Grievance Handling BPG, do you think it would be quite difficult for someone to make a complaint?

Janet McDonald: Yes, potentially, but the adoption of the Model Grievance Handling BPG does create an easier route, because the grievance handling officer is not a board member, he, or she as the case may be, is not part of the hierarchy of the floor's power and control, and we deliberately selected someone who is a senior junior and would be quite capable of liaising with the board and the person involved, which would be much easier than the person going to the board on their own.

Bar News: Finally, the Bar Association's Explanatory Memorandum states that the BPGs are intended to take into account the particular features of a barrister's practice and chambers arrangements. One such feature is our independence, as sole practitioners. Do you think that the BPGs manage to set the right balance in terms of enabling the floor to adopt a set of practices that requires compliance from all members and licensees, notwithstanding each barrister's independence?

Janet McDonald: Yes, what the BPGs represent is a commitment to a better workplace. The burden is on everyone within the floor to acknowledge that we won't tolerate inappropriate workplace behaviour. People are still vehemently independent and resistant to anyone dictating how we practice, but there has been no pushback from anyone on the floor as to our adoption of the BPGs for two reasons. First, there is legislation in force at both the state and Commonwealth level requiring us to behave in the ways that are encapsulated by the BPGs. Secondly, ours is a modern floor, and these are modern times. We want to embrace and cultivate a culture on the floor that reflects that reality, and this is facilitated by the adoption of the BPGs.

William Lee: First barrister of Chinese descent admitted to the New South Wales Bar

By Malcolm Oakes SC

William Lee in King Street, 1968. Photograph by David Mist. Collection: Powerhouse Museum, Sydney.

William Jangsing Lee was an Australian of Chinese descent who was admitted to the NSW Bar on 27 May 1938. He practised for 45 years[1], initially from old Chalfont Chambers at 142 Phillip St and later, after it opened in 1963, from the Thirteenth Floor of Selborne Chambers at 174 Phillip St. On his admission *The Sydney Morning Herald* recorded Lee as being 'the first Chinese to become a barrister in New South Wales'[2], a news item that was carried in at least ten other newspapers across the country at the time.

Lee was born in Sydney on 4 January 1912[3] and died on 29 October 2010. He was the son of Philip Lee Chun (Lee being the family surname), who came to Australia in 1875[4]. In 1906 Lee Chun became a partner in the business *Kwong War Chong & Co* (founded in 1883 in Campbell Street) and around 1910 the business shifted to 84 Dixon St, by which time Lee Chun was the controlling partner. The business continued for over a century until 1987.[5] The business does not lend itself to a single name description, although the type of business was common in the Chinese community and well understood by those who patronised it: it was organised around Chinese district of origin. At various times it offered travel ticketing services, moneylending services, money remittance services (it had branches in Hong Kong and Shekki, the county capital of Zhongshan), postal services (both poste restante and overseas courier delivery), immigration services (arranging Immigration Restriction Act paperwork), scribe services, interpretation services, market garden lease negotiation services, ossuarial services (bone repatriation), dormitory accommodation and was also a deposit taker, general store and trading company (Williams: 1999). Lee Chun was not averse to resorting to the courts to pursue recalcitrant debtors, with one of his claims going to the High Court: *Shannon v Chun* (1912) 15 CLR 257, [1912] HCA 52[6] where he was the successful respondent.

The family originated from the village of Chung Tou (涌 頭)[7] in Zhongshan county of Guangdong Province and were part of China's Pearl River delta community who constituted the bulk of the Chinese immigrants to NSW in the nineteenth century, initially attracted by the lure of the 'New Gold Mountain' as Australia was known. The family story is that Lee Chun landed at Cooktown in northern Queensland at the end of the Palmer River goldrush and made his way south to Sydney.[8]

Chinese movement back and forth to Australia in the nineteenth and early twentieth centuries came mainly from a relatively small number of districts on the Pearl River delta (Williams: 2002).[9] Williams argues that in the period prior to World War II the central desire of this movement was to ensure the survival and prosperity of the family in the village context, and not to migrate, build up a Chinese diaspora or establish transnational families. Returning to the village was the main goal, and that is what most did, until security deteriorated in the early twentieth century and Hong Kong became the domicile of choice of those who could gain residency. One of the effects of this was that at the time of Federation there were only 10,222 Chinese in New South Wales out of a total population of 1.35 million.[10]

Movement back and forth to Australia was initiated by the gold rushes and continued for almost a century until interrupted by the Japanese invasion of China in 1937, and the later occupation of Hong Kong (which was the embarkation port to Australia) in 1941. It was later permanently suppressed by the Communist government which came to power in late 1949.

In the late nineteenth and early twentieth centuries, Australian state and federal immigration restrictions prevented the bringing of wives from China to Australia except for merchant families. So the practice of returning to the home village for a wife (who remained there), and returning periodically to sire children, meant that the link to the home village remained strong, there was a need for money remittance services and there was a flourishing sea route between Australian ports and Hong Kong.

William Lee (third left) with his sister Lily (on his immediate left) and a group of Chinese children at the time of his departure for education in Hong Kong in 1923. Photo: Courtesy Roland Lee.

Lee Chun's wife was from China. William Lee was the seventh of eight siblings, all but the eldest of whom were born in Australia[11]. This indicates a family of standing as Lee's mother was permitted Australian residency. An issue facing such families was the education of children, particularly in Chinese culture and writing. Where funds were available a solution was to send a male child to China for part of his education, often to church run schools in Hong Kong or Macao, thereafter returning him to Australia for business training.

Lee's primary education was at Christ Church Primary School Railway Square, Sydney.[12] [13] At the age of 10 Lee was sent to Hong Kong for a classical Chinese education. Shortly after his arrival in 1923, Lee was taken by a first cousin to visit his father's village and home. He was carried in by palanquin with two bearers and escorted by a security guard of four armed with long-barrelled revolvers to protect against the risk of kidnapping. He visited the local school and was welcomed by a students' brass band as a tribute to his father's standing in the village.[14] He subsequently visited the village again on a Ching Ming Festival day.[15]

Lee returned to Australia when he was 16. The *SMH* reported that he had almost lost his familiarity with English at that stage, although he spoke fluent Cantonese[16] He would frequently observe that he arrived back in Sydney 'not qualified for anything in Australia'.[17] On his return he entered the business in about 1929 but became anxious to get out. In about 1932, his father, then about 76, relocated to Hong Kong with all family members other than William and one of his older brothers Harry, who remained in the Australian business. Lee perceived the only way out was through further education and obtaining a professional qualification[18] which had to be undertaken by night school. At his father's suggestion, he studied for a Diploma of Commerce at Sydney University, which did not require matriculation, then sat the matriculation examinations (which required passes in French and Latin for enrolment in the Law Faculty) and completed his Law degree, graduating in 1938. The journey from his return to Australia in around 1929 until completion of his law studies thus took some nine years. During part of that time he also worked in a bank.

As an interesting legal aside, the issue of the returning Australian born Chinese or Eurasian with lost or diminished English speaking and writing skills reached the High Court in *Potter v Minahan* (1908) 7 CLR 277, [1908] HCA 63. Minahan was born in Australia and was the child of a Caucasian mother and Chinese father. He left Australia aged five, returned aged 31 and successfully argued he was not an immigrant, not subject to the *Immigration Restriction Act 1901* and therefore not subject to the dictation test.[19]

In March 1941 Lee married Dorothy Wong in the Congregational Church in Pitt St. In 1999 Lee described this union as being to his 'utmost great fortune' and one of the greatest achievements of his life.[20] They initially resided in a flat on Ben Buckler, the rocky promontory at North Bondi, on the edge of the beach. In later life, Lee recalled the Japanese shelling of the Eastern Suburbs in June 1942[21], (one of the shells fell in Bondi). There were two sons from the marriage, Roland (1951) and Lachlan (1954).

One of Lee's older brothers, Arthur, graduated with Honours in Latin from Sydney University, was called to the English Bar[22], and became Professor of English at the University of Amoy[23] (now Xiamen University). Arthur's example inspired Lee to study Law.

Lee went to the Sydney Bar in May 1938 after his admission. He faced a large number of challenges including that there was not a lot of work around for anyone, let alone for the first person of Chinese descent who had set up practice as a barrister in NSW. He had very little work at the start[24]. From early 1940 until late 1945, during the Pacific War, he assisted the war effort as an interpreter and translator[25] at Victoria Barracks.[26]

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. Lee credits the Chinese Seamen's Union as giving him his kick start at the bar. 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 (instituted by shipping companies), defending Chinese who failed the dictation test (which resulted in a criminal charge and deportation) and later refugee deportation briefs. The criminal work was for virtually no money, and pro bono if the defendants had no money. But it got him on his feet. Chamber work included settling applications for exemption from the dictation test and settling applications for permanent residence.[27]

As part of his immigration practice, Lee became involved in the fate of the 'temporaries': the name given to alien seamen and evacuees who were in Australia as a result of wartime conditions. Many found jobs, married and had children whilst in Australia. After the Pacific War the Chifley Government moved to deport aliens who had been allowed to stay during the war. There was broad opposition to this in the Chinese community, including from the Chinese Masonic Society, and Charles Ng Kin, a Deputy Grand Master, lodged his title deeds to a terrace of 22 houses in Annandale as security for the release of arrested Chinese 'temporaries' pending legal challenge.[28] In *O'Keefe v Calwell* (1949) 77 CLR 261, [1949] HCA 6, a case concerning a Dutch evacuee from the Celebes which tested such proposed deportations, the High Court held that an immigrant who had not taken the dictation test was not a prohibited immigrant. Refugees and evacuees had been allowed entry without taking the dictation test. The parliamentary response was the *War-time Refugees Removal Act 1949.*

This legislation led to a highlight in Lee's immigration practice, being led by Barwick KC in the High Court in *Koon Wing Lau v Calwell* (1949) 80 CLR 534, [1949] HCA 65 which involved challenges to the constitutional validity of the deportation of Chinese refugees under the *War-time Refugees Removal Act 1949* and the *Immigration Act 1949*. It was Lee's idea to bring in Barwick KC, who was just establishing himself as a constitutional lawyer.[29] £40,000 was raised in the community to fund this case[30], over $2 million in today's money.[31] Although the case was unsuccessful, time was on the side of the litigants, as the People's Republic of China was proclaimed on 1 October 1949, the case was heard shortly thereafter in October 1949, and reserved judgment was handed down on 21 December 1949. On 19 December 1949 the Menzies Government came to office and decided not to deport Chinese seamen back to mainland China.

William Lee at his admission in 1938. Photo: *The Sydney Morning Herald* / Fairfax Photos.

Another highlight was *Chu Shao Hung v The Queen* (1953) 87 CLR 575, [1953] HCA 33 in which Lee was led by Badham QC, and which established that upon conviction for an Immigration Act offence, the Court could release a person on a good behaviour bond and was not limited to a custodial sentence. Lee viewed this case as indicating that immigration offences were not necessarily criminal in nature, that detention by imprisonment was unfair and unreasonable and that the case probably resulted in the establishment of detention centres rather than the gaoling of illegal immigrants in Australia.[32]

Lee's practice evolved into a general practice of the times primarily in Petty Sessions and the District Court, including tenancy law[33] and immigration, with appearances in the Supreme Court in matrimonial causes and in bankruptcy, and occasional appearances in the High Court. He was well liked and regarded by his floor colleagues, always made himself available to colleagues under the bar 'open door' tradition, and occasionally took floor colleagues to meals in Chinatown, giving them their first lessons in the use of chopsticks.[34]

Outside of the law, Lee was interested in reading and writing poetry in Chinese, was an MC of choice at Chinese weddings as he was bilingual and a good speaker, held committee positions on a number of Chinese social and community organisations[35] and enjoyed football (round ball) and mineral fossicking which he sometimes used to do with a friend and colleague from Law School days, 'Mac' Russell. Lee liked to go and physically look at the mineral prospects held by mining companies.[36] Lee was an active investor concurrently with his legal practice, taking a great interest in gold mining companies in particular, having some investment successes whilst others proved no better than speculative. He was a director and at times chairman of some non-listed companies, an engineering works in Unanderra, toolmakers in Surry Hills, Charters Towers Mines (which went on to list as Charters Towers Gold and is now Citigold Corporation Ltd) and Mt Coora Mining Ltd.[37] He also was a facilitator with various syndicates of Chinese people investing in land at Hoxton Park, Greenacre, Terrigal and Wamberal. In the years immediately preceding his retirement, Lee complained of his deteriorating eyesight, became less active in court work and spent more time on his investments.[38]

He assisted many Chinese immigrants through to the 1990s.[39]

The picture that emerges of Lee is one of determination and courage, a man who was prepared to take considered risks, realising that some may not be successful. Colleagues recall him as being a very gentlemanly figure[40] who always exhibited grace.

He had a great memory, and retained a clear mind until his death at 98.[41]

Endnotes

1. http://www.lawalmanacs.info/; Lee letter to Michael Williams 3 June 1999.
2. *The Sydney Morning Herald* Saturday 28 May 1938.
3. NSW Certificate of Entry in the Register of Births kept at the Registrar-General's Office, Sydney, No of Application 1912/935.
4. Handwritten Notes of Norman Lee (brother of William Lee) held by Norman Lee's daughter, Deborah Lee.
5. Williams, Michael (1999) *Chinese Settlement in NSW: a Thematic History. Report for the NSW Heritage Office of NSW*. http://www.environment.nsw.gov.au/resources/heritagebranch/heritage/chinesehistory.pdf
6. 'Chun' was Lee Chun's Chinese personal name, 'Lee' being the family name and 'Philip' being adopted as a Western Christian name in an adult baptism on 23 June 1896: Baptismal Register of St Thomas Church of England Narrandera, Charles Sturt University Regional Archives RW1025/LV/316. To avoid surnaming confusion William Lee changed his name by registered instrument to rearrange the order of his names from William Lee Jang Sing to William Jangsing Lee, such that his personal names preceded his family name: Instrument Publishing Change of Name dated 29 April 1938 recorded No 2026 in the Office of the Registrar General on 6 May 1938.
7. Other spellings are Chongtou and Tsung Tau.
8. Roland Lee (son of William Lee) email to the author 2 July 2014.
9. Williams, Michael (2002) *Destination Qiaoxiang: Pearl River Delta Villages & Pacific Ports 1849–1949*. Doctoral thesis submitted to the University of Hong Kong. http://hub.hku.hk/handle/10722/31596
10. http://www.abs.gov.au/ausstats/abs@.nsf/featurearticlesbytitle/4A6A63F3D85F7770CA2569DE00200137?OpenDocument
11. The eldest was born in the family village; see Handwritten Notes of Norman Lee (brother of William Lee) held by Norman Lee's daughter, Deborah Lee.
12. This school was a co-educational school and an adjunct to Christ Church St Laurence, Railway Square, Sydney. It ceased operation as a primary school in 1923.
13. Lee letter to Michael Williams 3 June 1999.
14. Lee letter to Michael Williams 5 June 1999.
15. The Chinese Ching Ming Festival, is also known a Tomb Sweeping Day. It falls on a particular day in the Chinese lunar calendar which matches the 15th day after the northern Spring Equinox (Autumn Equinox in the southern hemisphere).
16. *The Sydney Morning Herald* Saturday 28 May 1938.
17. Eulogy for William Lee delivered by his son, Roland Lee, at Lee's funeral 5 November 2010.
18. Lee interview with Michael Williams May 2004.
19. The *Immigration Act 1901* required an immigrant to pass a dictation test. Upon failure the immigrant was deemed to be a prohibited immigrant, and upon being found guilty liable to six months' imprisonment (or deportation).
20. Lee letter to Michael Williams 7 June 1999.
21. Eulogy for William Lee delivered by his son, Roland Lee, at Lee's funeral 5 November 2010.
22. Lee interview with Michael Williams May 2004.
23. Needham, J, *Science and Civilisation in China*, Vol 5 by Huang, H T (Cambridge, Cambridge University Press, 2000) 1.
24. Lee interview with Michael Williams May 2004.
25. Commonwealth of Australia, Department of Army (Civil Employment), Certificate of Service of W J Lee dated 28 September 1945 held by Roland Lee.
26. Roland Lee email to the author 2 July 2014.
27. Lee letter to Michael Williams 5 June 1999.
28. Lee letter to Michael Williams 5 June 1999.
29. Lee interview with Michael Williams May 2004.
30. Lee interview with Michael Williams May 2004.
31. Reserve Bank Pre-Decimal Inflation Calculator http://www.rba.gov.au/calculator/annualPreDecimal.html.
32. Lee letter to Michael Williams 5 June 1999.
33. Interview of the author with John McLaughlin on 7 July 2014. McLaughlin was a floor colleague from 1964–1984 and later master and associate justice of the Supreme Court.
34. Interview of the author with John McLaughlin on 7 July 2014.
35. He was president of the Australian-Chinese Association in 1949–1950 and 1950–51 (see photograph at http://chia.chinesemuseum.com.au/objects/D003881.htm) and on the committee that oversaw the erection of the Pavilion in the Chinese section of the Rookwood Necropolis.
36. Interview of the author with Nigel Russell, son of 'Mac' Russell, 16 July 2014.
37. Roland Lee email to the author 2 July 2014.
38. Interview of the author with John McLaughlin on 7 July 2014.
39. Roland Lee email to the author 2 July 2014.
40. Hon John Bryson QC email to the author 19 June 2014. Interview of the author with John McLaughlin on 7 July 2014.
41. Roland Lee email to the author 20 June 2014.

‘Trouble does not exist’: The New South Wales Bar and the Red Cross Missing and Wounded Enquiry Bureau[1]

By Tony Cunneen

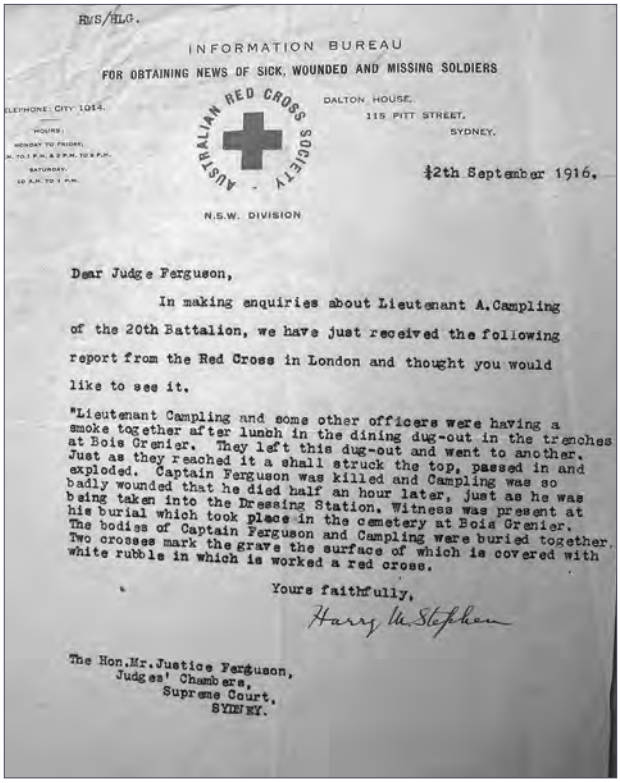
Pierce Arthur Goold, a 38-year-old law student, serving with the 3rd Battalion, was one of many who simply disappeared in battle during the first days after the Gallipoli landing. Goold was well known in the New South Wales legal community, despite stating his occupation as simply a ‘bushman’ on his enlistment form. In fact he was articled to John O’Neill in the law firm Murphy and Moloney in Elizabeth Street. Goold was also the firm’s accountant, a director of several mining companies and a founder, and vice-president of the New South Wales Country Storekeepers Association – but in 1915 he was simply one of hundreds who were missing on the Gallipoli Peninsula. Eventually, in April 1916 a reliable witness who knew Goold, Sergeant Major Edwards, was located in Egypt. He made a statement in Cairo that:

> He saw Gould (sic) on top of Shrapnel Gully, 27th April, severely wounded, gasping. Was left there. Never heard of since. Positive that he perished. The ground where he lay was ½ way between German Officer’s trench and Johnson’s Jolly. Right on Turks trenches. Body never seen on May 23rd when armistices, and think Turks buried him. Roll was called on 30th, Anzac Beach, when he was missing. Is convinced that he is dead.[2]

Goold’s mother in Greenwich, Sydney, knew nothing more than his fate as having been killed in action on 27 April 1915. His body was never found. Goold’s story would reoccur thousands of times during the First World War. That there was any information at all about him was due to a remarkable project initiated in Australia by the Sydney equity barrister, Langer Mead Loftus Owen KC[3] on the urging of his wife, Mary: The Red Cross Missing and Wounded Enquiry Bureau. The bureau is an overlooked contribution of the legal profession to the wider Australian community.

The many obituaries and eulogies concerning Langer Owen detail his background, education and his appointment to the Supreme Court Bench, but his creation and operation of the Red Cross Missing and Wounded Enquiry Bureau in the First World War ranks as foremost amongst his achievements for the general population. He was appointed CBE in 1918 for his work with it, with his citation mentioning the way in which ‘his tact, gentleness, and tender consideration had brought much help, comfort, and consolation’[4] for the bereaved. The extensive files of the bureau are now digitised and are one of the most invaluable historical sources available through the Australian War Memorial.

Within days of the landings on Gallipoli there were brief mentions in the various news outlets of battles, of Australian units in action and suspected casualties – but despite the



H/S/HLG.

INFORMATION BUREAU

FOR OBTAINING NEWS OF SICK, WOUNDED AND MISSING SOLDIERS

AUSTRALIAN RED CROSS SOCIETY

N.S.W. DIVISION

DALTON HOUSE,
115 PITT STREET,
SYDNEY.

12th September 1916.

Dear Judge Ferguson,

In making enquiries about Lieutenant A.Campling of the 20th Battalion, we have just received the following report from the Red Cross in London and thought you would like to see it.

"Lieutenant Campling and some other officers were having a smoke together after lunch in the dining dug-out in the trenches at Bois Grenier. They left this dug-out and went to another. Just as they reached it a shell struck the top, passed in and exploded. Captain Ferguson was killed and Campling was so badly wounded that he died half an hour later, just as he was being taken into the Dressing Station. Witness was present at his burial which took place in the cemetery at Bois Grenier. The bodies of Captain Ferguson and Campling were buried together. Two crosses mark the grave the surface of which is covered with white rubble in which is worked a red cross.

Yours faithfully,

Harry M. Stephen

The Hon.Mr.Justice Ferguson,
Judges' Chambers,
Supreme Court,
SYDNEY.

worries this news caused to the relatives of soldiers it was nearly impossible to find out anything definite about individual soldiers. The romantically patriotic headlines *Heroes of the Dardanelles* did little to assuage the concerns of worried families as beneath the praise was generally a montage of photos of men who were wounded and killed. Since many units were primarily comprised of men from particular locales it was easy for relatives to become extremely worried about the fate of loved ones who obviously took part in the same actions as the photographed ‘heroes.’ Australia went into shock.

On occasion these portraits could be particularly poignant for the legal profession. On 1 June 1915, under the banner of *Australian Heroes* was a large portrait of the son of Justice Phillip Whistler Street, Laurence Street – killed in action on Gallipoli. Beneath his image was that of the Sydney barrister Beaufort Burdekin, wounded in action with Royal Field Artillery in France and below him, that of George B G Simpson, the son of the chief judge in Equity, Justice Archibald Simpson, wounded in action on Gallipoli. Considering the losses already suffered amongst men connected to the legal community it was hard for the legal profession not to be affected by the war.

The cryptic cabled reports in newspapers did little more than cause intense concern and agitation in a population desperate to have solid news about their loved ones. There were questions

in federal parliament over the appalling lack of information. The army's ramshackle system of dealing with notifications of death, injury or illness, conducted from an overworked office in Melbourne, was woefully inadequate to the task. People scanned the casualty lists to see who was injured, killed or missing. It was not unusual for the first news of the loss of a loved one to be a mention in one of those lists. There were cases where the first people knew of a relative's fate was when a letter to a man on active service was returned and stamped: *Killed in Action*.

Early in the war, the Sydney barrister, Herbert Curlewis KC[5], spent an anguished afternoon chasing along Macquarie Street and surrounds in Sydney trying to find his brother-in-law, Francis Pockley, to tell him of the death of his son, Brian Pockley, who was killed in action with the Australian Naval and Military Expeditionary Force in Rabaul – before the father read of it in the evening news on the ferry home in the afternoon. The position and connection of the legal profession in the heart of Sydney, and their proximity to the cable offices, meant that they often had access to information before the wider community.

Langer Owen KC had volunteered as chief censor at the Pacific Cables Office in Sydney at the start of the war. He was well aware of the mechanics of communicating news via the rather labyrinthine network of cables and relay stations which connected Australia to the world. At the time Australia was the end of a very unreliable, easily interrupted network of undersea lines. If one line failed then another could be used via a number of relay stations to send and receive messages. In addition, Langer Owen's legal skills enabled him to collect and weigh evidence. He was also an excellent organiser, and influential in the Sydney legal community. He was used to exercising his authority: but combined these attributes with a profound sense of social justice and obligation to become involved in charitable works. Also, the fact that his son William[6] enlisted and saw action meant that he could empathise with those who were worried about the fate of loved ones. The enlistment of many lawyers and their relatives gave the profession great credibility in the eyes of the general public.

Langer Owen knew his way around the various corridors of power. He secured the active support of the New South Wales Law Institute (now known as the Law Society), the New South Wales Bar Association and the national executive of the Australian Red Cross. More importantly he was promised and given general financial and practical support from the entire legal community. The operational details of the bureau became

The army's ramshackle system of dealing with notifications of death, injury or illness, conducted from an overworked office in Melbourne, was woefully inadequate to the task.

officially recognised in the annual *Law Almanacs* published during the war.

The idea of an enquiry bureau spread around Australia and senior lawyers actively promoted the program in every capital city so that by December 1915 every state was covered. Solicitor, J Beacham Kiddle, and barrister, EF Mitchell KC, set up the bureau in the Colonial Mutual Chambers Melbourne, assisted by the firm of Henry Hurry and Sons, solicitors of Kyneton. Messrs Cohen, Kirby and Co, solicitors, also established a branch of the bureau in Bendigo. Solicitor, JE Heritage, was a leader in Tasmania. In South Australia it was established by Sir Joshua Symon KC on the request of Lady Galway of the Red Cross. In Brisbane one of the leaders was a solicitor, G Waugh and well known barristers such as A Feez KC and G Scott were involved with the active support of the attorney general, TJ Ryan. The bureau was established in Perth under the leadership of two silks, RR Pilkington KC and TP Draper KC and operated out of the offices of the solicitors Parker and Parker in Howard Street.

The Sydney bureau set up their first office in Woodstock Chambers at 88 Pitt Street in July 1915. Their first enquiries overseas were handled by the British Red Cross Bureau which was already established in Egypt, but this was clearly insufficient for the task as the Australian casualties started to mount. Vera Deakin, the daughter of former Prime Minister Alfred Deakin was the key appointee in establishing the workings of an Australian bureau in Egypt, with the help of Lady Barker of the British Red Cross. Deakin was introduced to Lady Barker by the Sydney barrister Adrian Knox KC[7], who had travelled to Egypt as part of a mission to investigate and organise the delivery of service and goods from the various charitable activities in Australia. Knox conducted a small number of interviews with troops about missing comrades. He formally established the cause of death in action of the well-known solicitor Ernest 'Nulla' Roberts. Knox's delegation included four men who would become officially designated as *Red Cross Searchers* in hospitals and rest camps.

The Searchers were an influential group, and could be described as 'men of standing'. There were 200 applications for Knox's

four places in 1915. The initial four men were: Robert Cain and Stanley Addison from Melbourne and Dr Norman Kater and Anthony Hordern from Sydney.[8] Hordern was the scion of the prosperous department store family of the same name. He paid for his own car to be transported to Egypt as did the pastoralist JB Donkin. They used these vehicles to transport convalescing soldiers, as well as to travel to various hospitals to act as searchers. Other searchers to arrive included the Sydney solicitor, H Stuart Osborne, and businessman, Frank de Villiers Lamb. While some worked in Egypt, others went over to the casualty stations on Lemnos and the hospitals on Malta. These were men who had been rejected for military service but were keen to help out in any way they could.

H Stuart Osborne was a particularly indefatigable searcher. He returned to Australia in 1916 and continued his work scouring the wards at Randwick hospital for news of lost men. In 1917 he was one of those who interviewed soldiers about the fate of Desmond Gavan Duffy, the barrister son of the Honourable Justice Frank Gavan Duffy of the High Court of Australia. Sydney solicitor Vero Read was one who went searching in Randwick hospital for details of the fate of Arthur Ferguson, the son of Justice Ferguson. The report he made gave some comfort to the grieving family, noting that Ferguson was considered 'a splendid officer, and no one could wish for a better man – and was liked by everyone. He was a real gentleman and would do anything for his men.'[9]

In Sydney, the opportunities for interviews with returned soldiers were offered through the various ANZAC cafes and canteens which were set up about the various cities. There was one canteen in Sydney near the Art Gallery in the Domain conducted by the Mosman branch of the Red Cross. Hospitals at both Randwick and Georges Heights were regularly visited by Searchers.

By November 1915 around 500 cabled enquiries had been made by the Sydney bureau on behalf of the relatives of the Gallipoli casualties. Many more would follow and the resulting material would be examined by some of the 50 or so barristers and solicitors who then worked part – or full – time in the bureau – others were on call if needed. The bureau constantly advertised that it was 'desirous of doing everything in its power to alleviate the anxiety of those relatives who have heard that their loved ones abroad are ill, wounded, missing or dead.'

Vera Deakin moved to England in mid-1916 and established the office in London, again with the help of Lady Barker. Deakin had conducted some interviews herself around the various hospitals in Egypt, but her real skill was as a manager of the process. She was remarkably efficient in organising the masses of enquiries, reports and replies. She, and a number of Australian women, wrote thousands of letters to people trying to track down the details of those missing or killed in action. Possible witnesses included a member of a subject's unit or medical officers in casualty clearing stations and hospitals. All ranks and all parts of the armed forces received her letters. She was admirably helped by Miss Mary Chomley, who later headed the Prisoners of War Department of the Australian Red Cross in London. The fate of prisoners of war was always problematic and it was only after the war, when Captain Mills visited Germany and traced all of the German records that the fate of many missing men, such as the Sydney barrister Ignatius Norris who disappeared at Fromelles in 1916, could be established.

By mid-1916 there were 4400 cases on file in New South Wales. The number of enquiries soon increased far beyond those early days and the Sydney bureau moved into larger premises at Dalton Chambers at 115 Pitt Street in Sydney. Eventually, there were thirteen full-time office workers, at least three of whom were funded by the New South Wales legal profession. The others were Red Cross employees. Lawyers were major donors to this and other charitable causes. The work expanded, as did the war. In 1917 there were around 3,000 cables each month sent to the United Kingdom.

The bureau urged all members of the Red Cross to know that its services were available free of charge to anyone who sought help. While payment would be accepted if offered, no one was under any obligation to part with money. There were some testy statements made in the press by Langer Owen if anyone suggested that this was not the case. The cable companies, such as the Eastern Telegraph Company, offered much reduced rates for their services. Regular ads appeared in the newspapers inviting people to come in and talk and ask for help. Langer Owen made himself constantly available – to the extent that when the bureau shut over Christmas/New Year later in the war he advertised his private home phone number as a point of contact. The motto of him and his staff was 'Trouble does not exist'. The slogan was coined as a response to the many enquiries which began with the somewhat hesitant introduction: 'I don't want to trouble you but…'and referred to the efforts the workers at the bureau would go to to help people.

On 25 August 1916 the *Sydney Morning Herald* wrote of the scene in Dalton Chambers in Pitt Street where one could look around the large room and see 'well known barristers and solicitors who [were] from morning to night, without fee and without reward, save the thanks of a grateful people in order that they may bring comfort to the families of brave

men who have been caught in the maelstrom of war.' When a new casualty list came in the room would fill with lawyers who would come 'for the task at hand. All honorary. All working on the brief their country had placed in their hands. All with their coats off.' The bureau was treated with something approaching a reverential respect. Letters to the bureau were quoted in the *Sydney Morning Herald.* One expressed gratitude for details of a 'brave brother's last hours', another that at last 'the weight of anxiety was lifted' regarding a husband lost at Lone Pine. One mother was comforted to know that her 'son died the noblest death a man could die, rifle in hand, at the front of the fight.'

By the end of 1916, at least 200 people per day made their way to the bureau in Sydney where they were met and given a sympathetic ear by one of the duty lawyers. Visitors could come as often as they liked and stay as long as they wished while they waited for the fate of loved ones to be established. Langer Owen often invited grieving relatives in to his office, or sent them a letter, to inform them of the result of any investigation. Any further information was also sent on when it became available.

By the end of 1916, at least 200 people per day made their way to the bureau in Sydney where they were met and given a sympathetic ear by one of the duty lawyers.

The number of enquiries increased dramatically as the war escalated. Eventually the bureau started a file on any soldier listed as a casualty. Visitors to the offices were stunned by how extensive the cards and filing cabinets were. By mid-1917 there were 30,624 cases under investigation in Australia. By February 1919, there were 36,000 cases on file with a total of 25,615 cables sent to inquire as to the fate of the men. Eventually, a remarkable 400,000 written reports were sent out regarding the fate of men killed or missing in action.

The problem of finding out what had happened to a casualty was a function of the nature of warfare at the time. The crowded excitement of frontal attacks meant that waves of men disappeared into No Man's Land and it was only when a subsequent roll call was made after the battle that there was any indication of who had failed to come back. In these circumstances rumours, mistaken identification and false impressions obscured just what had happened. When Anthony Hordern was interviewing men to discern the fate of the law student, Pierce Goold, Hordern met a soldier who was certain he had seen Goold on Gallipoli only two weeks earlier, and weeks after Goold had been killed. Such rumours were not uncommon and families could be rent with false hope as returning, often wounded and traumatised soldiers gave some vague report that a loved one was alive somewhere. It was common for searchers to append some form of comment to a report as to the reliability of an interviewee. The appellation 'a particularly reliable and careful witness' could determine which of the conflicting reports was chosen as the most likely explanation rather than the rather more general, 'I heard somewhere that…'

The circumstances of men listed as *Missing* were particularly horrible as relatives oscillated between wild hopes and black despair, which could not be resolved. Any rumour was eagerly devoured in the hope that a missing son, husband or brother could be found. Grieving relatives of missing men constructed elaborate scenarios imagining their sons dazed and wounded and suffering loss of memory in some remote hospital, unable to communicate their details to the staff. Desperately worried mothers and fathers of missing soldiers would haunt the soldiers' canteens and hospitals trying to find out about their loved sons. People outside of Sydney had to rely on the bureau to search on their behalf. Even families who had confirmed news of the death of a son, brother or husband wanted to know the details of the engagement in which he was lost. Naturally they wanted to know: How was he killed? Did he suffer?

Any extensive reading of the files suggests that the accounts were often sanitised. Invariably men died instantly, or were unconscious, without pain – even the victims of gas, as was the cause of death of the Sydney barrister, Geoffrey McLaughlin. One example was particularly close to the Sydney legal community. On 29 July 1916 it was the turn of the 25th Battalion to charge forwards at Poziers. They were cut to pieces. Among the dead was the nephew of a judge The deceased soldier was a 42 year old, who enjoyed a free and easy life as a station hand in Queensland. He was well known in his unit and his comrades were clear about his fate. He was hit, probably in the spine and unable to move. Rather than being captured he put his rifle under his chin and shot himself. The Red Cross interviewed five witnesses who confirmed the suicide in battle. One stated that he was 'extremely anxious that this report should not reach relations, who are in fairly good position.' Accordingly the Red Cross Missing and Wounded Bureau was rather coy about his end, simply stating that he received a 'fatal wound.' But the relations were not to be fooled. His sister was in London and had experience with the stories of returned men. She requested the full items. There is no record of them being sent. His

...the Red Cross Missing and Wounded Enquiry Bureau is testimony to the power of the legal profession to utilise its skills to help the community.

brother-in-law, a Sydney solicitor travelled to England later and gained a statutory declaration from an eyewitness, which confirmed the death, but did not mention the manner of it. It was a sad journey for the brother-in-law as his own son was also among the dead at Pozieres.

Many Sydney lawyers donated their time to interview soldiers or to man the office in Sydney. Most insisted on anonymity – one was simply referred to by Langer Owen as 'the master'. Others always used their initials. One searcher in Sydney had the initials 'W E G' and interviewed many men and was clearly well connected to the Sydney legal profession but it has not been possible as yet to identify just who he was. Some of the barristers who were searchers and workers in Sydney were listed in the *War Workers' Gazette* [10]of 1918 and included: I S Abrahams, G C Addison, E A Barton, F J Bethune, F l V Coffey, C Delohery, J A Ferguson, G Flannery, V Haig, C A Hardwick, E J B Macarthur, L J McKean, R K Manning, H H Mason, A V Maxwell, W D M Merewether, H S Nicholas, A G M Pitt, T P Power, P H Rogers, T Rolin, A V Worthington, F M Stephen, H M Stephen, C E Weigall, C A Weston and David Wilson. Many of the searchers had to investigate people they knew, such as when the barrister, David Wilson, who was often seen at Randwick Hospital, interviewed an eyewitness to the fate of his fellow barrister, Francis Coen, who was killed in action on 28 July 1916.

The people who acted as searchers overseas included the Adelaide solicitor W J Isbister, and the Sydney solicitor W J V (Vero) Read. Read specialised in interviewing soldiers in hospital in Weymouth and noted the rituals and rules surrounding the process, including the practice that interviews were not to be conducted while the doctors were doing their rounds. Other enquiries were conducted by the British Red Cross, which issued a book of names of the subject of enquiries to searchers every month. The British Red Cross had some 1500 searchers, many of whom enquired about Australians, including the indomitable Hilda Pickard-Cambridge. She had been staying near Koblenz in Germany at the start of the war and, after spending August 1914 concealed in her hotel, escaped by joining an American family on a Dutch steamer down the Rhine. The novelist EM Forster was also a searcher and interviewed Australians in Egypt. Eventually information came from such widely scattered places as Hungary, Sweden, German East Africa, German West Africa, Sierra-Leone, Capetown, Durban, India and Ceylon, in addition to the more expected locations of the United Kingdom, France and the Mediterranean.

The Red Cross Missing and Wounded Bureau closed its office to the public in Sydney in March 1919 but continued distributing information concerning missing men until 1920. In July 1919 then Acting Justice Langer Owen was presented with a Commander Order of the British Empire after four years of 'magnificent' service. His legacy is the collection of files, measuring some 55 metres of shelf space in the Australian War Memorial archives, but the real worth of which lies in the comfort those letters gave to the many grieving relatives of the men who fell in action. The bureau provided an interface between the people in Australia and the battlefields. In addition, the Red Cross Missing and Wounded Enquiry Bureau is testimony to the power of the legal profession to utilise its skills to help the community. The lady who first suggested the idea, Mary Langer Owen, is one of the hidden heroes of the conflict – she died of exhaustion from war work in 1917, worn out by the tireless support she maintained for so many war related causes.

Endnotes

1. An earlier version of this article appeared in *Wartime – Magazine for the Australian War Memorial* November 2010. This article includes new research and is specifically focussed on the contribution of barristers. Note, this article is part of a continuing research project into the varied roles of lawyers in the First World War. Anyone interested in the topic is invited to contact the author.
2. Statement by Sgt Maj Edwards concerning Pierce Arthur Goold 'Red Cross Missing and Wounded Files' Australian War Memorial Website https://www.awm.gov.au/people/rolls/R1490189/
3. Later a justice of the Supreme Court of New South Wales.
4. Rutledge, Martha, Owen, Sir Langer Meade (1862 – 1935) *Australian Dictionary of Biography* http://adb.anu.edu.au/biography/owen-sir-langer-meade-8499.
5. Later a judge in the Court of Arbitration and father of Judge Adrian Curlewis
6. William Owen, later a justice of the Supreme Court of New South Wales and a justice of the High Court of Australia. Langer Owen's father, Sir William Owen had been a justice of the Supreme Court.
7. Later chief justice of the High Court of Australia.
8. Oppenheimer, M. *The Power of Humanity: 100 Years of Australian Red Cross 1914 – 2014*.Harper Collins, Sydney 2014, p 43.
9. Statement re Arthur George (sic) Ferguson. Red Cross Missing and Wounded Files. Australian War Memorial. http://static.awm.gov.au/images/collection/pdf/RCDIG1045141--1-.pdf
10. Comforts Funds 1918 War Workers' Gazette.

Barristers v Solicitors rugby match, 1956

IN THE DISTRICT OVAL

OF THE PADDINGTON DISTRICT

HOLDEN AT VICTORIA BARRACKS

Special
Fixture: 12th August, 1956

BARRISTERS)
)
v.) BRIEF TO APPEAR
)
SOLICITORS)

guas.

The Law Book Co. of Australasia Pty Ltd.
140 Phillip Street,
SYDNEY

Under the distinguished patronage of His Excellency the Lieutenant-Governor of New South Wales, The Honourable Sir Kenneth Street, K.C.M.G.

EDITORIAL

Legal recreational activities on an organised basis include: the tennis matches between members of the Bench and Bar; golf between the Barristers and Solicitors; golf between the Bench and Bar and the Army, Navy and Air Force; golf and cricket matches between the staffs of the larger firms of Solicitors; bowls between members of the Bench and Bar; and these annual football matches. It is hoped to organise, next Summer, a series of cricket matches, where teams may be fielded by barristers and solicitors in age groups, and possibly a team of silks, and even of Judges (with no rights of appeal).

> Saepe repercusso pila te juvat icta bacillo,
> Seu pedibus calcatur tuis: his lusibus uti
> Innocuis fas est.
>
> (Often you take pleasure in striking the ball with resounding bat or kicking it with your feet: it is proper to play these harmless sports.)

The football matches are between teams aged over 30, for 10 minutes each half, and between teams aged under 30, for 20 minutes each half. The games are in the Rugby Union code.

Refreshments are available in the Canteen at the Barracks at the rear of the buildings on the southern side of the oval, through the archway.

We are indebted to the General Officer Commanding Eastern Command, Lieut.-General E. W. Woodward, C.B., C.B.E., D.S.O., and the officers of the Command for the kind permission to use this field, and for making available to us the facilities of the dressing sheds, parking area, and the canteen. The co-operation of players and visitors is sought to demonstrate, by the way we use and leave those facilities, that we appreciate the very considerable courtesies thus extended to us.

> Sic utere tuo ut alieno non laedas.

We also acknowledge our thanks to the following:—

N.S.W. Rugby Union, and Drummoyne R. U. Football Club, for the use of sweaters and shorts.
St. Andrew's College and Colleagues Football Club for footballs and posts.
Dr. I. R. Vanderfield and Dr. Murray Lloyd, for acting as referees.
St. John Ambulance Brigade.
The Law Book Co. of Aust. Pty Ltd. for printing and donating the programmes.

A small charge is made for these programmes to defray some expenses which cannot be avoided. Any funds remaining in hand will be donated to the War Widows Guild Fund.

Play begins at 2.30 p.m. The players are insured against injury.

BARRISTERS

Under 30 — Colour: Black — 2.30 p.m.

J. FOORD (1)
Full Back

W. J. HOLT (5) — Wing
W. JOB (2) — Wing
D. ROFE (3) — Outside centre
J. CRUMPTON (4) — Inside centre
A. B. SHAND (6) (Capt.) — Five eighth
T. O'L. REYNOLDS (7) — Half back
I. CURLEWIS (9) — Breakaway
P. A. McINERNEY (8) — Lock (Vice Capt.)
A. COOK (10) — Breakaway
C. EVATT, Jnr. (11) — 2nd row
M. L. FOSTER (12) — 2nd row
B. K. W. COWIE (13) — Front row
D. CASSIDY (14) — Hooker
D. VELDHAM (15) — Front row

Reserves: P. JEFFREY, B. COHEN, N. CAMPBELL, P. FLOWER, G. STEWART, J. CRIPPS

REFEREE: Dr. J
Line umpires: Mr. D. Fl

BARRISTERS

Over 30 — Colour: Black

D. G. McGREGOR (1)
Full back

A. V. MAXWELL (5) — Wing
P. M. WOODWARD, Q.C. (2) — Wing
M. D. HEALY, Q.C. (3) — Outside centre
J. A. LEE (4) — Inside centre
J. F. NAGLE (6) — Five eighth
K. E. WALSH (7) (Capt.) — Half back
P. M. HEALY (9) — Breakaway
E. P. KNOBLANCHE (8) — Lock
E. P. T. RAINE (10) — Breakaway
G. J. SAMUELS (11) — 2nd row (Vice Capt.)
J. A. M. PRITCHARD (12) — 2nd row
F. McALARY (13) — Front row
A. J. BELLANTO (14) — Hooker
B. R. THORLEY (15) — Front row

Reserves: P. G. WILLIS, R. J. B. ST. JOHN
Coach: Mr. K. E. WALSH

REFEREE: Dr.
Line umpires: Mr. J. C. Hal

QC, or not QC?

By Lee Aitken

'QC, or not QC? That is the question'.

Bullfry looked meditatively at the label on the bottom of the bottle as he sipped his second tincture – 'Green Dragon'? It seemed more soothing than his usual oolong.

Was it all, indeed, no more than a storm in a teacup? Bullfry thought back to his East Asian days, when he had enjoyed the fleshpots of the South China Sea. He had then been used, as a callow solicitor, to instruct Hong Kong's leading counsel, now sadly long deceased, who had come out from England to the colony with the Irish Rifles in 1945 to prosecute war-criminals and others, and had never returned to Munster. Indeed, he was rumoured never to have left the confines of Hong Kong Island itself at any time after his arrival. Yet, despite fifty years of practice as the acknowledged leader of the local bar – *he never took silk*.

A younger Bullfry had frequently instructed him in 'redomiciles' in the run up to '97 – many local *hongs* had decided to move to Bermuda, and other less risky places. The papers in support of the restructuring applications were four foot high – but such was his standing, the companies judge would simply ask: 'Is there anything I should note, Mr Wright?' In a voice etiolated, and refined, counsel would draw attention to one or two minor matters and then – 'Order in terms!'

So then, when a local billionaire found himself in a very sticky situation indeed, to whom did he turn for advice, and to appear before the commission? The billionaire could have had his pick of the cream of London's most highly-paid QCs – but he hastened quickly to Hang Chong Building and the sage counsel there to be had. His choice proved to be a wise one because after a lengthy hearing, he was completely exonerated.

Photo: Karl Hilzinger / Fairfaxphotos

In a small enough bar like Hong Kong it does not really matter what baubles and post-nominals wafted around. Sir Garfield Barwick once talked of a class of silks 'you could float on a saucer of milk'. The present local system, which permitted (indeed, invited) multiple applications by failed aspirants, had severely denatured the quality of the honorific.

And at a baser level, a purist would complain that it was simply rent-seeking in a virulent form – what had changed in the applicant's ability from the day before the application was successful? What stringent examination had he or she passed? What objective test demonstrated beyond argument that here was a one worth, and now entitled to charge, a substantial amount more than he or she had charged just the week before? Nothing had changed; no examination had been passed; no objective test had been satisfied.

Far better surely, to let the market sort out those who were to be preferred without the suppositious 'glamour' of an extra title; like a trooper in a large pack of Barbary apes, a member of the Sydney Bar constantly in court against his fellows knew to a precise degree the respective abilities, weaknesses, and standing of each.

...at a baser level, a purist would complain that it was simply rent-seeking in a virulent form – what had changed in the applicant's ability from the day before the application was successful?

But, of course, the solicitors, and those who employed them were simple men. They did not have the benefit of daily forensic intercourse and observation to permit them to make nice judgments on the ability of counsel. There were now, as Bullfry had been surprised to learn, 'annual surveys' (sic) of the bar in which various, but not disinterested,

commentators were invited to categorise and dilate on the abilities of counsel. Bullfry even believed it was possible, upon payment received, to garnish the recommendation, or reference, in the more meretricious of these publications. And if an in-house counsel had to tell the US head office why a particular 'trial lawyer' was being deployed, it no doubt helped to be able to state that he or she was a 'senior counsel' and regarded universally as a 'bet-the-company woman'.

Now, unfortunately, in the post-modern world, the very word, 'senior', had a markedly dyslogistic flavour. No-one, least of all Bullfry himself, wished to be regarded as 'senior'. 'Senior' connoted increasing decrepitude, diminishing powers, but happily not, in Bullfry's case at least, appetites. At a certain age one was eligible for a 'Senior's Card' but the notion of *seniores priores* did not find favour anywhere at all in the modern, distinctly non-Confucian, society – to be old, to be a 'senior', in the post-modern world was to be passe. And in the larger law firms, those unlikely ever to be 'elevated' to the partnership had to be content with a positional good like the title, 'senior associate', or 'special counsel'. It was no wonder that the laity was confused about exactly who a 'senior counsel' was, or what the title connoted.

Perhaps more importantly, as arbitration and mediation became transnational, it was increasingly difficult for a mere 'SC' to stand competition in zones further north when the competitors from Blighty continued to rejoice in the title of 'queen's counsel'. Despite the political

Now, unfortunately, in the post-modern world, the very word, 'senior', had a markedly dyslogistic flavour. No-one, least of all Bullfry himself, wished to be regarded as 'senior'.

appearances, those legal jurisdictions (often because of the educational background of those who controlled them) were frequently more English than the English, and they loved a Lord.

'Queen's counsel' carried more than a mere patina of honour – for centuries, and even now, it evoked a continuing connection with the Inns of Court, Lord Halsbury, and the glories of the common law. In olden times, with the 'two counsel rule' in operation, (now anathematised as 'anti-competitive') a successful aspirant for silk whose ambition had overreached his ability would find himself without any work to do at all. Now, in a grim legal iteration of *Gresham's Law*, an appointee could be found arguing – *sans* junior, of course – a costs argument, or seeking to call on a subpoena. (At least things had not yet reached the banal Canadian situation when almost anybody at all, whether accustomed to appearing constantly in court, or never going near a court at all, could apply for appointment as queen's counsel).

The original decision to do away with the appellation, 'queen's counsel', when the polity itself still had a viceroy, pointed to the underlying political schism which, in part, fuelled the present ferment. Just as some lamented the passing of the raillery of the old bar common room, so some looked nostalgically back to a time when a title actually meant something.

It was said that snobbery was playing a part in the desire to revive the old title – but that did not seem right. The restorationists must have some basis for the belief that the title would mean something more to the ill-informed members of the public than 'senior counsel', otherwise more grandiloquent titles ('grand wizard'? 'cyclops'? 'mikado'?) would have been pressed into action.

And was it not highly significant that there had been no great rush by those who held the Letters Patent prior to the redesignation to trade them in for a new title? Certainly, giving up his old title was not a course that Bullfry QC had ever contemplated. Furthermore, the numbers from the recusant bars to the north and south had revealed a massive amount of voting with one's feet! Almost every counsel there who had had the opportunity to do so had swiftly taken up the offer to use the old title, 'queen's counsel', in place of the new one.

Well, it was a muddle indeed, which even a third cup of 'Green Dragon' would not resolve. That old line so redolent of the present obdurate struggle, and equally applicable to both factions, recurred to him: '*Mens immota manet, lacrimae volvuntur inanes*' – 'Minds remained implacable, and still the tears flowed unavailing'.

The Hon Justice Robert McClelland

On 16 June 2015 the Hon Robert McClelland was sworn-in as a judge of the Family Court of Australia. In so doing, his Honour joined a distinguished cohort of former Commonwealth attorneys-general to be appointed to the bench: Isaac Isaacs, Henry Higgins, John Latham, Garfield Barwick, Bob Ellicott, Kep Enderby and Lionel Murphy.

His Honour graduated from the University of New South Wales with a Bachelor of Arts and a Bachelor of Laws in 1982. He was admitted as a solicitor of the Supreme Court of New South Wales in July of that same year. For the next 14 years he worked at Turner Freeman, eventually becoming a partner at the firm. At the bar, his Honour is still respected for being an excellent lawyer. One senior counsel recalled him as being a 'true student of industrial law', but one who also contributed articles in many and varied areas of law.

Justice McClelland was elected to the House of Representatives as the member for Barton in March 1996. His Honour's grandfather, Alfred, was a member of the NSW Legislative Assembly from 1920–1932 and his father, the Hon Doug McClelland AC, was elected to the Senate in 1961 and rose to become a minister in the Whitlam government and ultimately president of the Senate from 1983–1987. The federal seat of Barton was especially significant for his Honour. It was held by Labor leader Dr Herbert Vere Evatt from 1940–1958. In 1980, as a young law student, his Honour served as associate to Dr Evatt's nephew, the Hon Justice Phillip Evatt of the Federal Court.

Upon the election of the Rudd government in 2007, his Honour was appointed as the 33rd Commonwealth attorney-general, a post that he held with distinction until December 2011. During that time his Honour introduced into parliament legislation and numerous reforms affecting nearly every facet of federal criminal and civil law.

In December 2008, his Honour launched the National Human Rights Consultation resulting in the Human Rights Framework. This established a Parliamentary Joint Committee on Human Rights and required bills and legislative instruments introduced into parliament to be accompanied by 'statement of compatibility' with fundamental human rights resulting in added protections for ordinary citizens.

His Honour began the process of consultation to address gaps in the way Australia's criminal justice system complied with the Slavery Convention and other international protocols on people trafficking, sexual servitude and forced marriage. This, together with the ground breaking work of the National Roundtable on Human Trafficking and Slavery led eventually to the passage of the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* which revised Divisions 270 and 271 of the Criminal Code.

His Honour introduced changes to more than 80 pieces of legislation to remove discrimination and protect the rights of same-sex couples paving the way for the current debate in the context of marriage. Shared parenting was reformed and the federal family law courts gained jurisdiction over certain financial affairs of de-facto couples.

Following his term as attorney-general, his Honour remained as the member for Barton, until the 43rd parliament had run its course. He obtained a barrister's practising certificate from the New South Wales Bar Association in May 2012 and took a room at State Chambers.

Speaking on behalf of the Australian Bar Association, Fiona McLeod SC said:

> Your Honour has been my client. And if I may say so, you were the very model of a model litigant. The tragic circumstances of the Victorian Bushfires and Queensland floods and the royal commissions that followed were of great interest to your Honour, in terms of the devastating impact upon our communities and effective response of the whole of government.
>
> Your Honour oversaw the Australian Government's implementation of recommendations of the Victorian Bushfires Royal Commission and must be very pleased that every state and territory in Australia now has an emergency mobile phone messaging service capable of sending alerts to mobile phones based on their location.
>
> Your Honour was responsible for legislating many of the changes to Australian law, including the family law, which were designed to remove various forms of discrimination and to protect society's more excluded and vulnerable people.
>
> ...
>
> Indeed, safeguarding the interests of the vulnerable and promoting access to justice have been hallmarks of your Honour's long career in service to the people of Australia.
>
> Justice McClelland, you have distinguished yourself as a respected lawyer in private practice and as a decent, reforming Commonwealth attorney-general capable of crossing the political divide to build consensus.

The Hon Justice Desmond Fagan

The Hon Justice Desmond Fagan was sworn-in as a judge of the Supreme Court of NSW on 11 June 2015. His Honour's late father was a highly regarded as counsel in Tasmania, and served as the island state's attorney general for over 20 years. His Honour graduated from the University of Tasmania in 1978 with a Bachelor of Laws (first class honours) and was admitted as a legal practitioner on 25 February 1980. His Honour moved from Hobart to Sydney in 1982 and was admitted to the New South Wales Bar.

Throughout a distinguished career his Honour practised in various jurisdictions. His principal areas of practice were corporate law, trade practices, aviation and taxation law, but his Honour also acted for the Crown in connection with high profile corporate fraud and terrorism matters. His Honour took silk on 6 November 1997.

Attorney General Gabrielle Upton spoke on behalf of the New South Wales Bar. The attorney said:

> I understand you also have an avid interest in sailing, having recently skippered your own yacht, *Lisdillon*, to great success in professional races and without being trite, skippering most likely will prepare you for your life on the bench. Having traversed and tamed the unpredictable high seas you will most likely be able to take control of the most difficult situations and advocates in this courtroom.
>
> ...
>
> I have no doubt when I speak for the people of New South Wales in saying that it is for the great benefit of the people of this State that you have taken up the robes of a Justice of the Supreme Court. In your new role, your Honour, you will preside with integrity, with fairness, with independence, those qualities you have demonstrated already as an advocate in the Supreme Court.

I think my clients would have no idea how much they owe to a supportive family that enables a barrister to do work as intensely as sometimes we have to do.

Mr John Eades, president of the Law Society of NSW, commented on his Honour's skills outside the law.

> Intellectually your Honour has been described as a polymath, a gifted student of humanities and a ghastly thing called mathematics. Your Honour's ability to master those disciplines would have opened many doors. For instance engineering may have been available to you because of your resourceful activities in textile making, little boats in bottles, building your own kayak and catamaran. Your manual skills would have been equally employed as a surgeon following your late Uncle Kevin who had a distinguished service of record including assisting prisoners in World War 2 in the camps of the Japanese. We are fortunate that your Honour has chosen a legal career.

Speaking in reply, Justice Fagan was effusive in his praise for those who had supported him during the daunting transition into the country's largest independent bar.

> ...when I took rental chambers on 13th Floor Selborne, Justice Geoffrey Lindsay who was then a junior, a few years ahead of me, made himself my mentor and again went out of his way to ensure that I would get a chance to show whether or not I could do the work. It was a very big sea change to move from such a small profession, cut myself off from the connections of school and university and family in Hobart and start afresh. Fortunately I had from the start great moral support because my then fiancé, Bridget, agreed to come with me, join me and we were married two years later. She underwrote my early days at the bar and has backed me up in every way ever since. I think my clients would have no idea how much they owe to a supportive family that enables a barrister to do work as intensely as sometimes we have to do.

Geoffrey James Graham (1934–2014)

Geoff Graham died in Newcastle on Christmas Day, 2014. His death followed a number of years which must have been difficult for him being confined to a nursing home.

Geoff was well known and much loved by those in the legal community in Newcastle and beyond, in the sailing fraternity, particularly in Lake Macquarie, and in the thespian world with the Newcastle Gilbert and Sullivan players.

To quote his son Mark who delivered the eulogy at his funeral service, 'He was a larger than life character, in many ways a bit of a hard act to follow'.

Geoff was born and raised in the inner west in Sydney. His father Bill had fought in the Great War in both the Middle East and France. Geoff was the youngest of three siblings, the first of whom only survived to four years of age. His other sibling, his sister Audrey, lived a long life. She was a Franciscan nun spending years as a missionary in her order in West Africa and then as a school principal in Sydney.

Geoff was educated at Fort Street Boys' High. When he was about 14 or 15 his mother died. The emotional impact of this loss caused him to leave Fort Street. He undertook an apprenticeship initially as a motor mechanic but subsequently changing to and completing an electrical apprenticeship. He was awarded recognition for having attained the highest ever pass in his trade course.

He relayed to me at times some of his experiences in the electrical trade, notably working on the ships that then berthed in Darling Harbour and his occasional excursions to the nearby licensed establishments of 'The Hero of Waterloo' and the 'Lord Nelson'.

With encouragement from his lifelong friend, solicitor, Tom Halbert, Geoff went back to study, completing his Leaving Certificate, matriculating and completing the Bachelor of Law at Sydney University part-time. He worked full-time during this period in the NSW public Service as a clerk in the Registrar General's Department. He met and married his wife Fay during this time.

Upon obtaining his degree, and his subsequent admission as a solicitor, he worked in the then Public Solicitor's Office in Market St., Sydney. From his engagement in this work Geoff developed an understanding and empathy for those in the community who suffer disadvantage and the underprivileged. This became the focus of his professional life as most, if not all of it, both as a solicitor and later at the bar was devoted to championing and defending the rights and liberty of these members of the community.

Geoff often said that one of the best things that happened to him was coming to Newcastle. In 1969 he accepted a transfer within the Public Solicitor's Office to run its Newcastle office, then conducted from a two room office in Bolton Street. From here, and ably assisted by his articled clerk Ralph Coolahan (later Coolahan DCJ) he conducted a practice in civil work, matrimonial causes and criminal law. Together they developed a reputation of respect for their work and were described locally as 'the Sorcerer and the Sorcerer's apprentice'.

Geoff developed an understanding and empathy for those in the community who suffer disadvantage and the underprivileged. This became the focus of his professional life as most, if not all of it, both as a solicitor and later at the bar was devoted to championing and defending the rights and liberty of these members of the community.

His family, his wife Fay and children, Mark, Julie and Michael, joined him in Newcastle.

I first met Geoff when I, together with John Cobb, succeeded Ralph Coolahan as articled clerks in 1973. Success on exam result mornings was inevitably greeted with a black coffee laced with a copious

Geoffrey James Graham (1934–2014)

amount of 'White Heather'.

Newcastle provided Geoff with the opportunity to indulge in his passion of sailing. I am told that this interest originated from earlier days sailing a heron dinghy on Sydney Harbour. I recall him having a 'Bluebird' class yacht named *Impromptu*. I then recall him purchasing an abandoned project being a half completed timber yacht of about 32 feet with beautiful lines and constructed of Canadian fir. He spent many months completing the work, caulking the hull, constructing the topsides and fitting out. The work was a credit to his skill and its launch day on Lake Macquarie is still remembered.

Geoff raced this yacht, the *Noela Rose*, often with classical music coming loudly from within and frequently with an all-female crew. He enjoyed considerable success in the Club point score. He was involved in the affairs of the Lake Macquarie Yacht Club, was elected commodore, a position which he held for many years. This earned him the nickname 'the commodore' or sometimes 'Captain Fortune'. He competed in his first Sydney to Hobart race in 1980 together with his sons Mark and Michael. He competed in following Sydney to Hobarts as well as Lord Howe Island races and numerous coastal races.

Returning to his professional life he was called to the bar in 1976 accepting an appointment as a public defender. I recall him being admitted to the bar on a Friday and turning up at Bathurst District Court on the following Monday to defend an accused on trial for demanding money with menaces. I recall he won the trial.

As a public defender Geoff enjoyed enviable success. He had an ability to accurately select and focus on the real issue or issues in any case. He was not distracted by the irrelevant. He had a special skill in addressing a jury which amounted to a 'chat' with them simply pointing out in very clear terms the logic and force of his argument and sometimes reminding them of the 'Golden thread'.

Geoff retired as a public defender but continued to practise at the private bar in the mid-1990s. I had the privilege to be his pupil when I went to the bar in 1998. He was, for a number of these years, the president of the Newcastle Bar Association. He continued to represent accused persons in criminal trials for a number of years until his health began to fail. Many of these trials continued to be legal aid trials and he continued to defend those characterised by the shortcomings I have described earlier.

Geoff was widely acclaimed for his ability to deliver a joke, tell an anecdote or funny story. He was sharp witted and amusing company. He had a wicked and engaging sense of humour and it did not seem to matter to him if he was the subject of the fun. I recall one occasion, when I was articled to him, of a visit to the office by Guy Smith, a barrister at the Newcastle bar. Geoff was not in so Guy decided he would wait a while for his return. Eventually after a couple of cups of tea he decided he would wait no longer but left a note in terms I recall as follows:

> From Guy Smith to Captain Fortune
>
> I called to see you today but learnt you were at court with me.
>
> I decided I would wait a while for your return but apparently my case took longer than I thought.
>
> Perhaps we could go to court another day?

I quote again from the eulogy delivered by Mark Graham when describing going to court to see what his father might be doing when he himself was considering a career in the law.

> Geoff was good enough to introduce me to many of the judges, barristers and solicitors. In fact it was a bit like an episode of *Rumpole of the Bailey*, in fact Geoff and Horace Rumpole shared a number of characteristics including but not limited to, as the lawyers say, an appreciation of good red wine.'

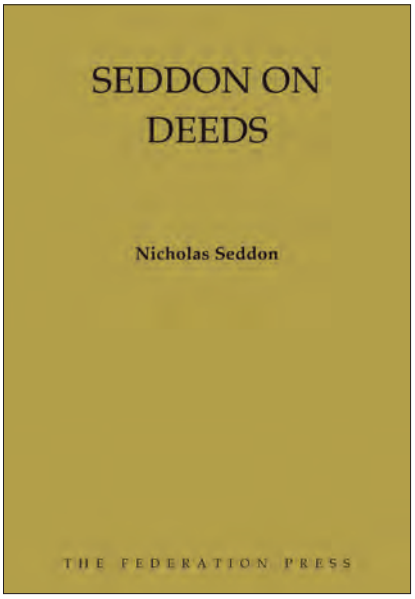
I should not conclude this obituary without saying something about Geoff's other talent that being his ability to 'hold a note' and his thespian endeavours. He had a great interest in opera. Additionally he had a great love of Gilbert and Sullivan. He was a member of the chorus in the Newcastle Gilbert and Sullivan players. Not a great deal of encouragement was required to persuade him to provide a rendition from one of the G & S operettas. 'Trial by Jury' was clearly his favourite.

Geoff is survived by his wife Maxine who stoically supported him through his final difficult years. He is also survived by his former wife Fay and their children Mark, a solicitor practising in Newcastle and Michael, a barrister practising in Newcastle. Sadly Julie, also a solicitor passed away in 2011.

By T J Bates

Seddon on Deeds

By N Seddon | Federation Press | 2015



The topic of deeds has not attracted standalone academic text writing. As the Hon Michael Kirby AC CMG points out in his foreword, the standalone (in some senses of the word) text is *Odgers on Deeds*, whose second edition was published in 1928 and is not replete with Australian authority. Yet a glance at Nicholas Seddon's footnotes shows that there is a rich ore of Australian authority to mine, much of it recent.

This is possibly because what is viewed by academics as a fusty document shackled by its feudal and earlier origins, ossified, tricky for the unwary and obsolete with the modern law of contract, enjoys a different perspective in lay perception, leading to continued use in commercial and property transactions. A deed is possibly perceived as giving a deal a solemnity and certainty from its formality and long tradition of use. The perception may be misplaced in many instances, but is strong. The author examines that 'gravitas' in the first chapter and clearly sees it as outweighed by the risks of non-compliance with complex formalities. He sees the solution in a uniform model law on deeds Australia-wide developed by a law reform commission.

There are areas of current practical advantage, for instance in limitation statutes. There are areas of self-evident necessity in gifts of some legal property and gifts of equitable property particularly when writing is required, from the absence of contractual consideration (although the author points out the wisdom of including at least nominal consideration for the purpose of equitable enforcement). Statutes, including land title by registration, import the status of a deed in some situations, which requires an understanding of what is being imported, although as the author points out one must be careful that a unique statutory creature simply given the label of 'deed' has not been created: *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636, [1999] HCA 24. Any reform would need to include policy decisions on preserving or removing practical advantages and dealing with an alternative for the areas of necessity. The latter would require difficult and detailed examination of Australian statute law to avoid unintended consequences, which may be a bridge too far and make an improvement of the existing law a more practical option.

The foregoing is the range of matters discussed in Chapter 1. Chapter 2 is the bulk of the book. It examines the complex requirements to create a valid deed, not just the formalities of execution, but also what is required for intention. The discussion of execution of deeds by company officers and governments, the validity or otherwise of virtual execution and exchange, and the ways to 'save' some legal consequences from an invalidly executed document are of great practical benefit as well as intellectual interest.

Chapter 3, again quite long, tackles the vexed questions surrounding delivery (intention immediately to be bound) and escrow (which is not the opposite but merely one alternative to delivery). Chapter 4 critiques the even more vexed rule in *Pigot's Case* concerning material alterations to deeds, the attempts to circumvent or ameliorate it, and the worthwhile effects in some jurisdictions (NSW alone within Australia) of abolishing it.

...a glance at Nicholas Seddon's footnotes shows that there is a rich ore of Australian authority to mine, much of it recent.

Chapter 5 outlines the same interpretation principles for deeds as for contracts, then focusses on the place of recitals in the interpretation and operation of deeds (including a brief discussion in relation to releases in compromises by deed), the unique doctrine of estoppel by deed and its distinction from estoppel by convention (where the recitals replace the implicit reliance shown by a course of conduct giving rise to the common assumption), statutory provisions concerning receipts and other matters, and curing of discrepancies in counterparts. A suggestion: the discussion of 'privies', an obscure but important concept, could have been slightly more fulsome, even by reference in footnotes.

Chapter 6 contains detailed discussion of enforcement, remedies and defences, in

Seddon on Deeds (Federation Press, 2015)

The writing is crisp, clear, propositional. The book has, as a consequence, brevity without loss of comprehensiveness and lucidity.

some cases common with contracts, in other cases unique to deeds, sometimes unique to deeds poll. There is a useful discussion of privity in that last context, and of the characterisation of deeds *inter partes* and deeds poll which throws light on the circularity of reasoning between characterisation and outcome. There is a pithy but equally useful discussion of accord and satisfaction within the discussion of deeds of compromise. The rights and burdens of multiple parties are analysed. The need to provide consideration if equitable remedies are to be attracted in aid of common law rights is stressed in the course of indicating where equitable relief is or may be available. Chapter 7 shortly describes the parallels with and distinctions from contract law in relation to the discharge of deeds.

As the author says in his preface, 'in the main, there is no need to refer to old English cases'. This is a precedent which it would be beneficial to follow in some chapters of Australian legal encyclopaedias which, in distinction to the title of the work in which they appear, sometimes significantly repeat the leading overseas authority rather than display an Australian exposition or application, which may not be as well known but would thereby become so.

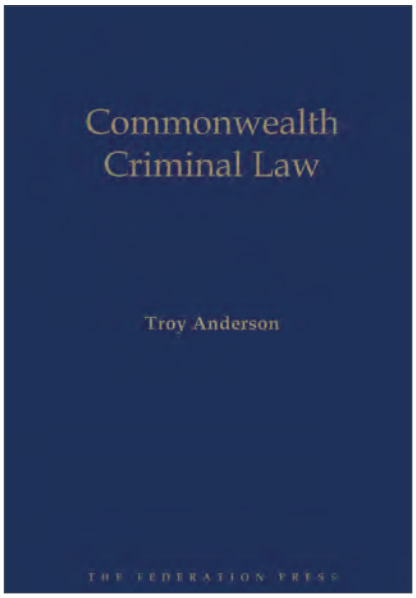
The writing is crisp, clear, propositional. The book has, as a consequence, brevity without loss of comprehensiveness and lucidity. The argument is in the text, with the footnotes being useful but not intrusive. The index is thoughtfully constructed and also useful. In areas of difficulty or controversy, the competing lines are discussed, authority critiqued and difficulties discussed with respectful rigour, and a reasoned conclusion and preference posited. The quotations at the start of each chapter are apposite and add verve.

It should be clear that I like this book; if I had not been given a review copy I would have gone out and bought it. It will be of interest and use to academic and practitioner. It is overdue. If its theme of law reform is taken up, then any subsequent edition may require a new start and the '1st and only' edition will gain added value from becoming a collectors' item!

Reviewed by Gregory Burton SC FCIArb

Commonwealth Criminal Law

By T Anderson | The Federation Press | 2014



The Australian Federal criminal justice system is a complex meshing of various Federal statutes, the effects of the Australian Constitution, Federal and state investigative bodies, prosecutorial bodies and courts and state prisons. It is not always obvious what law regulates the elements of a criminal offence, its investigation, the right to silence or its abrogation, trial procedure, extradition and so on.

This new text successfully takes on the difficult task of drawing together this lacework of legal threads and presenting them in a studied and practical manner.

The text adopts a structure that is accessible to experienced practitioners and strangers to the Commonwealth criminal law.

Each chapter addresses defined issues in a logical manner and pinpoints key authorities and legislation. The text is very helpful to practitioners wanting to find a succinct discussion of issues and the main cases relating to them.

The first chapter provides an overview of the legislation that applies to the Commonwealth criminal law and how these interact with each other and state laws. This includes an explanation of the

Commonwealth Criminal Law (The Federation Press, 2014)

The author is a member of the NSW Bar who practices in the Commonwealth criminal field in both prosecution and defence roles. Equally, the text deals with its subject matter in a balanced and factual way.

role of the Commonwealth Criminal Code.

The first chapter also addresses the roles of prominent participants in the Commonwealth criminal system and their empowering statutes, such as the Australian Federal Police, the Commonwealth Director of Public Prosecutions, ASIC and the ACCC.

The second chapter gives an analysis of key concepts of criminal responsibility and defences. It explains how Commonwealth legislation has changed common law concepts. The chapter canvasses issues such as mental and physical elements of offences, corporate criminal responsibility, onus of proof and geographical jurisdiction.

The third to eighth chapters cover various offences arising under Commonwealth criminal laws. The author has adopted the helpful format in each chapter of addressing investigation issues particular to such offences (including proceeds of crime issues), specific charges, case law on the elements of those charges and sentencing issues particular to such offences.

This structure in the third to eighth chapters is one I haven't seen before in a legal text and I found it very helpful as a practitioner dealing with considering issues of investigation, charge and sentence for an alleged offence without having to search for each issue in unrelated parts of a text or over several texts.

The third to eighth chapters each deal with a category of offences and the various statutes that cover those categories of offences. For example, the third chapter deals with offences relating to dishonestly obtaining benefits from the Commonwealth and then addresses as subsets of that category offences under the Commonwealth criminal code, social security legislation and taxation laws.

In broad terms, the third to eighth chapters cover the broad categories of offences of frauds, Corporations Law offences, money laundering, counter-terrorism, serious drug offences and child exploitation.

The ninth chapter explores issues of sentencing, imprisonment and release from prison.

The last chapter provides an overview of the laws relating to extradition between states within Australia and international extradition.

The author is a member of the NSW Bar who practises in the Commonwealth criminal field in both prosecution and defence roles. Equally, the text deals with its subject matter in a balanced and factual way.

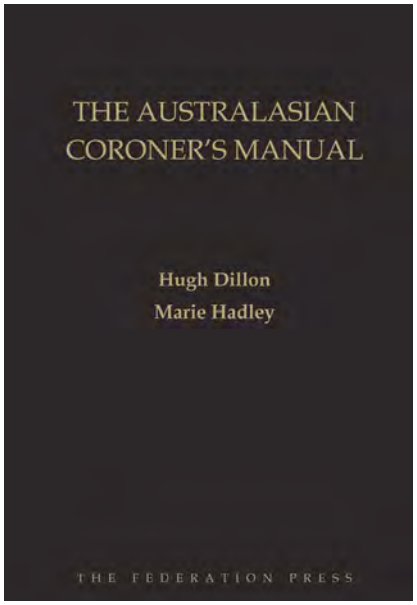
Overall, the text will provide great assistance to lawyers practising in criminal law. It will also be an excellent resource for those encountering the Commonwealth criminal system for the first time as practitioners or students.

The author has embarked on an ambitious task in writing this text. He has succeeded in producing a text of high quality that I think is a valuable addition to any criminal law practice.

By Tony Di Francesco

The Australasian Coroner's Manual

By Hugh Dillon and Marie Hadley | The Federation Press | 2015



For those who practise in coronial law (on either side of the ditch) or who simply enjoy good research and writing, this elegant volume is an important addition to a discerning library.

Local practitioners will already be reliant on the most recent edition of *Waller's Coronial Law in NSW*, of which Hugh Dillon is a co-author. This new addition to the coronial landscape undertakes a necessary and different task to that work.

Here the mission is to provide a comprehensive guide to the coronial process, beyond an analysis of legislation and case law. In his thoughtful Foreword, the Honourable Justice Michael Wigney (himself no stranger to the coronial jurisdiction in a past incarnation) describes this book as 'a tremendously helpful manual'. I agree.

A novel focus of the *Manual* is that it proposes material for consideration by coroners as well as by advocates. The usefulness of this is at least twofold. Given the increasing complexity of the work of coroners, this volume will be a useful primer for those judicial officers coming newly to this ancient role. Beyond that, an understanding of the likely challenges for a coroner conducting the inquiry (both before and at inquest) will provide particular insights for the thoughtful coronial advocate. As we all appreciate, understanding what might be exercising the judicial mind cannot hurt in trying to feed it appropriately.

Apart from the identification of systemic and institutional challenges for the inquisitor within the process, Dillon and Hadley propose a number of possible personal challenges for coroners. This represents a departure from the received practices of 'how to' tomes by considering, for example, the questions for one's mental health raised by working in such a confronting area and particular ethical challenges that arise for coroners in determining what invasive procedures can properly be approved, or not, as part of the autopsy process.

In his thoughtful Foreword, the Honourable Justice Michael Wigney ... describes this book as 'a tremendously helpful manual'. I agree.

The coronial process, properly executed, requires a particular place of respect for those who are bereaved. Sensitive acknowledgment of the pain the family carries, by coroners and lawyers, means proper forensic work can be undertaken without adding to those personal burdens.

To that end, apart from analysing the effect of grief for those engaged professionally in the process, Dillon and Hadley focus on the effect of death on kin generally and distil understandings of the bereavement practices of a range of racial and cultural groups. This material is illuminating on the simple human level and will appeal to that rare creature in the legal community – the amateur anthropologist. For those working regularly in this area, the insights to be gained from this section of the *Manual* are immeasurable.

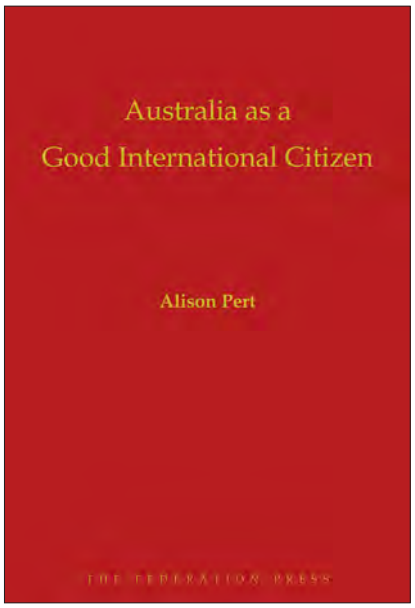
Chapter 8 – Aspects of Advocacy in the Coronial Jurisdiction – is likely to become particularly well-thumbed. Given that one of the authors is a very experienced and highly respected deputy state coroner in New South Wales, the term 'from the horse's mouth' springs to mind when reading and re-reading these thoughts about how to improve advocacy – whether as counsel assisting, or appearing for the family, a person of interest or others seeking leave to appear. A quote within a quote is a reliable feature of many reviews and, so, consider this; 'Chester Porter's sage observation 'Is it really desired that a particular subject be opened up? Many good advocates say little at inquiries' has much to recommend it.' The tip here is 'less can be more'.

The same might fairly be said about the *Australasian Coroner's Manual*. Well researched and comprehensive, it remains a slender volume, pared down to the necessary, like a careful advocate's questioning. Beyond its disciplined scope, the resonant feature of this work is the humane and considered voices of the authors lighting the way in what can otherwise be a gloomy endeavour.

Reviewed by Warwick Hunt SC

Australia as a Good International Citizen

By Dr Alison Pert | The Federation Press | 2014.



After security and economic prosperity, writes Gareth Evans in the foreword, states have a national interest in being a good international citizen. Dr Pert wished to test her perception that Australia had first acquired such a reputation under the Hawke/Keating governments, lost it under Howard and possibly regained it under Rudd. She looked at specific aspects of Australia's conduct, and tracked Australia's record on overseas development assistance, environmental protection, human and indigenous rights, and asylum seeker policy.

Chapter 1 considers the concept of 'good international citizenship', for which no agreed or comprehensive definition exists. The concept has a dynamic quality which involves exceeding international obligations, demonstrating leadership and raising international standards.

Two particular attributes are selected: engagement with international law (compliance, treaty participation, responses to the findings of international bodies) and active support for multilateralism (primarily through international organisations such as the United Nations (UN)). Such features she says are more relevant to an international lawyer than a foreign relations scholar.

Evidence of these attributes was sought in Australian policy since 1901. Chapters 2 to 8 are divided chronologically. Before the 1920s Australia had no independent international legal personality. Good international citizenship was not demonstrated at the 1919 Peace Conference where Australia pressed Germany for reparations. There was no significant engagement with international law during the inter-war years. After 1945 Australia had a low treaty participation rate and committed some international legal violations (such as conscripting aliens and racial discrimination) but its participation in the Vietnam War was not inconsistent with international law. Then Evatt demonstrated 'evangelism' during the UN's formative years before Australia dropped to a neutral status under Menzies notwithstanding peacekeeping contributions and development assistance.

'good international citizenship' ... has a dynamic quality which involves exceeding international obligations, demonstrating leadership and raising international standards.

Whitlam's 'vigorous' internationalism included greater treaty participation, combating racial discrimination, recognising Aboriginal land rights and environmental protection. Fraser demanded a federal clause be inserted into new treaties, eschewed reliance on the external affairs power, sought to end Rhodesian apartheid and received Indochinese refugees. Hawke and Keating pursued a bill of rights and native title, and Evan's energetically contributed to nuclear disarmament and the Cambodian peace process.

Good international citizenship for Australia reached its nadir under Howard. He oversaw many 'egregious' violations of international law and actively opposed multilateralism through mandatory detention for asylum seekers, offshore processing, invading Iraq, climate change scepticism and criticising human rights committees. Rudd/Gillard presented a schizophrenic picture: adhering to the Kyoto Protocol, Aboriginal reconciliation, the whaling case against Japan and Australia's seat on the Security Council but also lethargy on carbon emissions trading, anti-terrorism legislation and asylum seeker policy.

Dr Pert concludes that Australia has been and is a good international citizen. Three themes emerged. Good international citizenship arose from the activities of particular individuals who lifted Australia's standing internationally or promoted internationalism within Australia. Second, the concept varies with context: the White Australia policy, for example, only became contrary to international law with the emergence of decolonisation, apartheid and the prohibition against racial discrimination. Finally, the degree to which Australia demonstrates good international citizenship depends on which party holds power, with Labour governments tending to be more internationalist in outlook.

Readers will differ on some opinions. The weight Dr Pert attached to certain events is unclear, albeit a subjective assessment

Australia as a Good International Citizen (The Federation Press, 2014)

is admitted. For example, Australia's recognition of Indonesian sovereignty over East Timor, its reservations to the International Covenant on Civil and Political Rights (ICCPR), mandatory asylum seeker detention and adverse findings from the supervisory bodies of the International Labour Organisation are of insufficient weight to negate good international citizenship. Failing to domestically implement the ICCPR was not an egregious violation of international law, and one government was 'forgiven' for not implementing the Genocide Convention. Instances of poor international citizenship include offshore refugee processing and excluding maritime boundary disputes from the International Court of Justice's remit.

This book is short, lively and accessible. Both international context and domestic policies are painted broadly. Her review is necessarily brief, simplified and selective. It does not delve into some uncomfortable problems or paradoxes, including electoral support for Howard's refugee policies, why incoming governments might abandon or perpetuate a predecessor's policies and the complex interaction between international decisions and domestic policies across consecutive governments. But given the paucity of existing literature, the desirability of clarifying the concept and establishing a comparative standard to assess future conduct, good international citizenship is a worthwhile subject of scrutiny towards which Dr Pert has made a valuable and timely contribution.

Reviewed by Stephen Tully.

Inside Australia's Anti-Terrorism Laws and Trials

By Andrew Lynch, Nicola McGarrity and George Williams | NewSouth | 2015

Lawyers who come to this piece expecting a detailed reference on existing National Security legislation and related precedent will be disappointed. The book is not, and does not pretend to be, a text. In fairness, neither its length (approximately 200 paperback pages) nor its title suggests this. To the extent the title is evocative of an exposé on the political machinations associated with the laws' enactment or intrigue surrounding subsequent trials, purchasers at airport gate-lounges are likely to end up a little downhearted as well. If, however, one seeks a comprehensive, digestible and critical rundown of the Commonwealth Parliament's response to the emergence of the 21st century terrorist threat post September 11, 2001 then this book provides it.

Time is spent at the outset examining the statutory definition of a 'terrorist act'. While a little dry, covering this territory is necessary. The definition is foundational as most, if not all, of the legislative response to terrorism includes, or is contingent upon, it. From there the book reviews new terrorism-related crimes and their prosecution as well as the expanding powers of law enforcement and intelligence agencies in the name of investigating terrorist activity, gathering information on emerging risks, and monitoring or controlling identified threats.

In setting out their essential detail, the authors provide a critical appraisal of the laws. The reader's sense is that the mere recitation of that detail is, itself, productive of much critical analysis. Reading this book, and thereby understanding the reach of the federal anti-terrorism laws, is to appreciate that central aspects of it have re-drawn the boundaries of state intrusion into an individual's private life as well as the historically accepted limits of the criminal law. An example is ASIO's power to now detain and question people not suspected of any involvement in terrorism. Such action merely requires that questioning could provide 'information' about a terrorism offence. Another is the new 'preparatory' offences. Whereas previously the law of 'attempt' required proof of acts of perpetration rather than mere preparation, now an act preparatory to a terrorist act is a criminal offence punishable by life imprisonment.

The book's coverage of the detail is complemented by reference to

Inside Australia's Anti-Terrorism Laws and Trials (NewSouth, 2015)

Reading this book, and thereby understanding the reach of the federal anti-terrorism laws, is to appreciate that central aspects of it have re-drawn the boundaries of state intrusion into an individual's private life as well as the historically accepted limits of the criminal law.

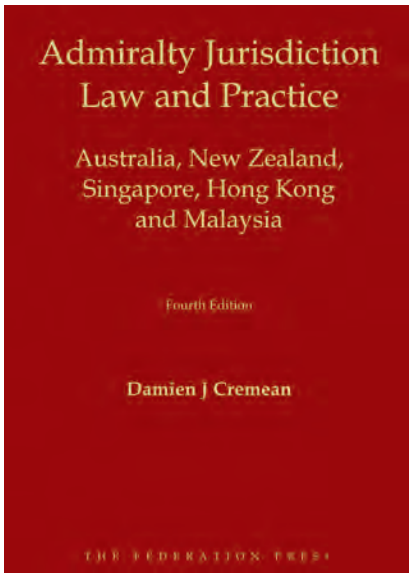
numerous of the resultant prosecutions, commissioned reviews of the legislation, observations by important stakeholders (including agencies such as state and Federal Police), as well as the content of political debate (or consensus) at the time of enactment, amendment or mooted repeal. Use of these references develops the book's critique of the laws without that critique ever becoming emotive or academic. To take an example, to learn that state police themselves advised a COAG review that they were unlikely to use the preventative detention powers, one can't help but question whether the continued existence of such powers is necessary.

The authors accept the necessity for a specific legislative response to the terrorist threat but raise (and grapple with) important questions of their reach and, in some aspects, utility. The result is a book that provides not only a timely insight into the laws but also an objective, hugely informative, and readable one. It can only be hoped that those who are contemplating entering the ongoing (and recently heated) debate about further reform might take time to read this piece, as a reading will no doubt contribute to how informed that participation is.

Reviewed by Ian Nash

Admiralty Jurisdiction Law and Practice (4th ed)

By Damien Cremean | The Federation Press | 2015



The fourth edition of this work, a necessity for those practising in admiralty and maritime law in Australia, has been long awaited. It deals with all of the essentials of admiralty jurisdiction in Australia and also other common law jurisdictions in the Asia-Pacific (Hong Kong, Singapore, New Zealand, and for the first time in this edition, Malaysia).

Admiralty Jurisdiction is a true practitioners' text: its author is a leading academic and a practitioner in the field and was involved in the Australian Law Reform Commission reference that produced the legislative basis for admiralty jurisdiction in Australia, the *Admiralty Act 1988* (Cth). Previous editions of the work were regularly cited in argument in the admiralty courts and in the judgments of those courts.

The structure and content of the book are appropriately well-structured and well written – the text follows the principal provisions and concepts of the Admiralty Act as they relate to the characterisation of admiralty jurisdiction, the circumstances in which a right to proceed against a ship *in rem* are engaged, and the practice and procedure of commencing and maintaining claims in admiralty.

The international approach of the book is essential for modern maritime practice.

Deploying this structure in this way is extremely accessible: should one, for example, wish to investigate the treatment of salvage as a head of general maritime jurisdiction, one will find set out together the relevant provision in the Admiralty Act and the cognate provisions in each other jurisdiction (as well as references to similar provisions in other common law jurisdictions), followed by commentary that encompasses the English law history of the law of salvage, the application of international conventions modifying the salvage rules, and analysis of the scope of jurisdiction conferred by the relevant provisions.

Admiralty Jurisdiction Law and Practice (4th ed) (The Federation Press, 2014)

...the book is a detailed and concise reference and provides a base for more detailed research as well as an excellent introduction into this interesting and complex area of law.

The international approach of the book is essential for modern maritime practice. In the words of Chief Justice James Allsop, who wrote the foreword for the fourth edition, '[t]he work reveals the existence of an harmonious and consistent common law maritime security regime in the Asia-Pacific region.' The approach of Australian courts to construction of the jurisdiction provisions in the Admiralty Act typically makes reference to decisions of courts of cognate jurisdiction, in the Asia-Pacific and elsewhere. This text facilitates that approach.

Despite the expanded scope of the jurisdictions covered in the fourth edition, the book remains compact, at less than 300 pages. At times, that comes at the cost of detailed analysis of some areas. Coverage of the case law of some jurisdictions is not as comprehensive as for others. Some areas of the law in respect of which there have been no decided cases would benefit from analysis based on the author's experience, particularly in relation to the ALRC reference, the report of which (ALRC 33, *Civil Admiralty Jurisdiction*) is a recognised aid to interpretation of the Admiralty Act.

Nonetheless, the book is a detailed and concise reference and provides a base for more detailed research as well as an excellent introduction into this interesting and complex area of law. Like many good practitioners' texts, precedents are included, helpfully cross-referenced to the relevant jurisdictional provisions covered in the text.

Reviewed by Catherine Gleeson

Judicial error, corrected

By Orbiculus

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

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

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

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